

TOWARDS A NEW UNDERSTANDING OF MINERAL TENURE SECURITY:

The demise of the property-law paradigm

by

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Abstract

South Africa's rich mineral endowment makes it a geologically favourable country for investment in its mining industry. However, even countries with geologically favourable conditions will not attract investment in its mining sector if the regulatory regime does not provide certainty and stability. One aspect of such a regulatory regime is the provision of mineral tenure security. Studies indicate that strong mineral tenure security is an important factor that investors take into account before investing in a country's mining industry. For example a study by J.M Otto found that out of a possible sixty factors influencing investment decisions, security of tenure was ranked second during the exploration phase and first during the mining phase.¹

Conceptually, mineral tenure security defies a single definition. The concept requires certainty and stability of rights through the entire mining sequence with the aim of providing the best opportunity for right holders and investors to develop mines profitably and to maximise returns on investments. In this sense, mineral tenure security requires minimisation of risks and uncertainties that may prevent profitable development of mines and maximising returns on investments.

The specific requirements for strong mineral tenure security depends on the theoretical underpinnings of the regulatory regime. This thesis argues that it is likely that in regimes with a strong private-law character, private-law rules will be significant for providing mineral tenure security. Conversely, in regimes with a strong public-law character, it is likely that private-law rules will not be central to the provision of mineral tenure security. In regimes with a strong public-law character, rules of administrative law, for example, are more likely to be significant for providing mineral tenure security.

The Mineral and Petroleum Resources Development Act (MPRDA) came into operation in 2002. This thesis demonstrates that the Act brought about significant changes to the theoretical landscape of mineral law. Before the MPRDA, the regime pertaining to minerals was based on a combination of private holding and public administration of rights to minerals. The Act changed this landscape to one that is based predominantly in public law.

¹ Otto paper presented to the Chamber of Mines of South Africa 10 table 3 cited in Dale 1996 *JERL* 298.

Against this background, this thesis follows two courses of inquiry; the first with a mainly theoretical character and the second with a mainly practical character. The first (theoretical) course of inquiry investigates whether the private-law concepts that are traditionally associated with mineral tenure security, namely ownership of minerals and mineral resources and real rights in property, continue to strengthen mineral tenure security in the current regulatory regime. This course of inquiry also investigates the limitation of a private-law based approach to mineral tenure security. The second (practical) course of inquiry investigates how the current predominantly administrative regime strengthens mineral tenure security. The second course of inquiry attempts to identify the shortcomings of the current regulatory regime in strengthening mineral tenure security and also attempts to provide a set of solutions for these shortcomings.

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List of Abbreviations

<i>AHRLJ</i>	<i>African Human Rights Law Journal</i>
BEE	Black Economic Empowerment
CC	Closed Corporation
CELMLP	Centre for Energy, Petroleum and Mineral Law and Policy
ESCAP	Economic and Social Commission for Asia and the Pacific
FDI	Foreign Direct Investment
GN	Government Notice
<i>GZ</i>	<i>Government Gazette</i>
GDP	Gross Domestic Product
HDSA	Historically Disadvantaged South African
ICSID	International Centre for Settlement of International Disputes
JA	Judge of Appeal
<i>JERL</i>	<i>Journal for Energy and Natural Resources Law</i>
<i>LAWSA</i>	<i>Law of South Africa</i>
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
MTRA	Mining Titles Registration Act 24 of 2003
MTS	Mineral Tenure Security
<i>PER</i>	<i>Potchefstroom Electronic Law Journal</i>
RQ	Research Question
<i>SAJHR</i>	<i>South African Journal for Human Rights</i>

<i>SALJ</i>	<i>South African Law Journal</i>
<i>SAPL</i>	<i>South African Public Law</i>
<i>Stell LR</i>	<i>Stellenbosch Law Review</i>
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
<i>TSAR</i>	<i>Tydskrif vir Suid-Afrikaanse Reg</i>
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme

List of Latin Terminology

Bona vacantia: unclaimed goods

In securitatem debiti: as security for a debt

Cuius est solum eius usque ad caelum et ad inferos: the owner of the land is automatically also the owner of the sky and everything contained in the soil

Dominium: ownership

Et al: and others

Ex lege: by virtue of law

In toto: in all

Inter alia: among other things

Ius: right

Ius disponendi: right of disposal

Mutatis mutandis: things having been changes that have to change

Nemo plus iuris ad alium tranferrre potest quam ipse habet: no-one can transfer a greater right than he himself has

Numerus clausus: closed number

Per se: by itself

Rei vindication: a real remedy in terms of which an owner can claim return of something that belongs to him

Res publicae: public thing

Ultra vires: beyond powers

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Chapter 1:

INTRODUCTION

1. Introduction

South Africa is a country rich in mineral resources,² and its mining industry forms an integral and critical part of the South African economy.³ By way of example, 80% of the world's platinum is found in South Africa, and the country is, by far, the largest platinum producer in the world.⁴ Furthermore, the country holds 80% of all manganese deposits world-wide.⁵ Mining is thus necessarily a significant contributor to the country's Gross Domestic Product (GDP),⁶ as well as to overall investment in the country.⁷ In 2013, mining accounted for 19.4% of private sector investment and 12.2% of total investment in the economy.⁸ During the same period, the mining industry accounted for 30.5% of South Africa's total merchandise exports.⁹ The mining industry further makes a valuable contribution to employment¹⁰ and tax.¹¹

Although South Africa's geological endowments render it favourable for mining enterprises, investors also consider other factors when deciding whether to invest in South Africa as opposed to other mineral rich countries.¹² The existence of mineral deposits is only one of

² See <http://chamberofmines.org.za/sa-mining> for an exposition of the quantities of different minerals found in South Africa.

³ White Paper on a Minerals and Mining Policy for South Africa (1998) 1; Leon 2013 *JERL* 171 178. See in general Chamber of Mines 2013/2014 *Annual Report* 2 available at <http://www.chamberofmines.org.za/industry-news/publications/annual-reports>; Chamber of Mines 2013/2014 *Facts and Figures* 4 available at <http://www.chamberofmines.org.za/industry-news/publications/facts-and-figures>.

⁴ Jones "Platinum Smelting in South Africa" available at <http://www.mintek.co.za/Pyromet/Platinum/Platinum.htm>; Central Intelligence Agency *World Fact Book* "South Africa" available at <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html>.

⁵ Creamer "South Africa's Manganese Geology Superb" 13 Sept 2011 *Mining Weekly* available at <http://www.miningweekly.com/article/south-africas-manganese-geology-superb-omh-2011-09-13>.

⁶ In 2013 the mining sector accounted for 8.3% of GDP directly, on a nominal basis and nominal mining GDP of R279.7 billion was recorded. See Chamber of Mines 2013/2014 *Annual Report* 3. In 2012, mining accounted for 8.3% of GDP directly on a nominal basis. However, in the same period, "if the indirect multiplier and induced effects of mining [were] included then the overall contribution to GDP [was] closer to 17%". During the same period, nominal mining GDP of R 262.7 billion was recorded. See Chamber of Mines 2012 *Facts and Figures* 2 at available at <http://www.chamberofmines.org.za/industry-news/publications/facts-and-figures>.

⁷ See van der Zwan and Nel 2010 *Meditari Accountancy Research* 89 90.

⁸ Chamber of Mines 2013/2104 *Facts and Figures* 4.

⁹ Chamber of Mines 2013/214 *Annual Report* 3; Chamber of Mines 2013/2014 *Facts and Figures* 4.

¹⁰ See *Sishen Iron Ore* 2014 2 SA 603 (CC) [37] and Leon 2013 *JERL* 178 and especially fn 42 for the importance of the mining industry in job creation.

¹¹ Chamber of Mines 2013/2014 *Annual Report* 3.

¹² Omalu and Zamora 1999 *JERL* 13 14. See in general Jackson and Green 2014 *Fraser Institute Annual Survey of Mining Companies* available at <http://www.fraserinstitute.org/sites/default/files/survey-of-mining-companies-2014.pdf>. According to the Fraser report 17, the Fraser Institute surveys mining and exploration companies in an attempt to "assess how mineral endowments and public policy factors such as taxation and regulatory uncertainty affect exploration investment".

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various factors that influence an investor's decision to invest in the mining industry of a particular country.¹³ Due to strong competition for private sector investment amongst mineral rich countries, it is crucial for the South African economy that the country becomes and remains an attractive mining investment destination.

Investment decisions are really “as much idiosyncratic as [they are] scientific”.¹⁴ The decision is the outcome of an investor's risk appetite weighed against the potential financial profitability of a project.¹⁵ This does not mean that a country is powerless to attract investment into its mining industry. Government can create a “legal, fiscal and institutional framework” that is attractive to investors where they can “commit their risk capital in relative comfort and security”.¹⁶ The legal framework is thus one of the key factors that investors take into account when making investment decisions.¹⁷ All else being equal, investors will favour investing in the mining industry of a country where the legal framework provides certainty,¹⁸ stability¹⁹ and predictability.²⁰ The legal framework consists not only of mining law but also of taxation law, environmental legislation and laws relating to land-use planning to name but a few.²¹ One of the central issues that mining law addresses,²² however, and that influences the decision to invest, is provision of mineral security of tenure.²³

¹³ Others include considerations about the cost of extraction, the ability to procure equipment and materials from local and overseas sources and the ability to sell the products of mining into local and export markets. See UNCTAD “Best Practices in Investment for Development How to Attract and Benefit from FDI in Mining: Lessons from Canada and Chile” *Investment Advisory Series, Series B, Number 7* (2011) 4 – 6 available at http://unctad.org/en/Docs/diaepcb2010d11_en.pdf; Pritchard in Bastida *et al* 74 76; Omalu and Zamora 1999 *JERL* 14. According to the Fraser report 22 figure 1 table 1, mineral potential weighs 60% while policy considerations weigh 40% when companies consider the attractiveness of investing in a country's mining industry. Policy factors in the report include uncertainty concerning the administration of current regulations, environmental regulations, regulatory duplication, the legal system, the taxation regime, uncertainty concerning protected areas and disputed land claims, infrastructure, socio-economic and community development conditions, trade barriers, political stability, labour regulations, quality of the geological database, security, and labour and skills availability. See the Fraser report 7 and 22.

¹⁴ Pritchard in Bastida *et al* 74.

¹⁵ Pritchard in Bastida *et al* 74 – 75.

¹⁶ Omalu and Zamora 1999 *JERL* 14.

¹⁷ Omalu and Zamora 1999 *JERL* 13.

¹⁸ Leon 2013 *JERL* 190.

¹⁹ Pritchard in Bastida *et al* 75.

²⁰ Bastida 2001 *JERL* 31 34; Johnson (Unpublished doctoral thesis) 8. See also Bastida (PhD thesis) 170 – 171.

²¹ See in general Pritchard in Bastida *et al* 74 – 76; UNCTAD *Management of Commodity Resources in the Context of Sustainable Development: Governance Issues for the Mineral Sector* (1997) 3 and 8.

²² Naito *et al* 1999 *JERL* 1 4.

²³ Leon 2013 *JERL* 190 opines that “security of tenure is a *sine qua non* of long-term capital investment in what is a high-risk industry”

1.1. Core concept: Mineral Tenure Security

Development of a mine normally requires investors to apply for a sequence of rights,²⁴ and regulation through such sequential rights translates into different phases for mine development. This is referred to as “the mining sequence”.²⁵ Conceptualising mineral tenure security depends on an understanding of the “mining sequence”.

The mining sequence generally involves that investors first apply for rights that will allow them to explore or prospect without large-scale extraction of minerals, thus the exploration phase.²⁶ In South Africa, the exploration phase depends on the granting of reconnaissance permissions and prospecting rights in terms of the governing law, i.e. the Mineral and Petroleum Resources Development Act (MPRDA).²⁷ Upon successful discovery of mineral resources,²⁸ investors are required to apply for rights that will allow large extraction of minerals. They thus have to apply for the right to mine to continue into the mining phase.²⁹ In South Africa, mining occurs by virtue of mining permits³⁰ or mining rights.³¹

Mineral law systems regulate the transition from exploration to mining in different ways. A first possibility is for mining rights to be assigned automatically to the discoverer without any governmental discretion.³² A second option is for the discoverer to receive priority in the

²⁴ Omalu and Zamora 1999 *JERL* 27. See Bastida 2001 *JERL* 33; Bastida (PhD thesis) 54 - 55 where the author says that in most countries regulation takes place through two main categories of rights, namely exploration licenses or permits and exploitation concessions or licences.

²⁵ Before rights are applied for, investors will develop the idea of developing a mine. This involves, for example, literature research on geological favourability of an area. This phase is not regulated. See Otto in Bastida *et al* 355 and figure 1 356.

²⁶ Omalu and Zamora 1999 *JERL* 27; Otto in Bastida *et al* 362.

²⁷ 28 of 2002. Ss 13 and 14 of the MPRDA regulate application for and granting of reconnaissance permissions while ss 16 and 17 regulate prospecting rights.

²⁸ See Bastida 2001 *JERL* 33 and Bastida (PhD thesis) 55 where the author says that the discovery of minerals determines the transition from one stage to the next.

²⁹ Omalu and Zamora 1999 *JERL* 27.

³⁰ MPRDA, s 27 regulates applications for and granting of mining permits. According to section 27(1) of the MPRDA, a mining permit is granted if “(a) the mineral in question can be mined optimally within a period of two years; and (b) the mining area in question does not exceed 5.0 hectares in extent”. Mining permits are thus granted for small-scale mining operations.

³¹ MPRDA, ss 22 and 23 regulate applications for and granting of mining rights. The MPRDA does not provide a definition of mining rights. The difference between mining rights and mining permits is that mining permits are granted for small-scale mining operations according to the criteria in section 27(1) of the MPRDA while the Act does not place a limitation on the extent of the mining operation for which mining rights are granted. Nothing in the MPRDA indicates that applicants for rights are under an obligation to apply for mining permits and not mining rights if the criteria of section 27(1) are met. However, mining rights are usually granted for large-scale mining operations.

³² Bastida 2001 *JERL* 35 - 36, Bastida (PhD thesis) 60; Warden-Fernandez and Waelde “Mining Law in Latin America: A Comparative Study of Chile, Peru, Argentina and Bolivia” 2001 *Mining Oil and Gas* as cited in Johnson (Unpublished doctoral thesis) 26 who says that regimes that allow for this are the most attractive. See

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granting of mining rights.³³ A third option is for mining rights to be granted to either the discoverer or another at the discretion of the government.³⁴ The second option³⁵ encompasses some degree of governmental discretion which is normally based on specified criteria that applicants must meet while the decision in the third option is normally based solely on the discretion of the government. For the investor, the first option is probably the most favourable.³⁶

Investors spend large amounts of resources during the exploration phase without certainty that they will find commercially viable deposits.³⁷ They will only assume the financial risks associated with prospecting if they have reasonable certainty that they will be able to continue mining upon the successful discovery of a mineral deposit.³⁸ Consequently, there must be a link between investors' rights to prospect and their ability to continue mining once their prospecting activities show potential.³⁹ In other words, there must be continuity between the different phases of mine development.⁴⁰

Mineral tenure security, firstly, addresses the risks and uncertainties that are associated with the transition between prospecting and mining.⁴¹ Security of tenure in the mining industry requires that holders of rights must be certain that they will be able continue into the mining phase if they discover economically viable mineral deposits. In this narrow understanding of the concept,⁴² mineral tenure security requires continuity between the different phases of mine development.

Ayisi "Ghana 2009 *JERL* 66 76 for examples of countries that assign the right to mine automatically to successful discoverers of mineral resources.

³³ Bastida 2001 *JERL* 35 - 36; Bastida (PhD thesis) 60 – 61.

³⁴ See Bastida 2001 *JERL* 36; Bastida (PhD thesis) 60 - 61; Ayisi 2009 *JERL* 76; Omalu and Zamora 1999 *JERL* 27 Williams in Bastida *et al* 741 742 in the context of the Latin American Model.

³⁵ According to Bastida 2001 *JERL* 36 this is the option that most countries follow.

³⁶ Commenting on the mining codes of Peru and Bolivia, Bastida 2001 *JERL* 40 mentions that the "unification of exploration and exploitation rights into a single concession" is "the most important innovations..." of the codes.

³⁷ De Sa in Bastida *et al* 494 comments that development requires "huge initial capital outlays". Also see UNCTAD "Best Practices" 4 and World Bank *Strategy for African Mining* for a discussion of how much money was needed in the exploration phase at the time of the report.

³⁸ Williams in Bastida *et al* 51; Omalu and Zamora 1999 *JERL* 27; Dale 1996 *JERL* 298 299 – 300 views specification of criteria for the transition from exploration to mining as a method to achieve security of tenure.

³⁹ See UNCTAD *Management of Commodity Resources* 11 concerning reforms of mining laws in the 1980's in an attempt to attract foreign investment.

⁴⁰ Badenhorst 2014 *JERL* 5 14.

⁴¹ For the success of the Latin American Mining Model to ensure continuity from exploration to exploitation see Williams in Bastida *et al* 752. Also see Bastida 2001 *JERL* 40 and Bastida (PhD thesis) 55 for comments on the Peruvian and Bolivian regulatory systems in this regard.

⁴² Also referred to as "the right to mine" in Johnson 1990 *National Resources Forum* 178 (n 43 below). Bastida 2001 *JERL* 35; Ayisi 2009 *JERL* 66 75; Bastida (PhD thesis) 58 refers to this narrow understanding as "the key

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Studies regarding mining companies' investment preference show that mineral tenure security, in this narrow sense, is one of the main criteria that a company takes into account when making investment decisions regarding mining projects.⁴³ Even countries with expansive mineral wealth will not attract investment unless the regulatory regime ensures security of tenure.⁴⁴ Out of a possible sixty factors influencing investment decisions, security of tenure was ranked second during the exploration phase⁴⁵ and first during the mining phase.⁴⁶ The World Bank confirms that security of tenure is a determining factor for investment in and growth of a country's mining industry.⁴⁷

Security of mineral tenure requires that investors can develop mines profitably.⁴⁸ The link between prospecting and mining contributes to the possibility of developing mines profitably. However, risks associated with profitable development are not limited to the transition between prospecting and mining but occur throughout the entire life of a mine.⁴⁹ Even if mineral deposits are found and investors are certain that they will be able to continue into the mining phase, there are further investment risks. These risks are brought about by volatility in mineral prices, obstacles in raising funds for mine development, and slow rates of return on

question of security of tenure; Omalu and Zamora 1999 *JERL* 27 refer to the narrow construction as the first phase of the concept; Badenhorst 2014 *JERL* 12 describes this as the traditional view. An example of a narrow definition is the one given by Waelde 1991 6 *ICSID/ Foreign Investment Law Journal* 102 as cited in Bastida 2001 *JERL* 35, Bastida (PhD thesis) 50 and Ayisi 2009 *JERL* 76. Waelde defines security of mineral tenure as "the legal entitlement to extraction rights after a successful exploration phase".

⁴³ Johnson 1990 *National Resources Forum* 178 as cited in Ayisi 2009 *JERL*, Dale 1996 *JERL* 298, Bastida 2001 *JERL* 32; Bastida (PhD thesis) 59, Dale *et al South African Mineral and Petroleum Law MPRDA-18* and Dale in Bastida *et al* 835. Another study was done by Otto in *ESCAP/UNDP Mineral Investment Conditions in Selected Countries of the Asian-Pacific Region* 330-342 as cited in Bastida 2001 *JERL* 32, Bastida (PhD thesis) 59, Dale 1996 *JERL* 298, Ayisi 2009 *JERL* 67, Dale *et al South African Mineral and Petroleum Law MPRDA-18*, Dale in Bastida *et al* 835, Otto 1996 *JERL* 256; UNCTAD "Best Practices" 6, Otto *et al Mining Royalties A Global Study of their Impact on Investors, Government, and Civil Society* (2009) 216 table 5.4. See UNCTAD *Management of Commodity Resources* 19 table 2 for a synopsis and brief comparison of Johnson's and Otto's surveys.

⁴⁴ Otto paper presented to the Chamber of Mines of South Africa, Johannesburg, 15 June 1995 2 as cited in Dale 1996 *JERL* 298; Ayisi 2009 *JERL* 67.

⁴⁵ In a South African context, rights to minerals in the exploration phase consist of reconnaissance permissions and prospecting rights. Mining legislation in different countries refer to rights to minerals differently. In Ghana, reconnaissance licenses and prospecting licenses are, for example, granted. See Ayisi 2009 *JERL* 81. The exploration phase is also referred to as the "discovery phase".

⁴⁶ Otto paper presented to the Chamber of Mines of South Africa 10 table 3 cited in Dale 1996 *JERL* 298.

⁴⁷ World Bank *A Mining Strategy for Latin America and the Caribbean* 14.

⁴⁸ Onorato and Fox *Rocky Mountain Mineral Law Foundation* chap 7 1 - 38 as quoted in Bastida 2001 *JERL* 32 and Bastida (PhD thesis) 59. See Williams in Bastida *et al* 51 where the author says that the reforms of mining laws during the 1990's were based on the recognition of the importance of security of tenure and accordingly that rights had to be granted for lengths of time that would allow the possibility to make "significant profits". Profit-making is more broadly required for foreign investment in a country's mining sector. See UNCTAD "Best Practices" 4. According to De Sa in Bastida *et al* 493 495, the first question that a mining company asks before investing is where in the world it can make the greatest profit.

⁴⁹ See in general Benning May/June 2000 *The Journal of The South African Institute of Mining and Metallurgy* 148. The author comments on the risks in relation to a bank's willingness to finance a mining project.

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investments.⁵⁰ Therefore, although continuity of tenure is essential⁵¹ for certainty in the mining industry, an investor's choices are further informed by the risks and uncertainties that may be encountered *throughout* the entire process of mine development.⁵² Certainty is as important in the application-, prospecting- and mining-phases as it is during the transition from prospecting to mining. One can extend the definition of mineral tenure security more broadly to include “the stability of rights granted to implement the different phases of the mining sequence”.⁵³ In what follows, the more inclusive construction of mineral tenure security is referred to as the “broad understanding” of the concept.⁵⁴

In this broad understanding of the mineral tenure security concept, key issues include the conditions under which investors can lose rights.⁵⁵ Accordingly, stability and certainty require clearly defined rules pertaining to conditions under which rights can be lost.⁵⁶ In this regard, the duties of holders to keep their rights such as minimum work commitments and reporting requirements also influence security of tenure in the mining industry.⁵⁷ It has been argued that tenure security requires registration of title because this assists investors to enforce their rights.⁵⁸ Furthermore, investors may need to transfer their rights to another entity in certain circumstances to ensure a profitable return on their investments. They may also require the ability to mortgage rights to raise funds for development of the mine. Accordingly, mineral

⁵⁰ Bastida 2001 *JERL* 32 and Bastida (PhD thesis) 58; Ayisi 2009 *JERL* 67; UNCTAD *Management of Commodity Resources* 8.

⁵¹ See Bastida 2001 *JERL* 33; where the author refers to this ability as “the most critical point of all...”, also see 35 and Bastida (PhD thesis) 60 where the ability is referred to as “the critical transition”; Omalu and Zamora 1999 *JERL* 13 27 refers to the ability as “the prime requisite of any investor. See Williams Bastida *et al* 51 where the author highlights the importance of the ability to obtain rights to exploit after discovering mineral deposits.

⁵² Bastida 2001 *JERL* 32 36 37; Bastida (PhD thesis) 181; Ayisi 2009 *JERL* 75.

⁵³ Otto in Bastida *et al* 362; Bastida 2001 *JERL* 36; Bastida (PhD thesis) 180; Badenhorst 2014 *JERL* 13; Otto, Chand and Foong gives a broad definition in “Guidelines for a National Mineral Policy” in *Mineral Development and Policy and Planning Project* as cited in Bastida 2001 *JERL* 36; Bastida PHD thesis 181. They define security of tenure as “the ability to maintain a right to minerals from exploration stage on through mining. The World Bank refers to security of mineral tenure in the broad sense. Also see World Bank *A Mining Strategy for Latin America and the Caribbean* xv 14.

⁵⁴ Omalu and Zamora 1999 *JERL* 27 refers to the broad understanding as the “second phase” of the concept. Saravia-Frias (LLM Dissertation) 31 as cited in Bastida 2001 *JERL* 32; Bastida (PhD thesis) 60 refers to this as the modern concept of mineral tenure security.

⁵⁵ Bastida 2001 *JERL* 36 37; Bastida (PhD thesis) 181; Dale 1996 *JERL* 299; Badenhorst 2014 *JERL* 15; World Bank *A Mining Strategy for Latin America and the Caribbean* 14.

⁵⁶ Bastida 2001 *JERL* 37; Bastida (PhD thesis) 181; Omalu and Zamora 1999 *JERL* 27; World Bank *A Mining Strategy for Latin America and the Caribbean* 14 Also see Williams in Bastida *et al* 742 in the context of the Latin American Model.

⁵⁷ Bastida 2001 *JERL* 33 36. According to the World Bank *Strategy for African Mining* 22 minimum work requirements must be specified clearly.

⁵⁸ Siac in Bastida *et al* 389 390 397; Wabnitz in Bastida *et al* 399 400; Badenhorst 2014 *JERL* mentions registration as a feature that enhances mineral tenure security. In the context of the Latin American Mining Model see Williams in Bastida *et al* 741 748.

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tenure security includes certainty about the conditions under which rights are transferred and mortgaged to raise funds for the development of a mine.⁵⁹ Profitable development further requires that investors must have enough time to prospect and mine.⁶⁰ Another important issue in tenure security thus includes the length of time for which rights are granted.⁶¹ Further temporal requirements are that there must, in general, be time limits on the government to grant rights and process key documents.⁶² Delays during procedures where rights are granted or renewed will weaken mineral tenure security.⁶³ Holders of rights further require the ability to interrupt operations without losing rights when profitable development is not possible at a given time.⁶⁴ It has been argued that uncertainty is increased by “the existence of contradictory rules, procedures open to discretion and excessive regulation”.⁶⁵ Mineral tenure security thus requires minimization of governmental discretion.⁶⁶ Linked to minimization of governmental discretion is the ability to challenge discretionary decisions in court or through arbitration.⁶⁷ Lastly, mineral tenure security requires that right holders hold rights exclusively.⁶⁸ A further aspect of mineral tenure security that has connections with property law concerns the question whether a regulatory regime provides protection against expropriation.⁶⁹

⁵⁹ Badenhorst 2014 *JERL* 14 mentions the abilities to transfer and mortgage rights as features that enhance mineral tenure security; Bastida 2001 *JERL* 37; Bastida (PhD thesis) 181; Omalu and Zamora 1999 *JERL* 28; Dale 1996 *JERL* 300; World Bank *A Mining Strategy for Latin America and the Caribbean xv*. In the context of the Latin American Mining Model see Williams in Bastida *et al* 746.

⁶⁰ Badenhorst 2014 *JERL* 14.

⁶¹ Otto in Bastida *et al* 354; Dale 1996 *JERL* 299.

⁶² Bastida 2001 *JERL* 37 38; Bastida (PhD thesis) 183.

⁶³ Bastida 2001 *JERL* 38; Bastida (PhD thesis) 183.

⁶⁴ Onorato and Fox 41 *Rocky Mountain Mineral Law Foundation* 7 – 23 as quoted in Bastida 2001 *JERL* 38 and Bastida (PhD thesis) 183; World Bank *Strategy for African Mining* 25. One of the features of the Latin America Mining Model is that title holders are “free to decide their own cut-off grades and production levels, as well as where and how to process their mineral output”. See Williams in Bastida *et al* 742.

⁶⁵ Bastida 2001 *JERL* 37 and Bastida (PhD) thesis 182.

⁶⁶ Omalu and Zamora 1999 *JERL* 28 37; Dale 1996 *JERL* 299. Regarding the need to limit governmental discretion is general see World Bank *Strategy for African Mining* 21 – 22.

⁶⁷ Apkan 1998 1 *Oil and Gas Law and Taxation Review* 26 27 as cited in Ayisi 2009 *JERL* 77, Bastida 2001 *JERL* 37; Bastida (PhD thesis) 183.

⁶⁸ See Williams in Bastida *et al* 742 where the author says that security of tenure in the Latin American model is “assured by the exclusivity of rights and the prohibition against overlapping concessions”. Johnson (Unpublished doctoral thesis) 25 opines that the question whether rights are held exclusively is of “initial importance” to investors. Exclusivity requires that the same mineral on the same land cannot be granted to another entity while there is an existing rights-holder. Application procedures influence exclusivity. See Badenhorst 2014 *JERL* 20.

⁶⁹ Bastida 2001 *JERL* 34, Dale 1996 *JERL* 299. Before the MPRDA, the court held in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T) 31 that mineral rights were not regarded as property and therefore did not enjoy constitutional protection. However, the case is criticised and it is generally accepted that mineral rights constitute property for the purposes of constitutional protection. See Van der Schyff 2008 *THRHR* 387 388; van der Vyfer 2012 *De Jure* 125 133. It has been argued that there is a strong indication that the level of regulation the current regime amounts to so-called “creeping or indirect expropriations” for purposes of South Africa’s bi-lateral investment treaties. See Leon 2009 *JERL* 597 629 – 630.

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A narrow understanding of the concept, i.e. the certainty of a transition from prospecting to mining, is too limited. This is because risks and uncertainties that can cause instability and prevent profitable development are not limited to the transition between prospecting and mining but are present for the duration of mineral development projects. The broad understanding of the concept is therefore preferable.⁷⁰

The above discussion of mineral tenure security relates to regimes where minerals and the rights thereto vest in the state and where the basic tenets of mineral law predominantly stem from public.⁷¹ In contrast, an alternative definition has been advanced that is based on private holding of rights to minerals with minimal governmental interference.⁷² This definition applies where the main theoretical underpinnings of mineral law flow from private law. Where private law mainly underpins mineral law governmental interference is allowed only to achieve limited objectives such as optimal exploitation of mineral resources, health and safety issues and protection of the environment.⁷³

It is arguable that private holding of rights to minerals reduces governmental interference, provides more certainty to the miner, and thus strengthens mineral tenure security.⁷⁴ For South Africa, however, a definition of mineral tenure security based on private holding of rights is not workable in the current regulatory regime. The MPRDA, discussed in more detail throughout this thesis, does not provide for private holding of rights to minerals or mineral resources. Instead, it “embraces State sovereignty and custodianship over mineral resources”.⁷⁵ The government extensively regulates the acquisition, exercise as well as loss of rights in

⁷⁰ Badenhorst 2014 *JERL* 14 refers to some of the aspects as features of security of mineral tenure; Bastida 2001 *JERL* 37 and Bastida (PhD thesis) 182 refers to” factors that influence certainty in the legal regime.”

⁷¹ Dale 1996 *JERL* 298 299. According to Bastida (PhD thesis) 21, “mineral tenure regimes deal with the legal problems and terms related to *ownership* and the acquisition, holding, transfer and termination of rights by private individuals, entitling the holder to conduct exploration and exploitation of minerals (own emphasis)”. At 32 Bastida makes it clear that ownership includes public ownership of minerals and mineral resources.

⁷² Dale 1996 *JERL* 301 – 307. At 308 the author accordingly defines tenure security as follows: “Security of tenure means the right, without time limitation, subject to free market forces, and free of state intervention, to acquire, hold, exercise and dispose of mineral rights, rights to prospect and rights to mine as rights in property, subject to the acquisition, suspension and cancellation, judges on criteria inter alia relating to optimal exploitation, of licences authorising such exercise, and subject to expropriation of such rights in the interest of optimal exploitation and for compensation”.

⁷³ Dale 1996 *JERL* 305 – 306.

⁷⁴ This is in essence Dale’s argument in 1996 *JERL* 301 – 303; Badenhorst 2014 *JERL* 24.

⁷⁵ Dale in Bastida *et al* 823; According to s 3 of the MPRDA, “mineral and petroleum resources are the common heritage of the people of South Africa and the state is the custodian thereof for the benefit of all South Africans”. On the principles of state sovereignty over natural resources see in general Bastida PhD thesis 133 – 138; van der Vyfer 2012 *De Jure* 140 – 142; Omorogbe and Oniemola in McHarg *et al* 115 122 - 124

pursuit of a number of complex and, at times, divergent objectives. An alternative conceptualization of mineral tenure security is therefore needed.

1.2. Premises and challenges

It is premised that mineral tenure security means the stability of rights granted for the duration of the life of a mine and creation of certainty through minimization of risks and uncertainties that may prevent profitable development of such mines. Mineral tenure security includes, on this premise, certainty that prospecting and mining can occur, and that it can be interrupted when necessary to ensure profitable development. Profitable development further requires the ability to transfer and mortgage rights to raise funds for mineral development projects.

Two complexities must be highlighted at the outset: The first, as explained above,⁷⁶ is that mineral tenure security is a very broad concept. The second is that the basic tenets of regulatory regimes differ significantly.⁷⁷ Regulation varies between, on the one hand, systems that display heavy state interference in mineral law, and on the other hand, systems where state interference is minimised and mineral law is predominantly left in the private sphere.⁷⁸ In systems adhering to state interference, rigorous regulation where governmental discretion plays a significant role in issuing, maintaining and terminating rights are often encountered.⁷⁹ In such instances public law is significant and “reform is aimed at weakening the institutions of private property”.⁸⁰ On the other hand, market economies tend to emphasise private mining rights.⁸¹ Where there is emphasis on private mining rights with limited governmental interference, property law is an important component of mineral law.⁸²

⁷⁶ S 2.1 above.

⁷⁷ Dale in *Global Issues in Corporate Mining Strategy and Government Policy*, CELMLP Dundee Annual Mining Seminar, June 2001 4 – 8 cited in Bastida *et al* 409 413 and Bastida (PhD thesis) 40 41 developed a classification system in terms of which regulatory systems can be classified according to the level of governmental interference and the question whether rights to minerals are regulated by private law and public law. See Naito *et al* 1999 *JERL* 2 where, in the context of uncertainties that regulatory changes in mining laws cause, the authors say that different countries adopt different legal approaches. Barton in McHarg *et al* 81 citing Thompson in Banks and Saunders 1 states that “a natural resource tenure could operate as a conveyance of real property, as a contract and by force of statute, and that these characteristics overlap in complex ways”.

⁷⁸ See Daintith in Zillman *et al* 37 – 39 where the author illustrates that in the United States of America mineral law is predominantly left in the private sphere and regulated by common-law.

⁷⁹ Bastida 2001 *JERL* 33 34.

⁸⁰ Bastida 2001 *JERL* 33 34. The author’s argument is wider and includes law reform in general where governments play a prominent role in economic development.

⁸¹ Bastida 2001 *JERL* 34.

⁸² Barton in Zillman *et al* 21 – 22 refers to “default rules” where no legislation is in place to regulate a specific activity. Default rules include rules of property law.

The type of regulatory regime, and the question whether the basic tenets stem predominantly from public law or private law, will determine the measures used to ensure stability and profitable development of mines⁸³ For example, regimes where rights to minerals are regulated administratively can result in wide governmental discretion.⁸⁴ In such regimes, tenure security will require clear and predictable rules regarding transfer, mortgage and loss of rights as well as the ability to challenge discretionary decisions in court or through arbitration.⁸⁵ It will further require clear rules setting out the circumstances in which rights can be lost.⁸⁶ In regimes based on private ownership of mineral resources and private holding of rights, governmental interference is naturally limited.⁸⁷ The nature of rights as real rights can indicate clearly whether they are transferred and mortgaged freely, and there might be no need for further elucidating rules.⁸⁸ However, regimes are not often purely administrative or only based on private holding of rights to minerals.⁸⁹ The specific characteristics of every regime will determine the measures required to ensure mineral tenure security.

2. Background to and parameters of the research

The MPRDA came into operation in 2004. This Act introduced a new regime for mineral and petroleum resource extraction in South Africa. The regime preceding the MPRDA was based on a combination of property law and regulatory measures based in public law.⁹⁰ The pre-MPRDA regime illustrates how mineral law traditionally straddles public law (especially

⁸³ See in general Bastida 2001 *JERL* 35.

⁸⁴ Dale 1996 *JERL* 300 opines that ministerial discretion “looms large” in systems where mineral rights vest in the state.

⁸⁵ Dale 1996 *JERL* 300.

⁸⁶ See Rønne in McHarg *et al* 60 68 where the author refers to Roggenkamp *et al Energy Law in Europe* 1281 who says that in systems where natural resource exploration and production is based on licenses that are issued at the discretion of the “responsible authority”, security includes that “the licence cannot be ...withdrawn arbitrarily”. This implies specific and clear reasons why rights can be withdrawn (lost).

⁸⁷ Dale 1996 *JERL* 303 mentions this specifically in the context of the transition between prospecting and mining. At 301 the author says that privatised mineral right systems avoid the problems identified in state-orientated systems. One of the problems that the author identifies in state-orientated systems is governmental interference. At 309 the author concludes that systems that adhere to private ownership of mineral rights avoid discretionary elements and minimizes state intervention.

⁸⁸ Generally, real rights in property can be the object of a further real right and can be transferred freely. Regarding mortgage see Badenhorst *et al Silberberg* 360; van der Merwe *Sakereg* 615; Lubbe in *LAWSA* par 335. Regarding transfer see van der Merwe *Sakereg* 16; van der Merwe in *LAWSA* par 12.

⁸⁹ Commenting on *regalian* and *dominal* systems of property in Latin America, González in Zillman *et al* 69 comments that public law and private law “converge” and that a consequence of this convergence is that “codes and laws on natural resources modify civil code provisions...”

⁹⁰ See chap 2 par 3.1 for an exposition of the property-law elements and regulatory features in public law in the pre-MPRDA regime.

administrative law) and private law (especially property law).⁹¹ The reason is that there are various relationships that mineral law must address.⁹² Property law typically addresses the relationship between the landowner and holder of the mineral right⁹³ while public law typically addresses the relationship between the state and private stakeholders.⁹⁴ Due to this dual nature of mineral law, aspects of mineral tenure security also fall within the ambit of both public law and private law. There is thus, academically, a strong connection between certain aspects of mineral tenure security and the rules of property law in a South African context. Administrative law also provides certain checks and balances, but the extent to which these measures form part of a concept of mineral tenure security has not yet been scrutinised thoroughly.

Even at doctoral research level, it is impossible to analyse all of the aspects of mineral tenure security comprehensively. The analysis here is thus partial, in that the scope of this study is limited to those aspects of mineral tenure security that impact profitable development of mines and that, in a South African context, are traditionally influenced by property law. The aspects are: (i) the ability to prospect and mine, (ii) the ability to choose not to prospect and mine, (iii) the ability to dispose of minerals found during prospecting and mining, (iv) the ability to transfer rights to minerals to an eligible third party and (v) the ability to encumber rights.

Traditionally, private-law ownership of minerals and mineral resources influences the ability to prospect and mine, the ability to choose not to prospect and mine and the ability to dispose of minerals found during prospecting and mining. The private-law nature of rights traditionally influences the ability to transfer and encumber rights. A discussion of the private-law nature of rights to minerals necessitates investigating registration and enforceability of rights to minerals. The research therefore also allows comments on the registrability and enforceability of rights to minerals as an aspect of mineral tenure security. Furthermore, the private-law nature of rights can influence the level of governmental interference in mining and prospecting. An

⁹¹ See Mostert *Principles and Policies* 15. This is not true in South Africa only, but also in other jurisdictions. See Barton in Zillman *et al* 21 22; McHarg *et al* in McHarg *et al* 1. According to Hamilton and Banks in McHarg *et al* (eds) 19 20 natural resources law was historically a subset of property law, but due to public ownership of natural resources in many jurisdictions leads to characterisation of issues regarding use and control of resources as administrative law problems.

⁹² Mostert *Principles and Policies* 15. See regarding competing interests in general (not only in a South African context) Bastida in Bastida *et al* 413; Bastida (PhD thesis) 25 – 28.

⁹³ The underlying common-law mineral right is referred to here and not the prospecting rights and mining rights that derived from the common-law mineral right. See chapter 2 sec 2.

⁹⁴ Mostert *Principles and Policies* 15. Also see chap 2 sec 1 and sec 3.2.3.

investigation into the nature of rights to minerals permits comments on the role of the nature of rights in reducing governmental interference in prospecting and mining.

Limiting the inquiry in this way allows the pursuit of two questions. The first involves investigating the basic tenets of mineral law in the regime created by the MPRDA, to evaluate the role that rules of property law continue to play in providing mineral tenure security within the current regulatory regime. This inquiry simultaneously establishes whether the regime is predominantly based on principles of public law or private law, and allows comments on whether private law is still an appropriate paradigm for mineral law in the current regulatory regime. The second question explores the extent to which the MPRDA itself provides security of tenure to right holders for those aspects of the concept that are core to the thesis, thus the abilities to prospect and mine, to discontinue operations, to dispose of minerals and the abilities to transfer and encumber rights to minerals.

Thus, the research is concerned both with the academic / theoretical underpinnings of mineral tenure security as well as its practical implications. The research contributes to academic debate by commenting on the theoretical basis for mineral law under the MPRDA and by analysing the role that rules of property law play in providing tenure security in the current regulatory regime. From an academic point of view, the research also comments on whether private law continues to be the appropriate lens through which to view mineral law. The research contributes practically by analysing the extent to which the MPRDA provides security of tenure in respect of those aspects of the concept that are within its scope.

The research is limited in its conclusions regarding the extent to which the MPRDA provides security of tenure in the current legislative dispensation because it does not fully analyse all aspects of the concept. However, it draws conclusions as regards the prevalence of tenure security for those aspects that fall within its scope. The research further identifies a series of important aspects pertaining to tenure security within the current regulatory regime. It therefore provides a useful starting point for investors who are interested in investing in the South African mining industry, and want to determine whether and to what extent tenure security prevails. The thesis also opens the door to future research that may focus on other or all of the commonly accepted aspects of mineral tenure security, in a quest to determine whether, broadly, tenure security prevails in the current regulatory regime.

The parameters of the research must be set not only regarding the aspects of mineral tenure security but also regarding the rights to minerals⁹⁵ for which the MPRDA provides i.e. reconnaissance permissions,⁹⁶ prospecting rights,⁹⁷ permissions to remove and dispose of minerals,⁹⁸ mining rights,⁹⁹ mining permits¹⁰⁰ and retention permits.¹⁰¹ Reconnaissance permissions, prospecting rights, mining rights and mining permits are the initial rights for which entities can apply. To apply for permissions to remove and dispose of minerals and retention permits, applicants must already hold prospecting rights.¹⁰² This research focuses on security of tenure of holders of initial rights to minerals. Reconnaissance permissions are excluded because the MPRDA does not include security of tenure regarding reconnaissance permissions as one of its objectives.¹⁰³ These permissions are seen as non-exclusive rights that exist early in the process of a mineral development project.¹⁰⁴ The research thus focuses on tenure security of holders of prospecting rights, mining rights and mining permits. Retention permits are not analysed separately, but these permits do play a role in providing tenure security to holders of prospecting rights.¹⁰⁵ Retention permits are thus referred to in relation to the tenure security of holders of prospecting rights. The term “rights to minerals” is used in the thesis as a collective term to refer to the rights and permits that fall within the scope of the research, thus prospecting rights, mining rights and mining permits.

3. Research question and delimitation

Given the dual line of inquiry as set out above, the thesis aims to answer the following research questions:

RQ 1. Do the rules of private law strengthen mineral tenure security in the current regulatory regime?

⁹⁵ The MPRDA also regulates the petroleum industry. This research is limited to tenure security of holders of rights to minerals only.

⁹⁶ MPRDA, s 13.

⁹⁷ MPRDA, s 16.

⁹⁸ MPRDA, s 20.

⁹⁹ MPRDA, s 22.

¹⁰⁰ MPRDA, s 27.

¹⁰¹ MPRDA, s 32.

¹⁰² MPRDA, s 20 for permissions to remove and dispose of minerals and s 31.

¹⁰³ MPRDA, s 2(g) states security of tenure as an objective of the MPRDA in respect of prospecting and mining only as far as rights to mineral are concerned.

¹⁰⁴ Johnson (Unpublished doctoral thesis) 25; Bastida (PhD thesis) 55.

¹⁰⁵ See chap 4, sec 2.4.3.

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The private-law concepts that traditionally impacts on mineral tenure security are ownership of mineral and mineral resources and classification of right to minerals as real rights in property. To evaluate the role of these concepts in strengthening mineral tenure security, RQ 1 consists of the following two sub-questions:

RQ 1.1 What role does ownership of minerals and mineral resources play in providing mineral tenure security through creating certainty regarding the ability of holders of prospecting rights, mining rights and mining permits to prospect and mine, to choose not to prospect and mine and to dispose of minerals?

RQ1.2 What are the limitations of a private-law rights-based approach to rights to minerals in providing mineral tenure security in the current regulatory regime?

RQ 2 How does the current regulatory regime strengthen mineral tenure security for certain aspects of the concept that traditionally are connected to the rules of property law?

The aspects of mineral tenure security that are traditionally associated with mineral tenure security are the abilities to prospect and mine, to remove and dispose of minerals, to choose not to prospect and mine and to transfer and mortgage rights. To evaluate how the current regulatory regime strengthen mineral tenure security for these aspects, RQ 2 consists of the following two sub-questions:

2.1 What challenges do the current regulatory regime pose to mineral tenure security regarding the abilities of right holders to prospect and mine, to choose not to prospect and mine, to dispose of minerals found during prospecting and mining and to transfer and mortgage their rights?

2.2 How can the challenges that the current regulatory regime pose for mineral tenure security regarding the abilities of right holders to prospect and mine, to choose not to prospect and mine, to dispose of minerals found during prospecting and mining and to transfer and mortgage their rights be addressed?

4. Methodology

To answer the research questions, this thesis primarily undertakes a technical-legal analysis of South African mining law. The research also uses the historical method of legal research to an

extent. The historical method is limited to the regulatory regime that immediately preceded the enactment of the MPRDA. The historical method is used to present arguments regarding the theoretical underpinnings of the current regime and the continued relevance of the rules of private-law ownership in strengthening mineral tenure security.

A very large part of the research for this thesis consist mainly of a technical legal analysis of certain parts of the MPRDA. The analysis is, however, not merely descriptive. The aim of the analysis is to provide insight into the weaknesses of the current regulatory regime in strengthening mineral tenure security. Furthermore, the outcome of the analysis is a set of proposed solutions to overcome the weaknesses of the current regulatory regime.

This thesis makes use of primary and secondary legal sources for the legal analysis and for the historical method.

5. Course of inquiry

The thesis is divided into a series of chapters dealing with its two main pursuits. This chapter has set out the core concept, background and research questions. Chapter two investigates the main tenets of the current regulatory regime. It is argued that the MPRDA establishes a regulatory regime with a predominantly¹⁰⁶ public law character. The theoretical basis of mineral law under the MPRDA is primarily based in public law and specifically administrative law. The chapter thus lays the foundation to answer the research question relating to the role that the rules of property law play in providing mineral tenure security within the current regulatory regime which is predominantly founded in public law.

Against this background, chapter three examines the role that ownership, as a private-law concept, plays in strengthening mineral tenure security. Traditionally, ownership of minerals and mineral resources impact on the abilities of holders of right to minerals to prospect and mine, to remove and dispose of minerals, and to choose not to prospect and mine. The abilities are rudimentary requirements for profitable development of mines. The chapter provides an explanation of how ownership of minerals and mineral resources traditionally protect mineral tenure security. It thereafter considers the continued role of ownership in providing mineral tenure security regarding the abilities to prospect and mine, to remove and dispose of minerals

¹⁰⁶ The terms “mostly” and “predominantly” are used because their might be aspects of mineral law, other than tenure security, which are still influenced by property law. See chap 2, sec 3.2.3.

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and to cease operations when necessary for profitable development. Chapter three also comments on whether the private-law concept ownership remains suitable as a lens through which to view rights to minerals in the current regulatory regime.

Chapter four aims to comment on how the current regulatory regime provides mineral tenure security regarding the abilities of right holders to prospect and mine, to remove and dispose of minerals and to cease operation when necessary for profitable development of mines. The chapter provides a detailed analysis of the manner in which the MPRDA regulates the abilities to prospect and mine, to remove and dispose of minerals and to choose not to prospect and mine when necessary to ensure profitable development of mines. The chapter takes into account that the government may have legitimate interests to limit these abilities of right holders. In this regard, the chapter aims to comment on the extent to which the MPRDA minimises risks and uncertainties that may prevent profitable development of mines, and thus strengthen mineral tenure security, while acknowledging the legitimate interests of the government. The chapter furthermore attempts to identify the features of the MPRDA that weaken mineral tenure security as far as the abilities to prospect and mine, to remove and dispose of minerals, and to choose not to prospect and mine are concerned.

Chapter five offers a detailed analysis, similar to chapter four, regarding the manner in which the MPRDA regulates the abilities of holders of prospecting rights, mining rights and mining permits to transfer and encumber their rights and permits. As with chapter four, chapter five acknowledges that the government may have legitimate reasons for limiting these abilities of right holders. The aim of the chapter is to comment on the extent to which the MPRDA provides mineral tenure security while taking into account legitimate objectives of the government. As with chapter four, chapter five aims to identify the shortcomings of the MPRDA in strengthening mineral tenure security.

Chapter six investigates the limitations of a private-law rights-based approach in strengthening mineral tenure security. The chapter examines the effect of registration and enforcement of real rights, according to the rules of property law, on mineral tenure security. Having established that effect, the chapter appeals for the acceptance of an alternative approach to registration and enforcement of rights to minerals granted in terms of the MPRDA that is not based on private-law rules. The chapter lastly explores whether the private-law categories of

rights, namely real rights and personal rights, continue to be an appropriate paradigm for analysing current prospecting rights, mining rights and mining permits.

Chapter 7 proposes a set of solutions for the shortcomings of current regulatory regime in strengthening mineral tenure security. These solutions are based on the rule of law and especially the principle of legality. In this regard, the chapter uses the approach of the Constitutional Court in the review of primary legislation for compliance with rationality review and the rule against vagueness as starting point. The chapter pleads for the adoption of the principle of legality when the Court reviews primary legislation that does not necessarily infringe fundamental rights, but that has an acute negative impact on individuals or entire industries. Such an adoption justifies amendments to the MPRDA to comply with rule-of-law standards and to overcome its shortcomings in strengthening mineral tenure security.

Chapter 8 provides the summative conclusions of the thesis.

6. Summative remarks

Provision of tenure security to holders of rights to minerals is an important consideration for prospective investors. The meaning of tenure security in the mining industry is very broad and includes aspects that would not fall squarely within the sphere of property law, but instead rely on public law for regulation. The reason for the combination is that mineral law is traditionally a combination of public law and property law due to diverging interests in the mining industry. In a South African context, there is thus a strong connection between certain aspects of mineral tenure security and the rules of property law.

The next chapter investigates the extent to which the MPRDA changed the theoretical landscape of mineral law. The chapter examines the impact of the MPRDA on the private-law character of mineral law.

Chapter 2:

THEORETICAL LANDSCAPE OF SOUTH AFRICAN MINERAL LAW

1. Introduction

The research for this thesis was fuelled by curiosity regarding whether the MPRDA provides the kind of security of tenure to holders of rights to minerals that would continue to attract investment. The aspects of mineral tenure security include concepts that fall in the sphere of private law as well as concepts informed by administrative law. It is arguable that the importance of the concepts that fall in the sphere of private law and public law depend on the type of regulatory regime. It is thus expected that, in regimes that are based predominantly in private law, the private-law aspects of mineral tenure security will be essential to strengthen mineral tenure security. Similarly, in regimes that are predominantly based in public law, it is expected that the administrative law aspects of the concepts will be vital to strengthen mineral tenure security.

The manner and intensity with which the government regulates the mining industry informs the theoretical basis of mineral law.¹⁰⁷ If the government plays no regulatory role in the mining industry, private law will govern mineral law and the system will be based on private holding of rights to minerals.¹⁰⁸ Alternatively, regulatory systems that are highly bureaucratic and that allow for wide governmental discretion in the issuing, maintenance and termination of rights to minerals tend to weaken private property rights.¹⁰⁹ In such regulatory systems, public law becomes the basis of mineral law.¹¹⁰ Between these two extremes are a myriad of regulatory options varying from extensive regulatory control to less extensive regulation.¹¹¹ The intensity

¹⁰⁷ According to Mostert *Principles and Policies* 15, the nature of mineral law at any specific time depends “largely on the type of regulatory interference foreseen by legislation and the manner in which [it effects] common law principles”.

¹⁰⁸ Barton in Zillman, *et al* (eds) 22 refers to “default rules” where no legislation is in place to regulate a specific activity. Default rules include rules of property law.

¹⁰⁹ Bastida 2001 *JERL* 34.

¹¹⁰ Bastida 2001 *JERL* 34; Dale 1996 *JERL* 300 states that in systems where mineral rights vest in the state and are heavily regulated, “mining law” is “wholly within the realm of administrative law”.

¹¹¹ Williams “Legal Reform in Mining” in Bastida *et al* 53.

of the regulation invariably impacts on the prominence of administrative law and property law in a specific regime.¹¹²

South African mineral law traditionally straddles private law and public law.¹¹³ Historically, mineral law developed from common-law principles and fell within the ambit of private property law.¹¹⁴ The regulatory function of government, on the other hand, is an administrative one that falls within the ambit of administrative law (and thus public law). Furthermore, “an entire structure of mineral law and mining law evolved” since the discovery of South Africa’s mineral resources.¹¹⁵ This structure of mineral law is a hybrid of property law and administrative law.

Governments regulate extraction of mineral resources for different reasons and in pursuit of a variety of objectives.¹¹⁶ The manner and intensity of regulation depends on the underlying policies and objectives pursued.¹¹⁷ Regulation may for instance aim to ensure optimal exploitation of mineral resources,¹¹⁸ protection of the environment as well as socially-responsible mining.¹¹⁹ Regulation can further aim to ensure that the government shares in the revenue from mining operations.¹²⁰ Furthermore, the political¹²¹ and socio-economic environment influence the extent of governmental regulation.¹²²

Mineral law must also reconcile diverging interests. Typically the interests of the state and private investors and the interests of landowners deserve protection.¹²³ In the South African context, the relationship between the state and investors is typically governed by public law,

¹¹² Mostert *Principles and Policies* 15.

¹¹³ Mostert *Principles and Policies* 15. This is also the case in other jurisdictions. See, for example, González in Zillman *et al* 60 where commenting on the law in Latin American countries the author says “private law rules on property in the region were complemented and, in some cases, modified by public law”.

¹¹⁴ Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1 – 1; Mostert *Principles and Policies* 1.

¹¹⁵ Mostert *Principles and Policies* 1; Badenhorst, Mostert and Dendy “Minerals and Petroleum” in *LAWSA* par 4.

¹¹⁶ Mostert and van den Berg in Zillman *et al* (eds) 91. See Williams in Bastida *et al* 38 – 39, 44, 50, 62 for the role of goals and objectives of mining reform.

¹¹⁷ Mostert *Principles and Policies* 157 – 158.

¹¹⁸ Mostert *Principles and Policies* 2.

¹¹⁹ Mostert and van den Berg in Zillmann *et al* (eds) 91. In 2001 Bastida 2001 *JERL* 43 argued that sustainable development and the socio-economic impact of mining presented new regulatory challenges. As regards sustainable development, see Bastida (PhD thesis) chap 6.

¹²⁰ Mostert *Principles and Policies* 2.

¹²¹ Bastida (PhD thesis) 74.

¹²² Bastida 2001 *JERL* 33.

¹²³ Mostert *Principles and Policies* 15. See regarding competing interests in general (not only in a South African context) Bastida in Bastida *et al* 413; Bastida (PhD thesis) 25 – 28.

while private law governs the relationship between landowners and holders of mineral rights.¹²⁴ Regulation of the mining industry is thus not a simple matter, and neither is the law that accompanies it. Regulation, even in pursuit of a single objective, for instance the optimal exploitation of mineral resources, can vary between rigorous state control that can lead to full scale nationalisation of the mining industry¹²⁵ and less rigorous forms of regulation. Less rigorous forms of regulation can, for example, attempt to ensure that only entities capable of optimal exploitation become holders of rights to minerals.¹²⁶ Less rigorous forms of regulation aimed at optimal exploitation of mineral resources can also force holders of rights to exploit mineral deposits for which they have a mining right actively.¹²⁷

The objectives and policies underlying regulation of the South African mining industry have been extensively dealt with elsewhere,¹²⁸ which renders a detailed analysis of the policy objectives underlying the MPRDA unnecessary here. Briefly, from the preamble and objectives of the Act, it is clear that the Act pursues a complex and inter-related set of objectives. The Act provides for environmentally¹²⁹ and socially responsible mining.¹³⁰ The MPRDA further aims to address discriminatory policies of the past and to provide equitable access to the country's mineral resources.¹³¹ It is thus expected that to realise all of these objectives, the MPRDA will extensively and rigorously regulate the mining industry.

The purpose of this chapter is to evaluate the impact of regulation under the MPRDA on the theoretical basis of mineral law. This chapter aims to evaluate the fundamentals of the current regulatory regime, to cast light on its continued dual administrative and proprietary features. The inquiry necessitates engagement with the core principles of property law that influenced

¹²⁴ See Mostert *Principles and Policies* 11 – 15. In case of an irreconcilable conflict between the landowner and holder of mineral right, the interests of the mineral rights holder takes precedence. See *Trojan Exploration Co (Pty) Ltd v Rustenburg Mines Ltd* 1996 4 SA 499 (A) 509; *Elektrisiteitsvoorsieningskommissie v Fourie en Andere* 1988 2 SA 627 (T) 638; *Hudson v Mann and Another* 1950 4 SA 485 (T) 488.

¹²⁵ Mostert *Principles and Policies* 2.

¹²⁶ Badenhorst 1991 *TSAR* 122.

¹²⁷ See chap 2, sec 2.4 for how the MPRDA ensures that right holders continuously prospect and mine.

¹²⁸ Mostert *Principles and Policies* 75 – 77.

¹²⁹ MPRDA, s 2(h).

¹³⁰ MPRDA, ss 2(f) and (i).

¹³¹ MPRDA, s 2(c) and (d). See *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) [1] where the court mentions that apartheid put 87% of land AND the mineral resources under the land in 13% of the population. See also [26] and [61], [64] – [65], [73] where the court engages with equitable access to minerals as an objective of the MPRDA in the context of expropriation. See also *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* 2014 2 SA 603 (CC) [3], [7] and Waelde 2002 *Minerals and Energy* 10.

mineral law.¹³² The focus is on the manner in which regulation in terms of the MPRDA erodes the core principles of mineral law that developed from property law.¹³³

To achieve its aim, this chapter uses the following structure: The next section identifies the relevant core concepts of property law that influenced the development of mineral law and provides a brief explanation thereof. The core concepts of mineral law that developed due to the influence of property law are then analysed. The remainder of the chapter explores the impact of regulation on the core principles of mineral law.

2. From property law to mineral law: development of the core concepts

Mineral law governs the “nature, content, acquisition, loss and transfer of mineral rights, prospecting rights and mining rights”.¹³⁴ This indicates that the core concepts of mineral law are mineral rights, prospecting rights and mining rights. Property law, and specifically the concepts “ownership” and “limited real rights”, played an important role in the development of these core principles of mineral law.

In common law, ownership is seen as the most comprehensive real right that a person can have regarding a thing.¹³⁵ Traditionally, ownership was seen as absolute and individualistic.¹³⁶ This means, *inter alia*, that an owner could do as he pleases with the thing that is subject to his ownership right.¹³⁷ However, today it is accepted that ownership is not truly absolute because an owner can only exercise his ownership right within the limits imposed by law.¹³⁸ The

¹³² See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-7 – 1-18. See Mostert *Principles and Policies* 7 – 13 for a detailed analysis of the concepts of property law that influenced mineral law.

¹³³ The focus is therefore not on the manner in which regulation influences the core principles of property law that form part of mineral law. In this regard see Mostert *Principles and Policies* 164.

¹³⁴ Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-1.

¹³⁵ *Gien v Gien* 1979 2 SA 1113 (T) 1129. See van der Merwe *Sakereg* 171; Badenhorst *et al Silberberg* 47 91; du Bois *Wille's Principles* 470.

¹³⁶ Badenhorst *et al Silberberg* 92; van der Merwe *Sakereg* 170.

¹³⁷ *Gien v Gien* 1120. See Badenhorst *et al Silberberg* 91; Sonnekus and Neels *Sakereg Vonnisbundel* 249.

¹³⁸ *Gien v Gien* 1120. In *Cosmos (Pvt) Ltd v Phillipson* 1968 3 SA 121 (R) 126, the court said an owner is entitled to “reasonable enjoyment”. See Badenhorst *et al Silberberg* 91; du Bois *Wille's Principles* 471 – 476; van der Merwe *Sakereg* 171 173; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-7; Sonnekus and Neels *Sakereg Vonnisbundel* 249 – 250; Pienaar 2006 *TSAR* 447. Van der Walt 1999 *Koers* 264 refers to the “ceiling approach” in the context of land reform. Also see Van der Walt 1992 *SAJHR* 433 – 435 where the author argues that the traditional concept of ownership is not appropriate in the context of transformation and for the fundamental re-structuring of society, the legal system and land rights.

content of ownership is at times described with reference to the entitlements of the owner.¹³⁹ An entitlement refers to the content of a right and in particular describes what an owner may lawfully do with the thing that is the object of his ownership.¹⁴⁰ The entitlements include the entitlement to use the thing, the entitlement to consume and destroy the thing and the entitlement to dispose of the thing.¹⁴¹ For purposes of mineral law, it is important that mineral exploitation is one of the entitlements of landownership.¹⁴²

The fact that mineral exploitation is an entitlement of landownership is closely connected to the maxim *cuius est solum eius usque ad caelum et ad inferos*. According to this maxim, the owner of the land is automatically also the owner of the sky and everything contained in the soil.¹⁴³ This rule has undoubtedly been accepted into South African law and was applicable before the MPRDA came into operation in the regime established by the Minerals Act¹⁴⁴ and the common law.¹⁴⁵ The *cuius est solum* rule means that the owner of land is automatically also owner of minerals in the land.¹⁴⁶ Thus, the owner of the land has control over the minerals

¹³⁹ Badenhorst *et al Silberberg* 92 – 93; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-8 – 1-9; van der Merwe *Sakereg* 173 - 174 acknowledges the entitlements of an owner but rejects a description of ownership according to the different entitlements. In South African law, the entitlements are seen as part of the content of ownership as a whole. Also see Sonnekus and Neels *Sakereg Vonnisbundel* 249 where the authors warn that the description of the entitlements of ownership must not mean that ownership is merely the sum total of its entitlements. See Badenhorst 2006 *Obiter* 552 where, with reference to *Elektrisiteitsvoorsieningskommissie v Fourie* the author argues that an owner's right to surface support *vis a vis* a mineral right holder is an entitlement of the owner according to the doctrine of rights. The entitlements also have been referred to as "rights". See, for example, Hall *Maasdorp's Institutes of South African Law II: The Law of Property* 11 and 27. For criticism on equating "rights" and "entitlements" see van der Vyfer 1988 *SALJ* 6 – 7. This thesis is not concerned with a definition of ownership and the mainstream South African approach as explained by Mostert *Principles and Policies* 9, namely the "concept of unity with the entitlements...forming part of the whole" is accepted.

¹⁴⁰ Badenhorst 1991 *TSAR* 114; van der Vyfer 1988 *SALJ* 1 6.

¹⁴¹ Badenhorst *et al Silberberg* 92 – 93; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-9; van der Merwe *Sakereg* 173.

¹⁴² *Agri SA* (CC) [7]; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-9; Badenhorst, van der Vyfer and van Heerden 1994 *JERL* 289; Badenhorst 1991 *TSAR* 114. See Badenhorst 1990 *TSAR* 239 251 where the author explains this within the doctrine of rights.

¹⁴³ As translated in Badenhorst *et al Silberberg* 92. See *Van Vuuren v Registrar of Deeds* 1907 TS 289 294; *Union Government (Minister v Railway and Harbours) v Marais and Others* 1920 AD 240 246; *Agri SA* (CC) [7]; van der Merwe *Sakereg* 190; Mostert *Principles and Policies* 5; Mostert and van den Berg in Zillman *et al* 77; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-9 states that "the owner of the land is the *dominus* of the whole land..." For a detailed exposition of this rule and the question whether it has its origin in Roman law see Dale (LLD thesis) 76 – 87. Also see Pienaar 1989 *De Jure* 258 fn 15 for the origins of the maxim. The rule also applies in other jurisdictions. See Barton in Zillman *et al* 22. See González in Zillman *et al* 69 72 73 for an explanation of how the rule has, at times, been limited in some Latin American Countries and Daintith in Zillman *et al* 39 for the position in the United States of America.

¹⁴⁴ 50 of 1991.

¹⁴⁵ Badenhorst *et al Silberberg* 92; van der Merwe *Sakereg* 551; Viljoen and Bosman *A Guide to Mining Rights in South Africa* 7; Leon 2009 *JERL* 612.

¹⁴⁶ *Neebe v Registrar of Mining Rights* 1902 TS 65 85; *Rocher v Registrar of Deeds* 1911 TPD 311 315; *Erasmus and Lategan v Union Government* 1954 3 SA 415 (O) 417; Viljoen (LLD thesis) 5; Kleyn and Boraine *Silberberg* 405; Mostert *Principles and Policies* 7; Sonnekus and Neels *Sakereg Vonnisbundel* 730.

in the soil and can decide what to do with the minerals, i.e. to exploit the minerals or let them lie fallow. The surface owner, by default, has the “first right” to the minerals.¹⁴⁷ The *cuius est solum* principle further implies that it is impossible to layer property horizontally and that ownership of the land and ownership of minerals in the land cannot vest in different entities.¹⁴⁸

The need arose to acknowledge mineral rights as rights separate from ownership of land that could be transferred to another entity.¹⁴⁹ One prominent reason for this was that, due to the high cost of mining, it became impossible for landowners to mine independently.¹⁵⁰ It was thus necessary to acknowledge mineral rights as rights, separate from landownership, which could be transferred to an entity with the financial and technical ability to extract the minerals. The need to acknowledge separate mineral rights gave rise to the notion of severance. Severance makes it possible to separate the rights to minerals from ownership rights in the land.¹⁵¹ The notion of severance gave way to the development of mineral rights as rights that are distinct from ownership of land. If the mineral rights were severed from ownership of the land, the landowner could be the holder of the mineral rights or could transfer the mineral rights to a third party.¹⁵² Mineral rights developed along the lines of property law and were

¹⁴⁷ Cawood and Minnitt 1998 *The Journal of the South African Institute of Mining and Metallurgy* 372. The authors opine that the fact that the surface owner, by default, became owner of the mineral rights was due to “the imperfect administration of mineral rights over a long period of time...”

¹⁴⁸ *Rocher v Registrar of Deeds* 315; *Neebe v Registrar of Mining Rights* 85; Mostert *Principles and Policies* 5; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-11. According to Barton in Zillman *et al* 24, despite the *cuius est solum* rule also being applicable in other common-law jurisdictions, horizontal layering is possible “as a matter of conveyancing” and through statute. According to de Alexander Xavier in McHarg *et al* 222 – 223, Brazilian law distinguishes between ownership of the soil and ownership of the subsoil.

¹⁴⁹ Badenhorst 2004 *JERL* 219; Mostert and van den Berg in Zillman *et al* 78; du Bois Wille’s *Principles* 618.

¹⁵⁰ *Agri SA* (CC) [8]; Mostert and van den Berg in Zillman *et al* 78; Mostert November 2014 *Recht In Africa* 9; Mostert *Principles and Policies* 10; van der Merwe *Sakereg* 553.

¹⁵¹ See Dale (LLD thesis) 89 -93 for an exposition of how this principle developed and 196 – 199 where the author shows that recognition was given to the separate holding of mineral rights for the first time by a Crown Land Disposal Ordinance in 1903 in the Transvaal Ordinance 57 of 1903 which was recognized in the Precious and Base Metals Act, 35 of 1908. In 1943 the Appellate Division in *Nolte v Johannesburg Consolidated Investment Company* 1943 AD 295 315 accepted separate holding of mineral rights. See Viljoen and Bosman *A Guide to Mining Rights* 9 for an overview of legislation as early as 1881 that provides evidence that mineral rights could be held separately from landownership. Also see Mostert November 2014 *Recht in Africa* 9 – 11; Mostert and van den Berg in Zillman *et al* (eds) 78 – 79; Cawood and Minnitt 1998 *The Journal for the South African Institute of Mining and Metallurgy* 372; Badenhorst 1999 *Stell LR* 96 and 99; Joubert 1959 *THRHR* 27. It is now well established that mineral rights could be held separately from ownership of land. See Badenhorst *et al Silberberg* 667; van der Merwe *Sakereg* 551 556 – 557; Sonnekus and Neels *Sakereg Vonnisbundel* 738. Section 70(1) of the Deeds Registry Act 47 of 1937 also provided for severance. Section 70 was repealed by section 53 of the Mining Titles Registration Act 24 of 2003. As regards severance in common-law jurisdictions in general see Barton in Zillman *et al* 23.

¹⁵² *Agri SA* (CC) [8] and [9]; Mostert and van den Berg in Zillman *et al* (eds) 78 – 79. When minerals rights were severed from landownership and both titles vest in the landowner, merger did not take place. See *Beyers v Du Preez* 1989 1 SA 328 (T) 336; Mostert November 2014 *Recht in Africa* 12; Badenhorst 1989 *De Jure* 385 – 386; Nel Jones *Conveyancing in South Africa* 415.

“conceptualised with reference to acknowledged categories of property rights”.¹⁵³ Although the judiciary experienced difficulty in finding the proper juristic niche for mineral rights within the acknowledged categories of limited real rights, mineral rights were classified as limited real rights.¹⁵⁴ As opposed to ownership, which is the only real right that a person can have in relation to his own property,¹⁵⁵ a limited real right is a right over the thing of another.¹⁵⁶ Limited real rights are more circumscribed than ownership and in actual fact derive from ownership.¹⁵⁷ Furthermore, ownership is viewed as the “mother right” from which mineral rights (limited real rights) derive.¹⁵⁸

In *Agri South Africa v Minister for Minerals and Energy*,¹⁵⁹ the court, for the first time, parted from the traditional conception of mineral rights as limited real rights.¹⁶⁰ The court referred to “mineral ownership” of which the entitlement not to mine (or the ability not to exploit) is an essential component.¹⁶¹ The decision creates the impression that “mineral ownership” is a type of ownership distinct from ownership of land.¹⁶² Mineral rights are thus, not limited real rights

¹⁵³ Mostert *Principles and Policies* 1. According to Mostert November 2014 *Recht in Africa* 12 the classification of mineral rights as limited real rights that derive from ownership of the land, is questionable.

¹⁵⁴ *Trojan Exploration* 509. Mineral rights were initially classified as personal servitude or quasi-personal servitudes. See for example *Lazarus and Jackson v Wessels, Olivier and Coronation Freehold Estate, Town and Mines Ltd* 1903 TS 499 510; *Van Vuuren v Registrar of Deeds* 294; *Rocher v Registrar of Deeds* 315 – 316; *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 2 SA 467 481; *Gluckman v Solomon* 1921 TPD 335 338. In *Anglo Operations Ltd v Sandhurst Estates Pty (Ltd)* 2007 2 SA 363 (SCA) [16] the court held that it is a settled principles that mineral rights are quasi-servitudes. This case was decided after the MPRDA came into operation and abolished mineral rights. Mineral rights were also regarded as *sui generis* real rights. See for example *Ex Parte Pierce* 1950 3 SA 628 (O) 634; *Erasmus v Afrikaner Proprietary Mines Ltd* 1967 1 SA 950 (W) 956E; *Apex Mines Ltd v Administrator, Administrator* 1986 4 SA 581 (T) 590 - 591. Regarding the proper juristic niche for mineral rights also see Mostert November 2014 *Recht in Africa* 12 – 15; Mostert and van den Berg in Zillman *et al* 79 – 89; Badenhorst 1996 *Stell LR* 99 – 101; Badenhorst, van der Vyver and van Heerden 1994 *JERL* 290 – 291; Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin* 581 – 604; Badenhorst 1989 *De Jure* 386 – 389.

¹⁵⁵ Badenhorst *et al Silberberg* 47.

¹⁵⁶ Badenhorst *et al Silberberg* 47; van der Merwe *Sakereg* 69.

¹⁵⁷ Mostert *Principles and Policies* 9.

¹⁵⁸ Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-8; Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin* 571.

¹⁵⁹ 2013 4 SA 1 (CC).

¹⁶⁰ *Agri SA* (CC) [38] [39]. Also see Mostert and van den Berg in Zillman *et al* 87. It has been argued the court’s departure from the traditional conceptualization indicates that “the concept of ‘mineral right has been misunderstood for decades”. See Mostert November 2014 *Recht in Africa* 8.

¹⁶¹ *Agri SA* (CC) [43].

¹⁶² Mostert and van den Berg in Zillman *et al* 87 argue that “[t]he majority judgment treated the right to minerals as a separate form of ownership, unceremoniously breaking with traditional conceptions of the right to minerals as a limited real right”. It seems that mineral rights are regarded as a separate type of ownership in other jurisdiction. See, for example, Barton in Zillman *et al* 28 where the author argues that in English and Scottish law “severance caused ‘minerals’ to come into separate ownership” and Daintith in Zillman *et al* 43 - 44 as regards the “mineral estate” in the United States.

that derive from ownership,¹⁶³ but constitute a different form of ownership. However, the court did not pursue this line of argument in any detail. Furthermore, before the *Agri SA* decision, mineral rights, as limited real rights distinct from ownership of the land developed from, and were firmly rooted in, property law.¹⁶⁴

As part of the content of common-law mineral rights, holders thereof had the entitlements to go upon the land for purposes of exploitation, to prospect, and to mine and remove the minerals if any were found.¹⁶⁵ The content of mineral rights by definition thus included the entitlements to prospect and mine. In the absence of statutory regulation to exploit minerals, holders of mineral rights had the entitlement to exploit minerals freely.¹⁶⁶

Holders of mineral rights (the landowner or the entity to whom the mineral right was transferred if the mineral rights were severed from landownership), could grant lesser rights, i.e. prospecting rights or mining rights to third parties.¹⁶⁷ Prospecting rights were granted by virtue of prospecting contracts¹⁶⁸ and mining rights by virtue of mineral leases.¹⁶⁹ Prospecting

¹⁶³ Mostert November 2014 *Recht in Africa* 12 supports this view.

¹⁶⁴ See Mostert and van den Berg in Zillman *et al* 88 where the authors argue that the judiciary has been unwilling for more than a century to conceptualize rights to minerals as a separate from of title. Majoni August 2013 *De Rebus* 42 opines that it “appears” that the MPRDA “follow an English law approach where separate ownership of strata of the soil under the surface is possible”.

¹⁶⁵ *Van Vuuren v Registrar of Deeds* 294 – 295; *Rocher v Registrar of Deeds* 316. See the definition of mineral rights proposed by Badenhorst 1991 *TSAR* 113 118; Badenhorst and Mostert 2003 *Stell LR* 384.

¹⁶⁶ *Agri SA* (CC) [38].

¹⁶⁷ Van der Vyfer 2012 *De Jure* 125 127.

¹⁶⁸ Kaplan and Dale *A Guide to the Minerals Act* 47 – 48 and 53; Badenhorst and Mostert 2007 *TSAR* 472. The term prospecting contract had a wide and a narrow meaning. In the narrow sense it meant only the entitlement to prospect for minerals. In the broad sense it contained an option to purchase ownership of the land or minerals or the option to obtain a mineral lease. Only prospecting contracts in the wide sense were registrable in the deeds office according to the repealed s 102 of the Deeds Registries Act. See Badenhorst and Olivier 1997 *TSAR* 587; van der Merwe *Sakereg* 558; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 4-2.

¹⁶⁹ Kaplan and Dale *A Guide to the Minerals Act* 47 – 48, 75 – 78; Badenhorst and Mostert 2007 *TSAR* 472. Although the term “mineral lease” can be problematic due to the unique nature of the contract. See *Wiseman v De Pinna and Others* [1986] 1 All SA 341 (A) [10]; van der Merwe *Sakereg* 558; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 5-2.

rights¹⁷⁰ and mining rights¹⁷¹ were regarded as limited real rights provided that they were registered.¹⁷²

To summarize, ownership of land included ownership of mineral deposits under the surface. The entitlements of ownership included the entitlement of exploiting minerals, i.e. the entitlements to prospect and mine. Mineral rights could be severed from ownership of the land, in which case either the landowner could be the holder thereof or could transfer the rights to another entity. Mineral right holders had the entitlements to prospect and mine, and could grant prospecting rights and mining rights to further parties. However, the core concepts of mineral law, specifically prospecting rights and mining rights, have been subject to governmental regulation since the discovery of large deposits of gold and diamonds in South Africa.¹⁷³ The next section explores the impact of regulation on the core concepts of mineral law.

3. Regulation

Prospecting rights and mining rights in particular have been subject to considerable regulation by government.¹⁷⁴ Indeed, prospecting rights and mining rights have been regulated to such an extent that “a distinction is typically drawn between the *right to mine and/or prospect* and the underlying *mineral right*”.¹⁷⁵ The manner in which the government regulated the rights to mine and prospect since the discovery of mineral resources has been dealt with extensively. Mostert¹⁷⁶ identifies four eras or generations of laws that regulated mineral law.¹⁷⁷ Following

¹⁷⁰ In terms of prospecting contracts in the wide sense (see fn 66) was registrable. In *Vansa Vanadium SA Ltd v Registrar of Deeds* 1996 1 ALL SA 433 (T) 442, the court held that registered prospecting contracts were not real. It is, however, generally accepted that this decision is wrong and that prospecting rights were real if registered. See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 4-4; Badenhorst and Mostert 2003 *Stell LR* 386; Badenhorst 1998 *Obiter* 146; Badenhorst and Olivier 1997 *TSAR* 593. Before legislation enabling prospecting contracts to be registered, these contracts were personal in nature. See *Cullinan v Pistorius* 1903 ORC 33 37. For a detailed examination of the nature of prospecting contracts, in the wide and the narrow sense see Badenhorst *Die Bevoegdheid om Minerale te Ontgin* 639 – 699.

¹⁷¹ Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 5-5; Badenhorst and Mostert 2003 *Stell LR* 387; Badenhorst 1998 *Obiter* 146; Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin* 707 - 711

¹⁷² Before registration the prospecting contracts and mineral leases gave rise to personal rights which were converted to real rights when registered. See Badenhorst and Mostert 2003 *Stell LR* 386; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 4-4 and 5-5; Badenhorst and van Heerden 1993 *TSAR* 166.

¹⁷³ Mostert *Principles and Policies* 1 and 15 – 16.

¹⁷⁴ Mostert *Principles and Policies* 1; Mostert and van den Berg in Zillman *et al* 78; van der Vyfer 2012 *De Jure* 127.

¹⁷⁵ Mostert *Principles and Policies* 1 and 163 for the right to mine in particular. See *Agri SA (CC)* [38] for the necessity to distinguish between the underlying mineral right and the right to mine.

¹⁷⁶ Mostert *Principles and Policies* 16 – 17.

¹⁷⁷ The eras are the Colonial and Union eras from 1860 to 1964 (Mostert *Principles and Policies* chap 3), the era between 1964 and 1991 (Mostert *Principles and Policies* chap 4), the era between 1992 and 2004 (Mostert

a detailed analysis of the extent of governmental regulation in the eras before 1991, the author concludes that governmental regulation was common in all eras.¹⁷⁸ Regulation was specifically aimed at controlling the ability to prospect and mine or, in other words, to exploit minerals.¹⁷⁹ It is thus *prospecting rights* and *mining rights* that were subject to governmental regulation.¹⁸⁰ These rights had a strong public-law character due to the extent of governmental regulation.¹⁸¹

The desired impact of the MPRDA in general, and specifically on the theoretical basis of mineral law, is best understood when compared to the system of mineral law immediately preceding it. This regime consisted of the Minerals Act¹⁸² and the common law. Before the Minerals Act came into operation, regulatory legislation had the effect that prospecting rights and mining rights vested in different entities at times. For example, the rights to mine for and dispose of precious metals and precious stones vested in the state.¹⁸³ The rights to prospect and mine for base minerals vested in the mineral right holder or the person with whom the mineral right holder concluded a prospecting contract or mineral lease.¹⁸⁴ These regulatory provisions thus altered the common-law position of mineral right holders because the entitlements to prospect and mine vested in entities other than the holders of mineral rights.

The pre-democratic government enacted the Minerals Act in pre-emption of a new political dispensation. Thus, while the Minerals Act attempted to deregulate the mining industry, the MPRDA seeks to regulate the same quite heavily.

Principles and Policies chap 5) and the current system from 2004 onwards (Mostert *Principles and Policies* chap 6).

¹⁷⁸ Mostert *Principles and Policies* 159. See 37 where the author remarks that in the Colonial and Union eras the laws “acknowledged the capacity of the state to control and regulate the various kinds of minerals...” See 45 – 46 for the extent of regulation in the era between 1964 and 1991.

¹⁷⁹ Commenting on the regime immediately preceding the MPRDA in terms of the Minerals Act and the common law, Badenhorst 2001 *THRHR* 645 says that the role of the state was to give the green light to exercise rights.

¹⁸⁰ Mostert *Principles and Policies* 159. See Viljoen and Bosman *A Guide to Mining Rights* 7 where the authors suggested in 1979 that mineral and mining law might fit better into administrative law due to state control of mining.

¹⁸¹ Mostert *Principles and Policies* 159.

¹⁸² Act 50 of 1991.

¹⁸³ S 2(1)(a) of the Mining Rights Act 20 of 1967 and s 2 of the Precious Stones Act 73 of 1964.

¹⁸⁴ S 2(1)(b) of the Mining Rights Act.

3.1. Regulation immediately prior to the MPRDA

The enactment of the Minerals Act was perceived to be a re-enactment of the common-law position regarding holders of mineral rights.¹⁸⁵ The Act further was an attempt (though not successful)¹⁸⁶ to deregulate the mining industry as part of the general policy of privatisation and deregulation of the National Party government at the time.¹⁸⁷ The Minerals Act pursued three objectives, namely, optimal utilisation of minerals, mine health and safety, and rehabilitation of the surface during and after prospecting and mining operations.¹⁸⁸

The Minerals Act re-vested the entitlements to enter upon the land that was subject to the mineral right and to prospect and mine for minerals in the holder of the mineral right.¹⁸⁹ The content of mineral rights were thus by definition restored so that the entitlements to prospect and mine vested in holders of mineral rights (or an entity to whom the holders of mineral rights granted the right to prospect or mine through a prospecting contract or mineral lease). Nevertheless, these entitlements could not be exercised freely. According to section 5(2), read with sections 6(1) and 9(1) of the Minerals Act, an entity had to obtain a prospecting permit¹⁹⁰ or mining authorisation¹⁹¹ to prospect or mine, respectively. The entitlements to prospect and mine were subject to strict regulation under the Minerals Act. In *Minister of Minerals and Energy v Agri South Africa*,¹⁹² the Supreme Court of Appeal (*Agri SA* (SCA)) said that mining authorisations conferred “practical value” on mineral rights.¹⁹³ Commenting on the Minerals Bill that preceded the Minerals Act, Badenhorst said that regulation of the entitlements to

¹⁸⁵ Kaplan and Dale *A Guide to the Minerals Act* 5 - 6; Kleyn and Boraine *Silberberg* 406; Badenhorst 1991 *TSAR* 125. The definition of the word “mineral” in the Minerals Act was also perceived to be a re-enactment of the common law. See Klein and Boraine *Silberberg* 410.

¹⁸⁶ See the White Paper on the Mineral Policy of the Republic of South Africa (1986) 5 – 6.

¹⁸⁷ See the White Paper on Privatisation and Deregulation in the Republic of South Africa (1987) in general; Dale 1997 *Resources Policy* 15 16; Waelde 2002 *Minerals and Energy* 13. See Mostert *Principles and Policies* 57 – 58 for the reasons for the enactment of the Minerals Act.

¹⁸⁸ Minerals Act, long title. Also see Kaplan and Dale *A Guide to the Minerals Act* 3 – 4; Mostert *Principles and Policies* 59; Badenhorst, Mostert and Dendy “Minerals and Petroleum” in *LAWSA* par 1.

¹⁸⁹ This is true concerning the rights to mine and dispose of precious stones and precious metals according to s 5(1) of the Minerals Act. Also see Badenhorst 1991 *TSAR* 122 – 123, 124 and 125 and for the entities in whom some of the entitlements vested before the Minerals Act; Badenhorst and van Heerden 1993 *TSAR* 164; Badenhorst, van der Vyver and van Heerden 1994 *JERL* 289.

¹⁹⁰ See Kaplan and Dale *A Guide to the Minerals Act* 55 – 56. See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* chap 8 for a general discussion of prospecting permits.

¹⁹¹ See Kaplan and Dale *A Guide to the Minerals Act* 78 – 79. See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* chap 9 for a general discussion of mining authorisations.

¹⁹² 2012 5 SA 1 (SCA).

¹⁹³ *Agri SA* (SCA) [70].

prospect and mine were so extensive that “the Minerals Bill is characterised by a cradle to the grave form of regulation”.¹⁹⁴

Regulation of the ability to prospect and mine resulted in two layers of rights.¹⁹⁵ The first layer consisted of the common-law mineral right¹⁹⁶ as well as the prospecting rights (granted by virtue of prospecting contracts) and mining rights (granted by virtue of mineral leases) that derived from the mineral right. The first layer provided *access* into the mining industry.¹⁹⁷ The second layer of rights consisted of the authorisations and permissions that were necessary to *exercise*¹⁹⁸ prospecting rights and mining rights. In pursuit of its objectives, the state effectively established control over the mining industry through the second layer of rights in the following manner: The state granted prospecting permits¹⁹⁹ and mining authorisations²⁰⁰ and determined the length of time for which they were valid.²⁰¹ These permissions and authorisations could further be abandoned,²⁰² suspended or cancelled²⁰³ in prescribed circumstances. Cancellation had no effect on the underlying mineral right, prospecting right or mining right.²⁰⁴ These rights would still exist. The holder thereof would, however, be unable to exercise them legally without the necessary permissions or authorisation. Prospecting permits and mining authorisations were not transferable in any way and could not be

¹⁹⁴ Badenhorst 1991 *TSAR* 130. At 129 – 130 the author advances reasons for the statement. The reasons include that exploitation of base minerals was also subject to the necessary state authorisation under the Minerals Bill while base minerals could be exploited freely in the regime before the Minerals Act. Another reason is that the Minerals Bill gave government officials broad discretionary powers in administration of the Bill.

¹⁹⁵ Mostert November 2014 *Recht in Africa* 23; Mostert *Principles and Policies* 15; Mostert and van den Berg in Zillman *et al* 89. Dale 1996 *JERL* 308 refers to a two-tiered system. The common-law mineral rights, prospecting rights and mining rights presented one tier and the authorisations represented a second tier.

¹⁹⁶ Mostert November 2014 *Recht in Africa* 23.

¹⁹⁷ Mostert *Principles and Policies* 94; Mostert November 2014 *Recht in Africa* 23; Mostert and van den Berg in Zillman *et al* 89.

¹⁹⁸ Mostert *Principles and Policies* 94 refers to “activation” of rights. Also see Mostert November 2014 *Recht in Africa* 23; Mostert and van den Berg in Zillman *et al* 89. See Badenhorst and Roodt 1995 *THRHR* 2 where the authors say “die Mineraalwet [reguleer] dus by uitstek die uitoefening van ontginingsbevoegdheid.” Also see Badenhorst 1996 *Obiter* 168.

¹⁹⁹ Minerals Act, s 6(1).

²⁰⁰ Minerals Act s 9(1).

²⁰¹ According to s 6(4) of the Minerals Act, prospecting permits were valid for 12 months or a longer period determined the Director of Mineral Development and were renewable in specified circumstances. The Minerals Act did not provide specific time periods for which mining authorisations were valid but according to s 11(1) the authorisation remained valid for the “period determined therein”.

²⁰² Minerals Act, ss 11(1), 11(2) and (3).

²⁰³ Minerals Act, ss 11(1) and 14.

²⁰⁴ See Leon 2009 *JERL* 613 where following a brief discussion of mining authorisations and prospecting permits, the author says that “...common-law rights to minerals were not subject to termination by a public authority for non-compliance with the Minerals Act or on any other grounds”.

encumbered by mortgage bonds.²⁰⁵ The underlying mineral rights were transferable freely and could be encumbered by mortgage.²⁰⁶

To summarise, the regime before the MPRDA thus regulated the ability to prospect and mine by requiring a prospecting permit or mining authorisation. Minerals rights were however recognised. Only the mineral right holder (the landowner or another if mineral rights were severed from ownership and transferred to another entity) or an entity that had consent to prospect or mine from the mineral right holder could apply for a prospecting authorisation²⁰⁷ or mining permit.²⁰⁸ Thus, any person, who wanted to prospect or mine, had to obtain the common-law mineral right from the original holder, or had to obtain a prospecting right (in the form of a prospecting contract) or mining right (in the form of a mineral lease) from the mineral right holder.²⁰⁹ Mineral rights thus provided access into the mining industry.²¹⁰ The right to prospect and mine, although derived from the mineral right, was extensively regulated by the government through a second layer of rights. The second layer of rights was purely administrative and had a public law character.²¹¹ The combination of mineral rights, based in private law, and regulation of prospecting rights and mining rights, an administrative function of the state based in public law, becomes apparent. It is evident that mineral law did indeed have a dual nature in the regime preceding the MPRDA, namely proprietary and administrative. This system of first and second layer of rights is utilised in the next section to illustrate the impact of the MPRDA on the theoretical foundations of mineral law.

3.2. Regulation under the MPRDA

The MPRDA effectively terminated the framework of mineral law that was operational before its enactment. Most significantly, it repealed the Minerals Act²¹² and the common law, to the extent that the common law was not consistent with the MPRDA.²¹³ According to the MPRDA, mineral and petroleum resources are the common heritage of all the people of South Africa and

²⁰⁵ Minerals Act, s 13.

²⁰⁶ See sec 3.2.2 fn 256 and fn 257 below.

²⁰⁷ Minerals Act, s 6(1).

²⁰⁸ Minerals Act, s 9(1).

²⁰⁹ Kaplan and Dale *A Guide to the Minerals Act* 47.

²¹⁰ Mostert *Principles and Policies* 94 and 161.

²¹¹ See Badenhorst 2011 4 *SALJ* 769 where the author says “[a] prospecting permit or mining authorisation was merely a licence and does not exhibit typical features of a real right”. See Badenhorst and van Heerden 1993 *TSAR* 168 regarding prospecting permits.

²¹² S 110 and sch 1 MPRDA.

²¹³ MPRDA, s 4(2).

the state is the custodian²¹⁴ thereof for the benefit of all South Africans.²¹⁵ According to section 3(2)(a) of the Act, the state can grant, issue, refuse, control, administer and manage any right to minerals.²¹⁶ The only way to obtain any right to minerals, including prospecting rights, mining rights and mining permits,²¹⁷ in the regime established by the MPRDA is thus to apply for such rights to government through an administrative process.

3.2.1. Extent of regulation

The MPRDA regulates prospecting rights, mining rights and mining permits extensively.²¹⁸ Although the extent of regulation is meticulously surveyed in later chapters, a simple reading of the Act demonstrates that current regulation is rigorous: The only way to obtain prospecting rights, mining rights and mining permits is to apply to government. The MPRDA determines the length of time for which the rights are granted²¹⁹ as well as the circumstances in which rights can be suspended and cancelled²²⁰ and the circumstances in which a right lapses.²²¹ The MPRDA further regulates the entitlements of holders of rights to enter the land under which the minerals subject to rights occur and to prospect and mine for minerals.²²² The state even determines when holders of rights may exercise their entitlement not to exploit the mineral by requiring holders to mine or prospect within a certain period from which the right is granted.²²³

²¹⁴ See chap 3, sec 2.2.

²¹⁵ MPRDA, s 3(1).

²¹⁶ MPRDA, s 3(2)(a).

²¹⁷ These are the rights to minerals relevant for this thesis. See chap 1, sec 2.

²¹⁸ There are some aspects of prospecting and mining that the MPRDA do not regulate, for instance, the ability of holders of mining permits to dispose of minerals found. See chap 4, s 2.2. Dale in Bastida *et al* 849 has described the system as one of “administrative decision-making” and Mostert *Principles and Policies* 82 opines that the system is “administratively driven”. According to Mostert and van den Berg in Zillman *et al* 80, the MPRDA “represents the zenith of the state’s right to intervene in subsurface matters”.

²¹⁹ According to s 17(6), prospecting rights are valid for a maximum period of 5 years and according to s 18(4) can be renewed once for a maximum period of 3 years. S 23(6) determines that a mining right can be granted for a maximum period of 30 years and according to s 24(4) can be renewed for “further periods” each of which may not exceed 30 years. According to ss 27(8)(a) and (b) mining permits can be granted for a maximum period of 2 years and can be renewed for 3 periods each not exceeding 1 year.

²²⁰ MPRDA, s 47

²²¹ MPRDA, s 56.

²²² MPRDA, ss 5(2)(a) and (b) for prospecting rights and mining rights and 27(7)(a) and (d) for mining permits.

²²³ For example, mining must commence within one year from the date on which the mining right becomes effective in terms of s 25(b) of the MPRDA and prospecting must commence within 120 days from the date on which the prospecting right becomes effective in terms of s 19(2)(b) of the MPRDA. See in this regard *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 1 SA 104 (GNP) [9] (Agri SA High Court). See chap 4, sec 2.4.1 for a discussion of the obligation to commence prospecting and mining within certain periods.

The MPRDA determines if and how prospecting rights, mining rights and mining permits can be transferred and encumbered.²²⁴

Furthermore, except for the transitional arrangements that provided for the transition from the previous regime to the current regime, which have already come to an end,²²⁵ the Act does not recognise the existence of common-law mineral rights.²²⁶ Holders of common-law mineral rights, prospecting rights and mining rights had an opportunity to convert their rights under the previous regime to new rights under the MPRDA.²²⁷ Common-law mineral rights, prospecting rights and mining rights ceased to exist irrespective of whether conversion was successful, unsuccessful or whether holders of rights in the previous regime did not lodge their rights for conversion.²²⁸ It is uncertain whether these rights were simply terminated or whether they were transferred to the state. Two interpretations are possible in this regard.

²²⁴ Section 11 MPRDA.

²²⁵ MPRDA, sch II. The transitional provisions gave holders of rights in the regime preceding the MPRDA an opportunity to convert their rights into rights under the MPRDA. The transitional arrangements made provision for “old order rights” to be converted into “new order rights”. Old order rights consisted of bundles of rights that existed in the previous regime. These bundles included common-law mineral rights. As an example, Category 1 Table 1 made provision for conversion of the common-law mineral right, together with a prospecting permits obtained in terms of s 6(1) of the Minerals Act. The last of the transitional provisions ended in 2009. See Badenhorst and Mostert 2003 *Stell LR* 381 for a list of “old order rights” and 392 for the “bundling of rights approach”. See in general regarding the transitional provisions Badenhorst “Mineral Rights: “Year Zero” Cometh” 2001 *Obiter* 133 – 139; Mostert *Principles and Policies* 92 – 101; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* chap 25; Badenhorst 2011 4 *SALJ* 764 – 766; Badenhorst and Mostert 2003 *Stell LR* 380 – 384.

²²⁶ *De Beers Consolidated Mines Ltd v Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy* Case 1590/2007 (OPD) Unreported (15-05-2008) par 2.5; Badenhorst 2004 *JERL* 235; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-6; Badenhorst “Mineral Rights: “Year Zero” Cometh ?” 2001 *Obiter* 130; Badenhorst 2011 4 *SALJ* 764; du Bois Wille’s *Principles* 618. Mostert *Principles and Policies* 161 acknowledges that common-law mineral rights have “limited significance” in the current regulatory system as it only forms the basis upon which rights from the previous regime could be lodged for conversion.

²²⁷ See fn 225 above.

²²⁸ See Badenhorst and Mostert 2003 *Stell LR* 397 – 399. Conversion of old order rights into new order rights came before the judiciary in the context of expropriation. The question was whether termination of unused rights in the previous regime amounted to expropriation of property. In an interlocutory decision in *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 1 SA 104 (GNP) [11] and [12] the court held that in the absence of the transitional provisions all pre-existing mineral rights would have been extinguished and the MPRDA would have been unconstitutional. Following the interlocutory decision, the court held in *Agri South Africa v Minister of Minerals and Energy* 2012 1 SA 171 (GNP) [88] that there was an expropriation. In *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) [101] the Supreme Court of Appeal set the High Court decision aside and held that there was no expropriation. For reasons different than the Supreme Court of Appeal, the Constitutional Court in *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) [72] also held that the coming into force of the MPRDA did not bring about expropriation of unused old order rights. The constitutionality of the MPRDA and the effect of the transitional arrangements have been extensively written about. See Dale in Bastida *et al* 844 – 845; Badenhorst and Mostert 2004 *Stell LR* 22; Mostert *Principles and Policies* 101 – 111; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 25-19 – 25-34B; Badenhorst 2002 *Obiter* 250; Badenhorst “Expropriations by virtue of the

The first interpretation is that the MPRDA extinguished the entitlements of holders of mineral rights and that the state acquired similar powers in terms of the MPRDA.²²⁹ The common-law powers and competencies of holders of mineral rights and the powers of the state in terms of the MPRDA are mutually exclusive.²³⁰ This interpretation thus includes destruction of the common-law entitlements of mineral right holders to prospect and mine. If the mineral right holder concluded a prospecting contract or mining lease with another, who subsequently had the right to prospect or mine, the impact would be the same, i.e. the prospecting rights and mining rights would be destroyed. In such a case, the holder of the prospecting right or mining right, and not the mineral right holder, would experience the effects of the destruction of the rights.

Another interpretation is that there was an *ex lege* transfer of mineral right holders to the state upon enactment of the MPRDA.²³¹ Before the MPRDA came into operation, the rights to prospect and mine vested in holders of mineral rights, prospecting rights and mining rights.²³² According to the interpretation that there was an *ex lege* transfer of mineral rights to the government, the government can only grant rights if the rights vest in it.²³³ Thus, there must have been an automatic transfer of the rights to the government when the MPRDA came into operation.²³⁴ This interpretation relies on the Roman maxim *nemo plus iuris ad alium transferre potest quam ipse habet* according to which no one can transfer more rights than they hold.²³⁵ Thus, to be grantor of prospecting rights and mining rights, the rights must first vest in the state.²³⁶ If the mineral right holder concluded a prospecting contract or mining lease with another, again the impact would be the same. The prospecting right or mining right would still be transferred to the state, but from the holder of the prospecting right or mining right and not the mineral right holder.

Mineral and Petroleum Resources Development Act” 2009 *TSAR* 600; van Niekerk and Mostert 2010 *Stell LR* 158; van der Walt *Constitutional Property Law* 383 – 398.

²²⁹ Dale *et al South African Mineral and Petroleum Law* MPRDA-127 and MPRDA-129.

²³⁰ Dale *et al South African Mineral and Petroleum Law* MPRDA-127.

²³¹ Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13 – 6; Badenhorst and Mostert 2003 *Stell LR* 383; Badenhorst *et al Silberberg* 674; Badenhorst and Mostert 2007 *TSAR* 481.

²³² Badenhorst *et al Silberberg* 674.

²³³ Badenhorst *et al Silberberg* 674.

²³⁴ Badenhorst *et al Silberberg* 674.

²³⁵ Badenhorst and Mostert 2003 *Stell LR* 383; Badenhorst 1998 *Obiter* 152. Regarding the *nemo plus iuris* maxim see Badenhorst *et al Silberberg* 73; van der Merwe *Sakereg* 301 and especially fn18; Sonnekus and Neels *Sakereg Vonnisbundel* 391.

²³⁶ Badenhorst and Mostert 2003 *Stell LR* 383. In the context of expropriation the court held in *Agri SA (CC)* [68] that the state did not acquire any mineral rights when the MPRDA came into operation.

Whichever interpretation is preferred, the *practical* effects remain the same: The MPRDA effectively regulated common-law mineral rights out of existence.²³⁷ In other words, mineral rights became extinct, and from the practical viewpoint of the landowner and mineral right holder, so did the accompanying entitlements that were part of the right.²³⁸ The mineral right holder is prohibited from exercising *any* entitlements that formed part of the right freely.²³⁹ The entitlements that the mineral right holder had are now incorporated in the public power of the Minister as set out in section 3(2)(a) of the MPRDA.²⁴⁰ The exercise of this power has the effect that the Minister grants rights with entitlements similar to those of common-law mineral right holders.

The above discussion indicates that the MPRDA extensively regulates rights to minerals and has a significant impact on common-law mineral rights.²⁴¹ The regulatory effect of the MPRDA on the theoretical basis of mineral law becomes more apparent when compared to the regime immediately preceding the Act.

3.2.2. Comparison with previous regime

In comparison to the regime immediately preceding the MPRDA, the first layer of rights no longer exist. Only the second layer of rights remains.²⁴² Current prospecting rights, mining rights and mining permits are indeed comparable to the second layer of rights in the previous regime in the following manner:²⁴³ The MPRDA provides for the procedures which must be

²³⁷ See *Agri SA* (High Court) [57]; *Sishen Iron Ore CC* [10] and [11]; *De Beers Consolidated Mines Ltd v Regional Manager* par 2.5; van der Vyfer 2012 *De Jure* 128; Badenhorst 2004 *JERL* 235

²³⁸ In *Sechaba v Kotze and Others* 2007 4 All SA 811 (NC) [8] where commenting on the power of the government to control mineral resources in terms of the MPRDA, the court referred to “ousting of the mining rights of the landowner and /or the holder of mining rights”.

²³⁹ Dale *et al South Africa Mineral and Petroleum Law* MPRDA-128; Mostert and van den Berg in Zillman *et al* 91. Leon 2009 *JERL* 614 opines that when the MPRDA, and the custodianship-model came into operation, “resource owners” were deprived of their “right of control”.

²⁴⁰ Dale *et al South African Mineral and Petroleum Law* MPRDA-128

²⁴¹ *Contra* Mostert November 2014 *Recht in Africa* where the author argues that the impact is not so significant because the state has always controlled and regulated rights to minerals and the conceptualization of common-law mineral rights as limited real rights were erroneous.

²⁴² Or the two-tier system is now a single tier system according to Dale 1996 *JERL* 308. Also see Mostert *Principles and Policies* 113 where the author refers to the “two-tiered” system that existed before the MPRDA.

²⁴³ See Cawood 2004 *JERL* 132 and 133; Mostert *Principles and Policies* 61 where both authors compare prospecting permits and mining licenses in the regime under the Minerals Act respectively with prospecting rights and mining rights under the MPRDA in table form; Badenhorst 2011 *SALJ* 776 and 778 says that some of the features of new prospecting rights and mining rights remind one of prospecting permits or mining authorisations in terms of the Minerals Act.

followed to apply for rights as well as the criteria that applicants must meet.²⁴⁴ The rights to minerals are granted for specific periods²⁴⁵ and in the case of prospecting rights and mining rights provision is made for the renewal of rights.²⁴⁶ The rights are terminated and cancelled in prescribed circumstances. If these rights lapse or are cancelled, there are no underlying common-law rights that remain as was the case in the regime under the Minerals Act.

This does not mean that the second layer of rights in the previous regime and current prospecting rights, mining rights and mining permits are exactly the same. Two pertinent differences are that the MPRDA classifies current prospecting rights and mining rights as registrable real rights²⁴⁷ in land (the Act is silent with regards to the classification of mining permits) and that these rights can, in principle, be encumbered by mortgage.²⁴⁸ The classification of prospecting rights and mining rights as limited real rights raises the question whether these rights may be comparable to common-law mineral rights which were classified as limited real rights.

Commenting on the Minerals Development Draft Bill,²⁴⁹ that preceded the MPRDA, Badenhorst opined that new prospecting rights and mining rights were “inferior and insecure compared to mineral rights...”²⁵⁰ One of the reasons advanced was that prospecting rights and mining rights were not registrable limited real rights in terms of the Bill.²⁵¹ Other reasons are that rights were not transferable freely and that exercise of the rights as well as “secondary entitlements” such as encumbrance, depended on compliance with the Bill and were subject to

²⁴⁴ S 13 for reconnaissance permissions, s 16 for prospecting rights and s 22 for mining rights. See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13 – 26 – 13 – 27 for a summary, in table form, of the facets of the new rights under the MPRDA. These rights have also been compared to prospecting leases and mining leases under the Mining Rights Act of 1967 and Precious Stones Act of 1964. See Dale *et al South African Mineral and Petroleum Law* MPRDA-137; Badenhorst 2008 1 *TSAR* 164.

²⁴⁵ In terms of s 14(4), reconnaissance permissions are valid for two years. In terms of s 17(6), prospecting rights are valid for a period specified but cannot exceed five years. In terms of s 23(6) mining rights are valid for the period specified but cannot exceed 30 years.

²⁴⁶ S 18 applies to renewals of prospecting rights and s 24 renewals of a mining rights.

²⁴⁷ MPRDA, s 5(1).

²⁴⁸ MPRDA, s 11. See chap 5, sec 4 for a detailed discussion of the ability to encumber rights with mortgage bonds.

²⁴⁹ (GN 4577) in *GG* 21840 of 18 December 2000.

²⁵⁰ Badenhorst “Mineral Rights: “Year Zero” Cometh?” 2001 *Obiter* 132. For a comparison of “old order rights” and “new order rights” in the context of expropriation see Badenhorst and Mostert 2003 *Stell LR* 397 – 399 and 2004 *Stell LR* 42 – 50.

²⁵¹ Badenhorst “Mineral Rights: “Year Zero” Cometh?” 2001 *Obiter* 132. See also the criticism of the Chamber of Mines of South Africa *Memorandum to the Director-General: Minerals and Energy on the Draft Minerals Development Bill* par 61.7 where the chamber strongly argued that prospecting rights and mining rights should be registrable real rights.

the discretion of the Minister.²⁵² The Bill was changed²⁵³ and the MPRDA now classifies mining rights and prospecting rights as registrable limited real rights. Semantic classification of prospecting rights and mining rights as real is, however, far removed from the question whether the rights have the common-law characteristics and advantages of real rights in property.²⁵⁴ The other objections raised by Badenhorst still remain and prospecting rights and mining rights do not exhibit those characteristics that were highlighted as justification for classifying mineral rights as limited real rights. Prospecting rights and mining rights cannot be transferred²⁵⁵ or encumbered freely²⁵⁶ and do not exist in perpetuity²⁵⁷ in the same manner as common-law mineral rights. Continued existence of prospecting rights and mining rights depend on compliance with provisions of the Act and if they lapse, are cancelled or terminated, nothing remains. In other words, following the Bill, the MPRDA classified prospecting rights and mining rights as limited real rights without making any changes that one would expect for the rights to resemble common-law limited real rights.

²⁵² Badenhorst “Mineral Rights: “Year Zero” Cometh?” 2001 *Obiter* 132.

²⁵³ The transitional measures were also largely rewritten due to criticism. See Mostert *Principles and Policies* 77.

²⁵⁴ See Badenhorst 2005 *Obiter* 522 where the author says that “the mere labelling of a right as a “limited real right” smacks of property theory based upon the common law”.

²⁵⁵ Current prospecting rights and mining rights can be transferred with ministerial consent. See chap 5, sec 3.2 for a detailed discussion of the ability to transfer prospecting rights and mining rights. Regarding the transferability of common-law mineral rights see *Agri SA* [10]; *Trojan Exploration* 510; *Lazarus and Jackson v Wessels, Olivier and Coronation Freehold Estate, Town and Mines Ltd* 510; *Du Preez v Beyers* 1989 1 SA (T) 320 324; *Van Vuuren v Registrar of Deeds* 294; *Webb v Beaver Investments (Pty) Ltd* 1954 1 SA 13 (T) 25A; Dale 1996 *JERL* 302; Badenhorst 1994 *THRHR* 46; Badenhorst 2010 *SALJ* 651; van der Merwe *Sakereg* 561; Sonnekus and Neels *Sakereg Vonnisbundel* 738; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 3-20; Badenhorst 2004 *JERL* 222. See Badenhorst 1998 *Obiter* 144 where the author states that mineral had “secondary rights” as part of its content, including the right of alienation; Badenhorst 2011 *SALJ* 773; Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin* 609; Badenhorst 1989 *De Jure* 389. The fact that mineral rights were transferable freely was used as justification for their classification as limited real rights. See Badenhorst 1990 *TSAR* 250. Not all limited real right, for example personal servitudes, are transferable freely. In fact, the transferability of mineral rights are used to distinguish them from personal servitudes. See van der Merwe *Sakereg* 560; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 3-10; Badenhorst 1990 *TSAR* 239 252. Sonnekus 2008 *TSAR* 133 regards the non-transferability of personal servitudes as an exception to the general rule that real rights are transferable. Also see Sonnekus 1987 *TSAR* 372 – 374.

²⁵⁶ Current prospecting rights and mining rights can be mortgaged with ministerial consent. See chap 5, sec 4.3 for a detailed discussion of the ability to mortgage prospecting rights and mining rights. Regarding encumbrance of mineral rights see *Agri SA* (CC)[10]; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 3-12; Badenhorst 1998 *Obiter* 143 144 where the author states that mineral rights had “secondary rights” as part of its content, including the right of encumbrance; Badenhorst 2004 *JERL* 222; Badenhorst 2011 *SALJ* 773. Mineral rights could also be the object of other limited real rights such as a usufruct. See *Ex parte Eloff* 1953 1 SA 617 (T); Badenhorst 1993 *Stell LR* 395, Badenhorst 1994 *TSAR* 107; Badenhorst 1994 *THRHR* 46.

²⁵⁷ One of the characteristics of mineral rights, as limited real rights, were that they existed in perpetuity. See Badenhorst “Mineral Rights: “Year Zero” Cometh?” 2001 *Obiter* 125; Badenhorst 1994 *THRHR* 46; Leon 2009 *JERL* 613. Also see *Aussenkjer Diamante (Pty) Ltd v Namex (Pty) Ltd* 1983 1 SA 263 (A) 274 where the court indicated that an important difference between statutory prospecting rights (granted under Ord 20 of 1968 (SWA)) and common-law mineral rights is that the statutory rights were limited to the duration of the grant.

Prospecting rights and mining rights may be *statutory conferred* limited real rights²⁵⁸ with their own characteristics and advantages. However, current prospecting rights and mining rights can best be compared to the second layer of rights in the regime immediately preceding it. Common-law mineral rights that developed under strong influence of property law, as well as its by-products, i.e. prospecting rights and mining rights no longer exist.²⁵⁹ These rights were replaced by rights to minerals that are granted administratively. It therefore seems as if the theoretical underpinnings of mineral law in the current regulatory regime are based in administrative law and no longer in property law.²⁶⁰ This shift in the theoretical underpinnings of mineral law requires reconsidering the role of property law in the current regulatory regime that is predominantly based in administrative law.

3.2.3. Continued relevance of property law

The shift in theoretical underpinnings does not mean that property law has no role to play in the current regulatory regime.²⁶¹ There are instances where the MPRDA fails to regulate prospecting rights, mining rights and mining permits.²⁶² The MPRDA, for example, does not regulate the entitlement of holders of mining permits to dispose of minerals found during mining.²⁶³ The Act also does not regulate situations where minerals are mined and carried away by an unauthorized entity, or are stolen.²⁶⁴ In such instances, the rules of property law can no doubt supplement the MPRDA to provide answers to legal questions. One has to accept

²⁵⁸ Leon 2009 *JERL* 628; du Bois *Wille's Principles* 621. See *Palala Resources* 2014 6 SA 403 (GP) [63] where the court said that prospecting rights and mining rights are “born out of, and their nature and ambit are determined by, the provisions of the MPRDA, rather than the common law”; Mostert *Principles and Policies* 165 says that “even the proprietary aspect of the rights to minerals is created and supported by the MPRDA”. According to Barton in *McHarg et al* 81 “there is no generally accepted body of law for ascertaining whether the attributes of property ownership attach to permits granted by statute”.

²⁵⁹ See *Agri SA* (High Court) [57]; In *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd* 2011 All SA 364 (SCA) [24] the court said that common-law minerals rights were destructed. See, however, *SFF Association v Xstrata* 2011 JDR 0407 (GSJ) 23 where, in the context of royalties payable under an “old order right”, the court held that the benefits of the rights were retained. For criticism on the judgement see Badenhorst 2012 *Obiter* 441 – 446.

²⁶⁰ Leon 2009 *JERL* 614 opines that the MPRDA “essentially replaced the principles of private law, based on rights of ownership, with principles of administrative law based on conditional state licences”. *Contra* Mostert *Principles and Policies* 113-114 where the author opines that the characterisation of rights in the MPRDA as limited real rights as well as compulsory registration thereof suggests that the current regulatory system goes beyond the “mere regulatory” and that the rights are not only based in administrative law.

²⁶¹ See Daintith in *Zillman et al* 49 where the author argues that despite legislative interventions in the United States, the common law remains relevant. It must, however, be kept in mind that a great part of mineral law in the United States are left in the sphere of common law. Also see *McHarg et al* in *McHarg et al Property* 7 – 8.

²⁶² In instances where statute law fails to regulate a specific activity, Barton in *Zillman et al* 22 refers to “default rules”. Default rules, according to Barton, are often “tort and property law”.

²⁶³ See chap 4, sec 2.2.

²⁶⁴ See chap 3, s 3.2.

the possibility that the failure of the MPRDA to regulate in the circumstances mentioned can quite simply be the result of careless drafting.²⁶⁵ The fact that rules of property law can fill the voids left by the legislator does not have to mean that mineral law is proprietary in nature. It means that established legal rules of property law can be utilised to supplement a partially flawed regulatory regime based in public law.

Traditionally, the relationship between the landowner and holder of the mineral right was governed by the rules of property law.²⁶⁶ The MPRDA acknowledges this relationship and governs it to a degree.²⁶⁷ If, for example, the Regional Manager accepts applications for prospecting rights,²⁶⁸ mining rights²⁶⁹ and mining permits,²⁷⁰ applicants must be notified to consult, *inter alia*,²⁷¹ with the landowner.²⁷² The MPRDA further provides that holders of rights to minerals must notify the relevant Regional Manager if landowners (or lawful occupiers) prevent them from conducting prospecting and mining activities.²⁷³ Similarly, landowners (or lawful occupiers) must notify the Regional Manager if they suffered or are likely to suffer any loss or damage as a result of prospecting and mining.²⁷⁴ The Act provides for a procedure aimed at settling the parties grievances if any such notifications occurred.²⁷⁵

A detailed analysis of the relationship between the landowner and mineral rights holder is beyond the scope of this work.²⁷⁶ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*,²⁷⁷ however, indicates that the rules of property law can in future play a role in governing the

²⁶⁵ For criticism on drafting and interpretational difficulties due to poor drafting of the MPRDA in general see for example Badenhorst and Mostert 2007 *TSAR* 486 and 492 – 493; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-19 – 13-24, 30-2 – 30-5; Dale *et al South African Mineral and Petroleum Law* MPRDA-203 – MPRDA-204; Mostert *Principles and Policies* 77 and 88 – 90. In *Doe Run Exploration SA (Pty) Ltd v Minister of Minerals and Energy & others* (499/07) [2008] ZANHC 3 (8 February 2008) [43] the court said that s 105 of the MPRDA “can hardly be described as an epitome of exemplary draftmanship”.

²⁶⁶ See sec 1 above.

²⁶⁷ Mostert and van den Berg in Zillman *et al* 96 - 97 indicates the MPRDA provides for compensation if the landowner suffered damages. However, owners of neighbouring properties who suffer damages as a result of mining activities will have to rely on common-law remedies.

²⁶⁸ MPRDA, s 16(4)(b).

²⁶⁹ MPRDA, s 22(4)(b). This section requires consultation with “interested and affected parties”. Landowners will, however, certainly be an interested and affected party.

²⁷⁰ MPRDA, s 27(5).

²⁷¹ Not only the landowner, but also lawful occupiers, interested and affected parties must be consulted according to ss 16(4)(b), 22(4)(b) and 27(5) of the MPRDA.

²⁷² See *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2001 4 SA 113 (CC) [65] – [67] where the court gave content to the consultation procedure.

²⁷³ MPRDA, 54(1).

²⁷⁴ MPRDA, s 54(7).

²⁷⁵ MPRDA, ss 54(2) – (6).

²⁷⁶ See Mostert *Principles and Policies* 11.

²⁷⁷ 2007 (2) SA (SCA).

relationship between landowners and holders of mineral rights.²⁷⁸ The case involved an irreconcilable conflict between the landowner and mineral rights holder. The case was decided after the MPRDA came into operation but before the transitional arrangements came to an end. The court utilised the rules of property law (although it was aware of the MPRDA)²⁷⁹ in deciding that the interests of the mineral right holder took precedence over the interests of the landowner.²⁸⁰ The reasoning of the court may have been different if the transitional arrangements were not operational anymore.²⁸¹ Still, the case points towards the possible relevance of property law in governing the relationship between the landowner and holder of rights to minerals in future.²⁸²

The argument here is that the MPRDA in principle regulates the nature, content, acquisition, transfer and loss of rights to minerals. This function is an administrative one and is firmly based in public law even though there are instances in which the MPRDA fails to entirely regulate every aspect of prospecting rights, mining rights and mining permits. Where the MPRDA fails to regulate, the rules of property law can still play a role.

4. Summative remarks

This chapter demonstrates that the MPRDA brought about significant changes to the theoretical landscape of mineral law in South Africa. The MPRDA changed the mineral-law system from a combination of privately-held, state-held and administratively-regulated rights to one that is predominantly based in public law. In the current regulatory regime, the state controls the acquisition, transfer and loss of rights to minerals.²⁸³ Mineral-law has, to a great extent, lost its private-law character with the enactment of the MPRDA.

These changes to the theoretical underpinnings of mineral law raise questions regarding the continued role of private-law rules to strengthen mineral tenure security. The next chapter examines the continued role of ownership of minerals and mineral resources, as a private-law concept in strengthening mineral tenure security.

²⁷⁸ Badenhorst 2008 *TSAR* 164.

²⁷⁹ *Anglo Operations* [25].

²⁸⁰ *Anglo Operations* [20].

²⁸¹ Because then mineral rights would not exist anymore. See sec 3.2.1 above.

²⁸² See Badenhorst and Mostert 2007 *TSAR* 418 where the authors list the entitlements that constitute the content of mineral rights and then recognises that the MPRDA are not subject to provisions of the MPRDA.

²⁸³ Badenhorst *et al Silberberg* 670.

Chapter 3:

OWNERSHIP AND MINERAL TENURE SECURITY:

1. Introduction

Prior to the MPRDA, the consequences of private ownership of minerals and mineral resources assisted in ensuring that holders of rights to minerals could develop mines profitably. This is evident from the fact that, in common law, landowners in some respects²⁸⁴ were owners of minerals that were not separated from the earth (unmined minerals)²⁸⁵ which afforded them the entitlements to prospect and mine.²⁸⁶ Landowners could also transfer the entitlements to prospect and mine to third parties.²⁸⁷ Once minerals were separated from the earth (mined minerals),²⁸⁸ ownership of such minerals conferred the entitlement to dispose of minerals and to vindicate minerals which were not in the possession of owners, on holders of rights.²⁸⁹ The ability to vindicate property means that owners of mined minerals can successfully institute the *rei vindicatio* to reclaim their minerals from anyone who cannot prove that they are lawfully in possession thereof.²⁹⁰

²⁸⁴ This was the position immediately before the MPRDA came into operation in the regime espoused by the Minerals Act 50 of 1991 and the common law. However, the rights could only be exercised with authorisation from the government. See sec 2.1 below. Before the Minerals Act, the right to mine minerals on private land vested in the government at times. For example, the right to mine for precious stones on private land vested in the Crown in terms of the Precious Stones Act, 44 of 1927. The Mining Rights Act 20 of 1967 and the Precious Stones Act 73 of 1964 also vested the right to mine for and dispose of precious metals and precious stones in the state. The rights to base minerals vested in the landowner or mineral right holder under the Mining Rights Act of 1967. Before the Mining Rights Act of 1967, rights to base minerals vested in landowners or mineral right holders according to the Base Minerals Amendment Act 39 of 1942 and Orange Free State Metals Mining Act 13 of 1936 (provincial legislation). In terms of some provincial legislation, for example the Precious and Base Metals Act 35 of 1908 in the former province of Transvaal, the right to mine precious metals vested in the Crown. Provincial legislation that vested the rights to base metals in landowners or mineral right holders include the Precious and Base Metals Act 35 of 1908 (Transvaal), Orange Free State Metals Mining Act 13 of 1936 (Province of the Orange Free State) and Mineral Law Amendment Act 16 of 1907 (Cape Province). See Mostert *Principles and Policies* 19 – 56 for a detailed and complete exposition of the different entities that rights to different minerals vested in before the Minerals Act of 1991. Also see Badenhorst 2002 *Obiter* 251 – 257.

²⁸⁵ The term “unsevered minerals” is at times used to describe minerals that have not been separated from the earth. The term “unmined minerals” is preferred here and the term “unsevered” is reserved for the juridical severance of mineral rights from ownership of land. The term “unsevered minerals” is only used in verbatim quotations.

²⁸⁶ See sec 2.1 below.

²⁸⁷ See sec 2.1 below.

²⁸⁸ The term “severed minerals” is at times used to describe minerals that have been separated from the earth. The terms “mined minerals” or “extracted minerals” are preferred here and the term “severance” is reserved for the juridical severance of mineral rights from ownership of land. The term “severed minerals” is only used in verbatim quotations.

²⁸⁹ See sec 3.1 below.

²⁹⁰ See sec 3.1 below.

A private-law ownership²⁹¹ analysis can be applied to two categories of minerals, namely, minerals that have not been separated from the earth, or unmined minerals, as well as minerals that have been mined. Traditionally, ownership of unmined minerals impacts on the ability of right holders to prospect and mine and to choose not to prospect and mine. Ownership of mined minerals traditionally impacts on the abilities of holders of rights to minerals to dispose of minerals and to claim minerals from anyone who cannot prove a lawful entitlement to be in possession, i.e. to vindicate minerals.

This chapter uses these two categories of minerals to investigate a narrow aspect of the foundations of mineral law: whether ownership of minerals and mineral resources continue to strengthen security of tenure of holders of new order rights²⁹² granted in terms of the MPRDA.²⁹³ In this regard, the inquiry focuses on whether ownership plays a role in enabling holders of rights to prospect and mine, to remove and dispose of minerals and to choose not to prospect and mine. The chapter does not aim to analyze the role of ownership in every aspect of the current regulatory regime.²⁹⁴

Moreover, it is arguable that private-law ownership is no longer the appropriate lens through which to view and analyze rights to minerals. The administrative nature of the current regulatory regime has the effect that continued sole reliance on the rules of private property law may be inefficient to find solutions for legal problems. The limited analysis of the role of private-law ownership to strengthen mineral tenure security in this chapter opens the door to questions relating to the continued suitability of a private-law ownership conceptualization of

²⁹¹ “Ownership” refers to the ownership of mineral resources and not “ownership” of rights to minerals (i.e. mineral title). Common-law mineral rights are classified as incorporeal property in South Africa *inter alia* because they can function as the object of a real right. See Badenhorst *et al* Sliberberg 15 and 14 – 19 for a general discussion of incorporeal things. “Ownership” over rights to minerals as “incorporeal property” is thus possible. The following sources are examples where ownership of rights terminology is used: Dale 1996 *JERL* 301; Bastida 2001 *JERL* 35; Cawood and Minnitt 1998 *The Journal of the South African Institute of Mining and Metallurgy* 396. It is unnecessary and confusing to refer to the “owner” of mineral rights or rights to minerals. It is preferable to refer to the “holder” of rights to minerals. See Badenhorst *et al* Silberberg 18 where this argument is made in relation to the “holder” of a servitude and not the “owner” thereof.

²⁹² Tenure security is, at times, also analysed according to the transition from the previous regime to the current regime. See, for example, Badenhorst 2014 *JERL* 25 – 34.

²⁹³ 28 of 2002.

²⁹⁴ For example, the question whether owners of unmined minerals were expropriated of their property when the Act came into operation is not investigated. An interpretation of s 3(1) which means that the *cuius est solum* principle was abrogated will be relevant in the context of expropriation. See Badenhorst and Mostert 2007 *TSAR* 484 - 491; Badenhorst and Mostert 2003 *Stell LR* 382. Also see fn 228 above. Ownership of tailings is also relevant for the question of expropriation in relation to the transition from the previous regime to the current regime. See *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* (3215/06) [2007] ZAFSHC 74 (13 December 2007) [68]; Badenhorst and van Heerden 2010 *Stell LR* 126.

rights to minerals granted in terms of the MPRDA in general. Although the chapter does not aim to provide a detailed analysis of the role of private-law ownership in every aspect of the current regulatory regime, the last part thereof raises considerations regarding whether a private-law ownership paradigm of rights to minerals continues to be appropriate in the current regulatory regime.

2. Ownership of unmined minerals

Traditionally, ownership of unmined minerals impacts on the abilities of holders of rights to prospect and mine and to choose not to prospect and mine. The abilities to prospect and mine are rudimentary requirements to ensure that holders of rights to minerals can develop mines profitably.²⁹⁵ If holders of rights to minerals cannot prospect and mine, they cannot develop mines profitably. These abilities are essential for providing mineral tenure security to holders of rights to minerals.

The ability to choose *not* to prospect and mine is important for mineral tenure security because it allows holders of rights to minerals the opportunity to postpone commencement of prospecting and mining, or to discontinue operations, during times when mining or prospecting will be uneconomical.²⁹⁶ The ability to choose not to prospect and mine thus increases the possibility of developing mines profitably and as a result mineral tenure security is strengthened.

This section firstly provides an account of the manner in which ownership of unmined minerals traditionally protects mineral tenure security by allowing holders of rights to prospect and mine and to choose not to prospect and mine. Secondly, it investigates whether private-law ownership of unmined minerals continues to protect and strengthen mineral tenure security in the current regulatory regime.

2.1. Traditional protection of mineral tenure security

The common-law maxim *cuius est solum eius usque ad caelum et ad inferos* expresses the rule that a landowner owns everything in the sky above and everything contained in the soil below the surface of the land.²⁹⁷ Accordingly, under common law, the landowner was automatically

²⁹⁵ See chap 4, sec 2.1 for a detailed discussion of the ability to prospect and mine in the MPRDA.

²⁹⁶ See chap 4, sec 2.4 for a detailed discussion of the ability to choose not to prospect and mine in the MPRDA.

²⁹⁷ See chap 2, sec 2.

owner of the minerals below the soil. One of the entitlements of landowners was to prospect and mine minerals in the ground.²⁹⁸ Landowners could grant prospecting rights, by virtue of prospecting contracts, or mining rights, by virtue of mineral leases, to other entities.²⁹⁹ In the first instance, landowners as owners of unmined minerals thus controlled the abilities to prospect and mine.³⁰⁰ Under common law, it was possible to sever the mineral rights from the ownership of the land.³⁰¹ Mineral rights that were severed from ownership existed as independent limited real rights separate from landownership, which could be transferred to other entities.³⁰² Even if landowners did not transfer mineral rights to others, or if mineral rights vested in landowners again at a later stage, the two titles existed separately.³⁰³

Upon transfer of mineral rights to other entities (the new mineral right holder), those entities obtained the entitlements to prospect and mine from the agreements between themselves and the landowner.³⁰⁴ Landowners no longer had the entitlements to prospect and mine, although ownership of the unmined minerals still vested in them.³⁰⁵ Mineral right holders could grant prospecting rights (by virtue of prospecting contracts) or mining rights (through mineral leases) to other third parties.³⁰⁶ The entitlements to prospect and mine then vested in the third parties because of the agreement between themselves and the holder of the mineral rights.³⁰⁷ This means that when the mineral rights were severed from ownership and transferred to a mineral right holder, the entitlements to prospect and mine attached to the mineral right and vested in the mineral right holder who could transfer them independent of the landowner. The mineral right holder thus controlled the ability to prospect and mine.

²⁹⁸ *Agri South Africa v Minister of Minerals and Energy and Others* (CC) [7]; *Van Vuuren and Others v Registrar of Deeds* 294; Mostert and van den Berg in Zillman *et al* 78; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-9; Badenhorst 2010 *SALJ* 649.

²⁹⁹ Badenhorst 1998 *Obiter* 145 for prospecting contracts and 146 for mineral leases.

³⁰⁰ According to Mostert November 2014 *Recht in Africa* 11, ownership of the surface “was indicative of control over the unextracted resources

³⁰¹ See chap 2, sec 2.

³⁰² See chap 2, sec 2.

³⁰³ *Beyers en ‘n Ander v Du Preez en Andere* 1989 1 SA 328 (T) 336. *Contra* Joubert 1959 *THRHR* 27.

³⁰⁴ See Mostert and van den Berg in Zillman *et al* 78 where the authors say that “[i]n property law parlance, the ‘right to mine’ was one of the ‘entitlements’ comprised by the ‘mineral right’”.

³⁰⁵ *Nolte v Johannesburg Consolidated Investment Company* 315; *Le Roux v Loewenthal* 1905 TS 742 745. Compare Barton in Zillman *et al* 28-30 where the author explains that in Scottish and English law “an instrument of severance caused ‘minerals’ to come into separate ownership”.

³⁰⁶ Badenhorst 1998 *Obiter* 145 for prospecting contracts and 146 for mineral leases; *Agri SA* (CC) [10].

³⁰⁷ See Chap 2, sec 2.

In common law, landowners, in the first instance, controlled the ability not to prospect and mine in the same manner that they controlled the ability to prospect and mine.³⁰⁸ Briefly, as owners of unmined minerals, landowners had the entitlement not to exploit the minerals under the surface.³⁰⁹ If landowners transferred the mineral rights to a mineral right holder, the mineral right holder had the entitlement to choose not to prospect and mine. If landowners or mineral right holders granted prospecting rights, by virtue of prospecting contracts or mining rights, by virtue of mineral leases, to another entity, that entity had the entitlement not to prospect and mine. The mineral right holder, prospector or miner then controlled the ability not to prospect and mine.

Thus, when ownership of unmined minerals vests in landowners, their ownership rights play a role in providing security of tenure to holders of rights to minerals as far as the abilities to prospect and mine, and to choose not to prospect and mine are concerned. Landowners are certain that they can prospect and mine, or choose not to prospect and mine, as a result of their ownership rights. Furthermore, entities to whom landowners transfer mineral rights, prospecting rights or mining rights are certain that they can prospect and mine, or choose not to prospect and mine, as a result of the agreements between themselves and landowners. When mineral right holders grant prospecting rights or mining rights to others, the certainty of holders of prospecting rights and mining rights to prospect and mine flow from the agreements between themselves and mineral right holders.

Immediately prior to the MPRDA, in the regime espoused by the common law and the Minerals Act, statutory authorisation was necessary to prospect and mine.³¹⁰ This meant that landowners and holders of mineral rights, prospecting rights and mining rights could not exercise their entitlements to prospect and mine freely. Although these statutory authorisations limited the ownership rights of landowners,³¹¹ landownership was still relevant regarding the abilities to prospect and mine and to choose not to prospect and mine. Entities could only apply for state authorisation to prospect or mine if they were the common law holder of mineral rights (the

³⁰⁸ See chap 2, sec 2. In *Agri SA* [CC] [43] the court said that the ability not to exploit mineral was an “essential component of mineral ownership”. According to the court [66], the MPRDA brought an end to the ability not to exploit minerals. Also see Mostert *Principles and Policies* 138 – 140.

³⁰⁹ *Agri SA* (CC) [43], [44] and [46].

³¹⁰ Chap 2.

³¹¹ See chap 2, s 2 where it is explained that ownership is not absolute.

landowner as owner of unmined minerals in the first instance³¹²) or if they obtained a prospecting right or mining right from the mineral rights holder.³¹³

Whereas holders of rights to minerals may have valid reasons not to exploit mineral resources,³¹⁴ the government has an interest to ensure optimal exploitation of minerals.³¹⁵ In other words, the government has an interest to limit the ability of holders of rights to choose not to prospect and mine. In this regard, the Minerals Act gave the Minister the power to intervene if he was of the opinion that holders of mining authorisations conducted mining in a manner, and on a scale, that were detrimental to optimal exploitation of minerals.³¹⁶ The Minister had the power to cause an investigation³¹⁷ and issue a directive³¹⁸ to holders of authorisations to take rectifying steps.³¹⁹ The ability of holders of mining authorisations to choose not to prospect and mine was thus limited to an extent in the regime under the common law and Minerals Act. In that regime, there were no limitations on holders of prospecting authorisations regarding the ability to choose not to prospect and mine. In the regime under the Minerals Act and the common law, the ability to choose not to prospect and mine were thus influenced by ownership of unmined minerals to the extent described above but was also influenced by the regulatory regime. This is consistent with the dual nature of the regime under the Minerals Act.

In summary, under the Minerals Act, the abilities to prospect and mine were influenced firstly by landownership, as a private-law concept, to the degree explained above. However, the exercise of these abilities was also influenced by governmental regulation (as part of administrative law). It is beyond the scope of this work to do a detailed analysis of prospecting and mining authorisations under the Minerals Act. It is, however, understandable that the manner in which these authorisations were regulated impacted on the certainty of holders thereof to prospect and mine. Under the Minerals Act, mineral tenure security was thus

³¹² S 1(ix)(a)(i) of the Minerals Act of 1991 defined “holder” as follows: “the owner of the land: [p]rovided that (i) if the right to such mineral or an undivided share therein has been severed from the ownership of the land concerned, the person in whose name such right or an undivided share therein is registered in the deeds office...”

³¹³ Minerals Act of 1991, ss 6(1) and 9(1) read with the def of “holder”. In *Agri SA [CC]* [36] the court said that “[p]rior to the commencement of the MPRDA the state could, in respect of private land, allocate these rights to exploit only to those who owned them”.

³¹⁴ See Mostert *Principles and Policies* 138.

³¹⁵ Mostert and van den Berg in Zillman *et al* 85; Mostert *Principles and Policies* 133.

³¹⁶ Minerals Act of 1991, s 22.

³¹⁷ Minerals Act of 1991, s 22(1)(a).

³¹⁸ Minerals Act of 1991, s 22(1)(b).

³¹⁹ Minerals Act of 1991, s 22(2) determined that the holder of the authorisation had to be notified of the contemplated intervention and had to have an opportunity to comment on the Minister’s intention.

influenced by ownership and the regulatory regime. This seems logical since the regulatory regime under the Minerals Act had a proprietary and an administrative nature.³²⁰

2.2. Protection of mineral tenure security in the MPRDA

According to section 3(1) of the MPRDA, mineral and petroleum resources are the common heritage of the people of South Africa and the state is the custodian thereof for the benefit of the people of South Africa.³²¹ The MPRDA does not specifically state in whom ownership of unmined minerals vests. Furthermore, the meaning of the word “custodian” is unclear and gives little guidance regarding the question of ownership of unmined minerals. The meaning of section 3(1) has not received significant attention from the courts.³²²

Different academic opinions exist regarding the meaning of section 3(1) and its effect on ownership of unmined minerals. The first distinction that is made concerns the question whether section 3(1) abrogates the common-law maxim *cuius est solum eius usque ad caelum et ad inferos*. If section 3(1) does not abrogate the *cuius est solum* maxim, the landowner is still the owner of unmined minerals under the MPRDA.³²³ This interpretation is supported by an argument that section 3(1) refers to the “minerals and petroleum occurrences collectively countrywide”.³²⁴ In other words, the collective mineral wealth of the country belongs to the nation or people of South Africa while ownership of specific unmined minerals vests in the landowner. This argument is, however, rejected based on the fact that the “nation” or “people of South Africa” is not a legal subject either in public law or private law.³²⁵ If section 3(1)

³²⁰ See chap 2, sec 3.1.

³²¹ MPRDA, s 3(1). S 3(1) gives effect to the objective in s 2(a) of the MPRDA namely to give effect to the universally accepted right of the state to exercise sovereignty over all mineral and petroleum resources. See Badenhorst *et al Silberberg* 673; Dale in Bastida *et al* 826.

³²² S 3(1) is at times mentioned but the meaning not discussed. Cases where the meaning of s 3(1) was relevant but not discussed include *Agri SA (CC)* [25]; *Agri SA (SCA)* [?]; *De Beers Consolidated Mines Ltd v Ataqua Mining* [67]; *Joubert and Others v Maranda Mining Company (Pty)* [2]. See Mostert and van den Berg in Zillman *et al* 87 and 88 where the authors criticise *Agri SA (SCA)* and *Agri SA (CC)* for not giving content to the concept.

³²³ This is the position that Dale *et al South African Mineral and Petroleum Law MPRDA* 123 take. See Watson (LLB thesis) 13 – 14 and van den Berg 2009 *Stell LR* 148 and 149 for a more detailed discussion of the argument. Dale in Bastida *et al* 827 argues that the *cuius est solum* rule was not abrogated and that the granting of rights confer suspensive ownership on holders of rights. According to the argument, ownership will pass to the holder when minerals are separated from the earth.

³²⁴ Dale *et al South African Mineral and Petroleum Law MPRDA*-122; Marumo 2013 *Without Prejudice* 50.

³²⁵ Mostert and van den Berg in Zillman *et al* 86; Badenhorst and Mostert 2007 *TSAR* 477 and 478; van den Berg 2009 *Stell LR* 148; Badenhorst 2010 *SALJ* 657; Marumo July 2013 *Without Prejudice* 51. Dale *et al South African Mineral and Petroleum Law MPRDA*-4, *MPRDA*-5 and *MPRDA*-123 also accept that mineral resources cannot vest in the “nation”. It is therefore strange that Dale *et al MPRDA*-121 argues that the collective mineral and petroleum resources vest in the “nation” while specific mineral resources cannot. See Badenhorst and Mostert 2007 *TSAR* 478 regarding the contradictory views of Dale *et al*. In *Minister of Mineral Resources and Others v*

does not abrogate the *cuius est solum* principle, the section can be seen as social rhetoric which is found in transformative legislation.³²⁶

If section 3(1) abrogates the *cuius est solum* maxim, ownership of unmined minerals does not vest in the landowner.³²⁷ The question that arises then is in whom the ownership of unmined minerals vests. One interpretation is that section 3(1) establishes a new type of *res publicae*.³²⁸ In terms of this interpretation, ownership of unmined minerals vests in the state, but for the benefit and use of the public.³²⁹ Unmined minerals do not belong to the state in private ownership, but for the benefit of the public.

Another possible interpretation is that mineral and petroleum resources are subject to the public trust doctrine.³³⁰ The public trust doctrine forms part of Anglo-American law and “seeks to develop a comprehensive legal approach to resource management problems”.³³¹ However, most authors accept that the public trust doctrine is foreign to South African law and should not be incorporated to address problems surrounding mineral and petroleum management.³³²

Sishen Iron Ore Company [10] the court held that the MPRDA dispensed with mineral rights and rights to minerals which existed before the MPRDA by “vesting all petroleum and mineral resources in the nation”.

³²⁶ Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-3 raises this possibility regarding the meaning of s 3(1) in general and not specifically in the context of mineral tenure security. See also Badenhorst *et al Silberberg* 673; Badenhorst and Mostert 2007 *TSAR* 476 and 478. Van den Berg 2009 *Stell LR* 148 disagrees with this and argues that “meaningful consequences must be attached to the provision ...”

³²⁷ The following sources argue that s 3(1) abrogated the *cuius est solum* principle: Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-4; Badenhorst and Mostert 2007 *TSAR* 476; Badenhorst and Mostert 2003 *Stell LR* 382; van den Berg 2009 *Stell LR* 147; du Bois Wille’s *Principles* 618. Vesting of ownership of unmined minerals in an entity other than the landowner (the state, for example) is at times viewed as an exception to the *cuius est solum* principle in other jurisdictions. See Rønne in McHarg *et al* 65. An extreme alternative is the model of “absolute governmental or state property” where ownership of unmined minerals vest in the government and private parties are not allowed even to participate in exploitation. See González in McHarg *et al* 211.

³²⁸ In *De Beers Consolidated Mines Ltd v Ataquia Mining* [38] the court expressly held that mineral resources are not *res publicae*. Van den Berg 2009 *Stell LR* 150 – 154 argues in favour of the *res publicae* construction. The author argues that the “collective mineral and petroleum resources” are *res publicae* of which the state acquires public ownership in order to protect and regulate the resources. Marumo “Getting to Legal Grips with Illegal Mining 2013 *Without Prejudice* 51 accepts the *res publicae* construction. Watson (LLB thesis) 19 – 22 argues against van den Berg’s acceptance of the *res publicae* interpretation. Also see Badenhorst and Mostert 2007 *TSAR* 476 – 478 where the authors mention the *res publicae* interpretation in the light of the mineral and petroleum resources as such and not in relation to every piece of land in which minerals are found without expressly rejecting or accepting the interpretation. According to Badenhorst 2010 *SALJ* 661 “the *res publicae* argument seems to be an acceptable explanation of the ownership regime created by the MPRDA”. Dale *et al South African Mineral and Petroleum Law* MPRDA-121 – 122 expressly rejects the *res publicae* interpretation.

³²⁹ Badenhorst and Mostert 2007 *TSAR* 477; van den Berg 2009 *Stell LR* 149.

³³⁰ This is the view of Van der Schyff (PhD thesis); Van der Schyff 2008 4 *TSAR* 760 – 766. Also see Badenhorst 2010 *SALJ* 658.

³³¹ Van den Berg 2009 *Stell LR* 144.

³³² Dale *et al South African Mineral and Petroleum Law* MPRDA-125 - MPRDA-126; Badenhorst and Mostert 2007 *TSAR* 478 (although the authors mention that the doctrine is incorporated expressly in some legislation and that there seems to be a tendency to draw from it); van den Berg 2009 *Stell LR* 147; Badenhorst *et al Silberberg*

None of the interpretations advanced above provide a satisfactory explanation regarding ownership of unmined minerals.³³³ All positions can be defended and criticized on some level.³³⁴ The question here is whether security of tenure is strengthened if one accepts the strongest possible private-law position, namely, that section 3(1) does not abrogate the *cuius est solum* principle and that ownership of unmined minerals thus vests in landowners.

Landowners, as owners of unmined minerals, no longer have the entitlements to prospect and mine. In fact, the entitlements of landowners “[have] been destroyed by the Act in the sense that it has been removed *in toto* from South African Law”.³³⁵ Even if ownership of unmined minerals vests in landowners, their ownership rights are limited to such an extent that it becomes “an empty shell”.³³⁶ Furthermore, common-law mineral rights, with the accompanying entitlements to prospect and mine, no longer exist.³³⁷ This means that landowners cannot transfer mineral rights to mineral right holders who can in their turn transfer the entitlements to prospect and mine to prospectors and miners.

As with the abilities to prospect and mine, ownership of unmined minerals has no bearing on the ability to choose not to prospect and mine under the MPRDA. This is simply because mineral rights and the accompanying entitlement to choose not to prospect and mine no longer exist.³³⁸ Even if section 3(1) of the MPRDA does not abrogate the *cuius est solum* principle and landowners remain owners of unmined minerals, landowners cannot transfer the entitlement to choose not to prospect and mine to others because they no longer have this entitlement. The MPRDA determines when and why holders of prospecting rights, mining rights and mining permits do not have to prospect and mine.³³⁹ Thus, ownership of unmined

673; Badenhorst 2010 *SALJ* 658. Also see Watson (LLB thesis) 23 – 27. There are, however, scholars who are in favour of the doctrine. See van den Berg 2009 *Stell LR* 146 fn 87 and fn 88 for references to environmental law scholars who are in favour and opposed to the public trust doctrine. According to Marumo July 2013 *Without Prejudice* 51, the public trust doctrine fulfils the same purpose than *res publicae*.

³³³ Van den Berg 2009 *Stell LR* 143.

³³⁴ Watson (LLB thesis) raises compelling criticism against all of the positions; van den Berg 2009 *Stell LR* 143 – 155 advances the *res publicae* position but raises criticism against the other positions; see Dale *et al South African Mineral and Petroleum Law* MPRDA-121 – MPRDA-122 for criticism on the *res publicae* interpretation and MPRDA-125 – MPRDA-126 for criticism on the public trust doctrine; Badenhorst 2010 *SALJ* 656 criticises the view in terms of which the *cuius est solum* principle is abrogated.

³³⁵ Dale *et al South African Mineral and Petroleum Law* MPRDA-123. Also see Badenhorst and Mostert 2007 *TSAR* 491; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-5. Badenhorst 2010 *SALJ* 657 states that “...the MPRDA excludes the ability of the owner to exploit the minerals beyond the legislative parameters”.

³³⁶ van den Berg 2009 *Stell LR* 153.

³³⁷ See chap 2, sec 3.2.1.

³³⁸ See chap 2, sec 3.2.1.

³³⁹ See chap 4, sec 2.4 for a detailed discussion.

minerals no longer contributes towards strengthening mineral tenure security as far as the ability to choose not to prospect and mine is concerned.

In summary, in contrast to the regime preceding it, the abilities to prospect and mine as aspects of mineral tenure security, are now influenced by the regulatory regime only. This seems logical based on the fact that the MPRDA created a regime that is predominantly administrative in nature.³⁴⁰ In this regime, the only way to obtain rights to minerals, including rights to prospect and mine, is to apply to the state through an administrative process.³⁴¹ Private-law ownership does not increase certainty, or reduce risks, concerning the ability to prospect and mine to ensure profitable development of mines. Even if one accepts the strongest possible private-law position, namely that ownership of unmined minerals vests in landowners, private-law ownership does not strengthen mineral tenure security.

3. Ownership of mined minerals

Traditionally, ownership of mined minerals impacts on the abilities of right holders to dispose of minerals and to vindicate minerals from anyone who is in unlawful possession thereof. These abilities are rudimentary requirements for mineral tenure security. Profitable development of mines will not be possible if holders of rights cannot dispose of mined minerals. Furthermore, right holders cannot dispose of minerals if, for example, minerals are separated from the earth and taken away by someone not authorised to do so,³⁴² or if the minerals are stolen after right holders extract them. Thus, mineral tenure security requires that holders of rights have a remedy to claim minerals from anyone in possession thereof who cannot prove a lawful entitlement to possess the minerals.

³⁴⁰ See chap 2, sec 3.2.

³⁴¹ See chap 2 sec 3.2.1.

³⁴² Additionally, illegal mining (in working mines and mines for which no closure certificate has been issued) presents safety risks and significant loss of income and opportunities to the government and to mines. See Author unknown "Running Riot Underground" 18 August 2015 *Miningm^x* available at http://www.miningmx.com/special_reports/green-book/Running-riot-underground.htm5; Author unknown "Clamping Down on Illegal Mining" 2014 11/12 *Inside Mining* 29 available at http://reference.sabinet.co.za.ezproxy.uct.ac.za/webx/access/electronic_journals/sh_mining/sh_mining_v7_n11_a14.pdf; Coetzee and Horn "The Theft of Precious Metals from South African Mines and Refineries" May 2007 *ISS Monograph Series* vi available at http://reference.sabinet.co.za.ezproxy.uct.ac.za/webx/access/electronic_journals/ismono/ismono_n133a.pdf; Chamber of Mines 2015 *Fact Sheet on Illegal Mining in South Africa* available at <http://www.chamberofmines.org.za/media-room/mining-factsheets>.

This section firstly provides an account of the manner in which ownership of mined minerals traditionally protects mineral tenure security by allowing right holders to dispose of minerals and to claim minerals from anyone who is in possession thereof. Secondly, it investigates whether private-law ownership of mined minerals continues to protect and strengthen mineral tenure security in the current regulatory regime.

3.1. Traditional protection of mineral tenure security

Under common law, minerals became separate movable things upon separation from the earth and were susceptible to ownership as a result of the separation.³⁴³ The entity that was entitled to separate the minerals from the earth, namely holders of mineral rights, prospecting right,³⁴⁴ and mining rights became owners of mined minerals.³⁴⁵ ³⁴⁶ Owners of minerals have the

³⁴³ *Agri SA (CC)* [8]; *Trojan Exploration* 525; Dale (LLD thesis) 79 – 83; *De Beers Consolidated Mines Ltd v Ataqua Mining* [27]; Badenhorst and Mostert 2007 *TSAR* 473.

³⁴⁴ See, however, Badenhorst 1998 *Stell LR* 148 where the author states that holders of prospecting rights by virtue of prospecting contracts did not become owners of extracted minerals unless the prospecting contract stipulated that the prospector became owner.

³⁴⁵ *Agri SA (CC)* [8]; *Trojan Exploration* 509 – 510. A perusal of earlier cases concludes that Badenhorst 1995 *TSAR* 573 – 574 is correct that the following cases are only implied authority for the statement that ownership of mined minerals vests in holders of the mineral rights: *Le Roux v Loewenthal*; *Van Vuuren v Registrar of Deeds*; *Gluckman v Solomon*; *Nolte v Johannesburg Consolidated Investment*; *Ex Parte Pierce*; *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd*. The following cases are direct authority: *Buitendach v West Rand Proprietary Mines Ltd* 1925 TPD 895 897; *Roets v Secundior Sand Bk* 1989 1 SA 902 905. In *Erasmus v Afrikaner Proprietary Mines Ltd* 961, after stating that holders of mineral rights have the entitlements to mine and take minerals away, the court said there can be no question of (joint)-ownership until minerals are separated from the earth. Also see Badenhorst *et al Silberberg* 694; van der Merwe *Sakereg* 562; Sonnekus and Neels *Sakereg Vonnisbundel* 730; *Wille's Principles of South African Law* 623; Joubert 1959 *THRHR* 27 28; Kaplan 1987 *SALJ* 283; Badenhorst and van Heerden 1989 *TSAR* 460; Badenhorst 1990 *TSAR* 465; Badenhorst 2001 *THRHR* 645; Badenhorst and Mostert 2007 *TSAR* 472; Badenhorst 2010 *SALJ* 658; Badenhorst 1999 *Stell LR* 147 – 148. *Contra* Mostert and van den Berg in Zillman *et al* 80 where the authors opine that the landowner became owner of mined minerals.

³⁴⁶ Although the method of acquiring ownership is uncertain. As far as can be ascertained the common law mode of acquisition of ownership of mined minerals has not received explicit attention from the courts. In *Trojan Exploration* 528 – 529 the court said that there were “contingent intentions” between landowners and mineral right holders to transfer and receive ownership of the separated ore. The contingency was that minerals had to be separated from the earth. According to Sonnekus and Neels *Sakereg Vonnisbundel* 730, holders of mineral rights acquired ownership through appropriation (*occupatio*). According to van der Merwe *Sakereg* 562, holders of mineral rights had, *inter alia*, the entitlement to appropriate extracted minerals. It is, however, not clear whether these authors refer to appropriation (toe-eining) in the technical property law sense or in the ordinary dictionary meaning. Perhaps it is better to refer to the ability of mineral right holders to “carry [minerals] away” as the court did in *Van Vuuren v Registrar of Deeds* 294. According to Badenhorst and Mostert 2007 *TSAR* 473, holders of mineral rights, mining rights and prospecting rights became owners through the real agreement with the landowner. Dale *et al South African Mineral and Petroleum Law* MPRDA-124 argues that the real agreement gave rise to a conditional transfer of ownership of mined minerals from landowners to mineral right holders. Dale in Bastida *et al* 828 argues that the granting of rights confer suspensive ownership on the holder and that ownership will pass to the holder upon severance of the mineral.

entitlement to dispose of the minerals for their own account.³⁴⁷ The entitlement to sell minerals means that ownership of mined minerals strengthened the security of tenure of holders of mineral rights, mining rights and prospecting rights.

Furthermore, when minerals are mined and carried away by an unauthorized entity, right holders are deprived of the ability to dispose of the minerals and the risk that the mine cannot be developed profitably will thus increase. Also, holders of rights cannot dispose of mined minerals that are stolen. In such cases, holders of rights, as owners³⁴⁸ of the unmined minerals, have the *rei vindicatio* at their disposal to get the minerals back.³⁴⁹ Owners of minerals have this remedy as one of the incidences of their ownership rights.³⁵⁰ The *rei vindicatio* is a real remedy which can be instituted against anyone who unlawfully withholds the thing (the mined minerals) from the owner.³⁵¹ It is regarded as the strongest real remedy³⁵² and it is the most important remedy for the protection of ownership.³⁵³ Traditionally, ownership of mined minerals thus enabled holders of mineral rights, mining rights and prospecting rights to vindicate minerals that were mined by an unauthorized entity or that were stolen after right holders mined them. Successful institution of the *rei vindicatio* means that minerals are returned to holders of rights who can dispose thereof to pursue profitable development of mines. Thus, before the MPRDA, ownership of mined minerals strengthened the security of tenure of holders of rights to minerals.

³⁴⁷ Badenhorst 1990 *TSAR* 465. A description of ownership includes the entitlement to dispose of the thing (the *ius disponendi*). As regards ownership of land see Badenhorst and Mostert *Silberberg* 93; van der Merwe *Sakereg* 173; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-9.

³⁴⁸ The *rei vindicatio* is available to owners. See *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty)* 1993 1 SA 77 (A) 77 81-82; *van der Merwe and Another v Taylor NO and Others* 2008 1 SA 1 (CC) [114].

³⁴⁹ On the *rei vindicatio* in general, see Badenhorst *et al Silberberg* 242 – 262; van der Merwe *Sakereg* 347 – 353, 361 – 373. See Kaplan 1987 *SALJ* 285 regarding the position under the Mining Rights Act of 1967.

³⁵⁰ See *Chetty v Naido* 1974 3 SA 13 (A) 20B regarding the *rei vindicatio* as an incidence of ownership. In *Absa Bank Limited v Keet* (817/2013) [2015] ZASCA 81 (28 May 2015) [20], the court referred to the *rei vindicatio* as “the right of ownership”.

³⁵¹ The plaintiff has to prove that he is owner, that the respondent is in possession of the thing at the beginning of the proceedings and that the thing exists and is clearly identifiable. See *van Der Merwe and Another v Taylor NO and Others* [114]; *Unimark Distributors (Pty) Ltd v Erf 94 Silvertendale (Pty) Ltd* [1998] JOL 4003 (T) 9 -10. The *rei vindicatio* will not succeed if the respondent can prove that he was lawfully in possession of the thing. See Badenhorst *et al Silberberg* 242 – 243; du Bois *Wille’s Principles* 540; van der Merwe *Sakereg* 347; Sonnekus and Neels *Sakereg Vonnisbundel* 467.

³⁵² Sonnekus 2007 *TSAR* 162; Sonnekus 2014 *TSAR* 201.

³⁵³ Sonnekus and Neels *Sakereg Vonnisbundel* 467; van der Merwe *Sakereg* 347. du Bois *Wille’s Principles* 538 lists the *rei vindicatio* as one of the most important remedies for the protection of ownership. Other real and personal remedies that are available in specific circumstances are the *actio negatoria*, *actio ad exhibendum*, *condictio furtiva*, *actio legis aquilia* and enrichment actions. See Badenhorst *et al Silberberg* 262 – 270; du Bois *Wille’s Principles* 541 – 546.

The Minerals Act was silent regarding ownership of extracted minerals. It is accepted that, under the Minerals Act, ownership of mined minerals was governed by common-law rules of ownership.³⁵⁴ Although the entitlement to dispose of minerals was an incidence of ownership, the Minerals Act expressly conferred the ability to dispose of minerals on holders of mineral rights, prospecting rights and mining rights.³⁵⁵ It therefore seems that it was not necessary to rely on rules of ownership regarding the ability to dispose of minerals. However, the Minerals Act did not grant a remedy to right holders to vindicate minerals from persons who were in unlawful possession thereof. The ability to vindicate minerals stemmed from the ownership rights of right holders in the form of the *rei vindicatio*. Thus, before the MPRDA came into operation, ownership of mined minerals strengthened mineral tenure security of holders of mineral rights, prospecting rights and mining rights.

3.2. Protection of mineral tenure security in the MPRDA

Similar to the Minerals Act, the MPRDA does not state in whom ownership of mined minerals vests.³⁵⁶ It is generally accepted that the common-law position prevails and that ownership of mined minerals vests in the holder of the right enabling separation of the minerals from the earth.³⁵⁷ The question here is whether mineral tenure security is strengthened if one accepts that ownership of mined minerals vests in holders of prospecting rights, mining rights and mining permits.

The MPRDA confers the ability to dispose of minerals on holders of prospecting rights and mining rights.³⁵⁸ The Act thus provides security of tenure in relation to the ability to dispose of minerals on holders of prospecting rights and mining rights and it is not necessary to rely on private-law rules of ownership. The Act does not confer the ability to dispose of minerals on holders of *mining permits*. Since the MPRDA confers the ability to mine for their own account on holders of mining permits,³⁵⁹ it is questionable whether the legislator did not intend to confer

³⁵⁴ Badenhorst and Mostert 2007 *TSAR* 473.

³⁵⁵ Minerals Act, s 5(1).

³⁵⁶ For criticism on this see Badenhorst 2010 *SALJ* 658 in comparison with the position in Australia; Mostert and Pope *The Principles of the Law of Property in South Africa* 273.

³⁵⁷ Dale *et al South African Mineral and Petroleum Law* MPRDA-124; Badenhorst 2010 *SALJ* 658; Badenhorst and Mostert 2007 *TSAR* 479, 491, 492; van den Berg 2009 *Stell LR* 154 – 155; du Bois *Wille's Principles* 623. Dale in Bastida *et al* 828 argues that “ownership will pass... on the mining actually occurring”. According to sec 4(2) of the MPRDA, if the common law is inconsistent with the Act, the Act prevails. It can perhaps be argued that it is not inconsistent with the MPRDA if ownership of extracted minerals vests in holders of rights and therefore the common law prevails.

³⁵⁸ MPRDA, s 5(1)(c).

³⁵⁹ MPRDA, s 27(7)(d).

the ability to dispose of minerals on holders of mining permits.³⁶⁰ The failure of the Act to confer the ability to dispose of minerals on holders of mining permits perhaps can be viewed as a legislative oversight.

It is thus arguable that certainty will be increased if one accepts the common-law position in terms of which holders of mining permits, who are entitled to extract the minerals, become owners thereof upon separation from the earth. As part of their ownership rights, holders of mining permits will have the entitlement to dispose of the mined minerals. Holders will then have certainty regarding the ability to dispose of minerals to ensure profitable development of mines. However, as explained, the MPRDA confers the ability to mine for their own account on holders of mining permits and the failure of the MPRDA to confer the ability to dispose of minerals on holders of mining permits probably is a legislative oversight. The argument that ownership of mined minerals can continue to strengthen mineral tenure security in the current regulatory regime is therefore not pursued here.

The MPRDA does not provide a remedy to holders of rights to vindicate minerals from entities who are in unlawful possession thereof.³⁶¹ In other words, the Act does not confer on holders of rights the ability to get their minerals back, and subsequently dispose thereof, to ensure profitable development of mines. If one accepts that holders of rights acquire ownership when minerals are separated from the earth, holders will have the *rei vindicatio* at their disposal as one of the incidences of their ownership rights. Certainty will be bolstered if one accepts that holders of rights who were entitled to separate minerals from the land, acquire ownership at the moment of separation *irrespective of who or what caused the separation*.³⁶² This means that holders of rights can institute the *rei vindicatio* against anyone in unlawful possession of

³⁶⁰ Dale *et al South African Mineral and petroleum Law* MPRDA-124.

³⁶¹ See Badenhorst 2010 *SALJ* 647 and 658; Marumo July 2013 *Without Prejudice* 50. Holders of rights will, of course, have delictual remedies at their disposal if they suffered damages. Holders of rights can also obtain an interdict against illegal miners to cease the mining activities. See, for example, *Macassar Land Claims Committee v Maccsand CC and Others* [2011] JOL 27464 (LCC).

³⁶² See Dale *et al South African Mineral and Petroleum Law* MPRDA-124 where the authors state “[e]ven if the severance was effected by natural forces or by a third party or by a thief, ownership vested in the mineral right holder”. However, the authors rely on the *minority judgment Trojan Exploration* 534 per Botha JA for this statement. Although Botha JA 531 concurred with the conclusions of the majority as well as the reasoning in general, this statement is not the same as the majority judgment. The majority per Schulze JA 525 specifically stated that the decision did not apply in case of illegal or unlawful mining. In *White v Adams* 14 1897 Juta SC 152 159 - 160 the court held that the right holder did not become owner of illegally mined minerals because he was not owner of minerals *in situ*.

the minerals. The availability of the *rei vindicatio* reduces risks and increases the certainty of right holders that they will be able to develop mines profitably.

In summary, ownership of mined minerals *can* assist in strengthening mineral tenure security in the current regulatory regime in two circumstances. Firstly, ownership of mined minerals confers the entitlement to dispose of minerals on holders of mining permits. Secondly, ownership of mined minerals confers the entitlement to claim minerals from anyone in unlawful possession thereof on holders of prospecting rights, mining rights and mining permits. Regarding these two circumstances, the situation is similar to the position under common law and the Minerals Act.

The MPRDA does not confer a vindicatory remedy on right holders and it is therefore necessary to rely on the private-law rules of ownership. The reasons for the lack of regulation here is a matter of speculation. It is possible that the legislator deliberately decided to be silent on all matters regarding ownership of minerals and mineral resources and to leave decisions in this regard to the judiciary. It is also possible that the absence of a remedy to vindicate minerals is an oversight and a result of careless drafting. Whatever the case may be, the current situation regarding a vindicatory action creates uncertainty. On the face of it, the legislator has two options to clear up the uncertainty and to strengthen mineral tenure security. Firstly, the legislator can opt to be explicit regarding ownership of minerals and mineral resources.³⁶³ If ownership of mined minerals vests in holders of rights who were entitled to extract minerals, right holders will automatically have the *rei vindicatio* at their disposal to claim their minerals back from anyone in unlawful possession. If ownership does not vest in the holder of the enabling right, the MPRDA should contain a remedy that will allow right holders to claim minerals back from anyone in unlawful possession thereof. Considering that the current regulatory regime is predominantly administrative in nature, following the latter approach will probably prove to be sounder. Furthermore, as discussed below, the rules of ownership will not solve all problems regarding a vindicatory action.³⁶⁴

³⁶³ Badenhorst 2010 *SALJ* 658 and Mostert and Pope *The Principles of the Law of Property in South Africa* 273 argue that the Act should state in whom ownership of severed minerals vest.

³⁶⁴ Sec 4 below.

4. Suitability of a private-law ownership analysis

It has been argued that section 3(1) of the MPRDA, according to which the state is the custodian of the country's mineral resources, must be interpreted from a "public law paradigm".³⁶⁵ Section 3(1) thus points to the powers of the government to grant and control rights to minerals and does not relate to private ownership of mineral resources. Furthermore, section 3(1) indicates that the government is responsible for regulating minerals and mineral resources for the benefit of the nation.³⁶⁶ Also, the MPRDA "presents a definite move away from the idea of private ownership of mineral resources"³⁶⁷ to a system of state-controlled rights to minerals.³⁶⁸

From the discussion above, it is clear that private ownership of *unmined* minerals does not play a role in the abilities to prospect and mine.³⁶⁹ The one area where the relevance of private law must be considered is the relationship between landowners and holders of rights to minerals.³⁷⁰ This aspect of mineral law was traditionally rooted in rules of property law.³⁷¹ It is beyond the scope of this thesis to do a detailed analyses of the relationship between landowners and holders of rights to minerals. However, it was pointed out earlier that the MPRDA regulates this relationship to a degree and describes a procedure that must be followed if there is conflict between landowners and holders of rights to minerals.³⁷²

In the case of unmined minerals, ownership based arguments will not be detrimental to the tenure security of holders of rights to minerals.³⁷³ Even if ownership of unmined minerals vests in landowners, holders of rights will still be able to prospect and mine. Still, since ownership

³⁶⁵ Watson (LLB thesis) 30. According to Watson, custodianship in a public law paradigm must "grapple with questions around polycentricity, separation of powers and Constitutional limitations on the state's duty to reform mineral law". Also see *De Beers Consolidated* [31] where the court said "[w]e must look at prospecting law through the lens of public law, not private law".

³⁶⁶ Mostert and van den Berg in Zillman *et al* (eds) 86. In *Agri SA* (CC), the court held that the custodianship-model aims to facilitate broader and more equitable access to mineral resources.

³⁶⁷ Mostert *Principles and Policies in Perspective* 114.

³⁶⁸ Badenhorst *et al* Silberberg; van den Berg 2009 *Stell LR* 154. See also *De Beers Consolidated Mines Ltd v Ataqua Mining* [62] where the court said that the MPRDA destroyed common-law rights and created rights granted by the government.

³⁶⁹ Sec 2.2 above.

³⁷⁰ See chap 2, sec 3.2.3.

³⁷¹ See chap 2, sec 1 and sec 3.2.3.

³⁷² See chap 2, sec 3.2.3.

³⁷³ See Mostert and van den Berg in Zillman *et al* 95 where the authors explain that the *cuius est solum* principle as a concept of private-law ownership will be detrimental to hydraulic fracking.

of unmined minerals will have very little impact in practice,³⁷⁴ it becomes questionable whether a private-law ownership paradigm is at all necessary and suitable for analyses and solving of problems that arise in relation unmined minerals.³⁷⁵

As regards *mined* minerals, it was shown above that, in the current regulatory regime, private-law ownership plays a role in the ability to institute the *rei vindicatio* if minerals are mined and carried away by an unauthorized entity or are stolen.³⁷⁶ However, an option that must be contemplated, but which will not be pursued here, is that mined minerals are also subject to section 3(1) of the MPRDA and hence fall under the custodianship of the state. Thus, holders of rights to minerals have the ability to remove, dispose of and vindicate minerals as far as the MPRDA allows them. If that is the case, the MPRDA must be criticised for not conferring a remedy to claim unlawfully or illegally mined and stolen minerals back on holders of rights.

Furthermore, accepting that ownership of mined minerals vests in holders of rights does not solve all problems. For instance, what is the situation if minerals, which are not subject to a right granted in terms of the MPRDA, are mined unlawfully or illegally?³⁷⁷ From a policy perspective, it is clear that in these instances the government should be able to claim the minerals back. The lack of regulation in this regard has contributed to an argument that minerals and minerals resources are *res publicae*.³⁷⁸ Consequently, when minerals are mined and carried away by an unauthorized entity, ownership thereof will vest in the state and the state will then be able to use remedies normally available to owners, including the *rei vindicatio*.³⁷⁹ However, the *res publicae* argument was rejected by the judiciary.³⁸⁰

On the one hand, it seems that private ownership of mined minerals that vests in holders of rights with the effect that right holders have the *rei vindication* at their disposal is advantageous to holders of rights to minerals. On the other hand, if minerals and mineral resources are *res publicae*, the government will have the remedies of private owners, including the *rei vindicatio* at their disposal.³⁸¹ However, private ownership of mined minerals that vests in holders of

³⁷⁴ Watson (LLB thesis) 30. Ownership of unmined also do not have bearing on ownership of mined minerals. See Badenhorst and Mostert 2007 *TSAR*

³⁷⁵ Mostert and van den Berg in Zillman *et al* 86 opine that explaining the custodianship role of the state in terms of private law lead to results that “borders on the absurd”.

³⁷⁶ Sec 3.2 above.

³⁷⁷ See Badenhorst 2010 *SALJ* 657 – 658.

³⁷⁸ See van den Berg 2009 *Stell LR* 150.

³⁷⁹ See van den Berg 2009 *Stell LR* 150.

³⁸⁰ *De Beers Consolidated Mines Ltd v Ataqu Mining* [38].

³⁸¹ Watson (LLB thesis) 22.

rights and the *res publicae* construction are mutually exclusive. It becomes questionable whether a private-law ownership paradigm, even in case of mined minerals, is appropriate for analysis and problem solving in the current regulatory regime. While the MPRDA does not contain a remedy for vindication, it remains to be seen whether the judiciary will solve problems of vindication from a solely private-law paradigm.³⁸² However, in a best-case scenario, the legislator will amend the MPRDA to provide remedies to holders of rights where minerals are mined and carried away by an unauthorized entity or are stolen. An amendment will also require remedies for the government in situations where minerals that are not subject to rights, are mined without the necessary right or permit.

5. Summative findings and remarks

Traditionally, private-law ownership of minerals and mineral resources protected and strengthened mineral tenure security. Firstly, ownership of unmined minerals affected the abilities of holders of mineral rights, prospecting rights and mining rights to prospect and mine and to choose not to prospect and mine. Secondly, ownership of mined minerals affected the abilities of holders of mineral rights, prospecting rights and mining rights to dispose of minerals and to claim minerals back from anyone who could not prove a legal entitlement to be in possession of the minerals. Ownership of mined minerals was particularly important to vindicate minerals that were mined and carried away by an unauthorized entity if that were stolen.

In the current regulatory regime, ownership of unmined minerals have no bearing on the abilities of holders of rights to minerals to prospect and mine and to choose not to prospect and mine. In this regard, private-law ownership of unmined minerals does not continue to strengthen and protect mineral tenure security. Private-law ownership of mined minerals continues to play a limited role in certain abilities of holders of rights to minerals that are necessary for mineral tenure security. In this regard, the MPRDA does not provide a vindicatory remedy to holders of rights to minerals. This is specifically problematic where minerals that are subject to rights are mined and carried away by an unauthorized entity or are stolen. The lack of regulation regarding a vindicatory remedy necessitates relying on the rules of private law to protect and strengthen mineral tenure security. Rules of private-law ownership automatically allow holders of rights to use the *rei vindicatio* to claim minerals back

³⁸² Dale *et al* *South African Mineral and Petroleum Law* MPRDA-124.

from anyone who cannot prove a legal entitlement to be in possession of the minerals. However, reliance on private-law rules of ownership does not solve all problems regarding vindication of minerals. This is especially apparent in situations where the state needs to vindicate minerals that were mined without the necessary right or permit.

The analysis in the chapter casts doubt on whether it is apposite to investigate right to minerals granted in terms of the MPRDA from a private-law paradigm. This is evident from the insignificance of private-law ownership of unmined minerals for the abilities to prospect and mine and to choose not to prospect and mine. The unsuitability of a private-law approach to minerals is also apparent from the inability of rules of private-law adequately to solve vindicatory problems regarding mined minerals adequately.

The next two chapters investigate how the MPRDA provides security of tenure to holders of rights to minerals regarding the abilities to prospect and mine, to remove and dispose of minerals, to choose not to prospect and mine and to transfer and mortgage rights. The analyses in these two chapters use the text of the MPRDA, and not a private-law paradigm, as a starting point.

Chapter 4:

RIGHT HOLDERS' ABILITY TO PROSPECT AND MINE

1. Introduction

For profitable development of mines, holders of rights to minerals must be able to prospect³⁸³ and mine,³⁸⁴ and to dispose of minerals found, for their own account. Profitable development of mines furthermore requires that holders of rights to minerals must, at least to an extent, be able to discontinue or interrupt operations and still retain their rights during times that mining would be uneconomical.³⁸⁵

An evaluation of how the MPRDA provides mineral tenure security thus necessitates investigating the conditions under which holders of rights to minerals are allowed to, and prevented from, prospecting and mining. It further requires scrutiny of the conditions under which holders of rights may dispose of minerals found. An evaluation of mineral tenure security also requires examining the conditions under which holders of rights to minerals can suspend operations while retaining their rights.

This chapter comments on the extent to which the MPRDA provides security of tenure to holders of prospecting rights, mining rights and mining permits concerning the abilities to prospect and mine, to dispose of minerals found for their own account and to choose not to prospect and mine. The chapter also highlights the features of the current predominantly administrative regulatory regime³⁸⁶ that cause uncertainty and weaken mineral tenure security. The analysis in this chapter is relevant for the insight it brings into how certainty may be bolstered, and tenure security thus strengthened, by minimizing risks and uncertainties that may prevent profitable development of mines.³⁸⁷

³⁸³ According to s 1 of the MPRDA, prospecting means “intentionally searching for any mineral by means of any method – (a) which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or (b) in or on any residue stockpiles or residue deposit, in order to establish the existence of any mineral and to determine the extent and economic value thereof; or (c) in the sea or other water on land”. Prospecting operations “means any activity carried on in connection with prospecting”.

³⁸⁴ According to s 1 of the MPRDA, mining operation “means any operation relating to the act of mining and matters directly incidental thereto”. Mine when used as a verb means “...the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area”.

³⁸⁵ Bastida 2001 *JERL* 38.

³⁸⁶ See chap 2, sec 3.2.1 and sec 3.2.2.

³⁸⁷ See chap 1, sec 1.1 regarding profitable development of mines as an aspect of mineral tenure security.

Administrative regimes are, at times, criticised for allowing extensive governmental interference and discretionary decision-making power.³⁸⁸ According to one commentator, the question whether the custodianship model³⁸⁹ of the MPRDA will be perceived to be investor-friendly³⁹⁰ depends largely on the degree to which governmental discretion in decision-making is circumscribed.³⁹¹ Furthermore, the MPRDA is, at times, criticised for being drafted poorly and carelessly and in vague and unclear terms.³⁹² The analysis in this chapter foresees the possibility that governmental interference, discretionary decision-making powers and drafting concerns can cause uncertainty that may weaken mineral tenure security.

2. Optimal mineral tenure security

Mineral tenure security will be served best if holders of rights are free to prospect and mine, to dispose of minerals and to choose not to prospect and mine. Such freedom will ensure the best prospects for profitable development of mines and will simultaneously allow investors to maximise returns on their investments. Holders of rights to prospect or mine need this freedom to make decisions regarding when and how to conduct their operations, based on objective market conditions and their own financial, technical and other abilities.

The government also has legitimate interests in prospecting and mining. For example, the government may pursue optimal exploitation of mineral resources in an attempt to create employment and alleviate poverty.³⁹³ It is possible that the government's interest in optimal exploitation may, at times, not coincide with the freedom of right holders to choose not to

³⁸⁸ See regarding wide governmental discretion Bastida 2001 *JERL* 37; Dale 1996 *JERL* 300; Dale in Bastida *et al* 833. Dale *et al South African Mineral and Petroleum Law MPRDA-16* submit that the most important aspect of administrative decisions is the degree to which the discretion is circumscribed by reference to stipulated objective criteria. Also see Williams in Bastida *et al* 50-51 where the author advances that "excessive discretionary authority" is an obstacle in "winning the respect and confidence of the mining industry". The World Bank *A Mining Strategy for Latin America and the Caribbean* 9 and 10 views limitation of discretion in the implementation of mining laws, to minimise corruption, as one of the main characteristics of a successful legal framework. Badenhorst 1998 *Obiter* 157, 159 and 169 criticises various provision of the Green Paper on a Minerals and Mining Policy for South Africa (1998) for allowing governmental discretion.

³⁸⁹ See chap 3, sec 2.1 for a discussion of the custodianship-model.

³⁹⁰ One of the requirements for the system to be investor-friendly is provision of tenure security. See chap 1, sec 1.

³⁹¹ Dale *et al South African Mineral and Petroleum Law MPRDA-15*.

³⁹² For criticism on drafting of the MPRDA in general see Badenhorst and Mostert 2007 *TSAR* 486 and 492 – 493; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-19 – 13-24, 30-2 – 30-5; Dale *et al South African Mineral and Petroleum Law MPRDA-203 – MPRDA-204*; Mostert *Principles and Policies* 77 and 88 – 90. In *Doe Run Exploration SA (Pty) Ltd v Minister of Minerals and Energy & others* (499/07) [2008] ZANHC 3 (8 February 2008) [43] the court said that s 105 of the MPRDA "can hardly be described as an epitome of exemplary draftmanship".

³⁹³ *Agri SA (CC)* [2]; Mostert *Principles and Policies* 2 and 157 – 158. According to Mostert and van den Berg in Zillman *et al* 91, the MPRDA indicates a policy choice by the government to ensure active mining.

prospect and mine. Furthermore, the MPRDA is transformative in nature and aims to ensure equitable access to the country's mineral resources³⁹⁴ and to advance opportunities to previously disadvantaged persons to participate in the mining industry.³⁹⁵ Thus, the government may legitimately require holders of rights to meet certain requirements in relation to black economic empowerment³⁹⁶ and socio-economic development to maintain their rights and the ability to prospect and mine.

An evaluation of mineral tenure security needs to take into account that the government has legitimate reasons and interests to limit the abilities of right holders to prospect and mine, to dispose of minerals and to choose not to prospect in mine. In this regard, the interests of the government and of holders of rights may not always coincide.³⁹⁷ It is thus accepted here that an evaluation of mineral tenure security cannot follow an all-of-nothing approach. It is not possible to argue that the MPRDA provides mineral tenure security if holders of rights have unfettered freedom to choose when they prospect and mine and when they do not. Similarly, it cannot be concluded that any limitation of these freedoms by the government unjustifiably weaken mineral tenure security. The approach followed here is that *optimal* mineral tenure security requires creating a state of certainty in relation to rights to minerals that is most attractive to investors, whilst supporting the legitimate and important objectives of the government.

The following sections accordingly investigate the manner in which the MPRDA regulates the abilities of right holders to prospect and mine, to dispose of minerals found and to choose not to prospect and mine. The analysis also identifies the situations in which, and the reasons why, right holders' abilities are limited.

2.1. The ability to prospect and mine

The ability to prospect emanates from prospecting rights³⁹⁸ in terms of the MPRDA, while mining occurs by virtue of mining rights³⁹⁹ or mining permits.⁴⁰⁰ To prospect, an entity must

³⁹⁴ MPRDA, s 2(c).

³⁹⁵ MPRDA, s 2(d).

³⁹⁶ See fn 451 below for the most salient requirements of black economic empowerment.

³⁹⁷ Erize in McHarg *et al* 282 opines that, in general, "when some combination of private effort and state activity exists, dispute arises".

³⁹⁸ MPRDA, s 5(3)(b) read with the def of "prospecting right" in s 1.

³⁹⁹ MPRDA, s (5)3(b) read with the def of "mining right" in s 1.

⁴⁰⁰ MPRDA, s 27(7)(d) read with the def of mining permit in s 1.

be the holder of a prospecting right; to conduct mining operations, such an entity must hold a mining right or mining permit.⁴⁰¹ The difference between mining rights and mining permits is that mining permits are issued when the mineral can be mined optimally within two years and the mining area does not exceed 5.0 hectares,⁴⁰² while no limitation is placed on the area and period related to mining rights. Mining permits are thus issued for small-scale mining and mining rights for large-scale mining operations. Holders of prospecting rights, mining rights and mining permits can prospect and mine by virtue of the rights that the government confers on them.⁴⁰³

Apart from having the ability to prospect and mine, holders of prospecting rights, mining rights and mining permits must have sufficient time to develop mines profitably.⁴⁰⁴ The time that a particular rights allows for prospecting and mining depend on the initial time that the right is granted for as well as the possibility to renew rights. The following sections investigate whether the MPRDA allows enough time for prospecting and mining and also investigates the requirements for renewals of rights.

2.1.1 Time allowed for prospecting and mining

It is difficult to generalize about the time that is required to develop mines profitable.⁴⁰⁵ Various factors influence timelines for profitable development, for example, the “scale, type of targeted deposit and local conditions”.⁴⁰⁶ Based on a study of 50 mines worldwide, Otto concludes that medium and large mining projects require upwards of ten years to gestate.⁴⁰⁷ The gestation period refers to “the length of time between the initiations of exploration...to the start of commercial production”.⁴⁰⁸ In the terminology of the MPRDA, this includes periods for reconnaissance permissions⁴⁰⁹ and prospecting rights. The MPRDA allows a total period

⁴⁰¹ According to s 5A(b) it is an illegal act to prospect without a prospecting right or to mine without a mining right or a mining permit.

⁴⁰² MPRDA, ss 27(1)(a) and (b).

⁴⁰³ MPRDA, s 5(3)(b).

⁴⁰⁴ Otto in Bastida *et al* 354; Dale 1996 *JERL* 299.

⁴⁰⁵ Otto in Bastida *et al* 365.

⁴⁰⁶ Otto in Bastida *et al* 357 and 365. Regarding differences in orebodies see Benning May/June 2000 *The Journal of The South African Institute of Mining and Metallurgy* 148. The author comments on the risks that uncertainties regarding orebodies have for the financing of mining projects.

⁴⁰⁷ Otto in Bastida *et al* 355 and table 1 358 – 359 for specific periods for specific mines.

⁴⁰⁸ Otto in Bastida *et al* 354.

⁴⁰⁹ Reconnaissance permissions are not analysed in detail in this thesis because the MPRDA does not include tenure security with regard to reconnaissance permissions as an objective. See chap 1, sec 2. The time period for reconnaissance operations is, however, included here because it is relevant for the total time allowed for exploration.

of nine years for development according to these two rights. This consists of one year for reconnaissance operations,⁴¹⁰ a maximum period of five years for the initial prospecting right⁴¹¹ and three years for a renewed prospecting right.⁴¹² The administrative regime created by the MPRDA thus falls short of providing the necessary time for development in the gestation period according to Otto's study.⁴¹³

The MPRDA does not place a limitation on the total time allowed for large-scale mining. Mining rights are granted for an initial maximum period of thirty years.⁴¹⁴ The Act provides that mining rights can be renewed for further periods (without placing a limitation on the number of periods), each not exceeding 30 years.⁴¹⁵ The fact that no limitation is placed on the number of times that mining rights can be renewed, in principle, strengthens mineral tenure security. However, renewal of mining rights is not automatic and holders of rights will have to show that they meet certain criteria before rights are renewed.⁴¹⁶ The concern is that some of these criteria are not closely circumscribed and create uncertainty regarding whether renewals will be granted.⁴¹⁷ A life-of-mine grant of mining rights will strengthen mineral tenure security and will find favor with investors.⁴¹⁸

The total time allowed for small-scale mining operations is five years. Mining permits are initially granted for a maximum period of two years and may be renewed three times for a period of one year per renewal.⁴¹⁹ Given that mining permits are only issued if the mineral can be mined optimally within two years or the mining area does not exceed 1.5 hectares, the five-year period appears long enough to ensure profitable development of mines. Furthermore, the Act does not preclude investors from applying for mining rights if they are uncertain whether the mine can be developed profitably within two years.⁴²⁰ Allowing sufficient time for prospecting and mining will only strengthen mineral tenure security if investors are certain that

⁴¹⁰ MPRDA, s 14(4). Reconnaissance permissions are not renewable.

⁴¹¹ MPRDA, s 16(6).

⁴¹² MPRDA, s 18(4).

⁴¹³ See Dale *et al South African Mineral and Petroleum Law* MPRDA-19 where the authors criticise the restriction on the Minister's power to grant one renewal for prospecting rights only even when the facts dictate otherwise.

⁴¹⁴ MPRDA, s 23(6).

⁴¹⁵ MPRDA, s 24(4).

⁴¹⁶ See sec 2.1.2 below.

⁴¹⁷ See sec 2.1.2 below.

⁴¹⁸ Dale *et al South African Mineral and Petroleum Law* MPRDA-19 and MPRDA-267; Badenhorst 2014 *JERL* 18 says that the fact that mining rights are not granted in perpetuity or for the life of a mine detracts from security of tenure.

⁴¹⁹ MPRDA, s 27(8)(a).

⁴²⁰ S 22 does not place any limitation on the area and size of the mine when mining rights are applied for.

the time will be allocated to them. In this regard, the requirements for renewal of rights to minerals are important aspects of mineral tenure security.

2.1.2 *Renewal of rights*

The MPRDA strengthens mineral tenure security of holders of prospecting rights⁴²¹ and mining rights⁴²² by providing for compulsory granting of renewals of rights if specified criteria are met.⁴²³ In case of mining permits, the Act provides only that permits *can* be renewed. There is thus no obligation on the Minister to grant renewals of mining permits. Furthermore, the MPRDA does not prescribe a procedure for lodging applications for renewals or any criteria on which decisions to grant renewals must be based.

In contrast to prospecting rights and mining rights, the MPRDA is silent regarding obligatory granting of renewals of mining permits based on specified renewal criteria. This creates uncertainty in relation to profitable development to holders of mining permits. It is unlikely that the absence of criteria in the case of mining permits must be interpreted to imply that renewals will be automatic. Such an interpretation will be contrary to the general character of the MPRDA in terms of which criteria are prescribed for applications and renewals of almost all rights to minerals.⁴²⁴ A reasonable inference is that the government has wide and

⁴²¹ S 18(1) of the MPRDA requires that applications must be lodged in a prescribed manner. According to section 18(2), applications must (a) state the reasons and period for which the renewal is required; (b) be accompanied by a report reflecting the prospecting result and prospecting expenditure incurred; (c) be accompanied by report showing the extent with which the prospector complies with the environmental management programme, the rehabilitation that is required and the cost thereof; (d) include a detailed prospecting work programme for the period of renewal; (e) must be accompanied by a certificate issued by the Council of Geoscience that all prospecting information as prescribed were submitted. According to 18(3), the Minister is under an obligation to grant renewals if the requirements for section 18(1) and (18(2) are met and if the holder of the prospecting right complies with (a) the terms and conditions of the right and is not in contravention of any relevant provisions of the MPRDA; (b) the prospecting work programme; and (c) the requirements of the approved environmental management plan.

⁴²² S 24(1) of the MPRDA requires that the applications must be lodged in a prescribed manner. According to s 24(2) applications for renewals must (a) state the reasons and the period for which the renewal is required; (b) be accompanied by a report reflecting the prospecting result and prospecting expenditure incurred; and (c) include a detailed mining work programme for the renewal. S 24(3) places an obligation on the Minister to grant the renewal if the requirements of ss 24(1) and (2) are met and if the holder of the mining right has complied with (a) the terms and conditions of the mining right and any relevant provisions of the MPRDA; (b) the mining work programme; (c) the requirements of the prescribed social and labour plan; and (d) the requirements of the approved environmental management programme.

⁴²³ Regarding obligatory granting of rights in general see See Dale *et al South African Mineral and Petroleum Law* MPRDA-204; Dale 1996 *JERL* 300; Dale in Bastida *et al* 833.

⁴²⁴ Ss 14(1), 17(1), 17(3), 23(1), 24(3), 32(1), and 34(2) respectively set criteria for granting of reconnaissance permissions, prospecting rights, renewals of prospecting rights, mining rights, renewals of mining rights, retention permits and renewals of retention permits. S 20(1) of the MPRDA does not set specified criteria for the granting of permissions to remove and dispose of minerals although the section requires that minerals may be removed and

uncircumscribed discretion to grant or refuse renewals of mining permits. The extent of the uncertainty created does not seem to be in pursuit of any particular governmental objectives that justify it. Where the government implements a regulatory regime, it cannot make continued mining dependent on renewals without informing holders of mining permits when and why renewals will be granted. Although mining permits are issued for small-scale mining, holders of permits require certainty that they will have enough time to develop mines profitably. Therefore, the MPRDA should be amended at least to provide for compulsory granting of renewals of mining permits and to inform holders of permits of the requirements that they must meet for renewals. The requirements can include, for example, that permits holders must show that they actively and continuously mined for the duration of the initial period of the permit but need more time to develop the mine profitably.

As stated, obligatory granting of renewals of prospecting rights and mining rights, in principle, strengthen mineral tenure security. However, certainty is diminished by two factors. Firstly, some criteria for renewals of prospecting rights and mining rights are drafted imprecisely and vaguely with the result that applicants for renewals are uncertain of the circumstances in which the Minister will be under an obligation to grant renewals. For example, the Minister is under an obligation to grant renewals of prospecting rights and mining rights if holders are not in contravention of any "relevant" provisions of the MPRDA. Secondly, some of the criteria for renewals of mining rights have been criticized for not being closely circumscribed and for creating uncertainty. Such criteria can lead to wide governmental discretion when rights are renewed. An example of criteria that lead to wide governmental discretion is that applicants for renewals of mining rights must comply with the social and labor plan. The following paragraphs discuss the effect of the two examples on mineral tenure security.

Regarding vague and imprecise drafting, one of the criteria⁴²⁵ that will place an obligation on the Minister to renew prospecting rights and mining rights is that right holders who apply for renewals are not in contravention of any *relevant* provision of "this Act".⁴²⁶ In addition, applicants for renewals of mining rights must not be in contravention of relevant provisions of

disposed to conduct tests or to identify and analyse the minerals. See sec 2.2 below for a discussion of the criteria for permissions to remove and dispose of minerals.

⁴²⁵ According to ss 24(3)(b), 24(3)(c) and 24(3)(d), holders of mining rights must comply, respectively, with the mining work programme, the requirements of the social and labour plan and the requirements of the approved environmental management programme.

⁴²⁶ MPRDA, ss 18(3)(a) and 24(3)(a) for prospecting rights and mining rights respectively.

“any other law”.⁴²⁷ It is unclear which provisions of the MPRDA will be deemed “relevant” for purposes of applications for renewals. According to Dale *et al*,⁴²⁸ relevant provisions refer to those which are relevant for the right or permit to be renewed. Supposedly this means that holders of mining rights must not be in contravention of any provision in the MPRDA that relate to mining rights and that provisions in relation to prospecting rights, for example, are irrelevant. This is possibly the correct interpretation taking into account that the 2013 Amendment Bill aimed to amend the criteria for renewals of prospecting rights and mining rights so that contravention of *any* provision of the MPRDA will have the effect that the Minister is not under an obligation to renew mining rights and prospecting rights.⁴²⁹ According to the proposed amendment, any contravention of any provision relating to mining rights will remove the obligation of the Minister to grant the renewals. As a matter of common sense, provisions relating to prospecting rights only will not have any effect on the obligation of the Minister to grant renewals of mining rights.

Still, the text of the MPRDA currently creates uncertainty and an amendment that removes the reference to “relevant” provisions is therefore desirable. It is understandable that the government expects right holders to comply with the provisions of the Act to be granted renewals of their rights. However, there does not seem to be any specific reason or objective for creating uncertainty regarding renewals of rights by requiring right holders to comply with “relevant” provisions of the MPRDA. The uncertainty that is created therefore unnecessarily weakens optimal mineral tenure security.

Furthermore, the reference to “any other law” in case of renewals of mining rights is extremely wide and vague. According to Dale *et al*, any provision in another law that is relevant for the specific rights qualify as relevant provisions in any “other law” for purposes of renewals of mining rights.⁴³⁰ Although this submission seems logical, the reference to “any other law” creates unnecessary uncertainty. The 2013 Amendment Bill aimed to remove the reference to “any other law” so that only contraventions of the MPRDA will give the Minister the discretion

⁴²⁷ MPRDA, s 24(3)(a).

⁴²⁸ *South African Mineral and Petroleum Law* MPRDA-212(3).

⁴²⁹ Mineral and Petroleum Resources Development Amendment Bill [B15-2103] (Explanatory summary in GG 36523 of 31 May 2013), ss 13(d) and 19(c) for prospecting rights and mining rights respectively. President Jacob Zuma refused to assent to the Bill and sent it back to parliament because the Bill did not pass constitutional muster in his view for various reasons. See the President’s letter of 16 June 2015 to parliament in this regard. The letter is available at <http://cer.org.za/wp-content/uploads/2010/08/Zuma-letter-to-the-NA-re-MPRDA-Bill.pdf>.

⁴³⁰ *South African Mineral and Petroleum Law* MPRDA-212(3).

to refuse to renew mining permits.⁴³¹ Such an amendment is desirable and will increase certainty and strengthen mineral tenure security. It must be considered that the government may wish to require that right holders comply with other laws, such as the Mine Health and Safety Act⁴³² or the National Environmental Management Act, to be allowed to continue their mining operations.⁴³³ However, the MPRDA should specify that compliance with these Acts is a requirement to place an obligation on the Minister to renew mining rights. Failure to specify the provisions of these Acts that will remove the obligation of the Minister to renew mining rights, unnecessarily creates uncertainty and weakens optimal mineral security.

Vague and imprecise drafting, in some instances, leads to broad, uncircumscribed governmental discretion. Such discretionary powers, not based on objective and closely circumscribed criteria, cause uncertainty. In this regard, one of the criteria for renewal of mining rights is that applicants must meet the requirements of the prescribed social and labour plan.⁴³⁴ The objectives of the social and labour plan are prescribed and include promoting employment and advancing the social and economic welfare of all South Africans.⁴³⁵ The objectives further are to contribute to the transformation of the mining industry⁴³⁶ and to ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they operate.⁴³⁷

The social and labour plan objectives are without doubt important in the South African mining industry. However, the vague content of the social and labour plan has been subject to harsh criticism. Dale asserts that the “formulation of the requirements of the social and labour plan

⁴³¹ 2013 Amendment Bill, s 19(c).

⁴³² 29 of 1996.

⁴³³ 107 of 1998.

⁴³⁴ MPRDA, s 24(3)(c). S 20(b) of the 2008 Amendment Act substituted s 24(3)(d) of the MPRDA. However, the Amendment Act, wrongly numbered the substitution as (c). An application of the incorrect numbering will have the effect that compliance with the social and labour plan is no longer a requirement for renewals of mining rights. It is, however, clear that the intention was not to remove compliance with social and labour plan as a requirement for renewals of mining rights. This is evident from s 19(c) of the 2013 Amendment Bill that attempted to amend s 24(3)(c) of the MPRDA to require compliance with the approved (and no longer prescribed) social and labour plan for renewals of mining rights. Dale *et al South African Mineral and Petroleum Law* MPRDA-17 – MPRDA criticise the social and labour plan as a requirement for initial granting of mining rights. Compliance with the social and labour plan is also a requirement for renewals of mining rights and the criticism is therefore also applicable here. See Dale in Bastida *et al* 833 – 834 for criteria for initial granting of rights that are not based on objective and closely circumscribed criteria.

⁴³⁵ Reg 41(a). Also see MPRDA, s 2(f).

⁴³⁶ Reg 41(b). Also see MPRDA, ss 2(c) and (d).

⁴³⁷ Reg 41(c). Also see MPRDA, s 2(f).

unfortunately suffers from lack of clarity".⁴³⁸ According to Leon, the content of the plan is "unworkably vague".⁴³⁹

In an attempt to overcome the difficulties that mining companies experienced regarding what was expected from them in relation to the social and labour plan, the Department of Mineral Resources published guidelines for its implementation in 2006.⁴⁴⁰ Despite these guidelines, it was argued that some of the requirements of the social and labour plan remain "frustratingly vague".⁴⁴¹ For example, the original regulations require the social and labour plan to provide "an internship and bursary plan and [that] its implementation [must be] in line with the skills development plan".⁴⁴²

The 2006 guidelines attempted to clarify the requirements regarding internships and bursaries by requiring a "detailed internship and bursary plan, which is in line with the skills development plan... and how the plan would be implemented".⁴⁴³ Despite the attempt at clarification, the guidelines do not really clarify any "desired courses of progression or desired outcomes" for mining companies to know what is expected of them. In 2010, the Department of Mineral Resources issued revised guidelines for the implementation of the social and labour plan.⁴⁴⁴ Regarding bursary plans, the revised guidelines require mining companies to provide targets, timeframes and budgets.⁴⁴⁵ Mining companies must also inform the government whether the bursaries will be given to employees of the company (internal bursaries) or to others (external bursaries).⁴⁴⁶ It is clear that the government does not aim to provide concrete

⁴³⁸ Dale *et al* *South African Mineral and Petroleum Law* MPRDA-17. See MPRDA-256(11) – 256(12) for a general discussion of the social and labour plan.

⁴³⁹ Leon 2013 *JERL* 186. Also see Andersson (Bachelor Thesis) 28 - 31; Howard (LLM thesis) 84 and 85.

⁴⁴⁰ Department of Mineral Resources 2006 *Social and Labour Plan Guidelines for the Mining and Production Industries*. These guidelines are not currently available on the Website of the Department of Mineral Resources. The guidelines can be accessed at http://www.blacklite.co.za/portals/0/BEE_in_Mining_legislation/SOCIAL%20AND%20LABOUR%20PLAN%20GUIDELINES.pdf. Also see University of Stellenbosch Business School "Corporate governance: Social and Labour Plans in the Mining Sector" 3 – 4 available at http://www.governance.usb.ac.za/pdfs/No.4_Governance_Africa_case%20study%202009.pdf.

⁴⁴¹ University of Stellenbosch Business School "Corporate governance: Social and Labour Plans in the Mining Sector" 4.

⁴⁴² Mineral and Petroleum Resources Development Regulations (GN R527) in *GG* 26275 of 23 April 2004, reg 46(iv).

⁴⁴³ Department of Mineral Resources 2006 *Guidelines*, s 2.4; Andersson (Bachelor thesis) 32.

⁴⁴⁴ Department of Mineral Resources 2010 *Revised Social and Labour Plan Guidelines*. These guidelines are not currently available on the website of the Department of Mineral Resources. The revised guidelines can be accessed at <http://cer.org.za/wp-content/uploads/2013/03/SLP-guidelines-2010.pdf>.

⁴⁴⁵ Department of Mineral Resources 2010 *Revised Guidelines*, s 3.6.1.1.

⁴⁴⁶ Department of Mineral Resources 2010 *Revised Guidelines*, s 3.6.1.3.

guidelines regarding the amount of bursaries that mining companies must provide.⁴⁴⁷ Instead, mining companies are expected to provide the government with information regarding the amount of bursaries that they will provide and their budget for bursaries.

The difficulty here is that the requirements and guidelines for the social and labour plan are so vague that mining companies do not know what is expected from them. Thus, at first glance, the discretion of the Minister to grant renewals of mining rights is circumscribed and based on a list of criteria: the Minister must grant renewals of mining rights if the criteria are met, including compliance with the social and labour plan. However, on closer inspection, all of the criteria, for example compliance with the social and labour plan, are not objective and closely circumscribed. There are no objectively ascertainable standards that will compel the Minister to conclude that applicants for renewals of mining rights meet the criteria relating to compliance with the social and labour plan. There are thus no objectively ascertainable criteria that will place an obligation on the Minister to grant renewals of mining rights. In reality, therefore, the Minister has wide and uncircumscribed discretion to grant or refuse renewals of mining rights.

It is comprehensible that the nature of the objectives of the social and labour plan requires some discretion on the part of government and that strict rules will not benefit achieving the objectives.⁴⁴⁸ However, it seems unreasonably vague that no objectively ascertainable guidelines are provided regarding the discretionary decision-making power of the government to determine whether applicants for renewals of mining rights comply with the social and labour plan. Regarding bursary plans, for example, the regulations can require minimum requirements in terms of which the amount of bursaries are expressed in relation to a percentage of a company's profit in the previous financial year. The regulations can also determine that a certain percentage of bursaries must be granted to internal applicants to ensure that mining companies contribute to the development of their employees.

⁴⁴⁷ See University of Stellenbosch Business School "Corporate Governance: Social and Labour Plans in the Mining Sector" 4 where it is stated that the reason for the vagueness can be that the "government seeks to always provide a generic form of guidance in cases like these, and must consider all permutations of the mining industry and their varied [social and labour plans]".

⁴⁴⁸ In the same manner that governmental discretion may be necessary to achieve the objectives of BEE empowerment. See Dale *et al South African Mineral and Petroleum Law* MPRDA-117. Also See *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) [53] and fn 73 and *Affordable Medicines Trust v Minister of Health* 2006 2 SA 247 (CC) [33] for the need for some governmental discretion in the modern state. Also see Hoexter *Administrative Law in South Africa* 47.

It is beyond the scope of this work to provide a detailed analysis of all of the requirements, advantages and shortcomings of the prescribed social and labour plan and the guidelines for its implementation. However, if the requirements of the plan are so vague that applicants for renewal of mining rights do not know what is expected from them,⁴⁴⁹ the risks that renewals will not be granted increase. This also increases the risks that holders of rights and investors face regarding profitable development of mines and maximization of returns on investments. In this regard, unnecessarily vague drafting leads to wide governmental discretion that unjustifiably limits optimal mineral tenure security.

Furthermore, the requirements of the social and labour plan cannot be viewed in isolation. The Mining Charter⁴⁵⁰ and the Code of Good Practice for the Mining Industry⁴⁵¹ contain more concrete requirements that aim to achieve transformation of the mining industry and socio-economic development of mining areas. Holders of mining rights must indicate how they intend to meet these requirements in the social and labour plan. One way in which the government can bolster certainty, and still pursue the objectives of transformation and socio-economic development, is to draft the requirements of the Mining Charter and the Code of Good Practice carefully and to ensure that these documents correspond with each other. For example, one of the purposes of the Code of Good Practice is to enhance implementation of the Charter.⁴⁵² The two documents make it clear that 26%⁴⁵³ of mining companies must be owned by historically disadvantaged South Africans (HDSAs).⁴⁵⁴ The Mining Charter refers

⁴⁴⁹ Andersson (Bachelor thesis) 32.

⁴⁵⁰ Amended Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838) in GG 33573 of 20 September 2010. Par 2.1 of the Mining Charter requires that mining companies had to meet 26% effective ownership by HDSA's in 2014 and par 2.4 requires that mining companies had to meet 40% HDSA demographic representation by 2014 at executive management level, senior management level, core and critical skills, middle management level and junior management level. Regarding housing and living conditions the Charter required, by 2014, an upgrade from hostels to family units at an occupancy rate of one person per room, and facilitation of home ownership options for employees in consultation with organised labour. There are reports that a new Charter will take effect in 2016. See Peyper 5 August 2015 *MiningMf* available at <http://www.miningmx.com/page/news/markets/1653449-New-Mining-Charter-in-2016-sanctions-raised#.VeapKE0VjIU>.

⁴⁵¹ Code of Good Practice for the Mining Industry (GN 446) in GG 32167 of 29 April 2009. Par 2.2.1 of the Code requires, with reference to the Charter, 26% ownership by HDSAs indicated by voting rights, economic interest and net value of mining companies. Par 2.2.2 requires 40% participation by HDSAs in the executive committee, top management, senior management, middle management and junior management as well as "demonstrable HDSA fiduciary [board] participation". Par 2.8.2 of the Code requires that 100% of the "total number of hostels in a measured entity must have been upgraded into single accommodation apartments and/or converted into housing units". In terms of s 9 of the Broad Based Black Economic Empowerment Act 53 of 2003, the Minister of Trade and Industry is empowered to issue codes of good practice regarding black economic empowerment.

⁴⁵² See "Purpose of the Document" in the Code of Good Practice.

⁴⁵³ See chap 5, sec 3.2.1.2 for a discussion of the manner in which the requirement of 26% black ownership in the Mining Charter and Code of Good Practice creates uncertainty.

⁴⁵⁴ Mining Charter, par 2.1; Code of Good Practice, par 2.2.1.

to effective ownership⁴⁵⁵ as the “meaningful participation by HDSAs in the ownership, voting rights, economic interest and management control of mining entities”.⁴⁵⁶ The Code of Good Practice refers to ownership as measuring and recognizing “the entitlement to the voting rights and economic interest associated with equity holding”.⁴⁵⁷ Certainty will be strengthened if these types of differences do not emerge. Although transformation of the mining industry is an important governmental objective, there is no specific reason for the difference in the description of ownership in the Code of Good Practice and the Mining Charter. The difference in description of ownership in these two documents is unjustified in the light of the objectives that the government pursues. In this regard, the imprecise drafting of these documents unnecessarily and unjustifiably weakens optimal mineral tenure security.

The 2013 Amendment Bill attempted to change the definition of “this Act” to include the Code of Good Practice, the Mining Charter as well as the Housing and Living Conditions Standards.⁴⁵⁸ The intention was thus that contravention of any of the provisions of these documents would have the effect that the Minister is not under an obligation to renew prospecting rights and mining rights.⁴⁵⁹ President Jacob Zuma refused to assent to the Bill due to concerns that about its constitutionality.⁴⁶⁰ One of the reasons for the concerns regarding unconstitutionality was that by changing the definition of “this Act”, the Bill elevated the Code, Mining Charter and Housing and Living Conditions Standards to the level of national legislation.⁴⁶¹ Furthermore, the Bill would give the Minister the power to amend or repeal these documents without having to comply with the constitutionally mandated procedures for the amendment of legislation.⁴⁶² The President’s refusal to assent to the Bill for these reasons is reassuring. Still, the attempt to elevate the Code of Good Practice, Mining Charter and

⁴⁵⁵ Leon 2013 *JERL* 188 opines that the Charter “confusingly requires” effective ownership.

⁴⁵⁶ Def of “effective ownership” in the Charter.

⁴⁵⁷ Def of “ownership” in the Code of Good Practice.

⁴⁵⁸ 2013 Amendment Bill, s 1(zA); Housing and Living Conditions Standard for the Minerals Industry (GN 445) in *GG* 32166 of 29 April 2009.

⁴⁵⁹ The 26% ownership requirement is also relevant when rights are granted. In *Mawetse SA Mining Corporation (Pty) Ltd v Minister of Mineral Resources and Others* (3081/12) [2014] ZAGPPHC 11 (30 January 2014) the Minister requested the applicant for a prospecting right to comply with the 26% requirement in terms of s 17(4) of the MPRDA. At [12] – [17], the court held that the grant of the prospecting right was therefore dependent on compliance with the 26% black economic empowerment ownership requirement. S 23(1)(h) of the MPRDA places an obligation on the Minister to grant mining rights only if applicants can show that the granting of the right will, *inter alia*, further the objective of advancing opportunities for previously disadvantaged persons.

⁴⁶⁰ See the President’s letter to parliament dated 16 June 2015 available at <http://cer.org.za/wp-content/uploads/2010/08/Zuma-letter-to-the-NA-re-MPRDA-Bill.pdf>.

⁴⁶¹ Presidential letter to parliament dated 16 June 2015.

⁴⁶² Presidential letter to parliament dated 16 June 2015.

Housing and Living Conditions Standards to the level of national legislation underlines the importance of clear, unequivocal provisions in these documents.

2.1.3 Synopsis: Renewal of rights; MTS strengths and weaknesses

Taking into account the legitimate objectives of the government, the effect of the provisions of the MPRDA regarding renewal of rights, discussed here, on mineral tenure security may be summarised as follows:

	Mining permits	Prospecting rights	Mining rights
MTS strengthened		<i>Compulsory granting</i> if criteria are met	<i>Compulsory granting</i> if criteria are met
MTS weakened	<i>Wide governmental discretion: no obligation to grant or criteria for decision to grant</i>	<i>Vague and imprecise drafting: criteria for renewal ("relevant provisions")</i>	<i>Vague and imprecise drafting: criteria for renewal ("relevant provisions" and "any other law")</i> <i>Wide governmental discretion: criteria for renewal (social and labour plan)</i>

Table 1 Synopsis: Renewal of rights; MTS strengths and weaknesses

In case of mining permits, the MPRDA weakens mineral tenure security by failing to provide for compulsory granting of mining permits and also by not listing any criteria on which decisions to renew permits are based. As regards prospecting rights and mining rights, the MPRDA, in principle, strengthens mineral tenure security by providing for compulsory granting of renewals if specified criteria are met. However, as regards obligatory renewals of prospecting rights and mining rights, the regulatory framework, at times, creates uncertainty and weakens mineral tenure security through unnecessarily vague and imprecise drafting. Furthermore, in case of renewals of mining rights, vague and imprecise drafting of the social and labour plan leads to wide governmental discretion that is not based on objective and closely circumscribed criteria. This discretion unnecessarily and unjustifiably weakens optimal mineral tenure security.

2.2. The ability to remove and dispose of minerals

Apart from being able to prospect and mine, profitable development requires that right holders are in a position to dispose of minerals found for their own account. The MPRDA confers the ability to remove and dispose of minerals found on holders of mining rights.⁴⁶³ The Act also confers this ability, with certain limitations, on holders of prospecting rights. The MPRDA does not explicitly confer the ability to remove and dispose of minerals found on holders of mining permits. However, the legislator probably intended to grant this ability to holders of mining permits.⁴⁶⁴

Holders of prospecting rights may only remove and dispose⁴⁶⁵ of minerals for their own account in quantities necessary for testing, identification and analyses.⁴⁶⁶ These limitations provide an indication of the purpose of prospecting operations, namely to determine the extent and economic value of mineral deposits⁴⁶⁷ with the aim of establishing whether mining operations will be economically viable. The limitations that are placed on holders of prospecting rights, therefore, do not have an adverse impact on mineral tenure security in general because they do not hinder the main aim of prospecting operations. Furthermore, except in the case of diamonds, holders of prospecting rights do not need ministerial consent to remove and dispose of minerals for testing, identification and analysis.⁴⁶⁸ Ministerial consent is required if holders of prospecting rights want to remove and dispose of any quantity of diamonds and bulk samples of any other mineral found in the course of prospecting.⁴⁶⁹

A point of criticism is that the MPRDA causes uncertainty by not describing the quantities of minerals that can be removed for testing, identification and analysis without ministerial consent. The Act further does not quantify bulk samples nor does it list any criteria in terms of which the Minister must exercise the discretion when holders of prospecting rights wish to remove diamonds or bulk samples of any mineral except diamonds.⁴⁷⁰ According to one

⁴⁶³ MPRDA, s 5(3)(c).

⁴⁶⁴ Dale *et al South African Mineral and petroleum Law* MPRDA-124.

⁴⁶⁵ Dale *et al South African Mineral and Petroleum Law* MPRDA-256 (4) correctly argues that “dispose” in this context probably means “alienating” in the narrow sense of the word because it is coupled with “for his or her own account”.

⁴⁶⁶ MPRDA, s 20(1).

⁴⁶⁷ MPRDA, s 1 def of “prospecting”.

⁴⁶⁸ MPRDA, s 20(1) does not require ministerial consent. In terms of s 20(2) ministerial consent is always required in case of diamonds.

⁴⁶⁹ MPRDA, s 20(2).

⁴⁷⁰ S 20(2) does not list any criteria.

argument, the quantities that are necessary for testing, identification and analysis will differ from one mineral type to another, and the test will therefore be the intention of the removal.⁴⁷¹ Thus, provided that the intention is to remove minerals for testing, identification and analysis, ministerial consent is not required. Concerning bulk samples, the argument is that the emphasis is still on the word “samples”, meaning that ministerial consent will not be obtainable if the intention is to remove the minerals for any other reason than sampling.⁴⁷² Ministerial consent will, for example, not be obtainable if the intention is to sell the minerals.⁴⁷³ It is thus a matter of evidence regarding the intention of the removal whether samples are bulk, which will require ministerial consent to remove, or whether samples are not bulk, in which case the holder of the prospecting right will not need to obtain ministerial consent.⁴⁷⁴

The reason for requiring ministerial consent in the case of removal of bulk samples of minerals is understandable: If holders of prospecting rights are allowed to remove and dispose of large quantities of minerals, the distinction between prospecting and mining can become blurred.⁴⁷⁵ Still, holders of prospecting rights need certainty that they will be able to remove the necessary samples, bulk or otherwise, to conduct tests with the aim of determining whether mining operations will be economically viable. Certainty regarding removal of samples is thus necessary to establish whether mines can be developed profitably. However, the MPRDA does not provide any guidelines regarding whether samples are bulk or not. Furthermore, if samples are bulk, the Act does not list any criteria on which the Minister must base the decision to consent to removal.

Guidelines concerning the quantities of minerals that can be removed and disposed of for testing, identification and analysis without ministerial consent will create more certainty to holders of prospecting rights, thus strengthening mineral tenure security. The same is true for the quantities of minerals that will constitute bulk samples. Certainty can also be fortified by placing an obligation on the Minister to grant consent for removal of bulk samples if specified

⁴⁷¹ Dale *et al South African Mineral and Petroleum Law* MPRDA-256(4). See Richard *et al* (eds) *Techniques in Underground Mining: Selections from Underground Mining Methods Handbook* 6 – 8 for a discussion of the technical issues concerning sampling and the minimum fragment size with respect to type of mineralisation.

⁴⁷² Dale *et al South African Mineral and Petroleum Law* MPRDA-256(5). See *S v McDonald and Others* 2002 1 SACR 66 (NM) 69 where the court referred to, *inter alia*, the intention with which minerals were removed to determine if the excavation in question amounted to prospecting or mining under the Minerals Act of 1991.

⁴⁷³ Dale *et al South African Mineral and Petroleum Law* MPRDA-265(4).

⁴⁷⁴ Dale *et al South African Mineral and Petroleum Law* MPRDA-256(5).

⁴⁷⁵ Dale *et al South African Mineral and Petroleum Law* MPRDA-256(4) argue that removal and disposal of minerals found during prospecting operations in itself blurs the distinction between prospecting and mining operations.

criteria are met. The Act can, for example, provide that the Minister *must* consent to removal if an independent expert is of the opinion that removal of bulk samples is necessary for testing in a specific instance.⁴⁷⁶ The lack of guidelines, criteria and compulsory granting of consent means that the Minister has wide and uncircumscribed discretion to decide whether removal of bulk samples is necessary. This wide and uncircumscribed discretion leads to uncertainty on the part of holders of prospecting rights regarding their ability to do the necessary tests to determine the economic viability of a deposit.

As explained, the government has a legitimate interest in limiting the abilities of holders of prospecting rights to remove large quantities of minerals, namely to preserve the distinction between prospecting and mining. However, it is not necessary to create uncertainty to pursue this interest. The government can maintain the distinction between prospecting and mining and ensure that holders of prospecting rights do not remove large quantities of minerals without wide and uncircumscribed discretion that leads to uncertainty. Certainty can be achieved by compulsory grant of consent to remove bulk samples that is based on objectively ascertainable criteria. It therefore seems that wide governmental discretion is not justified here in the light of the interests of the government and such discretion therefore unnecessarily and unjustifiably weaken optimal mineral tenure security.

2.3. Synopsis: Removal and disposal of minerals; MTS strengths and weaknesses

Taking into account, the legitimate objectives of the government, the effect of the provisions of the MPRDA regarding the ability to remove and dispose of minerals, discussed here, on mineral tenure security may be summarised as follows:

	Mining permits	Prospecting rights	Mining rights
MTS strengthened	Right holders can remove and dispose of minerals	Right holders can remove and dispose of minerals for testing and analysis	Right holders can remove and dispose of minerals
MTS weakened		<i>Wide governmental discretion: no guidelines regarding</i>	

⁴⁷⁶ See Bastida 2001 *JERL* 37 where the author argues that procedures open to discretion is an important factor that fosters legal uncertainty.

		<p>quantities that can be removed for testing without consent</p> <p><i>Wide governmental discretion: no obligation to grant permission to removal bulk samples and no criteria on which decision is based</i></p>	
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Table 2 Synopsis: Removal and disposal of minerals; MTS strengths and weaknesses

The MPRDA strengthens mineral tenure security by granting holders of prospecting rights, mining rights and mining permits the ability to remove and dispose of minerals. However, as regards removal of samples, bulk or otherwise, the Act unnecessarily increase uncertainty and risks relating to profitable development of mines through wide and uncircumscribed governmental discretion.

2.4. The ability to choose not to prospect and mine

Profitable development of mines requires that holders of rights to minerals have some degree of freedom to choose not to prospect and mine at a given time.⁴⁷⁷ Financial reasons and market conditions are the most important considerations that can influence the ability to develop mines profitably.⁴⁷⁸

Two issues are apparent regarding the manner in which the MPRDA regulates the ability to choose not to prospect and mine at a particular time. The first issue relates to the ability of rights holders to decide when to commence prospecting or mining operations.⁴⁷⁹ The second issue concerns the ability of right holders to interrupt operations when necessary for profitable development of mines and still retain their rights.⁴⁸⁰

⁴⁷⁷ Bastida 2001 *JERL* 38.

⁴⁷⁸ See Mostert *Principles and Policies* 138. Before the MPRDA, other reasons to choose not to exploit minerals included preference not to disturb the surface due to personal attachment to the land, increasing the value of the land, holding unmined minerals as valuable investments and a desire to monopolise industries for financial reasons. See *Agri SA (CC)* [45] and [50].

⁴⁷⁹ Sec 2.4.1 below.

⁴⁸⁰ Sec 2.4.3 below.

2.4.1. Commencement of prospecting and mining

It has been argued that mineral tenure security is best served if the regulatory regime leaves “the decision as to whether, when and how to start mining operations” to the investor.⁴⁸¹ This presumes that investors are in the best position to decide whether they can develop mines profitably at a given time.

The MPRDA leaves the decision regarding when to start mining operations at the discretion of holders of mining permits.⁴⁸² However, holders of prospecting rights and mining rights are not free to decide when to commence prospecting or mining operations. On the contrary, the MPRDA compels holders of prospecting rights and mining rights to start prospecting activities or mining operations within specified times after the “effective date”,⁴⁸³ unless the Minister authorises an extension of the periods.⁴⁸⁴ Prospecting activities must commence within 120 days from the date on which rights become effective⁴⁸⁵ and mining operations, in terms of mining rights, within one year from such date.⁴⁸⁶ The Minister can authorise an extension of the period in both cases.⁴⁸⁷ The MPRDA does not leave the decision about when to start mining and prospecting to holders of prospecting rights and mining rights. Accordingly, right holders are not able to decide when it is most suitable to commence activities to ensure profitable development.

On the one hand, this limitation of the ability of holders of prospecting rights and mining rights to decide not to prospect and mine poses a risk to profitable development of mines. Forcing holders of rights to commence prospecting and mining may compel them to start operations in circumstances not suitable for profitable development of mines. On the other hand, the limitation can be justifiable in light of the objectives of the MPRDA to ensure optimal exploitation⁴⁸⁸ of mineral resources to promote employment, as well as to improve social and

⁴⁸¹ Bastida 2001 *JERL* 40.

⁴⁸² S 27 of the MPRDA do not contain any provisions regarding commencement of operation in term so of mining permits.

⁴⁸³ See below in this sec for a discussion of the meaning of “effective date”.

⁴⁸⁴ The Minister has the power to extend the periods by virtue of ss 19(2)(b) and 25(2)(b) of the MPRDA for prospecting rights and mining rights respectively.

⁴⁸⁵ MPRDA, s 19(2)(b).

⁴⁸⁶ MPRDA, s 25(2)(b).

⁴⁸⁷ MPRDA ss 19(2)(b) and 25(2)(b) for prospecting rights and mining rights respectively.

⁴⁸⁸ Optimal exploitation is not an objective stated in s 2 of the MPRDA, but the Act does provide for optimal exploitation in s 51.

economic welfare.⁴⁸⁹ The need to ensure optimal exploitation of mineral resources to boost economic growth and simultaneously create employment, fight poverty and address the gap between rich and poor⁴⁹⁰ must thus be weighed against the objective of ensuring mineral tenure security.⁴⁹¹

One way to protect the interest of the government and the interests of right holders is by setting clear rules regarding the commencement of prospecting and mining and thus create certainty for holders of prospecting rights and mining rights in this regard. Here, the MPRDA poses two challenges. Firstly, the meaning of “effective date” (the date from which the count-down to commence operations start) is unclear. Secondly, the Act does not provide any indication of the circumstances in which the Minister may extend the periods and also does not list any criteria on which the Minister must base a decision to extend the periods.

According to the MPRDA, the effective date⁴⁹² means when “the relevant rights [are] executed”.⁴⁹³ The meaning of “execution” of rights is unclear and is open to different interpretations. Firstly, “execution” of prospecting and mining rights can refer to the date of registration of these rights in the Mineral and Petroleum Titles Registration Office.⁴⁹⁴ However, one of the obligations of right holders is to lodge their rights for registration within specified times after these become effective.⁴⁹⁵ The effective date, as the date of execution, is thus also the date from which the countdown starts for the timeframe within which to register rights. The date of registration can thus not be the effective date. Secondly, “execution” can refer to the date on which the Minister grants rights. Rights are granted when applicants are

⁴⁸⁹ MPRDA, s 2(f). Badenhorst 1997 *De Jure* 183 and 1998 *Obiter* 152 and 153 raises an interesting option regarding the manner in which problems of non-exercising of rights can be addressed. According to the author a “use it or lose it” approach that follows the rules of prescription can be used.

⁴⁹⁰ *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2014 6 SA 403 (GP) [63]; *Agri SA* (CC) [2].

⁴⁹¹ See *Meepo v Kotze* [8] (although in a different context) where the court was faced with conflicting interests of different parties. The court said that “when interpreting the applicable provisions of the MPRDA..., preference should be given to a construction which would result in the most rational balance...”.

⁴⁹² This definition was introduced by s 1(f) of the 2008 Amendment Act. Before the 2008 Amendment Act, the effective date referred to the date on which the environmental plan or programme was approved. See Dale *et al South African Mineral and Petroleum Law* MPRDA-207 in general, MPRDA-243 for prospecting rights, and MPRDA-265 for mining rights.

⁴⁹³ MPRDA, s 17(5) for prospecting rights and s 23(5) for mining rights read with the definition of “effective date” in s 1 of the MPRDA.

⁴⁹⁴ In terms of the Mining Titles Registration Act 16 of 1967. In *Mawetse* [19] – [20] the court rejected the interpretation that rights are granted only when registered. The case was decided before the def of “effective date” was changed by s 1(f) of the 2008 Amendment Act. At the time of the decision, the “effective date” thus meant the date on which the environmental management plan was approved.

⁴⁹⁵ MPRDA, s 19(1)(a) for prospecting rights and s 25(2)(a) for mining rights.

informed of the grant and the terms and conditions that attach to the right.⁴⁹⁶ Holders of prospecting rights and mining rights will be in a position to do a final evaluation of the profitability of developing a mine only when they are aware of the terms and conditions that attach to the right.⁴⁹⁷ Mineral tenure security will thus be strengthened if one accepts, that the countdown to commence prospecting and mining activities, begins once the Minister grants rights or permits and communicates the terms and conditions thereof to the holder. However, acceptances of this nature do not create certainty.

The uncertainty and risks for profitable development here is caused by vague and imprecise drafting regarding the meaning of the “effective date”. As explained, the government has legitimate interests to ensure that right holders start prospecting and mining within certain time periods after rights are granted. However, there are no specific reason or objective for the vague and imprecise drafting of the MPRDA regarding the “effective date”. Vague and imprecise drafting here causes unnecessary uncertainty and unjustifiably weakens optimal mineral tenure security. This uncertainty and accompanying risks can be eliminated easily by clearing up the meaning of the “effective date”

Moreover, there is a risk that delays in granting rights and communicating terms and conditions to applicants can prevent optimal profitable development of mines.⁴⁹⁸ Market conditions can, for example, change between the time of application and commencement of operations. Applicants may be aware of the requirement to commence prospecting and mining and take this into account when considering the possibility of profitable development of mines. However, if there are long delays between applications and granting of rights, the market can change in such a way that it is no longer suitable for profitable development.

In certain instances, the MPRDA provides specified time frames in which the government must take decisions and notify applicants accordingly, while time frames cause uncertainty in other

⁴⁹⁶ *Mawetse* [19]; *Meepo v Kotze* [125]. According to *Mawetse* [28], the court in *Meepo* held that rights are granted when registered. However, in *Meepo*, date on which the terms and conditions were communicated to the applicant *happened* to be the date of execution of the notarial deed. In my understanding, *Meepo* is not authority for the conclusion that rights generally are granted only when registered. *Mawetse* rightfully rejects the decision in *Meepo* for holding that the rights are contractual when granted. Also see chap 6, sec 2.1 fn 804.

⁴⁹⁷ *Mawetse* [19].

⁴⁹⁸ See Bastida 2001 *JERL* 37 - 38 where the author argues that there is a “need to limit the time span used by the government agency for granting mineral rights, approving applications and processing key documents”. Delays in these procedures cause uncertainty. According to the author this aspect of mineral tenure security is part of the regulatory time dilemma. See Otto in Bastida *et al* for a discussion of the regulatory time dilemma in general. Also see Badenhorst 2014 *JERL* 14 where the author states that “limitation of time frames for the state to approve the renewal or retention of a right also improves security of mineral tenure”.

instances. A comparison of some aspects of the application procedures for prospecting rights and mining rights illustrate this. If applications for mining rights are successful, the Regional Manager must accept the applications within fourteen days of lodgement.⁴⁹⁹ After the acceptance, the Regional Manager has another fourteen days to notify applicants to take certain steps.⁵⁰⁰ In case of successful applications for prospecting rights, applicants must also be notified to take certain steps within fourteen days of acceptance of the application.⁵⁰¹ However, the MPRDA does not determine how long the Regional Manager has to accept applications for prospecting rights. This means that the Regional Manager can, for example take thirty days, sixty days or ninety days to accept the application. This creates uncertainty compared to the acceptance of mining rights which must occur within fourteen days of lodgement.

It is possible to argue that applications for prospecting rights are deemed to be accepted within fourteen days if applicants do not receive the required notice that applications are unsuccessful during this time.⁵⁰² However, interpretations of this nature do not bolster certainty. There seems to be no reason why the MPRDA cannot be amended to regulate applications for prospecting rights in the same manner as applications for mining rights by prescribing a time period in which the Regional Manager must accept applications. Such an amendment will certainly decrease the risk of time delays that can influence profitable development of mines. Optimal mineral tenure security is weakened by seemingly careless drafting of the MPRDA that does not seem to be in pursuit of any particular governmental objective. Here too, the uncertainty can be terminated easily by placing a time limit on the Minister to accept applications for prospecting rights.

The second challenge for mineral tenure security is that the MPRDA does not provide any indication of the circumstances in which the Minister can authorise extensions of the periods in which prospecting and mining must commence. The Act also does not indicate any criteria on which the Minister must base decisions to extend the periods. It is not clear whether holders can apply for extensions and when these will be authorised. It is also not certain whether the Minister can unilaterally decide to extend the periods. If extensions of the periods are necessary to ensure that mines can be developed profitably, holders of rights do not know what the

⁴⁹⁹ MPRDA, s 22(2).

⁵⁰⁰ MPRDA, s 22(4).

⁵⁰¹ MPRDA, s 16(4).

⁵⁰² See, however, Dale *et al South African Mineral and Petroleum Law* MPRDA-15 where the authors say that the MPRDA “stops short of provisions...to the effect that applications must be decided within a stipulated period failing which the application is deemed granted”.

requirements are that they must meet to be awarded an extension. The wide and uncircumscribed discretion of the Minister in this regard creates uncertainty and poses a risk to right holders regarding profitable development of mines. There is no reason why the Act cannot be amended to provide that the Minister *must* grant extensions if specified criteria are met. The wide discretion of the Minister to grant extensions seems unnecessary for specific reasons or legitimate governmental objectives and thus unjustifiably weaken optimal mineral tenure security.

Regarding commencement of prospecting and mining activities within specified times after rights are granted, the MPRDA provides better security of tenure to holders of mining permits than to holders of mining rights and prospecting rights. In the case of mining permits, the decision regarding when to commence mining is left to holders of the rights. However, mining permits are initially granted for only two years. It is probably not necessary to force holders of mining permits to commence mining operations within specified times after permits are granted. If permit holders do not start mining shortly after permits are granted, they will in all probability not have enough time to develop the mine profitably. Still, in case of mining permits, investors can decide when it is best to start mining to ensure profitable development of mines.

2.4.2 Synopsis: Obligation to commence operations; MTS strengths and weaknesses

Taking into account the legitimate objectives of the government, the effect of the provisions of the MPRDA regarding the obligation to commence prospecting and mining, discussed here, may be summarised as follows:

	Mining permits	Prospecting rights	Mining rights
MTS strengthened	No requirement to commence mining		
MTS weakened		<i>Vague and imprecise drafting: effective date</i> <i>Careless drafting: application procedures (time period for</i>	<i>Vague and imprecise drafting: effective date</i> <i>Wide governmental discretion: extension</i>

		acceptance of obligations) <i>Wide governmental discretion: extension of periods to commence</i>	of periods to commence
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Table 3 Synopsis: Obligation to commence operations; MTS strengths and weaknesses

The MPRDA strengthens mineral tenure security of holders of mining permits by not requiring them to commence mining within specified times after rights are granted. The weakening of mineral tenure security by forcing holders of prospecting rights and mining rights to commence operations within specified times after rights are granted is justifiable in the light of the objectives pursued, namely optimal exploitation of mineral resources. However, certainty of holders of prospecting rights and mining rights is compromised unnecessarily by careless drafting of the date from which the countdown to commence activities start. The Act also poses risks to profitable development by not placing a time limit on the Regional Manager for the acceptance of prospecting rights. Furthermore, mineral tenure security is weakened by unjustifiable wide uncircumscribed governmental discretion regarding extension of periods in which prospecting and mining must commence.

2.4.3. Interruption of prospecting and mining

It has been argued that the profitable development of mines requires that holders of rights must be able to retain rights when they are unable “to develop the discovery due to unfavourable market conditions, lack of finance, or any other reason”.⁵⁰³ The following paragraphs investigate the extent to which the MPRDA provides mineral tenure security regarding the ability of right holders to retain rights when prospecting and mining will not be profitable at a given time.

The MPRDA provides that holders of prospecting rights and mining rights must prospect and mine actively and continuously according to the prospecting work programme and mining

⁵⁰³ Bastida 1996 *JERL* 38. The author refers to mining rights only. It is accepted here that the same requirement applies to prospecting rights and mining permits in the South African context. Also see Ayisi 2009 *JERL* 85 where the author discusses the positive impact that the ability to suspend mining operations had on the reform of Ghana’s mining laws. See Cawood 2004 *JERL* 140 for a different view on retention “licences”.

work programme respectively.⁵⁰⁴ There is no obligation on holders of mining permits to continue mining operations after mining has commenced. Holders of mining permits are thus free, without limitations, to choose to not to mine. In this regard, the MPRDA strengthens the mineral tenure security of holders of mining permits. The Act does not provide for any exception in relation to the obligation of holders of prospecting rights and mining rights to mine actively according to the mining work programme. Holders of prospecting rights and mining rights are forced to mine even if doing so is not profitable due to prevailing market conditions or their own financial circumstances. Although active development of mines is necessary for optimal exploitation and creation of employment, forcing holders of mining rights to continue operations in the face of market conditions that do not allow profitable development of mines is not necessary. In fact, it is a severe setback for optimal mineral tenure security.

Forcing holders of prospecting rights and mining rights to continue prospecting and mining irrespective of market conditions or their own financial position may well be an excessive regulatory measure, disproportionate to the objectives pursued. The government can pursue the objectives of optimal exploitation of mineral resources, and reap the benefits thereof, without a blanket rule on continued operations irrespective of any circumstances. Optimal mineral tenure security can be strengthened by allowing right holders of rights to discontinue operations and retain their rights under specifically circumscribed conditions. These circumstances can include, for example, that market conditions are not suitable to prospect and mine profitably at a given time as well as other circumstances beyond the control of right holders.

The only situation in which the MPRDA allows postponement of operations is upon completion of prospecting in the form of retention permits. Retention permits are available to holders of prospecting rights⁵⁰⁵ who completed prospecting and who wish to postpone mining operations.⁵⁰⁶ These permits allow holders of prospecting rights to retain rights when they are

⁵⁰⁴ MPRDA, s 19(2)(c) for prospecting rights and s 25(2)(c) for mining rights. S 19(2)(c) includes the word "continuously" while s 25(2)(c) refers only to "actively". The result of the two sections is, however, the same.

⁵⁰⁵ MPRDA, s 31(1).

⁵⁰⁶ This is apparent from the fact that according to s 32(1)(b) of the MPRDA, one of the requirements on which the discretion of the Minister to issue retention permits depend, is whether holders of prospecting rights have completed prospecting activities and a feasibility study. Furthermore, according to s 33(b) the Minister has discretion not to grant a retention permit if the applicant has not completed prospecting and the feasibility study. See, however Badenhorst 2014 *JERL* 19 where the author says "[a] holder of a prospecting right may obtain a

unable to develop the mineral deposit in limited circumstances.⁵⁰⁷ The availability of retention permits may strengthen mineral tenure security as they reduce the risk of not being able to develop mines profitably when prospecting has ended. The following paragraphs investigate the role of retention permits in providing mineral tenure security.

The MPRDA does not place an obligation on the Minister to issue retention permits. According to section 32(1)(d), the Minister *may* issue retention permits based on the listed criteria. Similarly, section 33(a) provides that the Minister *may* refuse to grant retention permits based on the criteria listed. This discretion can be positive and negative for mineral tenure security. It is arguable that the discretion weakens mineral tenure security because applicants are uncertain that the Minister will grant retention permits if they meet the criteria.⁵⁰⁸ However, it is argued below that the discretion can also strengthen mineral tenure security because it allows interpreting the MPRDA to include more circumstances in which retention permits are available.

According to section 32(1)(d) of the MPRDA, the Minister may issue retention permits if, *inter alia*,⁵⁰⁹ holders of prospecting rights studied the market conditions and found that it will be uneconomical to mine due to prevailing market conditions.⁵¹⁰ This consideration takes into account the lack of demand for the mineral in question as well as depressed commodity prices.⁵¹¹ According to Dale *et al*, the term is narrow because it does not include other objective market conditions for example that flooding of the market with a specific mineral will result in lower commodity prices.⁵¹² The mining of the mineral in this scenario may still be cost-

retention permit to suspend the terms and conditions of the prospecting right during unfavourable market conditions”.

⁵⁰⁷ Retention permits are also relevant as far the linkage between the prospecting phase and mining phase is concerned. See Mostert *Principles and Policies* 84; Dale *et al South African Mineral and Petroleum Law* MPRDA-312. Retention permits can further be relevant to lengthen the time allowed for a specific activity. See Williams Bastida *et al* 55. This is, however, not the case under the MPRDA because retention permits postpone mining upon completion of prospecting. No prospecting or mining will thus occur during the period of the retention permit.

⁵⁰⁸ Dale *et al South African Mineral and Petroleum Law* MPRDA-317.

⁵⁰⁹ Other factors listed in s 32 are “if the holder of the prospecting right has (a) prospected on the land to which the application relates; (b) completed the prospecting activities and a feasibility study; (c) established the existence of a mineral reserve which has mining potential; (d)... (included in the text above); and (e) complied with the relevant provisions of [the MPRDA], any other relevant law and the terms and conditions stipulated in the prospecting right”. The reasons stated here which are not mentioned in the text above are of a formal nature and do not require the exercise of ministerial discretion.

⁵¹⁰ MPRDA, s 32(1)(d).

⁵¹¹ Dale *et al South African Mineral and Petroleum Law* MPRDA-319 and MPRDA-325; Mostert *Principles and Policies* 84.

⁵¹² Dale *et al South African Mineral and Petroleum Law* MPRDA-319 and MPRDA-325.

effective based on prevailing market conditions, but flooding of the market will lead to closure of marginal mines.⁵¹³ It is not clear why Dale *et al* insist that a reading of section 33(1)(d) must exclude the example mentioned. There is no reason why objective market conditions, other than lack of demand for the mineral and depressed commodity prices, cannot be read into section 32(1)(d).⁵¹⁴ According to Dale *et al*, the term “uneconomical due to prevailing market conditions” also does not include factors such as lack of technology, water, power, transport, or other forms of services or infrastructure.⁵¹⁵

Section 32(1)(d) must, however, be read with section 33(a). According to section 33(a), the Minister *may refuse* to issue retention permits if the mineral can be mined profitably.⁵¹⁶ This means that the Minister is not under an obligation to refuse to grant permits if the mineral can be mined profitably. Thus, the Minister may grant retention permits even if minerals can be mined profitably. Surely, lack of technology, water, power, transport or other forms of services or infrastructure can influence whether a mineral can be mined profitably. When interpreting section 33(a) Dale *et al* state: “Whether or not the mineral can be mined profitably is a matter of technical advice”.⁵¹⁷ The authors then stress that this is an objective test, which is not related to subjective factors pertaining to the specific applicant.⁵¹⁸ Thus, in the context of section 33(a), the authors accept that objective technical abilities and reasons related to infrastructure can influence whether a mineral deposit can be mined profitably.⁵¹⁹ An interpretation that gives the Minister discretion to grant retention permits based on objective market conditions as well as objective technical abilities and infrastructure related factors is preferable.⁵²⁰ Such

⁵¹³ Dale *et al South African Mineral and Petroleum Law* MPRDA-319 and MPRDA-325.

⁵¹⁴ E.g. the need not to flood the market with the effect that commodity prices drop. S 51(2) of the MPRDA that applies after mining has commenced, gives the Minister the power, upon recommendation of the Minerals and Mining Development Board, to direct holders of mining rights to take corrective measures if minerals are not mined optimally. S 51(2) specifically provides that the Board must take technical and financial resources of holders into account before making recommendations. S 51(2) does not apply to retention permits, but it does indicate that in the realm of the MPRDA, subjective factors of holders of rights to minerals are not ignored.

⁵¹⁵ Dale *et al South African Mineral and Petroleum Law* MPRDA-319.

⁵¹⁶ The Minister must have regard to information submitted under section 32(1) of the MPRDA and research conducted by the Minerals and Mining Development Board.

⁵¹⁷ Dale *et al South African Mineral and Petroleum Law* MPRDA-323.

⁵¹⁸ Dale *et al South African Mineral and Petroleum Law* MPRDA-323.

⁵¹⁹ It is not clear whether the difference in interpretation between ss 32(1)(d) and 33(a) stem from the difference in the wording of the two sections. Section 32(1)(d) refers to “uneconomical due to prevailing market conditions” while s 33(a) refers to the mineral being mined “profitably”.

⁵²⁰ This interpretation is especially pressing taking into consideration the effect of load shedding on the mining industry. Load shedding occurs due to electricity demand that outweighs supply. To avoid complete failure of the country's power supply system, Eskom (the national parastatal electricity supplier) implements electricity cuts on a planned rotating schedule throughout the country. See <http://loadshedding.eskom.co.za/loadshedding/description>. These power cuts have a detrimental effect on South Africa's economy including the productivity and profit-making of mines. See Allix 15 July 2015 *Business Day*

an interpretation reduces the risks of not being able to develop mines profitably if objective factors have the effect that profitable development is not possible after prospecting has ended. The MPRDA should be amended to allow holders of prospecting rights and mining rights also to discontinue operations and retain rights for these reasons.

A further question is whether the Minister can take subjective factors, applicable to a specific applicant, into account when deciding whether to issue retention permits. A reading of sections 32(1)(d) and 33(a) creates the impression that subjective factors cannot be taken into account.⁵²¹ The MPRDA, however, gives the Minister a discretionary power to issue or refuse to issue retention permits by stating that the Minister *may* issue or refuse to issue permits.⁵²² This can be interpreted to mean that the list of factors is not a *numerus clausus* and the applicant can deduce reasons others than those listed.⁵²³ The reasons can then include subjective factors such as the financial constraints of the applicant.⁵²⁴ Subjective factors can also include the fact that holders of prospecting rights hold mining rights over another piece of land that must be mined first.⁵²⁵ The wording of section 34(2), that regulates renewal of retention permits, is informative in this regard. According to this section, retention permits may *only* be renewed if the criteria in subsections (a)⁵²⁶ and (b)⁵²⁷ are met. Here it is clear that the list of factors is a *numerus clausus* and that no other factors can be taken into account

In summary, the MPRDA can be interpreted to take into account objective market conditions, infrastructure-related factors and subjective factors relating to a particular applicant, when the Minister considers applications for retention permits. Such an interpretation would strengthen

BDLive available at <http://www.bdlive.co.za/business/industrials/2015/07/15/load-shedding-is-squeezing-the-life-out-of-sas-factories>; Van der Nest 11 February 2015 at <http://www.tralac.org/discussions/article/7000-the-economic-consequences-of-load-shedding-in-south-africa-and-the-state-of-the-electrical-grid.html>.

⁵²¹ Dale *et al South African Mineral and Petroleum Law* MPRDA-319 and MPRDA-323.

⁵²² MPRDA, ss 32(1) and 33.

⁵²³ Dale *et al South African Mineral and Petroleum Law* MPRDA-323. See Mostert *Principles and Policies* 85 where the author states that the lists of factors for granting and renewal of prospecting rights, mining rights and retention permits are *numeri clause*. Mostert relies on Dale *et al South African Mineral and Petroleum Law* as authority, but as far as can be established Dale *et al* argue that the list of requirements relating to retention permits is not a *numerous clauses*. In contrast, the lists of requirements relating to prospecting rights and mining rights are *numeri clause*. See Dale *et al South African Mineral and Petroleum Law* MPRDA 204, MPRDA-233 and MPRDA-259 in relation to prospecting rights and mining rights.

⁵²⁴ Bastida 2001 *JERL* opines that holders of mining rights should be able to retain mining permits if they are unable to develop discoveries and that the reasons for the retention must include lack of finance. The author mentions this as an important factor in the context of providing security of tenure in mining industries in general.

⁵²⁵ Dale *et al South African Mineral and Petroleum Law* MPRDA-319.

⁵²⁶ Namely that the holder has complied with any relevant provisions of the MPRDA, any other relevant law and the terms and conditions of the retention permit.

⁵²⁷ Namely that the market conditions in s 32(1)(d) (the market conditions that existed when the retention permit was applied for) still prevails.

mineral tenure security, because it would allow for interruption of mining operations upon completion of prospecting for an extensive array of reasons if investors cannot develop mines profitably.

Certainty would further served by obliging the Minister to grant retention permits if a *numerus clausus* of closely circumscribed criteria are met. A closed list of factors will have the disadvantage of excluding subjective factors related to specific applicants. However, the exclusion of subjective factors is probably justifiable in the interests of optimal exploitation of mineral resources. Thus, the certainty of a closed list of objective, closely circumscribed factors for granting retention permits outweighs the disadvantages of excluding subjective factors related to specific applicants. It is therefore submitted that obligatory granting of retention permits should be based on objectively ascertainable criteria and should at least include all objective market-related and infrastructure-related reasons that create risks for the profitable development of mines.

The difficulty with criteria that is not closely circumscribed may be illustrated as follows: The MPRDA provides that the Minister may refuse to grant retention permits if, *inter alia*, the granting will result in the concentration of mineral resources under the control of the applicant and their associated companies with the possible limitation of equitable access to minerals resources.⁵²⁸ It has been argued that this criteria is vague and introduces discretionary decision-making power in a manner that “detract from the investor-friendliness of the MPRDA”.⁵²⁹ The criteria is vague because the MPRDA does not provide any guidelines regarding its meaning and it is not objectively ascertainable whether applicants meet the criteria.

The difficulty with the reference to “concentration of mineral resources under the control of the applicant” is two-fold. First, granting of retention permits *per se* cannot result in the concentration of mineral resources under the control of the applicant.⁵³⁰ Mineral resources can be under the control of an entity only once mining has occurred.⁵³¹ Presumably, the purpose of the provision is to prevent granting of further mining rights to entities that already have the

⁵²⁸ MPRDA, s 33(c).

⁵²⁹ Dale *et al South African Mineral and Petroleum Law* MPRDA-17. This is not the only criteria listed by Dale *et al* that creates uncertainty.

⁵³⁰ See Dale *et al South African Mineral and Petroleum Law* MPRDA-238 where the author comments on a similar provision when prospecting rights are applied for.

⁵³¹ See Dale *et al South African Mineral and Petroleum Law* MPRDA-238 where the author comments on a similar provision when prospecting rights are applied for.

right to mine vast quantities of mineral resources. Thus, the purpose of the provision ostensibly is to prevent the concentration of an unreasonable amount of mineral resources under the control of one entity.⁵³²

The provision seems ill-placed, since such entities should rather be prevented from obtaining prospecting rights and mining rights. In this regard, the MPRDA attempts to prevent the granting of more prospecting rights to entities that already control vast amounts of mineral resources.⁵³³ However, the Act has no such provisions regarding granting of mining rights or mining permits.⁵³⁴ If applicants for retention permits already have control of mineral resources by virtue of mining rights, the granting of any additional rights will result in the concentration, i.e. increase, of mineral resources under their control.⁵³⁵ This is contrary to the purpose of the MPRDA, which attempts to achieve equitable access to mineral and petroleum resources by implementing policies aimed against hoarding and monopolising of resources.

The criteria apply when the (unreasonable) concentration of mineral resources under the control of the applicant is coupled with a possible limitation of equitable access to minerals resources. These requirements probably attempts to prevent the granting of mining rights or mining permits to entities who cannot meet the empowerment obligations of the MPRDA and to give effect to the objective of the MPRDA to advance opportunities for historically disadvantaged persons.⁵³⁶ However, as explained above, the granting of retention permits *per se* cannot have the effect that equitable access to mineral resources will be limited. Also the MPRDA requires advancing the opportunities for historically disadvantaged persons as a requirement for granting of prospecting rights and mining rights.⁵³⁷ Certainty can be increased here by providing that the Minister is not under an obligation (according to amendments suggested here) to issue retention permits if the right holders cannot comply with the black economic empowerment provisions of the MPRDA.

Additionally, it is unclear to whom or what the term “associated companies” refers. It is arguable that the term refers to subsidiary and holding companies as defined in the Companies

⁵³² See Dale *et al South African Mineral and Petroleum Law* MPRDA-239, in relation to a similar provision when prospecting rights are applied for.

⁵³³ MPRDA, s 17(2)(b). For criticism see Dale *et al South African Mineral and Petroleum Law* MPRDA-238.

⁵³⁴ Dale *et al South African Mineral and Petroleum Law* MPRDA-238

⁵³⁵ See Dale *et al South African Mineral and Petroleum Law* MPRDA-238 in relation to a similar provision when prospecting rights are applied for.

⁵³⁶ MPRDA, ss 2(c) and (d).

⁵³⁷ MPRDA, ss 17(2)(b) and 23(1)(h) for prospecting rights and mining rights respectively.

Act.⁵³⁸ Accordingly, the Minister may refuse to grant retention permits to a holding company if its subsidiary already controls large quantities of the specific type of mineral by virtue of mining rights that the subsidiary holds and if the company is not able to comply with its empowerment obligations. Thus, if the granting of the retention permit will cause an unreasonable concentration of mineral resources under the control of the holding company and its subsidiary, and these companies do not comply with their empowerment obligations, the Minister has the discretion to refuse the retention permit.

Ensuring equitable access to minerals and preventing holders from monopolising industries are without doubt important objectives. Furthermore, some degree of ministerial discretion is necessary to achieve these objectives.⁵³⁹ However, the government can allow discretion to pursue these objectives without unnecessarily increasing uncertainty as a result of unclear and imprecise drafting. The MPRDA can, for example, stipulate the applicable criteria where applicants for retention permits already hold mining rights or mining permits. Certainty can also be improved by stipulating that granting of retention permits must not lead to an unreasonable concentration of mineral resources under the control of applicants and their subsidiary and holding companies.

If the criterion is unreasonable concentration, the Minister will still have the necessary discretion to prevent monopolies from controlling the industry, but it will be clear that not any additional concentration of mineral resources could lead to refusal of retention permits. A reference to subsidiary and holding companies will enable objective determination, with reference to the Companies Act, whether the mining rights of another company will be taken into account when the Minister exercises his discretionary power to refuse retention permits.

Retention permits are initially granted for a maximum period of three years⁵⁴⁰ and can be renewed for one further period not exceeding two years.⁵⁴¹ A five-year period is sufficiently for the market to change and for the holders to implement strategies that will ensure profitable development of mines. As with the initial granting, however, applicants are uncertain that retention permits will be renewed because there is no obligation on the Minister to renew

⁵³⁸ A holding company is a juristic person that controls a subsidiary as a result of certain circumstances stipulated in the Companies Act 71 of 2008. See the def of "holding company" and s 3 of the Companies Act.

⁵³⁹ See Dale *et al South African Mineral and Petroleum Law* MPRDA-117 regarding discretion that is necessary to achieve equitable access to mineral resources.

⁵⁴⁰ MPRDA, s 32(4).

⁵⁴¹ MPRDA, s 34(3).

them.⁵⁴² The reasons for renewal are further limited to market conditions that existed at the time of application for the initial permit.⁵⁴³ Subjective factors applicable to a specific applicant are therefore not a valid reason for renewing retention permits.

2.4.4. Synopsis: Interruption of operations; MTS strengths and weaknesses

Taking into account the legitimate objectives of the government, the effect of the provisions of the MPRDA regarding the ability to interrupt prospecting and mining operations, discussed here, on mineral tenure security may be summarised as follows:

	Mining permits	Prospecting rights	Mining rights
MTS strengthened	No obligation to mine continuously	Availability of retention permits	
MTS weakened		<p><i>Excessive regulatory measures:</i> no exception regarding obligation to prospect continuously</p> <p><i>Wide governmental discretion:</i> no obligatory grant of retention permits</p> <p><i>Vague and imprecise drafting:</i> criteria for granting of retention permits (uncertainty regarding all objective market conditions; concentration of minerals with possibility of limiting equitable access)</p>	<p><i>Excessive regulatory measures:</i> no exception regarding obligation to prospect continuously</p>

Table 4 Synopsis: Interruption of operations; MTS strengths and weaknesses

⁵⁴² According to s 34(2) of the MPRDA, retention permits “may” be renewed.

⁵⁴³ MPRDA, s 34(2)(b).

The MPRDA poses risks to profitable development of mines and weakens mineral tenure security by forcing holders of prospecting rights and mining rights to continuously prospect and mine after operations commenced irrespective of market conditions or any other factor. The security of tenure of holders of mining permits is strengthened by the fact that the MPRDA does not require continuous mining from holders of mining permits.

The availability of retention permits for postponement of mining operation upon completion of prospecting, in principle, strengthens the mineral tenure security of holders of prospecting rights. However, mineral tenure security is weakened by not placing an obligation on the Minister to grant retention permits and to renew them if specified criteria are met. Furthermore, vague and imprecise drafting of some criteria for granting retention permits lead to unnecessary uncertainty that weakens optimal mineral tenure security.

3. Summative remarks and findings

The abilities to prospect and mine, to dispose of minerals for their own account and to interrupt prospecting and mining operations (at least to an extent) while retaining rights, are necessary to ensure profitable development of mines. It is, however, accepted that the government has legitimate reasons to limit these abilities in pursuit of important objectives. Optimal mineral tenure security requires the creation of a situation in which risks and uncertainties regarding profitable development of mines are minimised while taking into account the legitimate objectives of the government. This chapter identifies certain features of the current regulatory regime that unnecessarily and unjustifiably weaken optimal mineral tenure security.

The first is the existence of wide and uncircumscribed governmental discretion regarding some decisions that can influence profitable development of mines. The second is excessive regulatory measures that cause limitation of the abilities which are disproportionate to the objectives pursued. Lastly, drafting concerns, at times, create unnecessary uncertainty and weakening of mineral tenure security. In this regard, the Act is at times unnecessarily drafted in vague and imprecise terms that cause unnecessary uncertainty. Furthermore, there are instances in which the MPRDA seems to be drafted in a careless manner that unjustifiably weaken mineral tenure security.

Chapter 5:

RIGHT HOLDERS' ABILITY TO TRANSFER AND ENCUMBER

1. Introduction

To ensure profitable development of mines and maximum returns on their investments,⁵⁴⁴ holders of rights to minerals may need to conclude commercial transactions involving their rights. For example, holders of rights to minerals may want to transfer their rights if they are no longer able to develop mines profitably.⁵⁴⁵ Similarly, shareholders of companies may decide to sell shares in the company or merge with other companies in an attempt to raise funds for the development of a mine.⁵⁴⁶ Furthermore, holders of rights may want to use their rights as collateral security to obtain loans for development of mines.⁵⁴⁷ An investigation into how the MPRDA provides mineral tenure security thus requires a consideration of the conditions under which rights to minerals can be transferred to an eligible third party and mortgaged to raise funds for development of mines.⁵⁴⁸

This chapter comments on the extent to which the MPRDA provides security of tenure to holders of prospecting rights, mining rights and mining permits in relation to the abilities to transfer and mortgage their rights. Furthermore, the chapter highlights the features of the current regulatory regime that weakens mineral tenure security.

For the same reasons as explained in chapter 4,⁵⁴⁹ the analysis in this chapter foresees the possibility that governmental interference, discretionary decision-making powers and unclear drafting can cause uncertainty and weaken mineral tenure security. The analysis in this chapter is relevant for the insight it brings on how certainty may be bolstered, and tenure security thus

⁵⁴⁴ See chap 1, sec 1.2 regarding profitable development of mines as an aspect of mineral tenure security.

⁵⁴⁵ See chap 1, sec 1.1 regarding the ability to transfer rights as an aspect of mineral tenure security.

⁵⁴⁶ See 3.2.2 below.

⁵⁴⁷ See chap 1, sec 1.1 regarding the ability to encumber rights as an aspect of mineral tenure security.

⁵⁴⁸ Dale 1996 *JERL* 300; Badenhorst 2014 *JERL* 14; Omalu and Zamora 1999 *JERL* 13 28; Ayisi 2009 *JERL* 77; Bastida 2001 *JERL* 36 and 37; Bastida PHD thesis 181. See Dale in Bastida *et al* 830 and Dale *et al South African Mineral and Petroleum Law MPRDA-14* for the importance of the ability to mortgage rights to obtain funds in general. Williams in Bastida *et al* 54 views the increased freedom to transfer rights as “perhaps the most significant dimension of current legal reforms” in general. Pritchard in Bastida *et al* 76 includes security of tenure and the ability freely to pledge and alienate rights in his “Checklist of Basic Expectations of Mining Investors”.

⁵⁴⁹ See chap 4, sec 1.

strengthened, by minimizing risks and uncertainties that may prevent profitable development of mines

2. Optimal mineral tenure security

Identical to the abilities to prospect and mine,⁵⁵⁰ mineral tenure security will be strengthened when rights to minerals can be transferred and mortgaged freely without limitations.⁵⁵¹ However, similar to the abilities to prospect and mine, the government has legitimate reasons for limiting the ability of holders of rights to transfer and mortgage⁵⁵² their rights. As regards the abilities to transfer and mortgage rights, the government needs to be certain that entities to whom rights are transferred can comply with the obligations of original right holders and the terms and conditions of rights.⁵⁵³ In this regard, transferees must be able to comply with health, safety and environmental requirements.⁵⁵⁴ Transferees must also have the necessary technical and financial abilities to prospect and mine according to the prospecting work programme or mining work programme.⁵⁵⁵ Moreover, in South Africa, the government has an interest in the identities of entities to whom rights are transferred due to its commitment to providing equitable access to mineral resources and to advance opportunities for historically disadvantaged persons.⁵⁵⁶

Similar to chapter 4, it is accepted here, from the outset, that comments regarding the extent to which the MPRDA provides security of tenure, to right holders regarding the abilities to transfer and mortgage rights, need to take into account the interests of right holders and the interest of

⁵⁵⁰ See chap 4, sec 2.

⁵⁵¹ See Bastida 2001 *JERL* 39 – 40 and Bastida (PhD thesis) 212 where the author comments on how security of tenure in the mining codes of some Latin-American countries were improved. One of the aspects that the author highlights is that the limitations placed on the ability to transfer and mortgage rights are limited to health, safety and environmental concerns.

⁵⁵² The sale in execution of a mortgaged right will result in the transfer of the right to another.

⁵⁵³ *Mogale Alloys Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd* 2011 6 SA 96 (GSJ) [28]; Badenhorst and Du Plessis 2012 *De Jure* 396.

⁵⁵⁴ According to ss 17(1)(c) and (d) of the MPRDA, prospecting rights will only be granted if prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment and if the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act 29 of 1996. Ss 23(1)(d) and (f) have similar requirements regarding mining rights.

⁵⁵⁵ MPRDA, ss 17(1)(a) and (b) for prospecting rights and ss 23(1)(b) and (c) for mining rights

⁵⁵⁶ The Minister is under an obligation to grant prospecting rights only if applicants can show that they have given effect to 2(d) of the MPRDA. The objective in s 2(d) is to “substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources”. S 23(1)(h) has a similar requirement regarding mining rights. See *Mawetese* [12] – [17] where the court held that the grant of the prospecting right in that case was dependent on compliance with the 26% black economic empowerment ownership requirement of the Mining Charter. According to the “Preamble” of the Mining Charter, the Charter aims to give effect to s 2(d) of the MPRDA.

the government. An evaluation cannot only consider the interests of holders of rights to minerals. To reiterate: It cannot be concluded that the MPRDA provides mineral tenure security if right holders have unfettered freedom regarding the abilities to transfer and mortgage their rights. Also, every limitation of the abilities to transfer and mortgage rights does not necessarily unjustifiably weaken mineral tenure security. Therefore, the approach followed here is the same as in chapter 4: *Optimal* mineral tenure security means creating a state of certainty in relation to rights to minerals that is most attractive to investors, whilst supporting the legitimate and important objectives of the government.

The following section provides a detailed analysis of the provisions of the MPRDA regarding the abilities of holders of prospecting rights, mining rights and mining permits to transfer their rights. The objective of the analysis is to comment on the extent to which the MPRDA provides *optimal* security of tenure to right holders. The analysis furthermore aims to identify the features of the current regulatory regime that unjustifiably weaken optimal mineral tenure security.

3. Ability to transfer

The MPRDA regulates the ability of holders of prospecting rights, mining rights and mining permits to conclude various commercial transactions concerning their rights.⁵⁵⁷ Section 11(1) regulates the ability of holders of prospecting rights and mining rights to cede, transfer, let, sublet, assign, alienate, or “otherwise dispose of” these rights. Except for the ability to assign, section 27(8)(b) lists the same transactions in relation to mining permits. These transactions “render the rights that are granted in terms of the MPRDA commercially useful” for holders of such rights.⁵⁵⁸ It is beyond the scope of this work to analyse the different technical meanings that can be assigned to the terms in sections 11 and 27(8)(b) in any detail.⁵⁵⁹ In this chapter, the terms in sections 11(1) and 27(8)(b) are collectively used in a non-technical sense to refer to the ability of holders of prospecting rights, mining rights and mining permits to transfer these rights to eligible third parties.

⁵⁵⁷ Mostert *Principles and Policies* 140 refers to the *ius disponendi*. See chap 2, sec 2 fn 137 for the difference between rights (*ius*) and entitlements.

⁵⁵⁸ Mostert *Principles and Policies* 88.

⁵⁵⁹ See Mostert *Principles and Policies* 88 – 89; Dale *et al South African Mineral and Petroleum Law MPRDA* 162 – 163; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-25 and 30-9 for a discussion of the meaning of the terms in section 11(1).

3.1. Transfer of mining permits

Section 27(8)(b) prohibits the transfer of mining permits. It is arguable that the limitation weakens mineral tenure security because holders of mining permits cannot transfer permits when they become unable to develop mines profitably. However, mining permits are issued for small scale mining and for short periods (two years).⁵⁶⁰ It is therefore unlikely that holders of mining permits will need to transfer the permits to third parties to develop mines profitably.⁵⁶¹ Because of the short lifespan of a mining permit, there is a smaller risk to holders of mining permits that their circumstances or market conditions will change to such an extent that profitable development is no longer possible in two years. On face value, the prohibition against transfer of mining permits does not have an unreasonable negative impact on mineral tenure security. However, as discussed below, the inability to transfer mining permits has a severe negative impact on the ability to use mining permits as collateral security to obtain loans for the development of mines.⁵⁶²

3.2 Transfer of prospecting rights and mining rights

Section 11(1) of the MPRDA allows transfer of prospecting rights and mining rights, but requires ministerial consent for transfers. Ministerial consent for transfer of prospecting rights and mining rights is necessarily in two circumstances. First, ministerial consent is needed for the transfer of prospecting rights and mining rights or interests in these rights.⁵⁶³ Second, ministerial consent is needed for the transfer of controlling interests in companies and closed corporations (excluding listed companies) that hold prospecting rights and mining rights or that have interests in these rights.⁵⁶⁴ This second part of section 11 of the MPRDA relates to situations where prospecting rights or mining rights are not transferred but where there is a change in control, through the sale of shares by a majority shareholder/s, for example, in companies that hold prospecting rights or mining rights. Section 11(2) places an obligation on the Minister to consent to the transfer of prospecting rights and mining rights if specified criteria are met. Section 11(2) limits the discretion of the Minister when exercising the power

⁵⁶⁰ See chap 4 sec 2.1.

⁵⁶¹ The same reason probably apply to the fact that MPRDA does not require holders of mining permits to commence mining operations after a specific periods after mining permits are granted. See chap 4 s 2.4.1.

⁵⁶² Sec 4.2 below.

⁵⁶³ Badenhorst and du Plessis 2012 *De Jure* 395 – 396.

⁵⁶⁴ Badenhorst and du Plessis 2012 *De Jure* 397 - 400. See sec 3.2.2 below for a detailed discussion.

to grant or refuse consent for transfer. Obligatory granting of consent to transfer, in principle, strengthens mineral tenure security.

On the one hand, the MPRDA thus does not provide that prospecting rights and mining rights can be transferred freely without any limitations, which in principle weakens mineral tenure security. On the other hand, the Act strengthens mineral tenure security by placing an obligation on the Minister, and thus limiting his discretion, to give consent for transfer if certain criteria are met. However, these two observations are not sufficient to comment meaningfully on the extent to which the MPRDA provides optimal mineral tenure security to holders of prospecting rights and mining rights. Meaningful comments require an investigation of the reasons for the ministerial consent requirement, the requirements for obtaining consent, and the certainty of right holders regarding obtaining consent. The following sections separately examine these issues in respect of the two situations in which section 11(1) of the MPRDA requires ministerial consent for the transfer of prospecting rights and mining rights.

3.2.1. *Transfer of rights or interests in rights*

The first part of section 11(1) provides that prospecting rights and mining rights as well as *any interest in such rights* cannot be transferred without ministerial consent. The MPRDA does not define “interest/s in prospecting rights and mining rights”. To understand the prohibition against transfer without ministerial consent, it is necessary to understand the ambit of the first part of section 11(1). In this regard, it is necessary to establish the meaning of “interest in rights”. Consequently, the following section firstly investigates the meaning of the term “interest in rights”. This is followed by an analysis of the requirements for consent to transfer prospecting rights and mining rights. The purpose of the analysis is to comment on the extent to which the MPRDA creates certainty, through minimizing risks and uncertainties that may prevent profitable development of mines and maximising returns on investments, regarding the ability to transfer rights, while acknowledging the legitimate interests of the government to have some control over the transfer of rights.

3.2.1.1 *The ambit of section 11(1): interests in rights*

Discussions regarding the meaning of “interests in rights” are normally concerned with two topics. The first is whether security interests, such as mortgage bonds, are included in the ambit

of section 11(1).⁵⁶⁵ Since this thesis is primarily concerned with the security of tenure of holders of rights to minerals and not with holders of security interests in rights, this topic is not disused here. The second topic, that form the subject-matter of the following discussion, is whether interests in rights in section 11(1) denotes that co-holders can jointly hold rights to minerals in (undivided) shares.⁵⁶⁶

There are different opinions regarding whether the reference to “interests in rights” in section 11(1) denotes that co-holders can jointly hold rights to minerals in (undivided) shares.⁵⁶⁷ According to one argument, this is indeed the case.⁵⁶⁸ Accordingly, two or more entities can be co-holders of rights and the shares in the rights cannot be transferred without ministerial consent.⁵⁶⁹ However, in *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd*⁵⁷⁰ (*Sishen Iron Ore*), the court followed a different approach. The court indicated that the MPRDA “does not make any provision whatsoever for granting prospecting rights or mining rights in undivided shares”.⁵⁷¹ The court further held that the MPRDA “simply does not contemplate two right-holders in respect of the same mineral and land.”⁵⁷²

The case concerned the conversion of a mining right that was held in undivided shares, in terms of the Minerals Act,⁵⁷³ before the MPRDA came into operation.⁵⁷⁴ The co-holders each had a

⁵⁶⁵ Dale *et al South African Mineral and Petroleum Law* MPRDA-168

⁵⁶⁶ In common law, co-ownership in undivided shares means each owner has a right to share in the entire thing. See Badenhorst *et al Silberberg* 133; du Bois *Wille's Principles* 558. However, because the MPRDA establishes a regulatory regime that is administrative in nature (see chap 2, sec 3.2.1 and sec 3.2.2), the term “co-holders” is preferred here and not common-law “joint owners”. Security interests can also denote collateral security interests in rights. See Dale *et al South African Mineral and Petroleum Law* MPRDA-168

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⁵⁶⁸ Dale *et al South African Mineral and Petroleum Law* MPRDA-168 and MPRDA-190 – MPRDA-191; Badenhorst and du Plessis 2012 *De Jure* 395.

⁵⁶⁹ Dale *et al South African Mineral and Petroleum Law* MPRDA-168 and MPRDA-191 – MPRDA-192. The authors use the common-law joint-ownership construction. It is unfortunate that reference is still made to the common-law ownership construction since the MPRDA establishes a regime that is predominantly administrative in nature (see chap 2 sec 3.2.1 and sec 3.2.2).

⁵⁷⁰ 2014 2 SA 603 (CC).

⁵⁷¹ *Sishen Iron Ore* [81].

⁵⁷² *Sishen Iron Ore* [118].

⁵⁷³ Section 20 of the Minerals Act provided: “(1) Notwithstanding anything to the contrary contained in any law, but subject to sections 71(2)(a) and 73bis of the Deeds Registries Act, 1937 (Act No 47 of 1937), no deed which, if it would be registered, would give effect to (a) the division of any right to any mineral or minerals in respect of land among two or more persons into undivided shares; or (b) an increase in the number of holders of undivided shares in any right to any mineral or minerals in respect of land; shall be registered by the registrar of deeds concerned, unless the Director-General has under subsection (3) in writing approved such division or increase”.

⁵⁷⁴ *Sishen Iron Ore* [21]. Sishen held 78.6% and AMSA held 21.4% of the right respectively.

mining authorisation to mine that was granted in terms of the Minerals Act.⁵⁷⁵ When the MPRDA came into operation, the mining rights of both holders coupled with the mining authorisation were changed into old order mining rights.⁵⁷⁶ One party successfully converted the old order mining right into a new order right while the other failed to lodge the old order right for conversion.⁵⁷⁷ One of the main issues in the case was whether the party that converted his old order right also became the holder of the unconverted old order right.⁵⁷⁸ The court held that the unconverted old order right simply lapsed when the period allowed for conversion came to an end and that the right did not vest in the party that successfully applied for conversion.⁵⁷⁹ The court also held that the Minister could not grant the rights embodied in the unconverted right to anyone except to the entity that already held a mining right due to the successful conversion.⁵⁸⁰

In support of the last-mentioned finding, the court relied on section 22(2)(b) of the MPRDA that prohibits the Regional Manager from accepting applications and granting rights when there is an existing right holder for the same mineral on the same land.⁵⁸¹ The court also relied on the fact that sections 23 and 25 of the MPRDA refer to a single mining work programme⁵⁸² and social and labour plan.⁵⁸³ The reliance on a single mining work program and social and labour plan assumes that, if the Minister granted the unconverted old order right to anyone except the holder of the converted right, each co-holder would need to submit a separate mining work programme and social and labour plan. According to the court, the Act does not allow more than one mining work programme or social and labour plan and therefore the mining right in question could not be held jointly.

It would have been useful if the court distinguished between the following scenarios: First, where two or more entities jointly apply for a right in terms of the MPRDA and, second, where a newcomer applies for a right where there is an existing right-holder to the same mineral on the same land. In *Sishen Iron Ore*, the court addressed the second scenario. The successful

⁵⁷⁵ *Sishen Iron Ore* [22] and [62].

⁵⁷⁶ *Sishen Iron Ore* [63].

⁵⁷⁷ *Sishen Iron Ore* [24], [25] and [64].

⁵⁷⁸ *Sishen Iron Ore* [38].

⁵⁷⁹ *Sishen Iron Ore* [65], [66], [67] and [70].

⁵⁸⁰ *Sishen Iron Ore* [123].

⁵⁸¹ *Sishen Iron Ore* [115].

⁵⁸² MPRDA, ss 23(1)(a) and 25(2)(c). Ss 17(1)(a) and 19(2)(c) refer to a prospecting work programme in case of applications for prospecting rights.

⁵⁸³ *Sishen Iron Ore* [116] and [117].

conversion of one of the old order rights meant there was an existing right-holder. The unconverted right lapsed, which meant the only option for the previous holder thereof was to apply for a new order right as a newcomer. If both parties applied for conversion, the situation would be similar to the situation where more than one entity jointly apply for new order rights in terms of the MPRDA. Section 22(2)(b) of the MPRDA is clear that in the second scenario, where there is an existing right-holder, the Minister cannot grant a right⁵⁸⁴ for the same mineral on the same land to a newcomer.⁵⁸⁵

Contrary to this clarity, the Act is not clear on the question whether, in the first scenario, two or more entities can apply jointly for the same mineral on the same land and whether the right can be granted to them as co-holders. The fact that there can only be one mining work programme (or prospecting work programme if relevant)⁵⁸⁶ and one social and labour plan⁵⁸⁷ does not indicate that there cannot be joint-holders. It indicates that if entities jointly apply for a mining right, the joint-applicants must submit one mining work program and one social and labour plan and that all subsequent co-holders are bound by these documents. The court further seems to contradict itself by stating that if the unconverted right in the case was successfully converted, the party in whom it vested before the MPRDA “would have been entitled to be a co-holder of the mining right under the MPRDA...”.⁵⁸⁸

An interpretation of section 11(1) that means prospecting rights and mining rights cannot be held jointly will curtail the possibility of joint ventures and partnerships in the mining industry.⁵⁸⁹ Joint ventures and partnerships can give effect to the objectives of the MPRDA to promote equitable access to mineral resources⁵⁹⁰ and to expand opportunities for historically disadvantaged persons.⁵⁹¹ It is therefore arguable that the intention of the legislator was not to

⁵⁸⁴ The Minister cannot grant any right provided for in the MPRDA to a newcomer. In this case, there was an existing holder of a mining right. The Minister could thus not grant another mining right, a mining permit or a prospecting right to a newcomer. In *Sishen Iron Ore* [123] the court held that the government could not grant the unconverted “old order right” to anyone except the party that already held a mining right due to successful conversion. One of the reasons advanced by the court is that ss 16(2)(b) and 22(2)(b) of the MPRDA preclude the granting of prospecting rights and mining rights for minerals and land where there is an existing rights-holder.

⁵⁸⁵ See also *Dale et al South African Mineral and Petroleum Law* MPRDA-194.

⁵⁸⁶ MPRDA, s 17(1)(b).

⁵⁸⁷ The MPRDA does not refer to a social and labour plan in relation to prospecting rights.

⁵⁸⁸ *Sishen Iron Ore* [106]. The remark of the court that only one right in respect of the Sishen mine would be granted and that there can therefore not be co-holders is not convincing. Co-holders hold the same right in undivided shares.

⁵⁸⁹ See *Dale et al South African Mineral and Petroleum Law* MPRDA-191 where, in the context of common-law joint-ownership, the authors say that “the genesis of co-ownership is likely to lie in unincorporated joint ventures”.

⁵⁹⁰ MPRDA, s 2(c).

⁵⁹¹ MPRDA, s 2(b). Also see *Dale et al South African Mineral and Petroleum Law* MPRDA-191.

prevent entities to apply simultaneously for, and become joint holders, of prospecting rights and mining rights.⁵⁹² The 2013 Amendment Bill attempted to amend section 11, to refer specifically to, and regulate “any transfer of a part of a prospecting right or mining right”.⁵⁹³ The President refused to assent to the Bill.⁵⁹⁴ Although it remains to be seen whether a similar amendment will be made in future, the attempted amendment indicates that the intention of the legislature is to allow co-holders to hold prospecting rights and mining rights jointly.

It is clear that the MPRDA limits the ability of holders of prospecting rights and mining rights to transfer their rights freely. The limitation extends to the transfer of interests in prospecting rights and mining rights that are held jointly. However, these limitations must be considered in view of the reasons for requiring consent for the transfer of prospecting rights and mining rights and the situations in which the Minister must grant consent.

3.2.1.2. Requirements for consent

Section 11(2) of the MPRDA limits ministerial discretion by placing an obligation on the Minister to grant consent to transfer mining rights and prospecting rights if the requirements are met.⁵⁹⁵ The requirements of section 11(2) point to the purpose of limiting the ability of holders of prospecting rights and mining rights to transfer their rights. First, the acquirer of the right must be able to comply with the obligations and terms and conditions that attached to the right when it was granted.⁵⁹⁶ Second, the acquirer must comply with the requirements for applications of prospecting rights and mining rights in sections 17 and 23 of the MPRDA respectively.⁵⁹⁷ The requirements of section 11(2) aim to ensure that the acquirer of the right has the technical and financial capacity to prospect⁵⁹⁸ and mine⁵⁹⁹ optimally in the same manner as the original holder of the right and can comply with health and environmental

⁵⁹² Also Dale *et al South African Mineral and Petroleum Law* MPRDA-190 where the authors rely on s 102 of the MPRDA to justify an interpretation that rights can be held jointly. In general, s 102 determines that the rights, programmes and plans that the MPRDA provides for may not be amended or varied without ministerial consent. S 102 specifically include variations “through additional... minerals or... share[s]”.

⁵⁹³ 2013 Amendment Bill, s 8(a)

⁵⁹⁴ See Presidential letter to parliament dated 16 June 2015 available at <http://cer.org.za/wp-content/uploads/2010/08/Zuma-letter-to-the-NA-re-MPRDA-Bill.pdf>.

⁵⁹⁵ Badenhorst and du Plessis 2012 *De Jure* 397. *Contra* Dale *et al South African Mineral and Petroleum Law* MPRDA-168.

⁵⁹⁶ MPRDA, s 11(2)(a). See Badenhorst and du Plessis 2012 *De Jure* 396.

⁵⁹⁷ MPRDA, s 11(2)(b). See Badenhorst and du Plessis 2012 *De Jure* 396.

⁵⁹⁸ MPRDA, ss 17(1)(a) and (b).

⁵⁹⁹ MPRDA, ss 23(1)(a), (b) and (c).

requirements.⁶⁰⁰ The requirements further aim to ensure that holders of rights to minerals comply with the Broad Based Socio-economic Empowerment Charter for the South African Mining and Minerals Industry⁶⁰¹ as well as with the prescribed social and labour plan.⁶⁰² In short, when rights are transferred, the requirements of section 11(2), *inter alia*, attempt to achieve the objectives of the MPRDA to promote equitable access to the country's mineral resources⁶⁰³ and to expand opportunities for historically disadvantaged persons.⁶⁰⁴ It further attempts to promote employment and to advance the social and economic welfare of all South Africans.⁶⁰⁵

It is clear that the government has legitimate interests in limiting the ability of holders of prospecting rights and mining rights to transfer their rights freely. Section 11(2) contributes towards optimal mineral tenure security by placing an obligation on the Minister to grant consent if the requirements are met. One important point of criticism is that the requirements in sections 17 and 23 of the MPRDA for applications for prospecting rights and mining rights, respectively, are not always clear and certain. For example, according to section 23(h), the Minister is under an obligation to grant mining rights, or consent to the transfer thereof,⁶⁰⁶ if the applicant, or acquirer in case of transfer, complies with the Mining Charter. The Charter's language is generally vague and imprecise.⁶⁰⁷ It is arguable that inflexible and concrete rules are not suitable for the objectives of the Mining Charter.⁶⁰⁸ However, the following example

⁶⁰⁰ Dale *et al South African Mineral and Petroleum Law* MPRDA-162 refer to sec 11 as an "anti-avoidance measure which is designed to prevent persons who [do not] qualify according to the criteria in the MPRDA to be granted a prospecting or mining right..." Also see Mostert *Principles and Policies* 88.

⁶⁰¹ In terms of s 17(1)(f) of the MPRDA, applicants for prospecting rights for prescribed minerals must show that they have complied with the objective in s 2(d) of the MPRDA to expand opportunities for historically disadvantaged persons. See s 23(1)(h) of the MPRDA for mining rights. In *Rhino Plat (Pty) Ltd and Another v Minister of Minerals and Energy and Others* (34514/2008) [2009] ZAGPPHC 42 (28 April 2009) [9] and [11], the government refused to consent to the transfer of a prospecting right because the transfer did not conform to transformative requirements. However, the decision was set aside because, in the opinion of the court, the transfer did not undermine the objects of the MPRDA.

⁶⁰² According to s 23(h) of the MPRDA. The social and labour plan is not applicable as criteria for the granting of prospecting rights.

⁶⁰³ MPRDA, s 2(c).

⁶⁰⁴ MPRDA, s 2(d).

⁶⁰⁵ MPRDA, s 2(f).

⁶⁰⁶ MPRDA, S 11(2)(b) read with s 23(h).

⁶⁰⁷ The Charters will be challenged in court for being unconstitutional as a result of being vague and contradictory. See Secombe 18 August 2015 *Business Day BDLive* available at <http://www.bdlive.co.za/business/mining/2015/08/18/challenge-to-set-aside-mining-charters>. Also see Andersson (Bachelor Thesis) 26.

⁶⁰⁸ See Dale *et al South African Mineral and Petroleum Law* MPRDA-117. See *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) [53] and fn 73; *Affordable Medicines Trust v Minister of Health* 2006 2 SA 247 (CC) [33] for the need for some governmental discretion in the modern state. Also see Hoexter *Administrative Law in South Africa* 47.

illustrates how unnecessarily vague and imprecise drafting creates uncertainty and increases the risks that mines cannot be developed profitably.

One of the requirements of the Charter is that 26% of all mining assets must be black-owned.⁶⁰⁹ Mining companies and the Department of Mineral Resources are in disagreement regarding the meaning of “26% black ownership”.⁶¹⁰ On the one hand, the Department interprets the requirement to mean that mining companies must, at all times, comply with the 26% black ownership requirements.⁶¹¹ Mining companies, on the other hand, prefer a “once-empowered, always empowered” interpretation.⁶¹² Accordingly, if a company entered into transactions in the past that resulted in 26% black ownership, they meet the requirements of the Charter even if the black owners sell their interests to non-historically disadvantaged persons. Mining companies that complied with the 26% black ownership requirement in the past will thus want to argue that they meet this requirement and, provided they meet all other requirements, the Minister *must* consent if they apply to transfer their rights. The Department of Mineral Resources will argue that the Minister is not under an obligation to consent to transfers if companies do not meet the 26% black ownership requirement at the time of transfer.

Unclear drafting of this nature has the effect that holders of rights are uncertain regarding whether the Minister will grant consent for the transfer of rights. The uncertainty increases the risks that right holders will not be able to transfer their rights if they are no longer able to develop mines profitably. This consequently weakens mineral tenure security. The pursuit of empowerment targets is a legitimate reason for the government to interfere with and limit the ability of right holders to transfer their rights. It is also arguable that the nature of the objectives that the government aims to achieve, namely equitable access to mineral resources and expansion of opportunities for historically disadvantaged persons requires some flexibility. However, the uncertainty that arises as regards the 26% black ownership requirement can be cleared up easily by drafting the Charter in clear and unambiguous terms. It therefore seems

⁶⁰⁹ Mining Charter par 2.1.

⁶¹⁰ Jackson 22 April 2015 *Miningm*^x available at <http://www.miningmx.com/page/opinion/metal-heads/1651176-Folly-in-taking-mining-charter-to-court#.VYPWLk2JjIU> – accessed 1 July 2015; Creamer 31 March 2015 *Mining Weekly* available at <http://www.miningweekly.com/article/mining-bee-ownership-to-be-tested-in-court-minister-2015-03-31> - accessed 19 June 2015; van der Merwe and Ferreira September 2013 *Without Prejudice* 27.

⁶¹¹ Secombe 11 August 2015 *Business Day BDLive* available at <http://www.bdlive.co.za/business/mining/2015/08/11/ownership-of-mines-may-revert-to-whites>. Also see <http://www.fin24.com/Companies/Mining/Courts-to-decide-on-mines-ownership-compliance-20150331>.

⁶¹² Secombe 11 August 2015 *Business Day BDLive*. Also see <http://www.fin24.com/Companies/Mining/Courts-to-decide-on-mines-ownership-compliance-20150331>.

that the objectives pursued do not justify the uncertainty that the unclear drafting of the 26% black ownership requirement causes. Unnecessarily vague and imprecise drafting of this nature weakens optimal mineral tenure security.

The 2013 Amendment Bill attempted to give the Minister the power to grant consent for the transfer of prospecting rights and mining rights "subject to such conditions as [he] may determine".⁶¹³ If such an amendment is made, the Minister will still be under an obligation to grant consent if the requirements of section 11(2) are met. However, the Minister will have the authority to attach any conditions to the consent. The Bill did not provide for any standard terms and conditions and also did not indicate any criteria that the Minister must take into account when exercising the power to ascribe conditions. The Bill therefore appeared to confer wide and uncircumscribed discretion on the Minister. Such a discretion will limit the certainty of holders of rights regarding the situations in which they will be allowed to transfer their rights in an attempt to develop mines profitably and maximise returns on their investments. Although the President refused to assent to the Bill and it was subsequently sent back to parliament for reasons other than its impact on section 11(2),⁶¹⁴ the intention of the legislator to confer this type of wide and uncircumscribed discretion on the Minister is cause for concern. The uncertainty that the wide and uncircumscribed governmental discretion will create, if a similar amendment is made in future,⁶¹⁵ is unnecessary for, and disproportionate to, the objectives pursued.

Section 11(1) does not limit the reasons for which rights holders may apply to transfer their rights. Holders of rights can thus apply for transfer if objective market conditions or their subjective circumstances prevent them from maximising their return on their investment. This

⁶¹³ 2013 Amendment Bill, s 8(a).

⁶¹⁴ See the President's letter of 16 June 2015 to parliament. The letter is available at <http://cer.org.za/wp-content/uploads/2010/08/Zuma-letter-to-the-NA-re-MPRDA-Bill.pdf>. The President sent the Bill back to parliament for reconsideration of three issues regarding its constitutionality. First, the Bill attempted to elevate the Code of Good Practice, the Housing and Living Conditions Standard and the Amended Broad-Based Socio Economic Empowerment Charter to national legislation and to give the Minister the accompanying power to amend or repeal these documents without following the prescribed procedures for repeal and amendment of legislation. Second, the Bill attempted to impose quantitative restrictions on exports in contravention of South Africa's obligations under the General Agreement on Trade and Tariffs and the Trade, Development and Cooperation Agreement. Third, the National Council of Provinces and Provincial legislator did not sufficiently facilitate public participation as required by section 72 and 118 of the Constitution. Fourth, The Bill was not referred to the National House of Traditional Leaders for its comments in terms of section 18 of the Traditional Leadership and Governance Framework Act 41 of 2001.

⁶¹⁵ The reasons for the President's refusal to assent to the Bill did not include wide and uncircumscribed discretion. See the President's letter of 16 June 2015 to parliament. The letter is available at <http://cer.org.za/wp-content/uploads/2010/08/Zuma-letter-to-the-NA-re-MPRDA-Bill.pdf>.

limits right holders' risk of being unable to develop mines profitably and consequently strengthens mineral tenure security.

3.2.1.3. Synopsis: Transfer of rights and interests in rights; MTS strengths and weaknesses

Taking into account legitimate governmental objectives, the effect of the provisions of the MPRDA regarding transfer of rights and interests in rights, discussed here, on mineral tenure security, may be summarised as follows:

	Mining permits	Prospecting rights	Mining rights
MTS strengthened		<i>Obligatory granting of consent if criteria are met</i> No limitation on reasons for applications to transfer	<i>Obligatory granting of consent if criteria are met</i> No limitation on reasons for applications to transfer
MTS weakened	Not-transferable – effect apparent when permits used as collateral security ⁶¹⁶	<i>Vague and imprecise drafting: criteria for obligatory granting (26% BEE requirement)</i>	<i>Vague and imprecise drafting: criteria for obligatory granting (26% BEE requirement)</i>

Table 5 Synopsis: Transfer of rights and interests in rights; MTS strengths and weaknesses

The MPRDA limits the ability of holders of prospecting rights and mining rights to transfer their rights freely. However, this limitation is justifiable in view of the reasons for the limitation.⁶¹⁷ Section 11(2) of the MPRDA strengthens mineral tenure security by placing an obligation on the Minister to consent to transfer if certain requirements are met. The fact that the section does not restrict the reasons for which right holders can apply for transfer further strengthens mineral tenure security. However, the difference in opinion regarding the 26% black ownership requirement indicates that mineral tenure security is impacted negatively by unclear and vague drafting regarding the requirements that original holders of rights, and

⁶¹⁶ See sec 4.2 below.

⁶¹⁷ However, see Leon 2009 *JERL* 624 where the author argues that the MPRDA erodes the “transferability and thus the bankability of prospecting and mining rights”.

consequently transferees, must comply with for obligatory ministerial consent for transfers. Unclear drafting and wide governmental discretion unreasonably weaken mineral tenure security.

3.2.2. Transfer of interests in companies or closed corporations

The second part of section 11(1) provides that, with the exception of listed companies, ministerial consent is required for the transfer of a controlling interest in companies⁶¹⁸ that hold, or have an interest in, rights to minerals.⁶¹⁹ This means that for listed companies, ministerial consent is not required for the transfer of any interest, including controlling interests. For unlisted companies, ministerial consent is not required, for the transfer of any interests, other than controlling interests. Briefly, ministerial consent is only required for the transfer of a controlling interest in unlisted companies. Thus, any interests in listed companies as well as any interests that is not a controlling interest in unlisted companies are transferable freely. These freely transferable interests strengthens mineral tenure security.

An understanding of the impact of the prohibition against transfer without ministerial consent requires investigating the ambit of the second part of section 11(1). Therefore, the following section firstly investigates the interests in companies that fall within the ambit of section 11(1).

3.2.2.1. Ambit of section 11(1): interests in companies

As explained, the requirement for ministerial consent in the second part of section applies only to controlling interests in unlisted companies. The MPRDA fails to define “listed company” and “unlisted company”. The meaning of “listed company” and “unlisted company” must therefore be found elsewhere. In common parlance, listed companies refer to companies whose

⁶¹⁸ S 11(1) also refers to Closed Corporations (CC's). Due to the fact that CC's are being phased out as a business structure, the discussion here focusses on companies only. After commencement the Companies Act of 2008 on 1 May 2011, new CC's can no longer be registered and companies cannot be converted to CC's. CC's that existed before the Companies Act of 2008 will remain in force until deregistered or wound up. See s 2(1) of the Closed Corporation Act 69 of 1984 as amended by the Companies Act of 2008. See Cassim (ed) *The Law of Business Structures* chap 24 for a general discussion of CC's.

⁶¹⁹ The Act does not qualify “company or closed corporation” as one that holds a prospecting right or mining right or has an interest in one of these rights. A literal reading of the Act thus means that a change in controlling interest of any unlisted company requires written consent in terms of section 11(1). However, the Act has been interpreted to refer only to companies that hold prospecting rights and mining rights. See *Mogale Alloys* [30]; Moore and Veldsman 2013 *SALJ* 87 – 88. S 8(a)(1) of the 2008 Amendment Act, that is not yet in operation, proposes to correct this by requiring the company or closed corporation to hold a prospecting right or mining right

shares are listed on an exchange, for example the Johannesburg Stock Exchange.⁶²⁰ The Income Tax Act⁶²¹ refers to a “listed company” as a company whose shares⁶²² are listed on an exchange.⁶²³ This includes companies listed on a local or foreign exchange.⁶²⁴ By implication, an unlisted company must be a company whose shares are not listed on an exchange.

It is beyond the scope of this work to do a detailed analysis of the meaning of controlling interests in unlisted companies.⁶²⁵ Briefly, for an interest in an unlisted company to be considered a “controlling interest”, the interests must firstly be capable of being dealt with in terms of one of the transactions regulated by section 11(1) of the MPRDA.⁶²⁶ For purposes of this chapter, it must be possible to transfer the interest. Secondly, the controlling interest in an

⁶²⁰ See the following cases where the courts refer to “listed companies” without providing a definition: *Vlok No and Others v Sun International South Africa Ltd and Others* 2014 1 SA 487 (GSJ) [6]; *Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd* 2014 1 SA 550 (GSJ) [15]; *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 5 SA 183 (SCA) [1] and [4].

⁶²¹ 58 of 1962.

⁶²² The Companies Act of 2008 defines a share as “the units into which the proprietary interests in a profit company is divided”.

⁶²³ According to s 1 of the Income Tax Act, a listed company “means a company where its shares or depository receipts in respect of its shares are listed on (a) an exchange as defined in section 1 of the Financial Markets Act 19 of 2012 and licensed under section 9 of that Act; or (b) a stock exchange in a country other than the Republic which has been recognised by the Minister as contemplated in paragraph (c) of the definition of “recognised exchange” in paragraph 1 of the Eighth Schedule. S 1 of the Financial Markets Act of 2012 defines exchange as “a person who constitutes, maintains and provides an infrastructure - (a) for bringing together buyers and sellers of securities; (b) for matching bids and offers for securities of multiple buyers and sellers; and (c) whereby a matched bid and offer for securities constitutes a transaction. The Prevention and Combating of Corrupt Activities Act 12 of 2004 defines “listed company” as follows: “a company, the equity share capital of which is listed on a stock exchange as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act 1 of 1985)”. However, the Stock Exchange Control Act of 1985 was repealed by the Security Services Act 36 of 2004. The Security Services Act of 2004 was in turn repealed by the Financial Markets Act of 2012. This research revealed legislation that refers to “listed company” in the Income Tax Act of 1962 (for example s 181(5)(a) of Tax Administration Act 28 of 2011) and legislation that use the term “listed company” without a definition or reference to the Income Tax Act of 1962 (see, for example, s 4.9 of the Broad-Based Black Economic Empowerment Act of 2003 and s 3(e) of the Private Security Industry Regulation Act 56 of 2001), but not other definitions of “listed company/nies”.

⁶²⁴ Dale *et al South African Mineral and Petroleum Law* MPRDA-174 – MPRDA-175 mainly rely on the def of “listed company” in the Income Tax Act of 1962 for justification that listed companies include companies listed on foreign exchanges. Since the publication of this source, the Income Tax Act of 1962 was amended to reflect the Financial Markets Act of 2012 which repealed the Security Services Act of 2004. However, the def of “listed company” in the Income Tax Act of 1962 still refers to companies listed on a local or foreign exchange. Also see Moore and Veldsman 2013 *SALJ* 121.

⁶²⁵ See in general Badenhorst and du Plessis 2012 *De Jure* 397 – 400; Dale *et al South African Mineral and Petroleum Law* MPRDA-17; Moore and Veldsman 2013 *SALJ* 104. According to these sources, controlling interests refer to direct and indirect control of a company that holds, or has an interest in, a prospecting right or mining right. This is supported by the fact that the MPRDA does not exempt intra-group dealings of companies that hold prospecting rights and mining rights from ministerial consent. The relationships between holding companies and subsidiary companies must thus be taken into account to determine whether ministerial consent is required for the transfer of a controlling interest. If a holding company's subsidiary, for example, is a mining company, the holding company has indirect control over the mining company. In principle, therefore, a change in the controlling interest in the holding company will require ministerial consent.

⁶²⁶ *Mogale Alloys* [36].

unlisted company “cannot be confined to a single characteristic, or criterion”.⁶²⁷ An entity will, for example, have a controlling interest if it holds more than 50% of the issued share capital⁶²⁸ or more than half of the voting rights in respect of the issued share capital.⁶²⁹ The power to appoint or remove the majority of the directors of a company without the concurrence of another person also constitutes a controlling interest.⁶³⁰

The MPRDA requires ministerial consent for any *changes* in controlling interests. This means that if an entity has a controlling interest and concludes a transaction that will cause it to no longer have that controlling interest, ministerial consent is required.⁶³¹ Ministerial consent is required even if a controlling interest will not vest in any entity pursuant to the transfer⁶³² as the following example illustrates: A holds 60% of the issued share capital in company X while B holds 40%. Thus, A has a controlling interest. If A wishes to transfer 30% of his shares to C and 30% to D, neither B, C or D will have a controlling interest pursuant to the transfer. The transfer, however, will trigger a change in the controlling interest because A will lose his controlling interest as a result of the transfer. Irrespective of the fact that no one will have a controlling interest after the transfer, ministerial consent is required.

Section 8(a) of the 2008 Amendment Act will widen the ambit of section 11(1) by requiring ministerial consent for the transfer of any interest (not only controlling interests) in unlisted companies or closed corporations as well as controlling interests in listed companies.⁶³³ Regarding unlisted companies, the amendment means that a single share will not be transferable without ministerial consent.⁶³⁴ Apart from being “unduly burdensome” and

⁶²⁷ *Mogale Alloys* [37].

⁶²⁸ *Mogale Alloys* [37]. Also see s 1(a)(i) def of “controlling interest” in the Diamonds Act 56 of 1986 and 12(2)(a) of the Competition Act 89 of 1998.

⁶²⁹ *Mogale Alloys* [37]. See also s 1(a)(11) def of “controlling interest” in the Diamonds Act of 1986. S 12(2)(a) of the Competition Act of 1998 refers to the majority of votes that can be cast at the general meeting of “the firm” and 3(a)(i) of the Companies Act of 2008 refers to the ability to control the majority of the general voting rights associated with issued securities.

⁶³⁰ *Mogale Alloys* [37]. See s 1(a)(iii) def of “controlling interest” in the Diamonds Act of 1986; s 12(2)(c) of the Competition Act of 1998; s 3(a)(ii) of the Companies Act of 2008.

⁶³¹ *Mogale Alloys* [38]; Badenhorst and du Plessis 2012 *De Jure* 403. Moore and Veldsman 2013 *SALJ* 95 gives the example of where a company issues more shares and as a result the (former) controlling shareholder loses control.

⁶³² *Mogale Alloys* [38] and Badenhorst and du Plessis 2012 *De Jure* 403.

⁶³³ The section is not yet in operation. The 2008 Amendment Act came into operation through (Proc No 14) in GG 36512 of 31 May 2013. On 16 June 2013, the Proclamation was amended by (Proc No 17) in GG 36541 of 6 June 2013 with the effect that, *inter alia*, the amendments to s 11(1) was indefinitely suspended.

⁶³⁴ Dale *et al South African Mineral and Petroleum Law MPRDA-167*; van der Merwe and Ferreira September 2013 *Without Prejudice* 27.

equally “administratively unworkable”⁶³⁵ for the government, these strict requirements will be a severe setback for the ability of investors to maximise the returns on their investments.⁶³⁶ As with transfer of prospecting rights and mining rights, the government may have legitimate reasons for limiting the ability of shareholders in unlisted companies to transfer their shares freely. The government can, for example, aim to ensure that mining companies comply with black economic empowerment targets. However, the extent of the limitation that the 2008 Amendment Act envisages is unnecessary and excessive, even in pursuit of legitimate objectives. The extent of the limitation is disproportionate to legitimate interests that the government may have for limiting the ability of shareholders to transfer their shares freely. In this regard, excessive governmental interference and regulation unreasonably limit the interests of investors to maximize the returns on their investments. Thus, excessive governmental interference and regulation unjustifiably weaken optimal mineral tenure security.

Concerning controlling interests in listed companies, it has been argued that the requirement for consent to transfer controlling interests, is contrary to everyday trading of shares on exchanges.⁶³⁷ Although the requirement of consent will limit the ability of shareholders to transfer shares freely, these types of limitations are not uncommon. For example, the Competition Act regulates mergers of companies with the aim of promoting competition in the marketplace.⁶³⁸ According to the Act, a merger occurs when a company acquires or establishes control over the whole or part of the business of another company.⁶³⁹ Large⁶⁴⁰ and intermediate mergers⁶⁴¹ cannot take place without the approval of the Competition Commission.⁶⁴²

⁶³⁵ Dale *et al South African Mineral and Petroleum Law* MPRDA-167.

⁶³⁶ Leon 2013 *JERL* 201 refers to this as a “practical impossibility”. However, the author seems to be under the impression that the Amendment Act proposes to require ministerial consent for the transfer of any interest in *listed* companies. Also see “MPRDA Detrimental to SA Mining Industry” 8 March 2013 *Mining Weekly* available at <http://www.miningweekly.com/article/mprda-detrimental-to-sas-mining-industry-2013-03-08> where it is said that “shares in listed companies will become untradeable” if the amendments come into operation.

⁶³⁷ See Author unknown “MPRDA detrimental to SA mining industry” 8 March 2013 *Mining Weekly* where it is said that “shares in listed companies will become untradeable” if the amendments come into operation.

⁶³⁸ Competition Act of 1998, s 2.

⁶³⁹ Competition Act of 1998, s 12(1)(a). The acquisition of control can be direct or indirect.

⁶⁴⁰ S 11(5)(c) determines that “a large merger means a merger or proposed merger with a value at or above the higher threshold established in terms of subsection (1)(a).” See s 3 of the Determination of Merger Thresholds and Method of Calculation (GN 216) in *GG 31957* of 6 March 2009 for the higher thresholds.

⁶⁴¹ S 11(5)(b) of the Competition Act of 1998 determines that “an intermediate merger means a merger or proposed merger with a value between the lower and higher thresholds established in terms of subsection (1)(a)”. See ss 2 and 3 of the Determination of Merger Thresholds and Method of Calculation in *GG 31957* of 6 March 2009 for the lower and higher thresholds respectively.

⁶⁴² Competition Act of 1998, s 13A(3). With some exceptions, small mergers do not have to be approved. See s 13 of the Competition Act of 1998. S 11(5)(a) determines that “a small merger means a merger or proposed merger with a value at or below the lower threshold established in terms of subsection (1)(a)”. See Determination of Merger Thresholds and Method of Calculation in *GG 31957* of 6 March 2009 s 3 for the higher thresholds.

Shareholders who want to transfer their shares in companies that hold prospecting rights or mining rights, will require the approval of the Competition Commission if the transaction falls within the ambit of the Competition Act. If the transaction also results in a change in the controlling interest of the company, further ministerial consent will be required in terms of the proposed amendment of section 11(1) of the MPRDA.

In summary, the MPRDA limits the ability of shareholders of unlisted companies to transfer their interests freely. The restriction, arguably, has a negative impact on the ability of investors to maximise the return on their investments. The impact will be more severe if s 8(a) of the 2008 Amendment Act comes into operation. The Amendment Act will further limit the ability of shareholders of listed companies to transfer their interests freely. However, these observations are not sufficient to comment meaningfully on the extent to which the MPRDA provides optimal mineral tenure security. Meaningful comments require considering the reasons for requiring ministerial consent and the circumstances in which the Minister must grant consent.

3.2.2.2. Requirements for consent

Section 11(2) of the MPRDA indicates the purpose of requiring ministerial consent when a prospecting right or mining right is transferred, namely to ensure that the *acquirer* of the right complies with certain requirements.⁶⁴³ When prospecting rights and mining rights are transferred, the section further limits ministerial discretion by providing that the Minister *must consent* to the transfer if the requirements are met. Section 11(2) only refers to transfer of *the right* (the first part of section 11(1)) and not to the transfer of controlling interests in unlisted companies (the second part of section 11(1)). It is thus not clear whether section 11(2) applies in the case of transfer of controlling interests in unlisted companies. In *Mogale Alloys Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd*⁶⁴⁴, the court held that that section 11(2) applies when controlling interests in unlisted companies are transferred, “otherwise there will be no apparent purpose, or guidelines for the Minister”,⁶⁴⁵ in these situations.

⁶⁴³ See sec 3.2.1.2 above.

⁶⁴⁴ 2011 6 SA 96 (GSJ).

⁶⁴⁵ *Mogale Alloys* [29].

However, when interests in companies are transferred, the question should not be whether the *acquirer* of the interest complies with the requirements of section 11(2).⁶⁴⁶ The question must be whether the company that holds a right to minerals can still comply with the terms and conditions of the rights and its obligations in terms of the MPRDA *after the transfer*.⁶⁴⁷ For example, if the majority shareholders in mining companies want to sell their shares, the question is not whether the new shareholder can mine according to the mining work programme and comply with health and safety legislation. The question is whether the mining company that holds the mining right (probably the selling company) can still comply with all its obligations. It has been argued that a change in controlling interest is unlikely to have the effect that a company cannot comply with the requirements of section 11(2).⁶⁴⁸ In this regard, a change in shareholders unlikely to affect the technical and financial ability of a company to prospect and mine. Furthermore, a change in control will probably not interfere with the ability of the company to comply with environmental obligations and health and safety legislation. It has accordingly been argued that section 11(2) does not apply when controlling interests in companies are transferred.⁶⁴⁹ This means that the MPRDA contains no guidelines to assist the Minister when exercising the discretion to grant consent for the transfer of controlling interests in unlisted companies.⁶⁵⁰

Still, the government has a legitimate interest in having some control when interests in mining companies are transferred. For example, a change in the shareholders can impact on the extent to which a company complies with its BEE requirements. A change in shareholders can mean that 26% of the company's assets are no longer "black-owned" as required by the Mining Charter. It is possible to protect government's interests and to create certainty by specifying the criteria on which the Minister must base the discretion when considering an application for the transfer of interests in mining companies.⁶⁵¹ The criteria can, for example, include the effect that the transfer will have on the extent to which a company complies with its BEE

⁶⁴⁶ Badenhorst and du Plessis 2012 *De Jure* 400. *Contra Mogale Alloys* [37] where the court held that the acquirer of an interest must be "vetted for regulatory purposes".

⁶⁴⁷ Badenhorst and du Plessis 2012 *De Jure* 400. See Moore and Veldsman 2013 *SALJ* 85 88 where the authors argue that the purpose is, firstly, to vet the capabilities of the acquirer and, secondly, to determine whether the holder of the prospecting right or mining right will be able to comply with the requirements of the MPRDA for granting of rights.

⁶⁴⁸ Badenhorst and du Plessis 2012 *De Jure* 401.

⁶⁴⁹ Badenhorst and du Plessis 2012 *De Jure* 401.

⁶⁵⁰ Badenhorst and du Plessis 2012 *De Jure* 401.

⁶⁵¹ See Badenhorst and du Plessis 2012 *De Jure* 401 where the authors highlight the importance of promulgating regulations regarding consent of the Minister when interests in companies are transferred in general.

obligations. Furthermore, the Act can strengthen mineral tenure security by placing an obligation on the Minister to grant consent if the specified criteria are met.

If one accepts that section 11(2) does not apply when controlling interests in unlisted companies are transferred, it is clear that wide and uncircumscribed governmental discretion creates uncertainty. The discretion creates unnecessary uncertainty and increases the risks that investors face regarding the ability to maximise the returns on their investments. The complete lack of criteria on which the discretion must be based is not necessary in the pursuit of a legitimate governmental objective. Optimal mineral tenure security is unjustifiably limited here by wide and uncircumscribed governmental discretion. Furthermore, the existence of different opinions regarding whether section 11(2) applies when controlling interests in unlisted companies are transferred, in itself, indicates an incidence of vague and imprecise drafting. Unclear drafting again creates unnecessary uncertainty and unjustifiably weakens optimal mineral tenure security.

If the 2008 Amendment Act brings transfer of controlling interest in listed companies within the ambit of section 11(2), the arguments raised in relation to transfer of controlling interests in unlisted companies will apply. Thus, the government has legitimate interests in regulating transfer of controlling interest in listed companies. It is, however, unclear whether section 11(2) applies. This uncertainty in itself weakens mineral tenure security. Acceptance that section 11(2) does not apply will result in wide uncircumscribed governmental discretion and will consequently weaken mineral tenure security.

3.2.2.3. [Synopsis: Transfer of interests in companies; MTS strengths and weaknesses](#)

Taking into account legitimate governmental interests, the effect of the provisions of the MPRDA regarding transfer of interests in companies, discussed here, on mineral tenure security may be summarised as follows:

	Listed companies: interest other than controlling interest	Listed companies: controlling interest	Unlisted companies: interest other than controlling interests	Unlisted companies: controlling interest
MTS strengthened	Freely transferable	Freely transferable	Freely transferable	

MTS weakened		<i>Wide governmental discretion:</i> Proposed 2008 Amendment (no criteria for granting of consent)	<i>Excessive regulatory measures:</i> Proposed 2008 Amendment (transfer of any interest will require ministerial consent)	<i>Wide governmental discretion:</i> no criteria for granting of consent
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Table 6 Synopsis: Transfer of interests in companies; MTS strengths and weaknesses

The MPRDA strengthens mineral tenure security by allowing shareholders to transfer interests in listed companies and interests, other than controlling interests, in unlisted companies freely. The proposed amendment to section 11(1), in terms of which ministerial consent will be necessary for the transfers of any interest in unlisted companies, will result in excessive regulatory measures that are disproportionate to the objectives pursued. These excessive regulatory measures unnecessarily and unjustifiably weaken optimal mineral tenure security. The MPRDA further weakens optimal mineral tenure security by not describing any criteria on which the consent to transfer controlling interests in unlisted companies are based. If the proposed amendments to section 11(1) come into operation, ministerial consent for transfer of controlling interests in listed companies will also not be based on any specified objectives.

4. Ability to encumber

The ability to encumber rights to minerals refers to the possibility to use rights to grant real security rights to others.⁶⁵² In general, real security rights can take the form of mortgage bonds⁶⁵³ over rights to minerals or cession of rights to minerals through *cession in securitatem*

⁶⁵² Real security rights can be distinguished from personal security rights. In case of real security rights, a debt is secured by specific immovable or movable property (including incorporeal property such as rights to minerals) of the debtor. The property thus serves as security for payment of the debt. In case of personal security rights, such as suretyships, the creditor obtains a personal right against the surety for payment of a debt of the debtor. See Badenhorst *et al Silberberg* 357; du Bois *Wille's Principles* 630 – 631; van der Merwe *Sakereg* 605 – 606; Lubbe in *LAWSA* par 324.

⁶⁵³ In case of a mortgage bond, specific immovable property, including incorporeal property, of the debtor serves as security for payment of a debt. See van der Merwe *Sakereg* 615; Badenhorst *et al Silberberg* 361; Lubbe in *LAWSA* par 335. The reason why rights to minerals are encumbered by mortgaged and not pledged draws from the classification of real rights as immovable incorporeal things and personal rights as movable incorporeal things. See *Wille's Principles of South African Law* 421 - 425 for the classification of incorporeal things as movable things and immovable things. Immovable things are encumbered by way of mortgage bond while movable things are encumbered by way of pledge. Van der Merwe *Sakereg* 40 – 42 criticises the classification of incorporeal

debiti. In case of cession *in securitatem* *debiti*, the right is ceded to the cessionary and the cedent is divested of his right. The parties contemplate recession of the right to the original cedent upon satisfaction of the debt. Cession can also follow the pledge construction (or out-and-out cessions) in terms of which the right is not ceded to the cessionary but the cessionary only obtains a security interests.⁶⁵⁴ It is unclear whether cession in section 11(1) of the MPRDA includes *cession in securitatem debiti*. Some authors argue that “cession” in section 11(1) is probably synonymous with transfer and does not include *cession in securitatem debiti* while others argue that the ordinary meaning of cession includes out-and-out cession as well as *cession in securitatem debiti*.⁶⁵⁵ If one accepts that cession in section 11(1) includes *cession in securitatem debiti*, the MPRDA is clear that ministerial consent is always required to cede prospecting rights and mining rights.⁶⁵⁶ This requirement of ministerial consent is subject to the same arguments as the requirements for ministerial consent to mortgage rights.⁶⁵⁷ The MPRDA is also clear that mining permits cannot be ceded.⁶⁵⁸ It is arguable that the prohibition against cession of mining permits increases the risks that mines cannot be developed profitably and thus weakens mineral tenure security in the same way than the prohibition against transfer of mining permits. Holders of mining permits cannot cede their permits to obtain loans for development of mines. The current analysis focuses on encumbrance of rights to minerals by way of mortgage bonds.

Registered⁶⁵⁹ mortgage bonds, in general, offer good security to bondholders. If debtors (in the current context holders of rights to minerals) default on their payment obligations,

things into movable and immovable things but nonetheless recognises the practical need for this and confirms that real rights are classified as immovable incorporeal things. Also see van der Merwe in *LAWSA* par 17 where the author argues that incorporeal things should not be included in the definition of “things”. Again, the author accepts the practical need to recognise situations where incorporeal things are the object of other real rights. According to Badenhorst *et al Silberberg* 39 the importance of the classification of incorporeal things into immovable and movable things is that immovable things (thus real rights) are hypothecated by way of mortgage while movables (thus personal rights) are pledged or encumbered by way of a registered notarial bond.

⁶⁵⁴ See Lubbe in *LAWSA* pars 376 fn 1, 378 and 414.

⁶⁵⁵ Mostert *Principles and Policies* 88 argues that cession and transfer are probably synonymous and means “conveyance” of rights to minerals. Thus, cession does not include *cession in securitatem debiti*. Similarly, Moore and Veldsman 2013 *SALJ* 89 argue that cession denotes a method to transfer a right. However, according to Dale *et al South African Mineral and Petroleum Law* MPRDA-173 cession includes out-and-out cession as well as *cession in securitatem debiti*. The reason advanced is that the ordinary meaning of cession includes both terms.

⁶⁵⁶ MPRDA, s 11(1).

⁶⁵⁷ See sec 4.3.1 below.

⁶⁵⁸ MPRDA, s 27.

⁶⁵⁹ A real security right is only established upon registration of the bond in the deeds office. Before registration, the agreement between the parties gives rise to a personal right. See Badenhorst *et al Silberberg* 361; du Bois *Wille's Principles* 634; van der Merwe *Sakereg* 621.

bondholders can obtain a court order to sell the property (the mortgaged right to minerals) in execution.⁶⁶⁰ Furthermore, bondholders are secured creditors⁶⁶¹ and will be paid first from the proceeds of a sale in execution of the property in case of insolvency.⁶⁶² Mineral bonds are registered in the Mineral and Petroleum Titles Registration Office⁶⁶³ and not in the Deeds Registry⁶⁶⁴ as other bonds. There are important differences between registration in the Deeds Office and in the Mineral and Petroleum Titles Registration Office which are discussed in chapter 6.⁶⁶⁵ The current chapter is concerned with the ability to mortgage rights and the impact of foreclosure of mortgage bonds on the ability to develop mines profitable. The rules of foreclosure of mortgage bond are the same for minerals bonds and bonds registered in the Deeds Registries Act.

4.1. Mortgage as a method to finance mining projects

It has been argued that the ability to mortgage rights to minerals is “of great importance” as an instrument to facilitate borrowing and lending of money for the development of mines.⁶⁶⁶ According to the argument, the ability to mortgage rights to minerals is of particular importance for previously disadvantaged persons to enter the South African mining industry.⁶⁶⁷ It is also generally stated that mineral tenure security requires the ability to mortgage rights to raise funds for the development of mines.⁶⁶⁸

However, mortgaging of rights is not the only, or even the most important method, to raise funds for mining projects. In fact, the large scale of natural resource projects often require “project finance and special-purpose financing structures to undertake them”.⁶⁶⁹ It is beyond

⁶⁶⁰ Van der Merwe *Sakereg* 606; Badenhorst *et al Silberberg* 357; Lubbe in *LAWSA* par 368. See Fuchs August 2014 *LitNet Akademies* 223 – 224 available at http://www.litnet.co.za/assets/pdf/joernaaluitgawe_11_2/11_2_Fuchs.pdf for the procedures that must be followed before judgement can be obtained.

⁶⁶¹ *Firststrand Bank Limited v Land and Agricultural Development Bank of South Africa* 2015 1 SA 38 (SCA) [22].

⁶⁶² Insolvency Act 24 of 1936, s 2 def of “security” and s 95(1); Sharrock *Hockley's Insolvency Law* 183; Badenhorst *et al Silberberg* 357 and especially fn; 5 *Wille's Principles of South African Law* 637; van der Merwe *Sakereg* 605; Lubbe in *LAWSA* par 374.

⁶⁶³ Mining Titles Registration Act 16 of 1967, s 1 def of “mortgage bond” read with s 5(1)(h).

⁶⁶⁴ Deeds Registries Act 47 of 1937, s 3(1)(e).

⁶⁶⁵ See chap 6, sec 2.2.

⁶⁶⁶ Dale in Bastida *et al* 830. According to Dale *et al South African Mineral and Petroleum Law* MPRDA-14, registration of bonds “is of great moment to prospecting and mining companies as potential borrowers and to financial institutions as potential lenders”.

⁶⁶⁷ Dale *et al South African Mineral and Petroleum Law* MPRDA-14; Dale in Bastida *et al* 830.

⁶⁶⁸ See chap 1, sec 1.1 regarding the ability to mortgage rights as aspect of mineral tenure security.

⁶⁶⁹ Pritchard in Bastida *et al* 76. See Benning May/June *The Journal of The South African Institute of Mining and Metallurgy* 146 where the author says that the types of finance for mining projects normally are corporate loans, project finance or venture capital. Also see Coles “Debt Financing for Mining Projects” 24 Jan 2014

the scope of this work to do describe these methods of financing mining projects. The discussion that follows must therefore not be understood to mean that profitable development of mines depends solely on the ability to mortgage rights to minerals. Still, mortgaging of rights is one method to raise funds for the development of mines. Furthermore, the MPRDA acknowledges and regulates the ability to mortgage rights to minerals and the matter is hence discussed here.

4.2. Mortgage of mining permits

According to section 27(b) of the MPRDA, mining permits can be encumbered for purposes of funding or financing the mining project to which the permits relates with ministerial consent.⁶⁷⁰ Section 5(1)(h) of the Mining Titles Registration Act (MTRA) provides that the Director-General has a duty to attest and register mortgage bonds. Based on the fact that the definition of “mortgage bond” in section 1 of the MTRA refers to hypothecation of *rights* only, it has been argued that mining permits are not rights and that there is therefore no mechanism to register mortgage bonds over mining permits.⁶⁷¹ The argument seems somewhat superficial, especially because the MTRA contains no definition of “permits”. It is possible that all of the various rights, permits and permissions, which the MPRDA provides for, fall within the ambit of the definition of “right” in the MTRA.⁶⁷²

A much more serious concern in the case of mining permits is that these permits are not transferable.⁶⁷³ The purpose of mortgage bonds is to secure the debt of the creditor. Creditors need to sell hypothecated permits in execution if holders thereof default in re-paying the debt. A sale in execution will not be possible if mining permits cannot be transferred. Thus, registered mortgage bonds over mining permits do not provide any security to bondholders in reality.⁶⁷⁴ The fact that the MPRDA provides that mining permits can be hypothecated but then renders the security offered by the bond worthless by prohibiting transfer of mining

available at https://www.mayerbrown.com/files/News/e95d56ef-7dc9-4ad8-ac1c5e9cd9804876/Presentation/NewsAttachment/fd68c165-dbb9-4f3d-bdf15f3fb16856e5/art_coles_jan2414_debt-financing-mining-projects.pdf; “Financing Available for Mining in Africa” 19 Dec 2011 available at <http://www.fin24.com/Companies/Financial-Services/Financing-available-for-mining-in-Africa-20111219>.

⁶⁷⁰ Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-26, 31-2 and 31-2; Mostert *Principles and Policies* 90; Badenhorst *et al Silberberg* 685.

⁶⁷¹ Dale *et al South African Mineral and Petroleum Law* MPRDA-300.

⁶⁷² Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* MPRDA 30-2.

⁶⁷³ MPRDA, s 27(8)(b). See 3.1 above.

⁶⁷⁴ Dale *et al South African Mineral and Petroleum Law* MPRDA-300 argue that the reference to mortgage bonds over mining permits must be read *pro non scripto* because mortgage bonds offer no security to the bondholder. Also see Mostert *Principles and Policies* 90; Dale in Bastida *et al* 831; Badenhorst *et al Silberberg* 685.

permits is an indication of careless drafting. The non-transferability of mining permits is probably justifiable because these permits only allow small-scale mining.⁶⁷⁵ However, the impact that non-transferability has on the security offered by bonds cannot be justified in view of the interests pursued by limiting the ability of mining permits to transfer their permits. Careless drafting therefore unreasonably and unjustifiably weaken mineral tenure security. Certainty can be increased by allowing the transfer of mining permits with ministerial consent that is based on objectively ascertainable criteria. If ministerial consent for the transfer of mining permits is required, the government's interests in having some control in the transfer of rights to minerals will still be protected. Furthermore, allowing transfer of mining permits will remove the effect that non-transferability has on the security offered by registered bonds and will thus strengthen optimal mineral tenure security.

4.3. Mortgage of prospecting rights and mining rights

Prospecting rights and mining rights can be encumbered with mortgage bonds.⁶⁷⁶ The MPRDA is not clear regarding whether ministerial consent is necessary for the encumbrance. Section 11(1) of the MPRDA that requires ministerial consent for a wide range of transactions pertaining to mining rights and prospecting rights, does not expressly refer to mortgage bonds. Section 11(3) of the MPRDA determines that consent in the case of encumbrance by mortgage bonds is not required in particular circumstances.⁶⁷⁷ The difficulty with the wording of section 11(3) is that it refers to "consent contemplated in subsection (1)" and to "encumbrance by mortgage contemplated in subsection (1)" while subsection (1) does not expressly contemplate mortgage bonds. Section 11(1) expressly contemplates cession, transfer, letting, subletting, assignment and alienation of prospecting rights and mining rights.

These provisions are open to various interpretations. According to one interpretation, the transactions in section 11(1) include encumbrances by mortgage.⁶⁷⁸ Justification for this

⁶⁷⁵ See sec 3.1 above.

⁶⁷⁶ MTRA, definition of "mortgage bond" read with s 5(h). Also see Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 30-10; Dale *et al South African Mineral and Petroleum Law* MPRDA-14; Badenhorst *et al Silberberg* 681 and 689. The MTRA does not restrict the types of bonds that can be registered. This means that any bond recognised by common law can be registered over mining rights and prospecting rights in appropriate circumstances. See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 31-7 – 31-8 for a discussion on the different types of bonds.

⁶⁷⁷ The first requirement for s 11(3) to apply is that the purpose of the encumbrance must be to obtain a loan or guarantee for the purpose of funding or financing prospecting or mining projects. S 11(3) secondly only applies when the encumbrance takes place by way of mortgage. The bondholder must thirdly be a bank as defined in the Banks Act 94 of 1990 or another financial institution approved by the Registrar of Banks.

⁶⁷⁸ Dale *et al South African Mineral and Petroleum Law* MPRDA-172 mentions but rejects this argument.

interpretation is that it gives coherence to section 11 as a whole in line with the presumption against absurdity according to the rules of statutory interpretation.⁶⁷⁹ Thus, the reference to “mortgages contemplated in section 11(1)” in section 11(3) will be absurd if section 11(1) does not require ministerial consent for encumbrance by mortgage. The interpretation also accords with a contextual interpretation of section 11 in line with the objectives of the MPRDA and the purpose of section 11.⁶⁸⁰ Justification for interpreting section 11(1) to include encumbrance by mortgage can also be found in the catch-all phrase “otherwise dispose of” in section 11(1).⁶⁸¹ In other words, encumbrance by mortgage is to “otherwise dispose of” prospecting rights and mining rights for which ministerial consent is necessary. Furthermore, section 31(2) of the MTRA determine that bonds “may hypothecate rights of different kinds *with the written consent of the Minister*”.

The preferred interpretation is, however, a strict one, which excludes mortgage bonds from the ambit of section 11(1).⁶⁸² Ministerial consent is thus not required to register mortgage bonds over prospecting rights and mining rights in terms of the MPRDA. Justification for this interpretation is that foreclosure will in any event always require ministerial consent with the result that not requiring consent to initially register bonds will not undermine the purpose of section 11.⁶⁸³ The preferred interpretation of section 11(1) leads to the result that “interest in rights”⁶⁸⁴ does not include mortgages and that mortgage bonds can be transferred without ministerial consent.⁶⁸⁵ The reason advanced is that it will be anomalous if prospecting rights and mining rights can be mortgaged without ministerial consent but that consent is required for the transfer of bonds.⁶⁸⁶

The strict interpretation of section 11(1) seems to hinge on the desire to classify prospecting rights and mining rights as common-law limited real rights.⁶⁸⁷ Briefly, common-law limited

⁶⁷⁹ Dale *et al South African Mineral and Petroleum Law* MPRDA-172. See du Plessis *Re-Interpretation of Statutes* 162 – 164 regarding the presumption against absurdities.

⁶⁸⁰ Dale *et al South African Mineral and Petroleum Law* MPRDA-172. See du Plessis *Re-Interpretation of Statutes* 111 – 115 regarding contextual interpretation in general.

⁶⁸¹ Mostert *Principles and Policies* 89. The author raises the possibility but argues that the most appropriate interpretation is that mortgage bonds can be registered over prospecting rights and mining rights without ministerial consent and that the only restrictions are those set out in s 11(3).

⁶⁸² Dale *et al South African Mineral and Petroleum Law* MPRDA-172; Mostert *Principles and Policies* 89.

⁶⁸³ Dale *et al South African Mineral and Petroleum Law* MPRDA-172.

⁶⁸⁴ See sec 3.2.1 above for a discussion of the meaning of “interest in right”.

⁶⁸⁵ Dale *et al South African Mineral and Petroleum Law* MPRDA-168.

⁶⁸⁶ Dale *et al South African Mineral and Petroleum Law* MPRDA-169.

⁶⁸⁷ Dale *et al South African Mineral and Petroleum Law* MPRDA-172 – MPRDA-173; Mostert *Principles and Policies* 89.

real rights can, in general, be transferred and mortgaged freely.⁶⁸⁸ The ability to transfer and mortgage common-law mineral rights freely was at times used as justification for classifying the rights as limited real rights.⁶⁸⁹ It is questionable whether common-law categories of rights are suitable for the classification of prospecting rights and mining rights⁶⁹⁰ as the MPRDA establishes a regulatory regime that is predominantly administrative in nature.⁶⁹¹

The 2013 Amendment Bill attempted to include specific reference to encumbrance in section 11(1) of the MPRDA.⁶⁹² Although the Bill was sent back to parliament,⁶⁹³ the attempted amendment gives an indication of the intention of the legislature regarding how to interpret the current section 11(1), namely that ministerial consent is required for encumbrance of prospecting rights and mining rights. According to a combined reading of sections 11(1) and 11(3), and the intention of the legislator in the attempt to amend section 11(1), ministerial consent is required to encumber prospecting rights and mining rights except when the requirements of section 11(3) are met.

In summary, initial registration of mortgage bonds over mining permits always requires ministerial consent. The fact that mining permits are not transferable, however, casts doubt on the viability of registering mortgage bonds over mining permits. The provisions of the MPRDA regarding mortgage and transfer of mining permits do not support each other. The effect of this is that mineral tenure security is weakened. A combined reading of sections 11(1) and 11(3), and taking into account the attempt in the 2013 Amendment Bill to amend section 11(1), suggests that the correct interpretation of the current section 11 is that Ministerial consent is always necessary for encumbrance of prospecting rights and mining rights unless the MPRDA provides exceptions. It is arguable that the limitation on the ability of holders of prospecting rights and mining rights to mortgage rights freely weakens the possibility to develop mines profitably and therefore weakens mineral tenure security. However, meaningful comments regarding mineral tenure security, requires an investigation into the purposes of the consent requirement as well as the situations in which consent is not required for encumbrance.

⁶⁸⁸ See chap 2, sec 3.2.2 fn 250 and fn 251.

⁶⁸⁹ See chap 2, sec 3.2.2 fn 250 and fn 251.

⁶⁹⁰ See chap 6, sec 3.

⁶⁹¹ See chap 2, sec 3.2.1 and sec 3.2.2 regarding the administrative law nature of the current regulatory regime.

⁶⁹² 2013 Amendment Bill, s 8(a).

⁶⁹³ See the presidential letter to parliament available at <http://cer.org.za/wp-content/uploads/2010/08/Zuma-letter-to-the-NA-re-MPRDA-Bill.pdf> accessed 4 January 2016.

4.3.1. Requirements for consent

The purposes of requiring consent to mortgage prospecting rights and mining rights are the same as the purposes for requiring consent to transfer rights to minerals.⁶⁹⁴ If holders of hypothecated rights default on payment, bondholders can enforce the terms of the secured loan through a sale in execution of the rights. A sale in execution means that the right will be transferred to another entity. As explained above, the government has legitimate interests in having some control when rights are transferred. Furthermore, the limitation that the requirement of consent has on the ability of holders of prospecting rights and mining rights to mortgage their rights is hedged by the obligation on the Minister to grant consent if the requirements of section 11(2) are met.⁶⁹⁵ In this regard, the same objections as discussed above,⁶⁹⁶ applies, namely that vague and imprecise drafting of the criteria for the granting of consent (specifically the 26% BEE requirement), at times, lead to unnecessary uncertainty that unjustifiably weakens optimal mineral tenure security.

A further aspect that may strengthen mineral tenure security is that the requirement for consent in section 11(1) to initially mortgage rights can be circumvented if the requirements of section 11(3) are met. Section 11(3) provides that the “consent contemplated in subsection (1)” is not required in respect of encumbrance by mortgage if a bank⁶⁹⁷ or financial institution⁶⁹⁸ provides a written undertaking that it will not sell rights in execution without the required consent in terms of subsection (1). The section applies if the purpose of the loan⁶⁹⁹ is to fund or finance a prospecting project or mining project. Section 11(3) allows prospecting rights and mining rights to serve as real security against loans for development of mines without ministerial consent in specified circumstances. The circumstances involve situations in which reputable financial institutions hold registered bonds over rights and where the purpose of the loan is directly related to profitable development of mines. In these circumstances, ministerial consent is required *only* when debtors default on payment and creditors wish to sell hypothecated rights in execution. In this way, governmental interests for requiring consent, for example, to ensure

⁶⁹⁴ See sec 3.2.1.2 above.

⁶⁹⁵ See sec 3.2 above. Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 31-3 argue that the discretion is wide.

⁶⁹⁶ See sec 3.2.1.2 above.

⁶⁹⁷ S 11(3)(a) of the MPRDA requires the bank to be registered in terms of the Banks Act of 1990.

⁶⁹⁸ S 11(3) of the MPRDA requires that the financial institutions must be approved by the Registrar of Banks, as referred to in the Banks Act of 1990, on request by the Minister.

⁶⁹⁹ Section 11(3) refers to a loan or guarantee.

optimal exploitation of mineral resources and transformation of the mining industry are still protected. However, at the time of registration of bonds, right holders do not have to follow procedures that may prove to be cumbersome and time-consuming if bondholders are likely to be reputable and the purpose of the loan is directly related to profitable development of mines. The fact that section 11(3) does not apply when bondholders are entities other than banks or financial institutions, and if the purpose of the loan is not to pursue profitable development of mines, protects the government from potentially unreputable bondholders and suspect reasons for loans. The possibility of circumventing the requirement of ministerial consent at the time of registration of bonds, can be seen as an instance of clear and sound drafting of the MPRDA that strengthens mineral tenure security. If the requirements of section 11(3) are met, a sale in execution is subject to consent “in terms of subsection (1)”. In this regard, the Minister is under an obligation to grant consent if the requirements of section 11(2) are met.

The limitation of governmental discretion in section 11(3) to grant consent contributes significantly to protecting investor's interests to mortgage rights freely and government's interests in having control when rights are transferred adequately. A point of criticism is that banks or financial institutions may be reluctant to accept prospecting rights and mining rights as security for a loan readily due to the fact they will need ministerial consent to execute the terms of their security. However, in this regard, the limitation of ministerial discretion to grant consent in section 11(2), limits the risk of banks and financial institutions of not being able to recover their money. Furthermore, banks and financial institutions will be aware of the requirement of ministerial consent to sell rights in execution because they have to consent to this in writing.

4.3.2. Synopsis: Mortgage of rights; MTS strengths and weaknesses

Taking into account legitimate governmental objectives, the effect of the provisions of the MPRDA regarding mortgage of rights to minerals, discussed here, on mineral tenure security may be summarised as follows:

	Mining permits	Prospecting rights	Mining rights
MTS strengthened		<i>Obligatory grant</i> of consent if requirements are met (irrespective of	<i>Obligatory grant</i> of consent if requirements are met (irrespective of

		whether consent is required in terms of ss 11(1) or 11(3)) <i>Good and sound drafting:</i> possibility of circumventing requirement of consent for initial registration	whether consent is required in terms of ss 11(1) or 11(3)) <i>Good and sound drafting:</i> possibility of circumventing requirement of consent for initial registration
MTS weakened	<i>Careless drafting:</i> Incompatibility of provisions regarding transfer and mortgage	<i>Vague and imprecise drafting:</i> criteria for obligatory grant of consent (26% BEE requirement)	<i>Vague and imprecise drafting:</i> criteria for obligatory grant of consent (26% BEE requirement)

Table 7 Synopsis: Mortgage of rights; MTS strengths and weaknesses

The MPRDA strengthens mineral tenure security by placing an obligation on the Minister to grant consent to mortgage prospecting rights and mining rights if the requirements are met. Furthermore, careful and sound drafting of the Act opens a route that allows circumventing consent for registration of bonds when bondholders are likely to be reputable and the reasons for loans are directly related to profitable development of mines. However, vague and imprecise drafting, regarding the criteria that will place an obligation on the Minister to grant consent for encumbrance, weakens mineral tenure security. Furthermore, it seems that careless drafting results in incompatibility of the provisions relating to mortgage and transfer of mining permits and will significantly weaken mineral tenure security of holders of mining permits.

4.4. The effect of lapsing and cancellation on security offered by bonds

The ability to mortgage rights to minerals loses its advantages if, in practice, mortgages are weak and fail to offer good security to creditors. If registered bonds lose their advantages, the ability to mortgage rights are, by deduction, compromised. In this regard, the effect that lapsing and cancellation of prospecting rights and mining rights have on the security of bondholders requires investigation.⁷⁰⁰ If rights no longer exist, registered bonds over (former) rights to minerals cannot provide security to (former) bondholders because there will be no property to sell in execution. Rights to minerals lapse in the following circumstances: liquidation or

⁷⁰⁰ The investigation does not include mining permits because bonds over mining permits do not offer any security due to non-transferability of mining permits. See sec 4.2 above.

sequestration of right holders;⁷⁰¹ deregistration of companies;⁷⁰² cancellation of rights by the Minister;⁷⁰³ death of right holders;⁷⁰⁴ and expiration.⁷⁰⁵ The following sections investigate the effect that lapsing of rights, in these different circumstances, has on the security of holders of registered mortgage bonds.

4.4.1. *Lapsing upon liquidation or sequestration of right holders*

Rights to minerals lapse upon, liquidation⁷⁰⁶ or sequestration⁷⁰⁷ of the estates of holders of hypothecated rights, except when rights are subject to registered bonds which comply with the requirements of section 11(3) of the MPRDA.⁷⁰⁸ If the requirements of section 11(3) are met, rights do not lapse upon liquidation or sequestration of holders of hypothecated rights and the security offered by bonds is not threatened. Accordingly, rights will not lapse upon liquidation or sequestration of right holders if three requirements are met. First, the purpose the loan is to fund or finance a mining project or prospecting project.⁷⁰⁹ Second, the mortgagee is a bank as defined in the Banks Act⁷¹⁰ or financial institution that is approved by the registrar of banks.⁷¹¹ Third, such bank or financial institution undertakes in writing that a sale in execution or disposal of the hypothecated right pursuant to foreclosure, will only take place with ministerial consent.⁷¹² If rights do not lapse upon liquidation or sequestration of right holders, rights to minerals can become part of the insolvent estate.⁷¹³ This means that rights can be sold in execution and transferred to another if the requirements of section 11(2) are met. As explained,

⁷⁰¹ MPRDA, s 56(d).

⁷⁰² MPRDA, s 56(c).

⁷⁰³ MPRDA, s 56(e).

⁷⁰⁴ MPRDA, s 56(b).

⁷⁰⁵ MPRDA, s 56(a).

⁷⁰⁶ Winding-up of insolvent companies are regulated by chap 14 of the Companies Act of 1973 (and not by the Companies Act of 2008). See Item 9 of Sch 5 of the Companies Act of 2008. The Close Corporation Act of 1984 regulates winding-up of insolvent close corporations. However, the Close Corporation Act incorporates many of the provisions of the Companies Act of 1973 and the Companies Act of 2008. See Sharrock *et al Hockly's Insolvency Law* 269.

⁷⁰⁷ The insolvency Act of 1936 provides for the sequestration of the estate of a debtor. See Sharrock *et al Hockly's Insolvency Law* 5. According to s 2 of the Insolvency Act of 1936, a debtor is a person or partnership, or the estate of a person or partnership. Body corporates, companies, or other associations that that may be placed under liquidation in terms of the laws relating to companies is specifically excluded.

⁷⁰⁸ MPRDA, s 56(d).

⁷⁰⁹ MPRDA, s 11(3).

⁷¹⁰ MPRDA s 11(3)(a).

⁷¹¹ MPRDA, s 11(3)(b).

⁷¹² MPRDA, s 11(3).

⁷¹³ According to s 2 of the Insolvency Act of 1936, "immovable property" includes "rights or interests in land *or minerals*, which is registrable in any office in the Republic intended for the registration of title to land *or the right to mine*" (own emphasis). This definition seems wide enough to include rights granted in terms of the MPRDA that are registrable in the Mineral and Petroleum Titles Registration Office. See *contra* Sharrock *et al Hockly's Insolvency Law* 71 where the author only refers to rights that are registrable in a deeds registry.

the requirements of section 11(2) protect the interests of the government when rights to minerals are transferred. According to the rules of Insolvency law, mortgagees (banks and financial institutions) will be secured creditors and will be paid first if a sale and transfer of rights occur. Banks and financial institutions can thus protect their security in case of liquidation or sequestration of holders of hypothecated rights by complying with the requirements of section 11(3). The fact that the security offered by bonds will not become worthless if banks or financial institutions comply with the requirements of section 11(3) strengthens mineral tenure security. In this regard, it is arguable that the MPRDA is drafted in a sound and clear manner that strengthens mineral tenure security. However, if bondholders are not banks or financial institutions⁷¹⁴ or if loans were not for financing or funding of a prospecting project or mining project,⁷¹⁵ security offered by bonds will become meaningless if right holders are liquidated or sequestrated.⁷¹⁶ The difficulty here is that are instances, for example when bondholders are not banks or financial institutions, in which bondholders cannot protect their interests. In these instances, bondholders have no means to ensure that the security offered by bonds do not become meaningless upon the liquidation or sequestration of holders of rights to minerals. It is therefore also arguable that the inability of some bondholders to protect their interests in case of liquidation or sequestration of bondholders is a result of careless drafting that weaken mineral tenure security.

It is understandable that the government has legitimate interests in lapsing of rights when right holders are liquidated or sequestrated. Right holders that are liquidated or sequestrated will in all likelihood not have the financial resources to continue prospecting and mining according to the prospecting work programme or mining work programme. The government thus has an interest to ensure that the rights of liquidated or sequestrated right holders are terminated and that similar rights are granted to entities that can contribute towards optimal exploitation of mineral resources. However, there seems to be no reason why all rights (when the requirements of section 11(3) were not met) cannot continue to exist upon liquidation or sequestration of right holders. This will provide an opportunity to bondholders to recover loans according to the rules of Insolvency law. The government's interests will still be protected because rights

⁷¹⁴ Lenders can, for example, be public entities. In this regard, s 8(c) of the 2013 Amendment Bill attempted to include public entities. Bonds held over old order rights that were converted into new order rights will also not be covered by s 11(3) because bondholders did not agree in writing that a sale in execution will be subject to ministerial consent.

⁷¹⁵ Dale *et al South African Mineral and Petroleum Law* MPRDA-14 and MPRDA-15.

⁷¹⁶ Dale *et al South African Mineral and Petroleum Law* MPRDA-165 and MPRDA-166.

can only be sold in execution and transferred if the requirements of section 11(2) are met. In this regard, it seems that thoughtless and careless drafting of the MPRDA does not seem to be necessary in the pursuit of governmental objectives and creates unnecessary uncertainty that unjustifiably weakens optimal mineral tenure security. The 2013 Amendment Bill attempted to amend the MPRDA so that all rights will not lapse upon liquidation or sequestration of right holders.⁷¹⁷ Such an amendment will eliminate any negative effects that the liquidation and sequestration of right holders will have on the security of bondholders.

4.4.2. Lapsing upon deregistration

Hypothecated rights to minerals lapse upon deregistration of a company or closed corporation, unless an application was made for consent to cede or transfer the right and the Minister consented thereto.⁷¹⁸ If no application for consent to transfer or cede⁷¹⁹ the right was made prior to deregistration, rights will thus lapse and bondholders will not have any security.⁷²⁰ This seems to be a harsh situation for bondholders. However, as is explained in more detail below, deregistration occurs by virtue of different procedures. Some of these procedures have mechanisms that provide protection to bondholders.

In general, when companies are deregistered, bondholders will only be protected if the “consent [for transfer] was implemented” and the actual cession or transfer took place prior to deregistration.⁷²¹ It will thus not be sufficient if an application for consent to transfer or cede hypothecated rights was made before deregistration.⁷²² This is because there will be no entity that can transfer rights to transferees after deregistration.⁷²³ The company or closed corporation will no longer have an estate from which the rights can be ceded or transferred to a transferee. Generally, when a company or closed corporation is deregistered, remaining assets in the estate

⁷¹⁷ S 42 the 2013 Amendment Bill attempted to delete s 56(d) and to insert s 56(g). According to the attempted amendment and insertion of s 56(g), rights and permits would be part of the insolvent estate and would be transferable with consent as required by section 11(1) of the MPRDA.

⁷¹⁸ MPRDA, s 56(c). Also see *Palala Resources* [44] and [45].

⁷¹⁹ The requirements regarding ministerial consent to cede or transfer must also be kept in mind in the current context. See sec 3.2.1.2 above.

⁷²⁰ However, the interests of bondholders are protected in some cases of deregistration. See below in this sec.

⁷²¹ Dale *et al South African Mineral and Petroleum Law* MPRDA-165.

⁷²² Dale *et al South African Mineral and Petroleum Law* MPRDA-165.

⁷²³ Contra Dale *et al South African Mineral and Petroleum Law* MPRDA-165 who seem to suggest that the state could transfer rights to minerals if rights did not lapse due to merger. Merger occurs because the state is the custodian of minerals and minerals resources. The state cannot be grantor and transferee.

becomes *bona vacantia*⁷²⁴ and fall to the state.⁷²⁵ It has been argued that when assets become *bona vacantia*, right holders can claim the assets to which they have rights from the government.⁷²⁶ However, in case of rights to minerals, the state is not able to transfer rights once assets became *bona vacantia*. According to the MPRDA, the state has the authority to grant rights to minerals to applicants. The state cannot be grantor and holder of rights and rights will therefore lapse due to merger.⁷²⁷ The state can thus also not cede or transfer rights to possible transferees. In *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and Others*⁷²⁸ the court did not follow the *bona vacantia* approach and held that rights to minerals lapse upon deregistration of companies, i.e. rights do not become *bona vacantia*.⁷²⁹ If rights to minerals lapse when companies are deregistered, it is no longer possible to transfer rights to bondholders. Whether right to minerals lapse upon deregistration or become *bona vacantia* and vest in the state, the position of bondholders remain the same. An application for consent to cede or transfer rights is not sufficient to protect bondholders when companies are deregistered. Generally, bondholders will only be protected if rights were in actual fact transferred before deregistration.

However, as briefly mentioned, a company⁷³⁰ can be deregistered in different scenarios. Some of these scenario offer protection to bondholders. First, companies can be deregistered if it has been “completely wound up”.⁷³¹ Insolvent as well as solvent companies can be wound up.⁷³²

⁷²⁴ *Palala Resources* [47]. Regarding the property of a company that ceases to exist becoming *bona vacantia* and vesting in the state see *Rainbow Diamonds (Edms) Bpk. en Andere v Suid-Afrikaanse Nasionale Lewensassuransmaatskappy* 1984 (3) SA 1 (A) from [17]; *Valley View Homeowners' Association v Universal Pulse Trading 27 (Pty) Ltd* (70639/2010) [2011] ZAGPPHC 154 (13 May 2011) [9]. For a critical discussion of the application of the rules of *bona vacantia* in general see Sonnekus 1985 *TSAR* 121.

⁷²⁵ *Ex Parte Sprawson: (In re Hebron Diamond Mining Syndicate Ltd)* 1914 TPD 458 461. Assets that become *bona vacantia* includes mineral rights. See *Ex Parte Marchini* 1964 (1) SA 147 (T) 150 - 151; *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 1989 1 SA 35 (T) 36D; *Ex Parte Sengol Investments (Pty) Ltd* 1982 3 SA 474 (T) 476. Also see Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 3-17; Sharrock *et al Hockly's Insolvency Law* 268.

⁷²⁶ Sonnekus 2008 *TSAR* 138. According to Sonnekus, this is limited to transferable assets. Non-transferable assets, like personal servitudes cannot be transferred to the state. This statement must, however, be qualified. According to another line of reasoning, claims that creditors have against the company become unenforceable while the company is deregistered. It is only upon re-registration that creditors can institute claims against the company. See *Barclays National Bank Ltd v Traub*; *Barclays National Bank Ltd v Kalk* 1981 4 SA 291 (W) 295; Pama 2013 *De Rebus* 150. The difference is not further investigated here because the outcome does not have any practical implications in the current context.

⁷²⁷ Dale *et al South African Mineral and Petroleum Law* MPRDA-165.

⁷²⁸ 2014 6 SA 403 (GP).

⁷²⁹ *Palala Resources* [70].

⁷³⁰ In terms of the def of “company” in s 1 of the Companies Act of 2008, companies include closed corporations.

⁷³¹ Companies Act of 2008, s 82(1)

⁷³² Ss 79 – 81 of the Companies Act of 2008 regulate winding-up of solvent companies. Chap 14 of the Companies Act of 1973 regulate winding-up and liquidation of insolvent companies. See Sharrock *et al Hockly's Insolvency Law* 240.

As explained above, in case of liquidation of insolvent companies, bondholders will be protected according to the rules of Insolvency law if the requirements of section 11(3) of the MPRDA are met.⁷³³ In case of deregistration pursuant to liquidation, where the requirements of section 11(3) cannot be met, the objections raised above regarding weakening of mineral tenure security apply.⁷³⁴

Solvent companies can be wound up voluntarily⁷³⁵ or through a court order.⁷³⁶ In case of voluntary winding-up, the company must provide security, to the satisfaction of the Master of the High Court, for the payment of its debts within 12 months of the start of the winding-up.⁷³⁷ The interests of bondholders are thus protected. There is no similar requirement when solvent companies are wound up through a court order. Furthermore, the court does not have to be satisfied that winding-up will be to the advantage of the company's creditors.⁷³⁸ It thus seems as if the security interests of bondholders are not protected when solvent companies are wound-up through a court order. Holders of bonds over prospecting rights and mining rights will thus only be protected if a sale in execution of the hypothecated right takes place before deregistration.⁷³⁹

Second, the Companies and Intellectual Property Commission (the Commission) can remove companies from the companies register in certain instances.⁷⁴⁰ The Commission can deregister companies if companies transfer their registration to a foreign jurisdiction.⁷⁴¹ Failure to submit annual returns⁷⁴² for two successive years combined with a failure to show, on the demand of the Commission, satisfactory reasons for not submitting returns can furthermore lead to deregistration.⁷⁴³ Lastly, the Commission can deregister a company if it has been inactive for seven years⁷⁴⁴ or if the Commission has determined that the company ceased to carry on

⁷³³ See sec 4.4.1 above.

⁷³⁴ See sec 4.4.1 above.

⁷³⁵ Companies Act of 2008, s 82.

⁷³⁶ Companies Act of 2008, s 81.

⁷³⁷ Companies Act of 2008, s 80(3)(a).

⁷³⁸ Sharrock *et al Hockly's Insolvency Law* 251.

⁷³⁹ Dale *et al South African Mineral and Petroleum Law* MPRDA-14 indicate that in cases other than lapsing due to cancellation, suspension, liquidation and sequestration mortgagees will not have an opportunity to intervene. See, however, sec 4.4.3 fn 753 for criticism on Dale *et al* in this regard.

⁷⁴⁰ Companies Act of 2008, s 82(3).

⁷⁴¹ Companies Act of 2008, s 82(3)(a).

⁷⁴² In terms of s 33 of the Companies Act of 2008.

⁷⁴³ Companies Act of 2008, ss 82(3)(a)(i) and 82(3)(a)(ii). This is what happened to the mining company in the *Palala Resources* case.

⁷⁴⁴ Companies Act of 2008, s 82(3)(b)(i). The requirements here include that no person has demonstrated reasonable interests in the company or produced reasons for its continued existence.

business⁷⁴⁵ and, due to lack of assets, will probably not be liquidated.⁷⁴⁶ When the Commission deregisters companies, rights to minerals lapse⁷⁴⁷ without any notification to bondholders.⁷⁴⁸ It is clear that if the Commission deregisters companies as explained in this paragraph, bondholders over hypothecated rights to minerals are particularly vulnerable and really do not have any security. There is no procedure in terms of which bondholders will be notified of deregistration. Furthermore, there is no requirement in the 2008 Companies Act that bonds must be cancelled before deregistration. This situation weakens mineral tenure security.

If a company is deregistered by the Commission, any interested person, such as a creditor (bondholder) of the company may apply to have the company reinstated.⁷⁴⁹ Creditors of the company thus have an opportunity to apply for reinstatement to allow the company to carry on business in an attempt to get their money back. In the *Palala Resources* case, a company that held, *inter alia*, a prospecting right was deregistered because it did not submit annual returns; but was later reinstated.⁷⁵⁰ As explained, deregistration had the effect that the prospecting right lapsed.⁷⁵¹ The question arose whether the prospecting right revived when the company was reinstated.⁷⁵² The *Palala* case was decided in terms of the 1973 Companies Act.⁷⁵³ Restoration in terms of that Act had the effect that the company was deemed to be in existence as if it was never deregistered.⁷⁵⁴ Restoration was thus retroactive and all rights and obligation that existed prior to registration continue to exist after restoration.⁷⁵⁵ Despite this, in the *Palala* case, the court held that the prospecting right which lapsed when the company was deregistered did not

⁷⁴⁵ According to s 82(b)(ii) of the Companies Act of 2008, the Commission must first receive a request here before deregistration.

⁷⁴⁶ Companies Act of 2008, s 82(b)(ii).

⁷⁴⁷ *Palala Resources* [43].

⁷⁴⁸ All creditors and all bondholders are in actual fact deprived of enforcing their rights. See Pama 2013 *De Rebus* 150.

⁷⁴⁹ Companies Act of 2008, s 82(4).

⁷⁵⁰ *Palala Resources* [6], [9] and [11].

⁷⁵¹ *Palala Resources* [43] and [70].

⁷⁵² *Palala Resources* [7].

⁷⁵³ The company was deregistered in 2010 before the 2008 Companies Act came into operation and therefore s 73(6)(A) of the 1973 Companies Act was applicable regarding reinstatement. For restoration in terms of the Companies Act of 1973, see *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* 2007 4 SA 467 (A). Ss 82(4) and 83(4) of the 2008 Companies Act provide for reinstatement but it does not expressly determine that the reinstatement is retroactive. In *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) [29], the court held that reinstatement did apply retrospectively. See [22] of the judgment for an exposition of conflicting High Court decisions regarding the retroactive effect of reinstatement before the judgment.

⁷⁵⁴ Companies Act of 1973, ss 73(6)(a) and 73(6A).

⁷⁵⁵ *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* [23].

revive upon reinstatement of the company.⁷⁵⁶ The court reasoned that reinstatement revived the legal personality of the company and not rights that became void as a result of the company's deregistration.⁷⁵⁷ Furthermore, the court reasoned that the overall objectives and purpose of the MPRDA requires an interpretation that rights revert to the state, to be allocated to others, when companies are deregistered.⁷⁵⁸ According to the court, an alternative interpretation, in terms of which rights to minerals are frozen in anticipation of a possible restoration of the company, will not advance the objectives of economic and social development as well as equitable access to mineral resources.⁷⁵⁹

The reasoning of the court regarding the importance of achieving these objectives can be accepted without reservation. However, these objectives can be pursued without unnecessarily threatening the security of bondholders and consequently raising the risks that mines cannot be developed profitably. The security of bondholders can be strengthened by requiring that they receive timeous notification of a pending deregistration. Such a notification will allow bondholders to structure the terms of the mortgage agreement to allow foreclosure when they receive the notification. The MPRDA can easily be amended to provide bondholders an opportunity to protect their interests when companies are deregistered.

It was already indicated above that the rules of Insolvency Law and Company Law protect bondholders when companies are deregistered subsequent to being wound up. However, it seems that mineral tenure security can be strengthened if the MPRDA includes a general requirement that when rights lapse due to deregistration, bondholders must receive notification of the pending deregistration. Such a requirement will not have a negative impact on the interests of the government to grant similar rights to entities that can prospect and mine in pursuit of optimal exploitation of mineral resources. This is another example where careless drafting unnecessarily and unjustifiably weaken optimal mineral tenure security.

⁷⁵⁶ *Palala Resources* [50] and [70]; Also see *Bright Bay Property Service (Pty) Ltd v Moravian Church of South Africa* 2013 3 SA 78 (WC) [46]. Sonnekus 2008 *TSAR* 139 advances a similar argument in relation to revival of personal servitudes upon re-registration.

⁷⁵⁷ *Palala Resources* [49]. For reasons based on rules and presumptions of Interpretation Theory see [52] – [57] of the judgment.

⁷⁵⁸ *Palala Resources* [64] – [67].

⁷⁵⁹ *Palala Resources* [67].

4.4.3. *Lapsing upon cancellation and abandonment*

A comparison of the situations regarding lapsing of rights to mineral upon cancellation by the Minister and when right holders abandon rights serves as an example of how mineral tenure security can be strengthened or weakened depending on the manner in which the Act is drafted.

Rights to minerals lapse when the Minister cancels them in terms of section 47 of the MPRDA.⁷⁶⁰ Contrary to deregistration by the Commission, section 47(2)(d) of the MPRDA requires the Minister to notify the mortgagee of his intention to cancel or suspend⁷⁶¹ rights to minerals. Notification of cancellation or suspension does not mean that bondholders have an opportunity to intervene.⁷⁶² If holders of prospecting rights and mining rights cannot remedy the breach, the Minister may still cancel rights with the effect that the “security offered by the bond is rendered nugatory”.⁷⁶³

It is beyond the scope of this work to provide a detailed analysis of, and commentary on, all of the circumstances in which the Minister may cancel rights. It must, however, be accepted that the government may have valid reasons for cancelling the rights of a specific holders. In such instances, optimal exploitation of mineral resources requires that similar rights may be granted to other entities. When rights are cancelled, the security of bondholders is naturally threatened. However, the fact that the MPRDA requires that bondholders be given notice of the cancellation mitigates against this threat. Notification means that bondholders can structure the provisions of the mortgage contract in a way that will allow them to foreclose if they receive the notification. Here the MPRDA is drafted in a manner that protects the interests of

⁷⁶⁰ MPRDA, s 56(e). According to section 47(1) of the MPRDA, the Minister may cancel or suspend rights if holders (a) “is conducting..., prospecting or mining operations in contravention of [the MPRDA]; (b) breaches any material term or condition of such rights [or] permit...; is contravening the approved environmental management programme; or (d) has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under [the MPRDA]”.

⁷⁶¹ S 56 does not state that rights lapse when the Minister suspends them. Suspension can lead to cancellation if holders do not comply with the direction given by the Minister in terms of s 47(3) to remedy the contravention that lead to the suspension.

⁷⁶² See Dale *et al South African Mineral and Petroleum Law* MPRDA-14; Dale *Annual Survey* 2002 576 where the authors state that mortgagees have *no* opportunity to intervene when rights lapse due to suspension, cancellation, sequestration and liquidation. However, when rights lapse upon liquidation and sequestration, bondholders do not need to intervene due to the liquidation and sequestration processes. Dale *et al* are contradictory by also stating that “in instances other than cancellation, suspension, liquidation or sequestration, ...[the] lapsing provision does *not* safeguard or preserve the rights of the mortgagee with the result that the mortgagee *has* an opportunity to intervene”. Also see Dale in Bastida *et al* 831, where the last-mentioned contradictory information in Dale *et al* regarding the opportunity of bondholders to intervene is duplicated.

⁷⁶³ Dale *et al South African Mineral and Petroleum Law* MPRDA-166.

bondholders while acknowledging the interests of the government. In this regard, careful drafting strengthens optimal mineral tenure security.

As with lapsing due to cancellation, optimal exploitation of minerals requires that similar rights are granted to entities that have the capacity to prospect and mine. Contrary to cancellation of rights, the MPRDA does not provide that bondholders must receive notification when rights to minerals lapse as a result of abandonment by right holders. Upon abandonment of rights, the security offered by registered bonds is thus rendered worthless.⁷⁶⁴ The MPRDA does not provide that bondholders must receive notification of abandonment.⁷⁶⁵ The lack of notification to bondholders seems particularly unreasonable since holders of right to minerals are under an obligation to comply for a closure certificate if they abandon their rights.⁷⁶⁶ Abandonment is thus not a unilateral act on the part of right holders and the government will be aware of the abandonment.⁷⁶⁷ It therefore seems unreasonable that the MPRDA does not require that bondholders receive notification of abandonment. Notification to bondholders of abandonment will further have no impact on the interests of the government to grant similar rights to entities that can prospect and mine in pursuit of optimal exploitation of mineral resources. In this regard, it seems that careless and thoughtless drafting of the MPRDA is unnecessary for the pursuit of governmental interests and unnecessarily and unjustifiably weaken optimal mineral tenure security.

4.4.4. Death and expiration

Rights to minerals lapse when holders are deceased and there are no successors in title.⁷⁶⁸ Bondholders over rights to minerals that are held by natural persons are thus vulnerable.⁷⁶⁹ The bondholder is, however, only vulnerable if the holder of the hypothecated right does not have

⁷⁶⁴ Dale *et al South African Mineral and Petroleum Law* MPRDA-166.

⁷⁶⁵ See, for example, s 47(1)(f) of the Precious Stone Act of 1964 that required notice to the government of an intention to abandon mining rights.

⁷⁶⁶ MPRDA, s 43(3)(a).

⁷⁶⁷ Also see *Van den Heever v Minister of Minerals and Energy and Others* (unreported, Case No. 2090/2010, Northern Cape High Court, 19 December 2011) [37] where the court held abandonment of the rights held in terms of the Minerals Act of 1991 could not be established by a unilateral act.

⁷⁶⁸ MPRDA, s 56(b).

⁷⁶⁹ See Dale *et al South African Minerals and Petroleum Law* MPRDA-165. Dale *et al* states that the bond held by natural persons will be vulnerable. It rather seems that bondholders are vulnerable when the hypothecated right is held by a natural person.

any testate or intestate heirs.⁷⁷⁰ Bondholders are thus vulnerable to losing the security offered by registered mortgage bonds in very limited situations.

Lastly, rights to minerals lapse when they expire.⁷⁷¹ Bond holders will know when rights expire at initial registration (thus when they accept bonds as security) and they are not at risk to lose the security offered by bonds in situations over which they do not have control.⁷⁷²

4.4.5. Synopsis: Lapsing and cancellation of right; MTS strengths and weaknesses

Taking legitimate governmental objectives into account, the effect of the provisions of the MPRDA regarding lapsing and cancellation of rights, discussed here, on mineral tenure security may be summarised as follows:

	Liquidation or sequestration	Deregistration by Commission	Cancellation	Abandonment
MTS strengthened	<i>(Arguably) sound and clear drafting: rights do not lapse if bondholder complies with s 11(3)</i>	<i>Careless drafting: no notice to bondholders</i>	<i>Sound and clear drafting: notice to bondholders</i>	<i>Careless drafting: No notice to bondholders</i>
MTS weakened	<i>Careless drafting: rights lapse if compliance with s 11(3) is not possible</i>			

Table 8 Synopsis: Lapsing and cancellation of right; MTS strengths and weaknesses

The analysis regarding the effect of lapsing and cancellation of rights on the security of bondholders demonstrates how sound and careful drafting of the MPRDA, at times, strengthens mineral tenure security while careless drafting, at times, weaken mineral tenure security. In

⁷⁷⁰ In case of an intestate heir, the deceased did not leave a valid will or other document containing testamentary provisions while, in the case of a testate heir, there was a valid will or other document containing testamentary provisions. See du Bois *Wille's Principles* 668.

⁷⁷¹ MPRDA, s 56(a).

⁷⁷² Dale *et al South African Mineral and Petroleum Law* MPRDA-165. S 42 of the 2013 Amendment Bill attempted to delete s 56(a) of the MPRDA.

this regard, the analysis demonstrates that, on the one hand, sound drafting arguably allows bondholders to protect their security interest in registered bonds, in case of liquidation or sequestration of holders of rights to minerals, by complying with the requirements of section 11(3) of the MPRDA. On the other hand, careless drafting has the effect that bondholders who cannot comply with the requirements of section 11(3), cannot protect their security interests in case of liquidation or sequestration of holders of rights to minerals.

Furthermore, sound and careful drafting has the effect that, in case of lapsing of rights to minerals, i.e. when the Minister cancels them, bondholders can protect their security interests as a result of being notified of the intention of the Minister to cancel rights to minerals. Conversely, careless drafting has the effect that bondholders are not notified of lapsing of rights as a result of deregistration of companies by the Commission and abandonment and are thus not given an opportunity to protect their security interests.

5. Summative comments and findings

Profitable development of mines, at times, requires that right holders can conclude commercial transactions involving their rights. This chapter analyses the ability of holders of rights to minerals to conclude two commercial transactions that may be necessary for profitable development of mines, namely transfer and encumbrance of rights.

Mineral tenure security will be served best if right holders have unfettered freedom to transfer and mortgage their rights. However, the government may wish to limit these abilities in the pursuit of legitimate governmental objectives. Optimal mineral tenure security requires the regulatory regime to minimise risks associated with profitable development of mines and to create as much certainty as possible, while acknowledging the legitimate interests of the government that may weaken mineral tenure security.

This chapter demonstrates that the MPRDA strengthens optimal mineral tenure security in certain instances. However, the chapter also indicates that the Act, at times, unjustifiably weaken optimal mineral tenure security. In this regard, the current chapter demonstrates that the same features, as identified in chapter four, unnecessarily limit the abilities of holders of rights to mineral to transfer and mortgage their rights and therefore unjustifiably weaken optimal mineral tenure security.

Chapter 5 Right holders' abilities: transfer and encumbrance

First, wide and uncircumscribed governmental discretion that is unnecessary for achieving legitimate objectives unjustifiably weakens mineral tenure security. Second, excessive regulatory measures that are disproportionate to the objectives that the measures pursue create unnecessary uncertainty regarding profitable development of mines and maximization of returns on investments and as a result unjustifiably weaken optimal mineral tenure security. Finally, unnecessarily vague and unclear drafting as well as careless drafting of the MPRDA, at times, unjustifiably weaken optimal mineral tenure security.

Chapter 6:

REGISTRATION: LIMITATIONS OF A PROPERTY-LAW RIGHTS-BASED APPROACH ON MINERAL TENURE SECURITY

1. Introduction

The concept “real right” is central to private law and the distinction between real rights and personal rights forms the basis for distinguishing property law from other branches of law, especially the law of obligation.⁷⁷³ Practically,⁷⁷⁴ the distinction between real rights and personal rights are important for two inter-related reasons. Firstly, the nature of the right is associated with registration in the deeds office.⁷⁷⁵ Secondly, the private-law nature of rights determines their enforceability.⁷⁷⁶ Generally, only real rights can be registered.⁷⁷⁷ Registration of real rights fulfils the function of publicity⁷⁷⁸ and publicity contributes to the enforceability of real rights.⁷⁷⁹ In the context of land rights, it has been argued that real rights “represent

⁷⁷³ Van der Merwe *Sakereg* 58; van der Merwe in *LAWSA* par 59; van der Merwe *The Law of Things and Servitudes* 35. The courts accept the distinction. See *Smith v Farrelly's Trustee* 1904 TS 949 958; *Lorentz v Melle & Others* 1978 3 1044 (T) 1050D-E; *National Stadium South Africa (Pty) Ltd & Others v Firstrand Bank Ltd* 2011 2 SA 157 (SCA) [31]; *Absa Bank Limited v Keet* [21].

⁷⁷⁴ For the theoretical distinction see Badenhorst *et al Silberberg* 50 – 65; du Bois *Wille's Principles* 428 – 430; van der Merwe in *LAWSA* par 60. The distinction is by no means easy to make. This is illustrated by van der Merwe in *LAWSA* par 68: “...neither legal dogmatics nor precedent provides a workable criterion by which one can distinguish between real and personal rights. This shows that the distinction between these rights does not depend on the inherent nature of them but rather on the rules of the system. These rules are often the result of historical development and expediency rather than logic.” This conclusion is reiterated in du Bois *Wille's Principles* 443.

⁷⁷⁵ Badenhorst *et al Silberberg* 50.

⁷⁷⁶ Badenhorst *et al Silberberg* 50. Also see Cooke *The New Law of Land Registration* 3.

⁷⁷⁷ Deeds registries Act, s 63(1); *Houtpoort Mining and Estate Syndicate Ltd v Jacobs* 1904 TS 105 111; *Hollins v Registrar of Deeds* 1904 TS 603 605 – 606; du Bois *Wille's Principles* 427. According to the proviso to s 63(1) of the Deeds Registries Act, personal rights can be registered if they are intimately connected to real rights. See van der Merwe *Sakereg* 83 – 88; du Bois *Wille's Principles* 444 for exceptions relating to the rule against non-registration of personal rights. Some personal rights are by custom registered in the Deeds Office. Also see Nel *Jones Conveyancing in South Africa* 209.

⁷⁷⁸ *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 2011 2 SA 508 (SCA) [13]; *Prophitius v Campbell* 2008 3 SA 552 (D&CLD) 558; *Frye's (Pty.) Ltd v Ries* 1957 3 SA 575 (AD) 582; *Ex Parte Menzies et Uxor* 1993 3 SA 799 (C) 805-806; Badenhorst *et al Silberberg* 81; Sonnekus and Neels *Sakereg Vonnisbundel* 403; van der Merwe in *LAWSA* par 10. According to du Bois *Wille's Principles* 535, publicity of ownership and lesser real rights “avoids double sales and protect creditors and proposed holders of security rights in land”. In case of movable property, the various forms of delivery fulfils the publicity function. See Badenhorst *et al Silberberg* 175; van der Merwe *Sakereg* 340; van der Merwe in *LAWSA* par 10.

⁷⁷⁹ Pienaar 2006 *TSAR* says that ownership is better protected than other rights and this “is mainly ensured by the application of the publicity principle” (thus by registration). Also see Laurens October 1984 *De Rebus* 480.

better, more secure forms of titles” as a result of registration and enforceability.⁷⁸⁰ For the same reasons, it is arguable that it will be favorable to mineral tenure security if rights to minerals are considered real rights in property.⁷⁸¹

The MPRDA labels prospecting rights and mining rights as limited real rights.⁷⁸² The labelling takes place despite the fact that the Act’s regulatory framework is predominantly administrative in nature and that it legislated mineral rights, which were classified as limited real rights, out of existence.⁷⁸³ As already argued, current prospecting rights and mining rights are not comparable to common-law mineral rights.⁷⁸⁴ Prospecting rights and mining rights under the MPRDA can be compared best with the administrative prospecting permits and mining authorizations that existed before the Act came into operation.⁷⁸⁵ Still, the MPRDA’s explicit typification of prospecting rights and mining rights as “limited real rights” perpetuates a perception that rights so classified result in better protection (i.e. better mineral tenure security).⁷⁸⁶ On the face of it, assigning a proprietary nature to the rights is preferable to

⁷⁸⁰ Mostert in Cooke *Modern Studies* 5. Pienaar 2006 *TSAR* 435 440 opines as follows in the context of land reform: “[t]he existing deeds registration system provides security of tenure to those whose rights are registered in the different deeds registries”. This hierarchical approach is, however, criticised. Registration in the Deeds Office can protect tenure security, particularly because the register is accurate and reliable. Although the South African registration system is classified as a negative system, which means that the correctness of the information in the register is not absolutely guaranteed, the system is generally reliable and accurate. See Pienaar 2006 *TSAR* 440 – 441; Mostert 2011 *PER* 95; Pienaar 1996 *TSAR* 205; Pienaar 1990 *TSAR* 29 – 30; Badenhorst “From Waurn Ponds” 2009 *TSAR* 794; van Der Merwe *Sakereg* 344; Sonnekus and Neels *Sakereg Vonnisbundel*; Badenhorst *et al Silberberg* 236.

⁷⁸¹ See Mostert *Principles and Policies* 114 where the author argues that registration in the mineral and petroleum titles register “resembles that of the deeds register in all material respects”. Mostert opines that therefore registration on the mineral and petroleum register, “affords the same *security of title* as the preceding systems of registration...” (own emphasis).

⁷⁸² MPRDA, s 5(1). It is, therefore, generally accepted that prospecting rights and mining rights are limited real rights. See *Agri SA* [CC] [25]; *Meepo v Kotze* [8]; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-20; Badenhorst 2014 *JERL* 5 17; Badenhorst *et al Silberberg* 678 and 686 for prospecting rights and mining rights respectively; Dale *et al* South Africa Mineral and Petroleum Law MPRDA-137.

⁷⁸³ See chap 2, sec 3.2.1 and sec 3.2.2.

⁷⁸⁴ See chap 2, sec 3.2.2.

⁷⁸⁵ See chap 2, sec 3.2.2.

⁷⁸⁶ Badenhorst 2014 *JERL* 13 states that “[a] real right offers the best form of security of tenure. In the context of development of a new mining law policy (before the MPRDA came into operation) Dale 1997 *Resources Policy* 22 opines that one option is a “private mineral right system whereby mineral rights vest in private holders”. Protagonists of such a system list “good security and continuity of tenure” as a factor which contribute to them preferring such a system. There is also a perception that investors find a proprietary overlay preferable to a purely administrative regime. See Chamber of Mines *Memorandum to the Director-General* par 61.7 where, commenting on the fact that the Minerals Development Draft Bill, (GN 4577) in GG 21840 of 18 December 2000, did not classify any rights to minerals as limited real rights, the chamber argued that such a classification would “promote the *perception* of security and continuity of tenure” (own emphasis). Also see Dale *et al South African Mineral and Petroleum Law* MPRDA-12; Dale in Bastida *et al* 828; Dale *Annual Survey* 2002 575.

protection stemming from a purely administrative law regime.⁷⁸⁷ Real rights are, after all, enforceable against anyone and everyone who interfere with those rights.⁷⁸⁸

Apart from creating the impression that rights are better protected and enforced than will be the case if rights are purely administrative in nature, a proprietary overlay also supports the notion that governmental interference is limited in prospecting and mining.^{789 790} Lower levels of governmental interference mean less governmental discretionary decision-making power and more certainty for holders of rights to minerals. Less governmental interference and discretion lessen the risks that holders of rights and investors face regarding profitable development of mines and maximization of returns on investments. The analyses in chapters 4 and 5 already indicate that the government extensively regulate the abilities of holders of rights to minerals to prospect and mine and to transfer and mortgage their rights. The typification of prospecting rights and mining rights is thus not sufficient to limit governmental interference in prospecting and mining.

The current chapter aims to indicate that a proprietary overlay also presents limitations to mineral tenure security as regards registration and enforceability of rights to minerals. To achieve the aim of the chapter, the next section explains the effect that a private-law rights-

⁷⁸⁷ Mostert *Principles and Policies* 113. Dale *et al South African Mineral and Petroleum Law* MPRDA-137 accept that the mere classification of rights as limited real rights in the MPRDA “removes them from the ambit of the debate which raged as to whether common-law prospecting contracts and rights to prospect simpliciter (i.e., not coupled to an option), were real rights”. However, on the same page, the authors opine that the incidences of rights granted in terms of the MPRDA must all be gathered from the statute since the rights are creatures of statute.

⁷⁸⁸ *Absa Bank Limited v Keet* [20]; *Shoprite Checkers (Pty) Ltd v Member of The Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* CCT 216/14 [40] and [106]; *Agri SA (CC)* [9]; *Cowin NO and Others v Kyalami Estate Homeowners Association and Others* (12/11377) [2013] ZAGPJHC 121 (25 February 2013) [9]; *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd* [33]; *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA) [16]; *Ex parte Geldenhuys* 1926 OPD 155 163. In *AXZS Industries v AF Dreyer Pty (Ltd)* 2004 4 SA 186 (W) 196 the court said “[a] real right such as ownership, is as every first year law student knows, enforceable against the whole world”. In *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) [61], the court said that the right to claim restitution on the basis of enrichment is a personal right and enforceable against a specific person and not against all like a real right. Also see Van der Walt and Maass 2012 *TSAR* 228 231; van der Merwe in *LAWSA* par 9; du Bois Wille’s *Principles* 428; Nel Jones *Conveyancing in South Africa* 207 – 208; Hamilton and Banks in McHarg *et al* 26; Barton in McHarg *et al* (eds) 97.

⁷⁸⁹ Dale 1996 *JERL* 300 criticises state-orientated systems because they allow high levels of state interference. Bastida 1996 *JERL* 35 acknowledges that the questions whether rights are privately owned, real rights in property or in the realm of administrative law have important implications for the levels of state interference. Also see Ayisi 2009 *JERL* 88.

⁷⁹⁰ This does not mean that private property rights are always free from governmental interference. See van der Merwe in *LAWSA* par 4. The legitimate regulatory powers of the state in property law is also apparent from the analysis of the relationship between state and private actors in Mostert November 2014 *Recht in Africa* 21 – 26. Bastida 1996 *JERL* 35 stresses that the question whether rights to minerals are in the realm of administrative law or private law are not decisive for the levels of governmental interference.

based approach, to registration and enforceability of rights, has on mineral tenure security. This is followed by a discussion of a different approach to registration and enforceability of rights in the interest of mineral tenure security. The chapter finally comments on whether a private-law, rights-based approach continues to be an appropriate lens through which to view and analyse rights to minerals granted in terms of the MPRDA.

2. Registration and enforceability

In property law, a distinction is drawn between ownership and limited real rights. Ownership is the real right that a person has in his own property,⁷⁹¹ whereas limited real rights are derivative rights, finding their content from the ownership of another.⁷⁹² Limited real rights are, thus, real rights in the property of another, with limited content.⁷⁹³ As stated, one of the characteristics of real rights is that the rights are enforceable against anyone and everyone who interfere with them. For limited real rights, this means, *inter alia*, that rights are enforceable against the current landowner as well as any successors in title to the current landowner.⁷⁹⁴ Thus, irrespective of how many times the property that is subject to a limited real right, is sold and transferred to a new owner, the limited real right is enforceable against the new owner.⁷⁹⁵

However, the question of enforceability also depends on registration of rights in certain circumstances. A distinction is drawn between original acquisition and derivative acquisition of real rights. Original acquisition takes place when a real right “is constituted by a unilateral act or series of such acts by the person who acquires it”.⁷⁹⁶ Derivative acquisition takes place when a limited real right already exists and is transferred from one person to the next or when

⁷⁹¹ Badenhorst *et al Silberberg* 47.

⁷⁹² Mostert *Principles and Policies* 9.

⁷⁹³ Badenhorst *et al Silberberg* 47; van der Merwe *Sakereg* 69.

⁷⁹⁴ In arguing that registered prospecting contracts, before the MPRDA, were real, Badenhorst, Mostert and Dendy in *LAWSA* par 48 mention that these real rights were enforceable not only against the immediate parties but also against “any gratuitous or onerous successor in title of the grantor, including a trustee on insolvency or a liquidator of a company, as well as upon any bona fide purchaser who would be bound by the contract registered against the title to the land or to the right to minerals”.

⁷⁹⁵ *Cowin v Kyalami Estate Homeowners Association* [9]; *Odendaalsrus Gold, General Investments and Extensions Ltd V Registrar of Deeds* 1953 1 SA 600 611; *Manganese Corporation Ltd v South African Manganese Ltd* 1964 2 185 (W) 189; Badenhorst *et al Silberberg* 81; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 27 – 3; Dale *Annual Survey* 2002 575 – 576; Kilbourn *The ABC of Conveyancing in South Africa* 2 – 5. Concerning registration as a requirement for mineral leases to be binding on third parties see *Roets v Secundior Sand Bk* 90; *Wiseman v De Pinna and Others* 48. For a discussion of the *Roets* case see Badenhorst and van Heerden 1989 *TSAR* 452. Also see Badenhorst 1998 *Obiter* 146.

⁷⁹⁶ Badenhorst *et al Silberberg* 71. In the context of acquisition of ownership see du Bois *Wille's Principles* 488.

a real right is acquired as a result of an agreement between two parties.⁷⁹⁷ When real rights are acquired through a derivative method of acquisition, i.e. as a result of an agreement between two parties, registration is a requirement⁷⁹⁸ for the acquisition of the real right.⁷⁹⁹ ⁸⁰⁰ Importantly, the enforceability of such rights extends beyond the parties to the agreement to third parties, only if rights are registered.⁸⁰¹ Unregistered rights will be enforceable against third parties only if they had knowledge of the existence of the right.⁸⁰² The requirement of registration for derivative acquisition of real rights does not mean that, generally, registration

⁷⁹⁷ Badenhorst *et al Silberberg* 71 fn 2 and 72. In the context of acquisition of ownership see du Bois *Wille's Principles* 488 and 519.

⁷⁹⁸ Registration is not the only requirement. There must, for example, also be a real agreement between the parties. The real agreement refers to the intention of the parties to transfer and receive the real right. See *Air-Kel h/a Merkel Motors v Bodenstein* 1980 3 SA 917 (A) 922; van der Merwe *Sakereg* 303 – 304. Also see Sonnekus 2010 *TSAR* 586. Regarding the general requirements to transfer real rights see Badenhorst *et al Silberberg* 72 – 74. Acquisition of real rights must also comply with certain formal requirements. For example, before the MPRDA, prospecting contracts and mineral leases had to be in writing and signed by the parties in terms of s 2(1) of the Alienation of Land Act 68 of 1981. The def of land in the Alienation of Land Act includes “any interest in land, other than a right or interest registered or capable of being registered in terms of the Mining Titles Registration Act, 1967”. Prospecting contracts and minerals leases were registered in the Deeds Office and were therefore not excluded from s 2(1) of the Alienation of Land Act. S 2(1) is no longer applicable because all rights to minerals are now registered in the Mineral and Petroleum Titles Registration Office. S 16 of the Deeds Registries Act requires transfer of real rights to be in notarial form.

⁷⁹⁹ According to s 102 of the Deeds Registries Act a “real right includes any right which becomes a real right *upon registration*” (own emphasis). S 16 of the Deeds Registries Act also requires registration for the transfer of real rights. See *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 37; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13 – 21; Sonnekus 2005 *TSAR* 411. Badenhorst *et al Silberberg* 73 regard registration as one of the essential elements for the transfer of real rights. Sonnekus and Neels *Sakereg Vonnisbundel* 97 regard registration as the *origin* of derivative acquisition of real rights; Dale *et al South African Mineral and Petroleum Law* MPRDA- 67 refer to *Murphy v Labuschagne and Others* 1903 TS 393 400 where it was held that real rights “dates from registration”. At MPRDA-13 the authors say that “to constitute” real rights registration is required. Commenting on the doctrine of notice, Van der Walt and Maass 2012 *TSAR* 228 says it is a “requirement that all real rights must be registered to *acquire* the status” of a real right (own emphasis). Also see Laurens October 1984 *De Rebus* 480. In the context of derivative acquisition of personal servitudes see Sonnekus 1987 *TSAR* 376.

⁸⁰⁰ Registration is not required in case of original methods of acquiring real rights or limited real rights in immovable property. See Badenhorst *et al Silberberg* 82; Sonnekus 2010 *TSAR* 578; Nel *Jones Conveyancing in South Africa* 27 – 28; Cary Miller and Pope *Land Title in South Africa* 53 – 55 for exceptions when registration is not required for acquisition of ownership. In *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* [19] and [21] – [24], the court estopped the owner of immovable property from claiming ownership as a result of the owner’s negligence for failing to take steps to correct the register while knowing that the registry contained incorrect information.

⁸⁰¹ See van der Vyfer 1988 *SALJ* 12 and 13 where the author demonstrates that unregistered real rights are not enforceable against successors in title.

⁸⁰² In terms of the doctrine of notice, unregistered (real) rights to minerals are also enforceable against third parties if they had knowledge of their existence. Regarding the doctrine of notice in general see *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 280; *Grant v Stonestreet* 1968 4 SA 1 (A) 24; *Manganese Corporation Ltd v South African Manganese Ltd* 196; *Frye's (Pty) Ltd v Ries* 582; Van der Walt and Maass 2012 *TSAR* 228 – 232. In *Vansa Vanadium SA Ltd v Registrar of Deeds* 444, the court held that the doctrine of notice was not applicable in case of prospecting contracts because prospecting contracts gave rise to personal rights only. However, according to Badenhorst *et al Silberberg* 83 and especially fn 96, the doctrine of notice applies to knowledge of all personal rights. As regards the doctrine of notice in case of mortgages see Lubbe in *LAWSA* par 351.

of rights can change any personal right into a real right.⁸⁰³ On the contrary, it is a general rule of property law that registration cannot change a personal right to a real right.⁸⁰⁴ The requirement of registration for the derivative acquisition of real rights means that a right that is capable of being real must be registered for acquisition to be complete.

According to the courts, a right is registrable if it satisfies the subtraction from *dominium* test. According to the test, rights are real if the correlative obligation is a burden upon the land, i.e., a subtraction from the *dominium*.⁸⁰⁵ This means that a right is registrable if it confers on its holder an entitlement that normally vests in the landowner or if it prevents the landowner from exercising one or more of the entitlements of ownership.⁸⁰⁶ Furthermore, the intention of the parties must be to bind not only the current owner but all his successors in title.⁸⁰⁷ The subtraction from *dominium* test combined with the intention test has been applied in numerous cases⁸⁰⁸ and has been the subject of much academic debate and criticism.⁸⁰⁹

⁸⁰³ Van der Vyfer 1988 *SALJ* 13 stresses that registration has the *consequence* of rendering rights enforceable against successors in title but does not create real rights. Also see Mostert 2011 PER 95 and especially fn 77.

⁸⁰⁴ *Odendaalsrus Gold, General Investments and Extensions Ltd V Registrar of Deeds* 602; *Fine Wool Products of S.A v Director of Valuations* 1950 4 SA 490 (E) 499; *British South Africa Co v Bulawayo Municipality* 1919 AD 84 93; *van der Merwe v Wiese* 1948 4 SA 8 (C) 11; *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1999 2 419 (T) 435; *Badenhorst et al Silberberg* 66; *van der Merwe Sakereg* 83; *van der Merwe in LAWSA* par 69; *Carey Miller and Pope Land Title* 96 – 97. In *Registrar of Deeds (Transvaal) Appellant v The Ferreira Deep Ltd Respondent* 1930 AD 169 180, the court held that certain personal rights, *jura in personam ad rem acquirendam*, change into real rights upon registration. In *Odendaalsrus Gold, General Investments and Extensions Ltd V Registrar of Deeds* 607, the court relied on the *Ferreira Deep* decision and held that personal rights that become real rights upon registration does not present a contradiction. The decisions are, however, criticised. See *Badenhorst et al Silberberg* 67 – 69. Also see *Nel Jones Conveyancing in South Africa* 208; *Carey Miller and Pope Land Title* 109.

⁸⁰⁵ *Ex Parte Geldenhuys* 1926 OPD 155 164; *Schwedhelm v Hauman* 1947 1 SA 127 (E) 135; *Ex parte Pierce* 1950 3 SA 628 (O) 634.

⁸⁰⁶ *Badenhorst et al Silberberg* 56; *du Bois Wille's Principles* 435; *van der Merwe in LAWSA* par 65.

⁸⁰⁷ *Ex Parte Geldenhuys* 164; *Cape Explosive Works Ltd v Denel (Pty)* [12]; *Nel v Commissioner of Inland Revenue* 1960 1 SA 227 (A) 233; *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 1 SA 879 (A) 885; *Cowin NO and Others v Kyalami Estate Homeowners Association and Others* [10]. Also see *Carey Miller and Pope Land Title* 98 – 101.

⁸⁰⁸ *Fine Wool Products of South Africa Ltd v Directors of Valuations; Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds; Hotel De Aar v Jonordan Investments (Edms) Bpk* 1972 2 SA 400 (A); *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (C); *Kain v Khan* 1986 4 SA 251 (C); *Cape Explosive Works Ltd v Denel (Pty) Ltd; Cowin NO and Others v Kyalami Estate Homeowners Association and Others*. In *Lorentz v Melle* 1978 3 SA 1044 (T) 1052, the court said the curtailment of ownership had to be “in relation to the enjoyment of the land in the physical sense”. The test does not provide an easy answer to the question whether rights are real or personal. The difficulties encountered with the subtraction from *dominium* test combined with the intention test has led *van der Merwe in LAWSA* par 68 to conclude that “neither legal dogmatics nor precedent provides a workable criterion by which one can distinguish between real and personal rights. This shows that the distinction between these rights does not depend on the inherent nature of them but rather on the rules of the system. These rules are often the result of historical development and expediency rather than logic”.

⁸⁰⁹ See *Badenhorst et al Silberberg* 55 – 65; *van der Merwe Sakereg* 73 – 82; *Sonnekus and Neels Sakereg Vonnisbundel* 102 – 120; *van der Merwe in LAWSA* pars 65 – 87; *du Bois Wille's Principles* 434 - 442 for a general discussion of the subtraction from *dominium* test. Also see *Badenhorst* 2000 *THRHR* 499; *Badenhorst*

The following section provides a detailed discussion of the effect that private-law rules regarding acquisition, registration and enforceability of rights have on mineral tenure security.

2.1. Property law approach

The MPRDA classifies prospecting rights and mining rights as limited real rights. The Act foresees a different office for the registration of these rights than other real rights in land. Whereas other real rights in land are registered in the Deeds Office, holders of mining rights and prospecting rights are under an obligation to lodge rights for registration in the Mineral and Petroleum Titles Registration Office.⁸¹⁰ The differences in the purposes of registration in the Deeds Office and in the Mineral and Petroleum Titles Registration Office are discussed below.

From a property law paradigm, holders of prospecting rights and mining rights must acquire rights by virtue of either original or derivative acquisition. Right holders do not acquire rights by a series of unilateral acts and therefore do not acquire rights through original acquisition. Derivative acquisition of rights require either that rights already exist and are transferred to right holders from the government or that right holders acquire rights as a result of an agreement between themselves and the government. Rights to minerals do not exist before the government grants them to right holders and it can thus not be said that the government transfers rights to right holders.⁸¹¹ From a property-law paradigm, the best-suited construction is that right holders acquire rights as an agreement between themselves and the government and thus through a derivative method of acquisition. The only circumstance in which right holders will acquire rights originally is through expropriation (where the state unilaterally divests the holder of such rights).⁸¹² However, in the majority of cases, right holders will obtain rights through the applications procedures that the MPRDA prescribes. Therefore, the

and Coetser 1991 *De Jure* 375; Badenhorst “Erroneous Omission of Real Right from Subsequent Tittle Deed” 2001 *Obiter* 190.

⁸¹⁰ MPRDA, ss 19(2)(a) for prospecting rights and 25(2)(a) for mining rights.

⁸¹¹ Badenhorst 2005 *Obiter* 520.

⁸¹² Regarding expropriation as an original method of acquisition of real rights see Badenhorst *et al* 173 – 174. Prescription also comes to mind as a potential method of original acquisition of rights to minerals. However, in terms of s 5A(b) of the MPRDA it is an illegal act to prospect or mine without a prospecting right, mining right or mining permit. The rules of original acquisition of real rights, generally, do not apply where possession (or the exercise of rights) is illegal because it contravenes a statutory provision. Entities that prospect and mine without the necessary permission will thus not be able acquire rights through prescription. See Badenhorst *et al Silberberg* 165 and especially fn 285.

following discussion analyses the effect of the rules of derivative acquisition of real rights on mineral tenure security.

According to property law theory, prospecting rights and mining rights are personal rights when the Minister grants them.⁸¹³ The act of granting rights and permits is contractual and rights flowing from the contract are personal in nature.⁸¹⁴ The contract exists between the grantor of the rights, thus the state, and the grantee, thus the holder of rights. At this stage, holders of rights can enforce their rights against the state only. When prospecting rights and mining rights are registered, the personal rights are extinguished and real rights come into existence.⁸¹⁵ The rights are then also enforceable against third parties.⁸¹⁶ Third parties include the current landowners whose property is subject to the rights as well as subsequent landowners should the property be sold and ownership transferred to another. Third parties can also refer to persons who attempt to obtain rights to minerals over the same property. If unregistered rights are not enforceable against third parties the risks increase that right holders will not be able to develop mines profitably. The same is true for the ability of investors to maximize the returns on their investments. The property-law rules of derivative acquisition of real rights thus weakens mineral tenure security.

The MPRDA and the MTRA can be criticized for echoing the rules of property law regarding derivative acquisition of real rights. According to section 5(1) of the MPRDA, prospecting rights and mining rights granted in terms of the Act *and* that are registered in terms of the MTRA are limited real rights.⁸¹⁷ Section 5(1)(d) is consistent with the rules of property law

⁸¹³ This construction was accepted in *Meepo v Kotze* [46.3] and *Doe Run Exploration SA (Pty) Ltd v Minister of Minerals and Energy & Others* [20] and [21]. In *Mawetse SA Mining Corporation (Pty) Ltd v Minister of Mineral Resources and Others* [24] and [26] the court rejected *Meepo v Kotze* and held that the granting of rights is not contractual but is a “unilateral administrative act” by the Minister. However, at [19] the court accepts that limited real rights come into existence when rights are registered. Also see Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-22; Badenhorst 2005 *Obiter* 520. Dale *et al South African Mineral and Petroleum Law* MPRDA-138 criticises *Meepo v Kotze* for falling short of giving proper regard to the fact that the act of granting rights is an administrative act.

⁸¹⁴ This construction was also accepted in *Meepo v Kotze* [46.3] but rejected in *Mawetse SA Mining Corporation (Pty) Ltd v Minister of Mineral Resources and Others* [24] and [26]. Also see Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-22.

⁸¹⁵ Commenting on the position before the 2008 Amendment Act, Badenhorst 2005 *Obiter* 520 regards this as the dogmatically correct interpretation.

⁸¹⁶ Commenting on the position before the 2008 Amendment Act, Badenhorst 2005 *Obiter* 520 regards this as the dogmatically correct interpretation.

⁸¹⁷ Before the 2008 Amendment, s 5(1) of the MPRDA did not expressly require registration as a requirement for rights granted in terms of the MPRDA to be limited real rights. This gave rise to various possible interpretations regarding the moment when the real right came into existence. According to one possibility, the act of granting rights is an *ex lege* creation of real rights by the Minister. This interpretation is dogmatically incorrect in terms of property law theory. However, the interpretation accords with the objectives of the MPRDA to provide security

according to which registration is required for derivative acquisition of real rights. Furthermore, according to section 2(4) of the MTRA, registration of a right in the Mineral and Petroleum Registration Titles Office constitutes a real right binding on third parties.⁸¹⁸ Section 2(4) is consistent with the rules of property law, namely that if registration is a requirement for real rights to come into existence, rights are generally enforceable against third parties only upon registration.

Considering the compulsory consultation process that the MPRDA requires,⁸¹⁹ unregistered prospecting rights and mining rights will probably be enforceable against the landowner at the time when rights are granted. However, enforceability can prove to be a problem if ownership of the property that is subject to an unregistered prospecting right or mining right, is transferred to a new owner who is unaware of the right. In theory, the new owner can prevent a right holder from exercising his rights by arguing that the right holder never acquired a limited real right because one of the requirements for derivative acquisition of real rights, namely registration, was not complied with. The question whether this was truly the intention of the legislator in the light of the objectives of the MPRDA is discussed in more detail in the next section.

The MPRDA is silent regarding the nature of mining permits. Holders of mining permits are under an obligation to lodge permits for recording (and not registration as prospecting rights and mining rights) in the Mineral and Petroleum Titles Registration Office.⁸²⁰ It is unclear whether recording fulfils a different function than registration.⁸²¹ It is thus unclear whether holders of mining permits acquire real rights when permits are recorded. The silence of the MPRDA regarding the nature of mining permits, along with inconsistencies between the MPRDA and MTRA, resulted in strong criticism⁸²² as well as various interpretations regarding

of tenure to holders of prospecting rights, mining rights and mining permits. Regarding the interpretations before the 2008 Amendment Act see Badenhorst 2005 *Obiter* 519 - 521; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-19 - 13-24 and 30-2 – 30-5.

⁸¹⁸ It has been argued that the reference to “binding on third parties” in section 2(4) is superfluous because real rights are by their nature binding on third parties. See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 13-5; Badenhorst 2005 *Obiter* 520.

⁸¹⁹ MPRDA, ss 16(4)(b), 22(4)(b) and 27(5)(a) for prospecting rights, mining rights and mining permits respectively.

⁸²⁰ MPRDA, s 27(7)(e).

⁸²¹ Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 30-3 raises the possibility that recording does not entail an act of attestation.

⁸²² Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 30 – 5. Badenhorst 2005 *Obiter* 519 where the author opines that “[t]he literal reading of the provisions of the two Acts is absurd, to put it mildly”.

the private-law nature of mining permits.⁸²³ As stated, registration can only serve as one of the requirements for derivative acquisition of real rights if rights are registrable in the first place.

To determine if mining permits are registrable, the judiciary will investigate whether permits comply with the subtraction from *dominium* test. It is beyond the scope of this work to provide a detailed analysis of whether mining permits satisfy the requirements of the subtraction from *dominium* test. However, on the face of it, mining permits meet the prerequisites of the test.⁸²⁴

⁸²⁵ Firstly, mining activities will inevitably encroach upon the entitlements of landownership. Landowners whose property is subject to mining permits will not be able to exercise the entitlement to use and enjoy the property fully.⁸²⁶ Secondly, it seems reasonable to accept that the government and holders of mining permits have the intention that rights are enforceable against third parties. An alternative intention would be contrary to the objective of the MPRDA to provide security of tenure in case of prospecting and mining and will also be not serve optimal exploitation of mineral resources.

If mining permits are registrable according to the subtraction from *dominium* test, it seems artificial to argue that right holders do not acquire limited real rights when permits are recorded

⁸²³ For a general discussion of the different possible interpretations see Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* chap 30 and 13-19 – 13-24. According to one view, all the rights, including mining permits, not specifically classified as limited real rights are personal rights. Central to the view that mining permits are personal rights is that permits have a much narrower scope than the rights that are classified as limited real rights. The content of mining permits is restricted specifically by the prohibition against transfer, cession, letting, subletting, alienation and disposal of mining permits in s 27(8)(b) of the MPRDA. In this regard, it is acknowledged that an inconsistency arises as a result of the ability to encumber registered mining permits with mortgage bonds in certain instances. See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 30-8 – 30-11; Badenhorst 2005 *Obiter* 523 and 524. Also see Dale *et al South African Mineral and Petroleum Law* MPRDA-68 – MPRDA-69 regarding mining permits being personal rights. Critically, Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 30-10 and 30-12 indicate that the ability to encumber mining permits with a mortgage bond gives rise to the possibility that mining permits can in some instances be limited real rights. However, Dale *et al South African Mineral and Petroleum Law* MPRDA-300 persuasively argue that the prohibition against transfer of mining permits requires that the reference to the ability to mortgage mining permits must be read *pro non scripto*.

⁸²⁴ Dale *et al South African Mineral and Petroleum Law* MPRDA-131. It has also been argued that before the MPRDA, registered prospecting contracts were real in nature because the rights flowing these contracts resulted in a subtraction from *dominium*. See Franklin and Kaplan *The Mining and Minerals Laws of South Africa* 630 citing *Kotze v Newmont SA Ltd* 1977 3 SA 368 (NK); Badenhorst and Olivier 1997 *TSAR* 583 595; Badenhorst, Mostert and Dendy in *LAWSA* par 48. *Contra Vansa Vanadium SA Ltd v Registrar of Deeds* 1996 442.

⁸²⁵ The test was also used to justify that common-law mineral rights were real rights. See *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 604; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd and Others* 516; Badenhorst *Minerale* 579 – 580.

⁸²⁶ Also referred to as the *ius utendi*. See Badenhorst *et al Silberberg* 92. Regarding the entitlements of landowners, it is not the entitlements to prospect and mine that are limited. These entitlements no longer vests in landowners. Even if one accepts that ownership of unmined minerals still vests in landowners, landowners no longer have the ability to prospect and mine. Entities can only obtain the abilities to prospect and mine if the governments grants them prospecting rights, mining rights or mining permits. See chap 2, sec s 3.2.1.

while holders of prospecting rights and mining rights acquire real rights upon registration. It thus seems as if the above analysis, regarding the effect of applying property-law rules of derivative acquisition of real rights to prospecting rights and mining rights, applies *mutatis mutandis* to mining permits. As with prospecting rights and mining rights, unrecorded mining permits probably will be enforceable against the landowner at the time when the Minister grants permits due to the consultation process that the MPRDA requires. Again, the tenure security of holders of unrecorded mining permits is threatened if ownership of the property over which the permit applies, is transferred to a new owner without knowledge that the Minister granted a mining permit.

In summary, according to a property-law rights-based approach, unregistered or unrecorded prospecting rights, mining rights and mining permits are unenforceable against the landowner's successor in title, who was unaware of the rights when he obtained ownership. This inability to enforce rights seriously prejudices the ability of right holders to develop mines profitably and the interests of investors to maximise returns on investments. A property-law rights-based approach to rights to minerals thus weakens mineral tenure security. The next section explores an alternative approach to registration of rights to minerals.

2.2. An alternative approach

When the MPRDA came into operation, it was accompanied by the Mining Titles Registration Amendment Act.⁸²⁷ The Amendment Act revived the Mining Titles Registration Act (MTRA) and converted the Mining Titles Office into the Mineral and Petroleum Titles Registration Office.⁸²⁸ Currently, all rights to minerals granted in terms of the MPRDA must be registered or recorded in the Mineral and Petroleum Titles Registration Office.⁸²⁹ Before the MPRDA, mineral rights, prospecting rights and mining rights, as limited real rights, were registered in the Deeds Office.⁸³⁰ Rights other than mineral rights, prospecting rights and mining rights

⁸²⁷ 24 of 2003.

⁸²⁸ MTRA, s 2(1).

⁸²⁹ MTRA, s 53, read with the schedule to the Act, repealed all provisions of the Deeds Registries Act of 1937 dealing with registration of rights to minerals in the deeds registry. Confusion existed for a while as to the place of registration as a result of inconsistencies between the Schedule of the MTRA and Schedule I of the MPRDA. The confusion was cleared up by the Minerals and Energy Law Amendment Act 11 of 2005. See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 29 – 2; Badenhorst and Mostert 2004 *De Rebus* 25 in this regard.

⁸³⁰ *Ex Parte Pierce* 634; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 27 – 3; Badenhorst, Mostert and Dendy in *LAWSA* par 41.

were registered in the Mining Titles Office. These rights were “statutory rights, separate from the ownership of the land to which they pertained.”⁸³¹

The Mineral and Petroleum Titles Registration replaced the Deeds Office as the location where rights to minerals are registered. It is therefore tempting to transfer the private-law rules and effects of registration in the Deeds Office to the Mineral and Petroleum Titles Registration Office. However, the functions and purposes of registering rights in the Mineral and Petroleum Titles Registration Office and the Deeds Office “differ significantly”.⁸³² The Deeds Office functions in a private-law system that endorses a hierarchical approach to rights.⁸³³ Real rights are higher in the hierarchy than personal rights and are stronger and better protected than rights that are not registrable.⁸³⁴ The apartheid government used this private-law rights hierarchy to ensure that white people had strong and secure rights in land while other race groups could only obtain weak and insecure use-rights.⁸³⁵ In this regard, only white people could obtain ownership of land in the largest part of the country while other racial groups could obtain inferior use- rights only.⁸³⁶ These inferior use rights took the form of statutory rights based on permits and tribal land rights.⁸³⁷ Considering the inextricable link between ownership and the ability to prospect and mine before the MPRDA,⁸³⁸ mineral wealth accumulated in white hands.⁸³⁹

In the context of land reform, the private-law hierarchical approach to right has come under scrutiny and has been subject to criticism in recent times.⁸⁴⁰ The system is criticised for perpetuating the inequitable results of the apartheid regime concerning rights in land.⁸⁴¹

⁸³¹ Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 27 – 4; Badenhorst 2005 *Obiter* 521.

⁸³² Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 27 – 4.

⁸³³ Regarding the hierarchical approach see Van der Walt *Koers* 261 – 263; Pienaar 2006 *TSAR* 447; Mostert in Cooke *Modern Studies* 5.

⁸³⁴ It has been argued that ownership is at the pinnacle of this hierarchy. See Van der Walt *Koers* 262; Pienaar 2006 *TSAR* 447; Mostert in Cooke *Modern Studies* 5 – 6. Badenhorst *et al Silberberg* 238 refers to “categorisation of rights” that places ownership and limited real rights “in a superior position...as far as enforcement and publicising thereof is concerned”.

⁸³⁵ Badenhorst *et al Silberberg* 69 – 70 and 238 – 239; Pienaar 2006 *TSAR* 447; Van der Walt *Koers* 261 – 263. Also see Mostert 2011 *PER* 103.

⁸³⁶ See Cooke *The New Law of Land Registration* 8.

⁸³⁷ Badenhorst *et al Silberberg* 69 – 70; Van der Walt *Koers* 262; Mostert in Cooke *Modern Studies* 6.

⁸³⁸ See chap 3, sec 2.1.

⁸³⁹ *Agri SA (CC)* [1] and [65].

⁸⁴⁰ Badenhorst *et al Silberberg* 69 – 70 and 238 -239. The dissatisfaction with the hierarchical approach primarily stems from the fact that land-rights have fragmented into different use rights. See in general Van der Walt 1992 *SAJHR* 431; Van der Walt *Koers* 264; Mostert 2011 *PER* 103. For criticism on the fragmented use-rights model see Pienaar 2006 *TSAR* 448 – 449. On the historical development of fragmentation see González in McHarg *et al* 62.

⁸⁴¹ Badenhorst *et al Silberberg* 69 - 70 and 238 – 239; Mostert in Cooke *Modern Studies* 5 – 6.

Furthermore, the hierarchical approach provides security of tenure to holders of registered real rights but does not promote the tenure security of holders of informal land rights that are not registrable. It has therefore been suggested that the practice of registering rights in lands in the Deeds Office may need to be extended to include registration of a wide variety of use rights in land.⁸⁴² Furthermore, it has been argued that security of tenure can also be ensured through “extensive regulation of rights” and publicising rights through methods other than registration.⁸⁴³ Along similar lines, it is strongly arguable that the Mineral and Petroleum Titles Registration Office should not endorse the private-law hierarchical approach where some rights are stronger and better enforceable than others.⁸⁴⁴

This is supported firstly by the fact that the MPRDA is transformative in nature and does not endorse a system where rights to minerals are privately held according to the rules of private law.⁸⁴⁵ In this regard, the MPRDA terminated the framework that preceded it in terms of which some rights to minerals were held privately.⁸⁴⁶ Instead, the MPRDA determines that the state is the custodian of the nation’s mineral resources for the benefit of all the people of South Africa. The objectives of the Act include to promote equitable access to the nation’s mineral resources,⁸⁴⁷ and to expand, meaningfully and substantially, opportunities for historically disadvantaged persons to participate in the mining industry.⁸⁴⁸ The only way to obtain minerals in terms of the MPRDA is to apply to the government through an administrative procedure. The emphasis of the MPRDA is thus not on privately held minerals and regulation according to the rules of property law. It is therefore also arguable that the question of registration and enforceability must not be analysed using a private-law rights-based approach.

Secondly, a consideration of registration and enforceability of rights to minerals must be considered against the backdrop of the administrative nature of the MPRDA. Rights to minerals granted in terms of the MPRDA are enforceable against anyone as long as holders of

⁸⁴² Badenhorst *et al Silberberg* 69 – 70 and 238 – 239; Pienaar 2006 *TSAR* 450. Van der Walt *Koers* 264 267 - 268 argues that land-reform requires abolishing the hierarchical approach and adopting a use-rights model. Also see Mostert 2011 *PER* 89 – 92; Mostert in Cooke *Modern Studies* 19 – 24.

⁸⁴³ Badenhorst *et al Silberberg* 69 – 70 and 238 – 239. Also see Mostert in Cooke *Modern Studies* 19 – 24; Mostert 2011 *PER* 89 – 92.

⁸⁴⁴ See Badenhorst *et al Silberberg* 239.

⁸⁴⁵ See Dale *et al South African Mineral and Petroleum Law MPRDA-67* whether the authors state that the commentary on the Mining Titles Office prior the MPRDA must be read keeping in mind that minerals and minerals resources are now under the custodianship of the government.

⁸⁴⁶ See chap 2, sec 3.2.1.

⁸⁴⁷ MPRDA, s 2(c).

⁸⁴⁸ MPRDA, s 2(d).

rights comply with the terms and conditions to which the rights are subject and with the provisions of the MPRDA. If holders of rights do not comply with their obligation to lodge their rights for registration or recording, the Minister can invoke the procedures for suspension and cancellation in terms of section 47 of the MPRDA.⁸⁴⁹ According to these procedures, holders of rights must receive notification of the complaint of non-compliance and the intention of the Minister to cancel or suspend rights.⁸⁵⁰ Holders of rights should also have an opportunity to show why their rights or permits must not be suspended or cancelled.⁸⁵¹ Furthermore, before cancelling or suspending rights, the Minister must direct holders to take specific measures to correct the contravention that led to the invoking of the suspension and cancellation procedures.⁸⁵² Certainly, if the contravention is non-registration or non-recording, the Minister will direct holders of rights to register or record rights. Holders of rights who wish to continue mining or prospecting certainly will comply with the directive of the Minister to lodge rights for registration or recording.

It therefore seems that the consequences of non-compliance with the obligation to register or record rights are that the Minister can take administrative steps to correct the contravention. If, after these administrative steps, holders of rights still fail to register or record rights, they can face losing their rights through cancellation. Cancellation will, of course, prevent right holders from enforcing their rights. However, it seems unlikely that the consequences of failure to register rights *per se* are that private parties can prevent holders of rights from enforcing their rights according to the rules of private law.

⁸⁴⁹ *Contra Dale et al South African Mineral and Petroleum Law* MPRDA-398 where the authors argue that only provisions directly related to prospecting and mining “operations” can lead to suspension and cancellation in terms of s 47. Examples of provisions directly related to prospecting and mining “operations” according to the authors include the obligation to commence prospecting and mining within certain time periods in ss 19(2)(b) and 25(2)(b) of the MPRDA as well the obligations to prospect and mine continuously in ss 19(2)(c) and 25(2)(c) of the MPRDA. Dale *et al* argue that the obligation to lodge rights for registration is not directly related to “operation” and can therefore not result in the activation of suspension and cancellation procedures in s 47. However, if Dale *et al* is correct, non-compliance with black economic requirements and the socio-economic obligations will also not activate s 47. It seems clear that the government is set on suspending and / or cancelling rights due to non-compliance with black-economic requirements and socio-economic obligations. See Mantshantsha 11 August 2014 *Business Day BDLive* available at <http://www.bdlive.co.za/business/mining/2014/08/11/state-threatens-to-halt-gold-fields-operations-over-transgressions>; Harvey 3 September 2015 *Business Day BDLive* available at <http://www.bdlive.co.za/opinion/2015/09/03/revoking-mining-licences-no-cure-for-poser>.

⁸⁵⁰ MPRDA, ss 47(2)(a) and (b).

⁸⁵¹ MPRDA, s 47(2)(c).

⁸⁵² MPRDA, s 47(3).

Registration of rights is a necessary element of mineral tenure security.⁸⁵³ In this regard, as the position in the Deeds Office, registration of rights still serves the important function of publicizing rights.⁸⁵⁴ A notice to the world that a specific entity holds rights to minerals must certainly give some assurance to investors that their rights are protected. However, registration also serves other purposes. The existence of a reliable register provides an easy reference for the government regarding rights that have been granted. Such a reference will certainly make it easier for the government to ensure that right holders comply with their obligations, such as environmental, socio-economic and empowerment responsibilities.⁸⁵⁵ Furthermore, a record of rights also makes it easier for the government to ascertain where resource-rich land is not exploited. Knowing where rights have not been granted⁸⁵⁶ has the potential to facilitate the government's pursuit of optimal exploitation of the country's mineral resources.

It remains to be seen whether the courts will interpret the registration provisions of the MPRDA and the MTRA to follow the rules of a private-law rights-based paradigm. As indicated above, a literal reading of these two Acts certainly allows such an interpretation. To avoid a situation where private entities can prevent right holders from exercising their rights due to non-registration, it is desirable to amend the MPRDA and MTRA. An amendment that removes the semantic classification of prospecting rights and mining rights by eliminating all references to "limited real rights" in the MPRDA and the MTRA will have the desired effect.⁸⁵⁷ ⁸⁵⁸ Such an amendment will eradicate the possibility that private parties can prevent right holders from enforcing their rights as a result of non-registration. The proposed amendment will thus decrease the risks that mines cannot be developed profitably and that returns on investments cannot be maximised and will therefore strengthen mineral tenure security.

⁸⁵³ See chap 1, sec 1.1.

⁸⁵⁴ *Mawetse SA Mining Corporation (Pty) Ltd v Minister of Mineral Resources and Others* [19].

⁸⁵⁵ See *Coetsee v Rabie en 'n Andere* 1964 2 SA 626 (C) 629 regarding prospecting licenses on state land in terms of s 35 of The Mineral Law Amendment Act 16 of 1907.

⁸⁵⁶ According to Dale *et al South African Mineral and Petroleum Law* MPRDA-13, registration also improves access to rights. According to this argument, searches of the registers will reveal whether rights to specific minerals on specific land have been granted to a third party.

⁸⁵⁷ This will require deleting s 5(1) of the MPRDA and s 2(4) of the MTRA.

⁸⁵⁸ It is difficult to foresee any negative consequences of the proposed amendment. All of the characteristics of rights that can be influenced by such an amendment, for example the abilities to mortgage and transfer rights, are regulated by the MPRDA and semantic classification of the rights as limited is not going to change the way that it is regulated.

3. Suitability of a private-law, rights-based approach to rights to minerals

The question that arises is whether it is appropriate to continue to investigate rights to minerals from a private-law paradigm and to force the rights into the established categories of private law rights, namely real rights and personal rights.⁸⁵⁹ Apart from the limitations of a private-law rights-based approach in strengthening mineral tenure security, rights to minerals granted in terms of the MPRDA do not exhibit the characteristics that were used for justification that common-law mineral rights were limited real rights.⁸⁶⁰

Still, the typification of prospecting rights and mining rights as limited real rights necessitates considering that these rights are statutorily created limited real rights with its own characteristics and advantages.⁸⁶¹ In this regard, the creation of limited real rights by statute is not a novelty.⁸⁶² For example, the Mining Rights Act⁸⁶³ and Precious Stones Act⁸⁶⁴ vested the rights to mine for petroleum, precious metals and precious stones in the state. This was regarded by some as the creation of statutory mineral rights⁸⁶⁵ that were real in nature, in favor of the state.⁸⁶⁶ Earlier legislation also acknowledged statutory real rights to minerals held by private persons.⁸⁶⁷ Furthermore, when statutory real rights are created it is not unusual for the

⁸⁵⁹ Mostert November 2014 *Recht in Africa* argues that “perpetuating an understanding embedded in the concept of a private-law mineral right is erroneous in terms of the current statutory regime dealing with minerals” (own emphasis).

⁸⁶⁰ See chap 2, sec 3.2.2 fn 250 and fn 251. Barton in McHarg *et al* 91 argues that one way to determine whether permits granted by statute is proprietary, is to consider whether the permits have one or more characteristics of property rights in general. At 95 the author states that “if a statutory licence is determined to be property or statutory property, then an accepted set of consequences should follow, unless the legislation or the dictates of fairness require another result”.

⁸⁶¹ See chap 2, sec 3.2.2.

⁸⁶² In the context of mining, Bastida PHD 64 – 65 refers to “administrative real property rights”. Badenhorst and van Heerden 1992 *THRHR* 223 refers to “statutêre mineraalregte” (statutory mineral rights). Also see Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin* 620 – 621. Another example of a statute that creates real rights is s 2 of the Sectional Titles Act 66 of 1971. The Act creates a new type of *res* and allows ownership of part of a building. See Badenhorst *et al Silberberg* 442 – 447; van der Merwe *Sakereg* 402 – 410; Sonnekus and Neels *Sakereg Vonnisbundel* 507.

⁸⁶³ 20 of 1967, s 2(1)(a). Subject to exceptions in the transitional provisions, the statutory mineral rights were terminated when the Minerals Act of 1991 came into operation. See Badenhorst and van Heerden 1992 *THRHR* 227.

⁸⁶⁴ 73 of 1964, s 2. Subject to exceptions in the transitional provisions, the statutory mineral rights were terminated when the Minerals Act of 1991 came into operation. See Badenhorst and van Heerden 1992 *THRHR* 227.

⁸⁶⁵ Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin*; Badenhorst 1999 *Stell LR* 102 – 103.

⁸⁶⁶ Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin* 94; Badenhorst 1999 *Stell LR* 104.

⁸⁶⁷ For example, ss 12(1) and 5(1) of the Mining Rights Act of 1991 and Precious Stones Act of 1967, respectively, vested the rights to prospect for precious metals and precious metals on alienated state land in the landowner. See Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin* 94. Subject to exceptions in the transitional provisions, the statutory mineral rights were terminated when the Minerals Act of 1991 came into operation. See Badenhorst and van Heerden 1992 *THRHR* 227.

statute to describe the attributes, including the abilities and limitations to transfer and mortgage, of these rights.⁸⁶⁸

However, when rights created by statute are regulated to such an extent that they exist and operate only through the administrative powers of the government, it becomes questionable whether it remains appropriate to analyze these rights from a private-law paradigm.⁸⁶⁹ The question arises whether the abilities of holders of rights that resemble the attributes of common-law real rights in land are not merely characteristics that are administratively attributed to rights.⁸⁷⁰ In this regard, the abilities to register or record, transfer and mortgage prospecting rights, mining rights and mining permits are characteristics that are administratively attributed to the rights by the MPRDA. Thus, the rights are administrative rights that can be registered, transferred and mortgaged according to the provisions of the MPRDA.⁸⁷¹ An analysis of the abilities to transfer and mortgage prospecting rights, mining rights and mining permits indicated that the MPRDA rigorously regulates these abilities.⁸⁷² The abilities to transfer and mortgage rights do not seem to be a feature of the rights as a result of their common-law nature, namely real rights in property. It simply appears to be a feature of the administrative regime. Furthermore, registration or recording of rights do not appear to be based on their private-law nature as real rights in land. Registration appears to be administratively required for specific purposes.⁸⁷³

Contemplation of statutorily created rights to minerals seems to necessitate distinguishing between two scenarios. First, rights can be administratively granted after which rights operate

⁸⁶⁸ Bastida (PhD thesis) 63. See Badenhorst, Mostert and Dendy in *LAWSA* par 49 where the authors mention that most of the real rights created by previous mining legislation could have been transferred and mortgaged.

⁸⁶⁹ See Mostert and van den Berg in Zillman *et al* 92 where, in the context of the MPRDA, the authors say that although it may be impossible to divorce the rules regarding the subsurface from the property law context, there is an argument made for positioning them in administrative law. There are arguments to the contrary. See, for example, Badenhorst 2011 4 *SALJ* 776 and 783 – 784 where the author argues that old order rights which were created by the transitional provisions in sch II of the MPRDA were real although they lost most of their characteristics as real rights, including the abilities to transfer and mortgage. Also see Badenhorst *Die Juridiese Bevoegdheid on Minerale te Ontgin* 610 – 624 where the author argues that statutory rights to minerals in terms of the Mining Rights Act of 1967 and the Precious Stones Act of 1964 were limited real rights in the private sphere. However, the author argues in a system where private ownership of mineral rights and mineral resources were possible.

⁸⁷⁰ Barton in in McHarg *et al* 93 refers to “statutory rights that include property characteristics”.

⁸⁷¹ See, however, Bastida (PhD thesis) 65 where the author gives examples of countries where rights are subject to administrative law only. The author then says that these rights cannot be transferred or used as security to obtain loans at all.

⁸⁷² See chap 5, sec 3 and sec 5 regarding regulation of transfer and mortgage rights in the MPRDA respectively.

⁸⁷³ See sec 2.2 above.

as real rights in property with limited governmental interference.⁸⁷⁴ Second, rights can be granted administratively but then operate only according to the administrative powers of the government.⁸⁷⁵ The limited analysis⁸⁷⁶ in this thesis indicates that prospecting rights, mining rights and mining permits may fall in the second scenario.⁸⁷⁷ If rights are truly only administrative in nature, it is unclear why the MPRDA labels prospecting rights and mining rights as limited real rights. One possible reason is that the legislator inserted the term “limited real right” in response to objections that rights in the Minerals Development Draft Bill, that preceded the MPRDA, were not limited real rights in land.⁸⁷⁸ However, following the objections, prospecting rights and mining rights were labelled limited real rights, but no changes were made to the characteristics of rights that would resemble characteristics of common-law real rights.⁸⁷⁹ This creates the impression that the legislator inserted the term “limited real rights” into the MPRDA as an afterthought and in an attempt to silence critics.

4. Conclusion

The MPRDA’s explicit typification of prospecting rights and mining rights as limited real rights perpetuates a perception that a proprietary overlay to rights to minerals strengthens mineral tenure security. Generally, registered real rights are stronger and better enforceable than rights which cannot be registered. However, this chapter reveals that a private-law rights-based approach to minerals present limitations for mineral tenure security.⁸⁸⁰

According to property-law theory, right holders acquire rights to minerals through a derivative method of acquisition of real rights. The private-law rules regarding acquisition of real rights and enforceability of rights weaken mineral tenure security. These rules include that registration is a requirement to complete derivative acquisition of real rights and rights are enforceable against third parties only upon registration. The effect of these rules is that private parties can prevent holders of rights from exercising their rights if they fail to comply with their

⁸⁷⁴ Bastida (PhD thesis) 64 – 65. This seems to be the scenario that Bastida 2001 *JERL* 39 and 40 refers to.

⁸⁷⁵ Bastida (PhD thesis) 65.

⁸⁷⁶ The thesis does not provide a detailed examination of all of the rights and permits that the MPRDA provides for or of conditions under which rights can be lost. Also, final conclusions regarding the nature of rights to minerals require an investigation into conflict resolution between holders of rights and landowners.

⁸⁷⁷ For a different approach that focuses on the relationship between state powers and private parties see Mostert November 2014 *Recht in Africa* 21 – 26.

⁸⁷⁸ Chap 2.

⁸⁷⁹ Chap 2.

⁸⁸⁰ See Mostert November 2014 *Recht in Africa* 16 where the author demonstrates other weaknesses of a purely private-law approach to the conceptualisation of mineral rights, even before the MPRDA.

obligations to register or record rights. Thus, private-law rules regarding derivative acquisition or real rights have a negative impact on the enforceability of rights to minerals.

The rules of derivative acquisition of real rights function in a private-law system that endorses a hierarchical approach to rights where registered real rights are stronger and better enforceable than rights that can not be registered. This chapter argues that registration of rights to minerals should not endorse this hierarchical private-law rights-based approach. Instead, registration of rights to minerals in the Mineral and Petroleum Titles Registration Office should follow an approach in terms of which one of the functions of registration is that it is a means to assist rightholders to prove the existence of their rights. Registration should thus facilitate enforcement of rights and the exclusivity of rightholders. Lack of registration should not have the effect that rights become unenforceable against third parties.

Apart from the limitations that a private-law rights-based approach to rights to minerals pose for mineral tenure security, rights granted in terms of the MPRDA do not exhibit the characteristics that were used for classifying common-law mineral rights as *limites real rights*. Furthermore, rights to minerals in the MPRDA functions in an administrative regime. The characteristics of rights depend on the regulatory legislation and not on the rules of private law. This opens the door to arguments that rules of private-law are no longer suitable for analysing rights to minerals

Chapter 7:

RULE OF LAW: LEGALITY AS A SAFEGUARD FOR MINERAL TENURE SECURITY

1. Introduction

The MPRDA pursues multiple, complex and at times diverging objectives. One of the central themes of the MPRDA is to transform the mining industry and to provide equitable access to South Africa's mineral resources.⁸⁸¹ At the same time, the Act aims to promote economic growth and mineral resource development⁸⁸² and to provide security of tenure in prospecting and mining.⁸⁸³ Within this complex framework, the preceding chapters identified certain shortcomings of the MPRDA in strengthening mineral tenure security.

First, in certain instances, the MPRDA contains excessive regulatory measures that are disproportionate to the objectives pursued. Second, wide and uncircumscribed governmental discretion that is unnecessary for achieving legitimate governmental objectives are at times encountered. The third shortcoming emerges from unnecessarily vague and, at times, poor legislative drafting in the MPRDA. These shortcomings result in unnecessary and unjustifiable increases in risks associated with profitable mine development and maximised investment returns. This, in turn, unjustifiably weakens mineral tenure security.

Some argue that the MPRDA infringes section 25(2) of the Constitution as it amounts to "creeping expropriation".⁸⁸⁴ However, pursuant to the decision in *Agri South Africa v Minister of Minerals and Energy*,⁸⁸⁵ it seems improbable that the Constitutional Court will, in the near future, find that the MPRDA is unconstitutional for infringing fundamental rights. In *Agri South Africa*, the court decided that the coming into effect of the MPRDA did not result in the expropriation of certain categories of pre-MPRDA mineral rights.⁸⁸⁶ Although the case may

⁸⁸¹ MPRDA, ss 2(c) and (d). Provision of equitable access to mineral resources is also part of the short title of the MPRDA. Also see Mostert November 2014 *Recht in Africa* 7.

⁸⁸² MPRDA, s 2(e).

⁸⁸³ MPRDA, s 2(f).

⁸⁸⁴ Leon 2009 *JERL* 597.

⁸⁸⁵ 2013 4 SA 1 (CC)

⁸⁸⁶ Specifically unused old order rights. See *Agri SA* (CC) [14] and [68] – [72].

not be direct authority for the constitutionality of the MPRDA in general,⁸⁸⁷ the decision strongly supports the transformative objectives of the Act.⁸⁸⁸ In this regard, it has been argued that in coming to its decision, the Court “nailed its pro-redress colours to the mast from the start.”⁸⁸⁹ The Constitutional Court thus made it clear that it strongly supports the transformative objectives of the MPRDA and that strong persuasion will be required to declare the Act unconstitutional.

Acceptance of the importance of the transformative nature of the MPRDA and the correctness of the decision in *Agri South Africa* do not relegate the shortcomings of the MPRDA in strengthening mineral tenure security. Even though the Act may not infringe fundamental rights, it poses challenges to mineral tenure security. The MPRDA, therefore, has the potential to deter investment in South Africa’s mining industry. If the government wishes to continue attracting investment in the country’s mining industry, it needs to amend the MPRDA to overcome these shortcomings.

This chapter argues that the constitutional framework itself provides the necessary justification for amendments to the MPRDA to address shortcomings in strengthening mineral tenure security. The rule of law is the very heart of our constitutional framework.⁸⁹⁰ Particularly foundational to South Africa’s Constitution, as part of the rule of law, is the principle of legality.

⁸⁸⁷ In *Agri South Africa* [75], the court held that it would be inappropriate to decide, definitely, that expropriation in terms of the MPRDA could never be established.

⁸⁸⁸ See *Agri SA* (CC) [1], [61] – [64], and [73].

⁸⁸⁹ Mostert November 2014 *Recht in Africa* 20. Also see Mostert and van den Berg in Zillman *et al* 88.

⁸⁹⁰ According to s 1(c) of the Final Constitution, 1996, the rule of law is one of its founding provisions. See *Chief Lesapo v North West Agricultural Bank and Another* 2000 1 SA 409 (CC) [11], [16], [19] and [22]; *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others*; *Sheard v Land and Agricultural Bank of South Africa and Another* 2000 3 SA 626 (CC) [5] – [6]; *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another* 2001 1 SA 1109 (CC) [50]; *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 1 SA 429 (CC) [11]; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) [39]; *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 3 SA 247 (CC) [48]; *Kruger v President of the Republic of South Africa* 2009 1 SA 417 (CC) [65]; Currie and de Waal *Bill of Rights Handbook* 10. It is uncertain whether the foundational values, including the rule of law and legality, give rise to independent enforceable rights. In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders* 2005 3 SA 280 (CC) [21], the court said that they do not. In *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* 2009 1 SA 565 (CC) [36], the court seems to accept that the rule of law does give rise to independent constitutional challenges by the following statement: “[T]he applicants are not complaining of a breach of one of their fundamental rights, but of an infringement of the rule of law...”. For a more detailed discussion regarding whether the foundational values give rise to independent enforceable claims see Fowkes in Woolman *et al Constitutional Law of South Africa* 13-16 – 13-18. Michelman in Woolman *et al Constitutional Law of South Africa* 11-3 opines the rule of law gives rise to stand-alone enforceable claims.

2. Conceptualization of the rule of law

The South African Constitution abolished parliamentary sovereignty⁸⁹¹ and provides for constitutional supremacy.⁸⁹² By entrenching the rule of law as a foundational principle, the Constitution requires that the exercise of all public power must adhere to rule-of-law standards.⁸⁹³ This includes executive decisions⁸⁹⁴ (including administrative action⁸⁹⁵ and the exercise presidential powers),⁸⁹⁶ and primary legislation, such as the MPRDA, enacted by Parliament.⁸⁹⁷ The rule of law thus provides a mechanism for the control of the exercise of all public power, including the public power that Parliament exercised when it enacted the MPRDA.⁸⁹⁸

⁸⁹¹ Before the Constitution, parliament was sovereign in South Africa. See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 [28]; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 [40]; Mceldowney 2013 *TSAR* 271; Michelman in *Constitutional Law of South Africa* 11-1.

⁸⁹² Final Constitution, 1996, s 2. Also see *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [40].

⁸⁹³ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [32] [34] [59]; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [17] [20] [40] [51]; *Affordable Medicines Trust v Minister of Health* [48]; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 [17]; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 (CC) [38]; *S v Mamabolo* 2001 3 SA 409 (CC) [38]; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 1 SA 343 (CC) [29]; *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 5 SA 171 (CC) [62]; *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 3 SA 293 (CC) [49].

⁸⁹⁴ *Democratic Alliance v President of South Africa and Others* 2013 1 SA 248 (CC) [12]; *Masethla v President of the Republic of South Africa* 2008 1 BCLR 1 [77] – [81].

⁸⁹⁵ Administrative action will, however, be reviewed according to the provisions of the Promotion of Administrative Justice Act 3 of 2000. The rule of law should only be engaged once norms of greater specificity, such as the right to administrative action, have been exhausted. See Currie and de Waal *The Bill of Rights Handbook* 12.

⁸⁹⁶ *Pharmaceutical Manufacturers Association of South Africa and Another: In Ex Parte President of the Republic of South Africa and Others* [79].

⁸⁹⁷ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [32]; *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC) [55]; Currie and de Waal *The Bill of Rights Handbook* 136. Furthermore, policy decisions also seem to be subject to rule-of-law standards. In *NICRO* [58] - [61], the court relied on the Canadian case of *Sauvé v Canada (Chief Electoral Officer)* 2002 S.C.C. 68. In that case the majority of the court decided that the policy choice was subject to legality review and held there was no rational connection between the policy decision and the infringement of the right to vote. The court in *NICRO* did not make a direct finding on the whether the policy decision was rationally connected to a legitimate governmental objective. At [67], the court held that there was not enough information before it.

⁸⁹⁸ Under parliamentary sovereignty, the courts had limited power to invalidate governmental action and thus to control the exercise of public power. Public power was constrained by the rules of administrative law and especially judicial review of legislative and executive action. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [148]; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [37].

The rule of law is a difficult, complex and elusive concept, which has a number of different meanings.⁸⁹⁹ At its most basic, the rule of law requires that all state action must be undertaken according to law⁹⁰⁰ and every person and every institution, including state institutions,⁹⁰¹ is subject to the law.⁹⁰² Modern accounts of the rule of law depend on whether a formal or substantive interpretation of the concept is accepted.⁹⁰³ Formal interpretations of the rule of law generally set requirements regarding the manner and procedures for the promulgation of laws.⁹⁰⁴ Contrary to formal interpretations, substantive interpretations of the rule of law are concerned with, not only procedural requirements, but also with the content of laws and the protection of fundamental rights.⁹⁰⁵

The Constitutional Court has not, as yet, provided an outright indication of its conceptualization of the rule of law as either a formal or substantive concept. As can be expected, the Court's annotations on the concept depend on the facts of the case before it. In some instances involving constitutionally entrenched fundamental rights, the Court has adopted a more substantive understanding of the concept.⁹⁰⁶ However, a survey of the judgments of the

⁸⁹⁹ Barnett *Constitutional and Administrative Law* 76; Wade and Forsyth *Administrative Law* (2009) 17; Tamanaha *On the Rule of Law* 3. It has been argued that the uncertainty regarding the meaning of the rule of law might cause the concept to become a phrase without meaning. See Tamanaha *On the Rule of Law* 114; Schweitzer, Sylvester and Saks 2006 – 2007 *De Paul Law Review* 615.

⁹⁰⁰ Wade and Forsyth *Administrative Law* 17.

⁹⁰¹ Currie and de Waal *Bill of Rights Handbook* 10

⁹⁰² Barnett *Constitutional and Administrative Law* 73.

⁹⁰³ Tamanaha *On the Rule of Law* 91; Craig 1997 *Public Law* 467; Bachmann and Frost 2012 *De Jure* 306 308; Kruger 2010 3 *PER* 475; De Ville 2006 *Acta Juridica* 66; Schweitzer, Sylvester and Saks 2006 – 2007 *De Paul Law Review* 619; Fombad 2014 *AHRLJ* 418. Baxter *Administrative Law* refers to “a minimalist or a normative concept”. The minimalist concept corresponds with formal theories whereas the normative concept is similar to substantive theories.

⁹⁰⁴ Tamanaha *On the Rule of Law* 91 – 92; Craig 1997 *Public Law* 468 - 470; Kruger 2010 *PER* 476.

⁹⁰⁵ Tamanaha *On the Rule of Law* 102 – 103; Craig 1997 *Public Law* 477; Kruger 2010 *PER* 478; Bachmann and Frost 2012 *De Jure* 308.

⁹⁰⁶ See *Chief Lesapo v North West Agricultural Bank and Another* [1], [11], and [22] and *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [39], [40], [41] and [46] (the right of access to courts and the principle against self-help); *De Beer* [11] and *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another* 2011 3 SA 1 (CC) [58] (right to a fair hearing). Also see the following minority judgements: Ngcobo J in *van der Walt v Metcash* 2002 4 SA 317 (CC) [36] and Madala J in *van der Walt v Metcash* [65] (right to equality). See Mostert in Mostert and de Waal *Essays in Honour of CG van der Merwe* 88 – 95 for an argument that, in the context of the right to housing, substantive interpretations of the rule of law have been followed in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC), *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) and *Occupiers of 51 Olivia Road, Berea Township, Johannesburg v City of Johannesburg and Others* 2008 3 SA 208 (CC). For further annotations regarding the substantive nature of the rule of law see *Du Toit v Minister for Safety and Security and Another* 2009 12 BCLR 1171 (CC) [24]; *Justice Alliance of South Africa v President of Republic of South Africa and Others*, *Freedom Under Law v President of Republic of South Africa and Others*, *Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 5 SA 388 (CC) [30] and [40]; minority judgement of Sachs J in *Matatiele Municipality v President of the Republic of South Africa*

Constitutional Court, reveals that the Court, unequivocally, *at least*, requires the exercise of all public power, including primary legislation, such as the MPRDA, to comply with a formal interpretation of the rule of law that is mainly based on the (constitutionally developed) principle of legality.⁹⁰⁷ The Court requires such compliance irrespective of whether fundamental rights are in question. In this regard, it has been argued that, in South Africa, the rule of law *is given effect to* by the development of traditional common-law doctrines⁹⁰⁸ of which the most common is the principle of legality.⁹⁰⁹

3. Legality and the shortcomings of the MPRDA

In common-law, administrative decision-making was subject to judicial review, including the principle of legality.⁹¹⁰ However, as a result of parliamentary sovereignty, the common-law principle of legality as part of administrative law, gave the courts limited power to control the exercise of public power.⁹¹¹ In particular, under parliamentary sovereignty, the courts could not, as a general rule, invalidate primary legislation, such as the MPRDA, enacted by Parliament.⁹¹² The role of the courts was confined to interpreting the legislation and applying it to the facts of the case before the court.⁹¹³

In the Constitutional dispensation, the principle of legality derives directly from the Constitution,⁹¹⁴ and as such, has been extended to include standards for the review of the

(referred to as *Matatiele (I)* for the remainder of the chapter) 2006 5 SA 47 (CC) [107] and [110]. Also see Price 2010 *SAPL* 371.

⁹⁰⁷ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [40] [56] and [58]; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [17] and [24]; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [34]; *Affordable Medicines Trust v Minister of Health* [49]; *Albutt v Centre for the Study of Violence and Reconciliation and Others* [49]; *Masethla v President of the Republic of South Africa* [33]; *Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC) [32]; [81]; Fowkes in Woolman *et al Constitutional Law of South Africa* 13-15.

⁹⁰⁸ Fowkes in Woolman *et al Constitutional Law of South Africa* 13-55.

⁹⁰⁹ Fowkes in Woolman *et al Constitutional Law of South Africa* 13-54. Devenish 2004 *TSAR* 678 regards legality as the “core of seminal meaning of the rule of law”. As regards, the content of common-law legality see Michelman in Woolman *et al Constitutional Law of South Africa* 11-1; Dyzenhaus 2007 *SALJ* 736.

⁹¹⁰ Hoexter *Administrative Law in South Africa* 115 read with 122.

⁹¹¹ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [28]; Dyzenhaus 2007 *SALJ* 736.

⁹¹² Opposed to legislation enacted by parliament, subordinate legislation was subject to judicial review. See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [29] – [31].

⁹¹³ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [28] and [29]; Hoexter *Administrative Law in South Africa* 115; Dyzenhaus 2007 *SALJ* 736.

⁹¹⁴ Price 2013 *SALJ* 649, 653 and 656; Michelman in Woolman *et al Constitutional Law of South Africa* 11-2. The common-law grounds for judicial review of administrative action are still relevant. They have, however, been “subsumed” by the Constitution and gain their force from the Constitution. See *Pharmaceutical*

exercise of all state power,⁹¹⁵ including the enactment of primary legislation.⁹¹⁶ Although the principle of legality under the Constitution is a more convoluted concept than in common law,⁹¹⁷ the principle is still associated with a set of (constitutionally developed) common-law doctrines.⁹¹⁸ These common-law doctrines include the *ultra vires* doctrine,⁹¹⁹ rationality review and the rule against vagueness.⁹²⁰ The following discussion indicates that these doctrines contain elements that highlight the shortcomings of the MPRDA in strengthening mineral tenure security, namely excessive regulation, vagueness and broad discretionary powers. The discussion provides an exposition of the elements of the *ultra vires* doctrine, the rule against vagueness, and rationality review, that direct attention to the shortcomings of the MPRDA, without differentiating between its common-law and Constitutional understandings.

3.1. Ultra vires and the rule against vagueness

According to the principle of legality, the legislature and executive may only exercise the powers and perform the functions that the law confers on them.⁹²¹ The exercise of any public power that is not authorised by law will be *ultra vires* and thus not in adherence to rule-of-law-standards.⁹²² This means that, if an executive functionary performs an executive action that is beyond the powers that the MPRDA confers on such functionary, the action will be against the principle of legality as a result of being *ultra vires*. The discussion here is primarily concerned with the legality of the MPRDA itself (the exercise of legislative power) and not with the

Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others [33]. As regards the common-law *ultra vires* doctrine see *Affordable Medicines Trust v Minister of Health* [50].

⁹¹⁵ Hoexter *Administrative Law in South Africa* 124. The standard according to legality is generally accepted as “rationality”. See Price 2013 *SALJ* 649 and sec 4.2 below.

⁹¹⁶ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [40]; Michelman in Woolman *et al Constitutional Law of South Africa* 11-11. It has been argued that under the Constitution, the principle of legality has been developed to regulate the exercise of public power that specifically does *not* amount to administrative action. See Price 2013 *SALJ* 658 – 659.

⁹¹⁷ Rationality review has “evolved” to include certain procedural aspects. See Price 2013 *SALJ* 645 – 655.

⁹¹⁸ Fowkes in Woolman *et al Constitutional Law of South Africa* 13-54.

⁹¹⁹ See *Affordable Medicines Trust v Minister of Health* [50] where the court held that what would have been *ultra vires* under common law, is invalid under the Constitution as an infringement of the principle of legality.

⁹²⁰ Fowkes in Woolman *et al Constitutional Law of South Africa* 13-54 – 13-56. In *Affordable Medicines Trust v Minister of Health* [108] where the court held that the doctrine of vagueness is a common-law doctrine that is now founded on the rule of law.

⁹²¹ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [58]; *Affordable Medicines Trust v Minister of Health* [49]; *Law Society of South Africa v Minister of Transport* [32].

⁹²² *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [59]; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [20] and [50]; *Affordable Medicines Trust v Minister of Health* [50].

exercise of executive power in terms of the MPRDA. The extent to which the *ultra vires* principle applies to executive action, it is not discussed further here. Therefore, the discussion does not consider whether a specific executive action was authorised by the MPRDA, or whether an executive functionary acted outside the scope of his powers when he performed an executive action. The following paragraph indicates that the *ultra vires* principle is, at times, associated with the legality of legislation itself.

In the *Affordable Medicines* case,⁹²³ the court struck down some provisions of regulations 18(3) and 18(5) of the Medicines and Related Substances Act⁹²⁴ for being *ultra vires*.⁹²⁵ In coming to this conclusion, the court took into account that the regulations were not formulated in an accessible manner.⁹²⁶ Furthermore, the regulations did not, with reasonable certainty, indicate to affected persons, what was relevant for the exercise of the power that affected them and in which circumstances they could seek relief against an adverse decision.⁹²⁷ The approach of the court, in *Affordable Medicines Trusts*, with regard to vagueness, is discussed in more detail below.⁹²⁸ It is clear, however, that, for the court, there was a connection between the vagueness of the relevant provisions of the regulations and its conclusion that the provisions were *ultra vires*.

Legality restricts the vagueness of legislation more directly through the rule against vagueness.⁹²⁹ In this regard, legality entails an element that restricts the vagueness of statutory authorizations for official action.⁹³⁰ According to the Constitutional Court, the rule of law requires legislation to be written in a clear and accessible manner.⁹³¹ Legislation that is impermissibly vague will violate the rule against vagueness, which is an aspect of the rule of law.⁹³² The rule against vagueness requires reasonable certainty in contrast to absolute

⁹²³ *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC).

⁹²⁴ 101 of 1965.

⁹²⁵ *Affordable Medicines Trust v Minister of Health* [119] and [123].

⁹²⁶ *Affordable Medicines Trust v Minister of Health* [121].

⁹²⁷ *Affordable Medicines Trust v Minister of Health* [121].

⁹²⁸ Sec 4.1.2.1 below.

⁹²⁹ Fowkes in Woolman *et al Constitutional Law of South Africa* 13-54

⁹³⁰ Michelman in Woolman *et al Constitutional Law of South Africa* 11 – 1 fn 3. According to Plasket “Administrative Law” 2008 *Annual Survey* 42, “none could argue with the proposition that an executive instrument that is incorrigibly vague would offend against the value of certainty that is part of the rule of law”.

⁹³¹ *Dawood and Another v Minister of Home Affairs and Others* [47]. Also see *Du Toit v Minister for Safety and Security and Another* [24]; *Kruger v President of the Republic of South Africa* [67]; *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* 2007 3 SA 210 (CC) [26].

⁹³² *Affordable Medicines Trust v Minister of Health* [108]; *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* [27].

certainty of laws.⁹³³ It requires “reasonable certainty to those who are bound by it to know what is required of them so that they may regulate their conduct accordingly”.⁹³⁴

The rule against vagueness further applies where legislation confers wide discretionary powers on the government. In this regard, discretionary powers that contain no express constraints, can have the effect that those who are affected by it will not know what is relevant for the exercise of the power and in which circumstances they will be entitled to seek relief in case of an adverse decision.⁹³⁵ People affected by the discretionary power will also not know which factors are relevant to a decision that impacts on them.⁹³⁶ Broad discretionary powers that contain no express constraints can, therefore, violate rule-of-law standards⁹³⁷ as a result of violating the rule against vagueness.

The rule against vagueness can be invoked to overcome two challenges that the MPRDA poses for mineral tenure security, namely drafting concerns and wide governmental discretionary powers. Previous chapters of this thesis indicated various examples of both challenges.⁹³⁸ It can be argued that there is not a watertight distinction between these challenges. In this regard, some instances of wide discretionary powers that this thesis revealed, are arguable a result of vague and imprecise drafting of the MPRDA. For example, the wide discretion that flows from the failure of the MPRDA to place an obligation on the Minister to grant mining permits, *can* be seen as a result of poor drafting of the Act. Similarly, it is arguable that some instances of vague drafting, revealed in this thesis, necessarily widens governmental discretion in decision-making. For example, one of the criteria that right holders must meet, to place an obligation on the Minister to grant consent for the transfer of mining rights, is compliance with the Mining Charter.⁹³⁹ This thesis proposes that as a result of vague and unclear drafting, it is uncertain when some of the requirements of the Mining Charter are met.⁹⁴⁰ However, it is also arguable that the uncertainty, regarding when the requirements of the Charter are met, widens the discretion of the Minister when deciding whether to grant consent for the transfer of

⁹³³ *Affordable Medicines Trust v Minister of Health* [108].

⁹³⁴ *Affordable Medicines Trust v Minister of Health* [108] referring to *R v Jopp and Another* 1949 (4) SA 11 (N) at 13-4.

⁹³⁵ *Dawood and Another v Minister of Home Affairs and Others* [47]; *Affordable Medicines Trust v Minister of Health* [34].

⁹³⁶ *Dawood and Another v Minister of Home Affairs and Others* [47].

⁹³⁷ *Dawood and Another v Minister of Home Affairs and Others* [47].

⁹³⁸ See chap 4: table 1 sec 3.1.2, table 2 sec 2.3, table 3 sec 2.4.2 and table 4 sec 2.4.4; chap 5: table 5, sec 3.2.1.3 and table 7 sec 4.3.2.

⁹³⁹ MPRDA, s 11(2)(b) read with s 23(h).

⁹⁴⁰ See chap 5, sec 3.2.1.2.

prospecting rights and mining rights. Thus, vague drafting causes wide discretionary powers. In this way, wide discretionary powers *can be viewed* as a sub-set of vagueness.

It is argued here that the rule against vagueness can be invoked to challenge vague provisions of the MPRDA from two angles. First, vague provisions can be challenged simply because of the uncertainty that the vagueness causes to holders of rights to minerals regarding what is expected from them to develop mines profitably. Second, vague provisions can be challenged because they result in wide governmental discretion that causes uncertainty regarding profitable development of mines. For ease of reference, with regard to the application of the rule against vagueness from these two angles, the first angle is referred to as “simple” vagueness” and the second angle as “compound vagueness”.

The approach of the Constitutional Court to vagueness and discretionary powers, and the suitability of this approach to overcome the challenge that wide governmental discretion poses for mineral tenure security, is discussed in more detail below. As a precursor to this discussion, the next section illustrates that rationality review, as an aspect of legality, highlights the challenge that excessive regulatory measures, at times encountered in the MPRDA, poses for mineral tenure security.

3.2. Rationality review

Legality requires that executive decisions,⁹⁴¹ as well as legislation,⁹⁴² must be rationally related to the purpose for which the power was given.⁹⁴³ This requirement of rationality is a “minimum

⁹⁴¹ *Affordable Medicines Trust v Minister of Health* [75]; *Democratic Alliance v President of South Africa and Others* [27]; *Albutt v Centre for the Study of Violence and Reconciliation and Others* [49]; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [85]; *Prinsloo v van der Linde and Another* 1997 3 SA 1012 [25].

⁹⁴² *Law Society of South Africa v Minister of Transport* [32]; *Glenister v President of the Republic of South Africa and Others* [55]; *Affordable Medicines Trust v Minister of Health* [74] citing *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) [44]; *United Democratic Movement v President of the Republic of South Africa* 2002 11 BCLR 1179 (CC) [55]; *New National Party v Government of the Republic of South Africa and Others* 1999 3 SA 191 [19]. In *South African Transport and Allied Workers Union v Garvas* 2013 1 SA 83 (CC) [37] and [49], the court held that legislative provisions that are open to more than one interpretation must be interpreted in a manner that will render the provision rationally related to its purpose. The reason for adopting a rationality standard seem to lie in the doctrine of separation of powers. See *New National Party v Government of the Republic of South Africa and Others* [24]; *Affordable Medicines Trust v Minister of Health* [86]. For a detailed analysis of the justification for rationality review in the context of equality cases see Bishop 2010 *SAPL* 317 – 321. Also see Price 2010 *SAPL* 358 – 359.

⁹⁴² *New National Party v Government of the Republic of South Africa and Others* [19] and [24].

⁹⁴³ Price 2010 *SALJ* 581; Price 2013 *SALJ* 649; Currie and de Waal *The Bill of Rights Handbook* 11- 12.

threshold” for the exercise of public power,⁹⁴⁴ even when no fundamental right is in question.⁹⁴⁵ Legislation will pass rationality review, if it is aimed at a legitimate governmental purpose and if there is a rational connection between such purpose and the means chosen to pursue it.⁹⁴⁶ If the legislation serves no legitimate governmental objective at all, it is irrational and unconstitutional.⁹⁴⁷ Furthermore, even if the legislation aims to achieve a legitimate governmental purpose, the legislation will not pass rationality review if there is no rational connection between its purpose and the means chosen.⁹⁴⁸ Rationality review thus incorporates some form of a means-ends analysis.⁹⁴⁹

Rationality review draws attention to the challenge that excessive regulatory measures, which are disproportionate to the objectives pursued, pose for mineral tenure security. It was indicated in previous chapters that the means used in the MPRDA to achieve the legitimate purposes that the Act pursues, are at times excessive and unnecessary.⁹⁵⁰ The effect of these excessive regulatory measures is that mineral tenure security is unjustifiably weakened. The Constitutional Court’s approach to rationality review and the suitability of this approach to justify amending the MPRDA to overcome the challenges of excessive regulation is discussed in the next section.

4. Approach of the Constitutional court to legality and its application to the MPRDA

The rule against vagueness and rationality review draw attention to the challenges that the MPRDA poses for mineral tenure security. The aim of this section discussion is to consider whether the judiciary’s approach to vagueness and rationality review is suitable to overcome

⁹⁴⁴ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [90]; *Affordable Medicines Trust v Minister of Health* [78].

⁹⁴⁵ Price 2010 *SAPL* 347.

⁹⁴⁶ In *Affordable Medicines Trust v Minister of Health* [77], the court said that “legislation that regulates practice will pass constitutional muster if (a) it is rationally related to the achievement of a legitimate government purpose; and (b) it does not infringe any of the rights in the Bill of Rights. Also see [34]; *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [62] and *Law Society of South Africa v Minister of Transport* [114]. Price 2010 *SALJ* 582 refers to the “purpose requirement” and the “effect requirement”. According to Price 2010 *SAPL* 361, rationality review requires that the law serves only one purpose.

⁹⁴⁷ Price 2010 *SAPL* 375.

⁹⁴⁸ If there is no rational connection, the exercise of the power will be arbitrary. See *New National Party v Government of the Republic of South Africa and Others* [19] and [24]; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [85]; *Democratic Alliance v President of South Africa and Others* [27]. See Price 2010 *SAPL* 365 – 366 regarding the meaning of arbitrariness.

⁹⁴⁹ *Democratic Alliance v President of South Africa and Others* [32]; Price 2013 *SALJ* 650.

⁹⁵⁰ See chap 4 table 4 sec 2.4.4; chap 5 table 6 sec 3.2.2.3.

the challenges that the MPRDA pose for mineral tenure security. To achieve this aim, the section provides an analysis of the Constitutional Court's approach to the rule against vagueness and rationality review. This analysis is followed by comments on the difficulties that arise from the Court's approach to the rules against vagueness and rationality review.

4.1. Vagueness

The rule against vagueness can be applied from two angles in an attempt to justify amending the MPRDA to overcome two challenges that the Act poses for mineral tenure security. Both challenges cause unreasonable uncertainty to right holders regarding profitable development of mines and maximising returns of investments. From the first angle, "simple" vagueness causes unreasonable uncertainty to holders of prospecting rights, mining rights and mining permits. From the second angle, the MPRDA confers wide discretionary powers on the government that cause unreasonable uncertainty to right holders. The second angle is referred to as "compound" vagueness.

4.1.1. "Simple" vagueness

The rule against vagueness requires that laws must be reasonably certain, in contrast to absolute certainty of laws.⁹⁵¹ Those who are bound by the law must be reasonably certain regarding what is expected from them.⁹⁵² Legislation that is unreasonably vague can be declared unconstitutional for violating the rule against vagueness.

The question whether legislation is unreasonably vague, to the extent that those who are bound by it do not reasonably know what is expected from them, depends on the facts of each case. In *South African Liquor Traders Association*,⁹⁵³ the Constitutional Court held that the definition of "shebeen" in the Gauteng Liquor Act⁹⁵⁴ was void for vagueness.⁹⁵⁵ According to the Act, a "shebeen" was an unlicensed operation whose main business was to sell less than a

⁹⁵¹ See sec 3.1 above.

⁹⁵² See sec 3.1 above.

⁹⁵³ *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC). See *HTF Developers v Minister of Environmental Affairs and Tourism and Others* 2007 4 All SA 1108 (SCA) [8] and [9] where the Supreme Court of Appeal held that a specific item in regulations that were made in terms of s 21(1) of the Environment Conservation Act 73 of 1989 were void for vagueness as a result of unreasonable uncertainty that it caused.

⁹⁵⁴ 2 of 2003.

⁹⁵⁵ *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* [26] and [28].

certain quantity of beer.⁹⁵⁶ The vagueness of the definition was a result of the failure of the Act to specify the period in which the prescribed quantity was sold.⁹⁵⁷ The Court held that the omission of a time period in which the liquor had to be sold, was “impermissibly vague” and that the definition was therefore unconstitutional.⁹⁵⁸

Previous chapters of this thesis revealed instances where it was argued that vague provisions of MPRDA cause unreasonable uncertainty to right holders regarding what is expected from them.⁹⁵⁹ This uncertainty increases the risks associated with profitable development of mines and maximising returns of investments. For example, the MPRDA requires holders of prospecting rights and mining rights to commence operations within specified times after “the effective date”.⁹⁶⁰ The “effective date” means the date on which rights are “executed”.⁹⁶¹ The MPRDA, however, does not indicate what is meant by “execution of rights”. This thesis argues that mineral tenure security will be strengthened if “execution of rights” refers to the date on which the Minister grants rights and communicates the terms and conditions, attached to such rights to applicants.⁹⁶²

However, certainty is not served where there is a need for arguments of this nature: the current formulations of “effective date” and “execution of rights” in the MPRDA cause unreasonable uncertainty. This uncertainty has the effect that holders of prospecting rights and mining rights, who are bound by the relevant provisions, do not have reasonable certainty regarding what is expected of them to regulate their conduct according to the provisions of the MPRDA. Therefore, the provisions of the MPRDA that regulate the requirement to commence prospecting and mining within specified times after rights are executed, contravene the rule against vagueness. The MPRDA should therefore be amended to clear up the uncertainty that the current drafting of “effective date” and “execution of rights” causes, so as to comply with rule-of-law standards.

The approach of the Constitutional Court to “simple vagueness”, in terms of which the rule against vagueness requires reasonable certainty of laws, is suitable to justify amending the

⁹⁵⁶ Gauteng Liquor Act of 2003, s 1 def of “shebeen”. The quantity of beer specified was less than 12 x 750 ml bottles of beer.

⁹⁵⁷ *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* [26].

⁹⁵⁸ *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board and Others* [28].

⁹⁵⁹ Chap 4: table 1 sec 2.1.3, table 3 sec 2.4.2, table 4 sec 2.4.4; chap 5: table 5 sec 3.2.1.3, table 7 sec 4.3.2.

⁹⁶⁰ MPRDA, ss 19(2)(b) and 25(2)(b), for prospecting rights and mining rights respectively, read with the def of “effective date” in s 1.

⁹⁶¹ MPRDA, s 1 def of “effective date”.

⁹⁶² See chap 4, sec 2.4.1.

MPRDA in those instances where the Act is unreasonably vague. The next section investigates whether the approach of the judiciary to vagueness that leads to wide governmental discretion (“compound” vagueness) is suitable to justify amending the MPRDA to overcome the challenges that it poses for mineral tenure security.

4.1.2. “Compound” vagueness

As explained, according to the rule against vagueness, legislation that confers broad discretionary powers with no express constraints on the government, can violate rule-of-law standards.⁹⁶³ The difficulty with discretionary powers is that they are necessary for the administration and functioning of any state and indeed “play a crucial role in any legal system”.⁹⁶⁴ Discretionary powers are important because they allow “abstract and general rules to be applied to specific and particular circumstances”.⁹⁶⁵ Furthermore, there are situations in which decision-makers have specific expertise that places them in a better position than the legislator to make decisions.⁹⁶⁶ Broad discretionary powers are also justifiable where the decision-maker must take copious factors into account and it is not appropriate or possible for the legislator to identify all factors in advance.⁹⁶⁷ Discretionary powers may also be acceptable where the factors to be taken into account are uncontestably clear.⁹⁶⁸ Discretionary powers are thus an inevitable part of any administration and the judiciary needs to show some level of respect for the existence of discretion.

The need for discretionary decision-making power, however, overlooks the fact that decision-makers can act unreasonably.⁹⁶⁹ It therefore remains essential to retain some form of control over decision-makers who act according to discretionary powers.⁹⁷⁰ In the context of the MPRDA, the need to control discretionary decision-making powers is apparent from its negative impact on mineral tenure security as demonstrated in previous chapters of this thesis.

⁹⁶³ *Dawood and Another v Minister of Home Affairs and Others* [47].

⁹⁶⁴ *Dawood and Another v Minister of Home Affairs and Others* [53]; *Affordable Medicines Trust v Minister of Health* [34]. Baxter *Administrative Law* refers to discretionary powers as “an indispensable necessity for any government”. Also see Hoexter *Administrative Law in South Africa* 47.

⁹⁶⁵ *Dawood and Another v Minister of Home Affairs and Others* [53]; *Metcash* [13]. Also see Baxter *Administrative Law* 84.

⁹⁶⁶ *Dawood and Another v Minister of Home Affairs and Others* [53].

⁹⁶⁷ *Dawood and Another v Minister of Home Affairs and Others* [53]; Baxter *Administrative Law* 92.

⁹⁶⁸ *Dawood and Another v Minister of Home Affairs and Others* [53]. Also see *Affordable Medicines Trust v Minister of Health* [126].

⁹⁶⁹ Baxter *Administrative Law* 88.

⁹⁷⁰ Baxter *Administrative Law* 88.

It seems that the level of control required, and the degree of deference that the Constitutional Court shows, for vagueness and discretionary powers, is influenced by the question whether fundamental rights are limited. The following paragraphs indicate the difference in approach by comparing certain aspects of the judgments in the *Affordable Medicines Trusts*⁹⁷¹ and *Dawood*⁹⁷² cases.

4.1.2.1. Level of deference for discretionary powers

The *Dawood* case concerned a constitutional challenge to the Aliens Control Act,⁹⁷³ which determined that a person who is not a South African citizen may not enter or reside in the country without a valid permit.⁹⁷⁴ Section 25(9) of the Act established a general rule that immigration permits could only be granted if applicants were outside South Africa.⁹⁷⁵ Section 25(9)(b) of the Act made an exception to this rule, namely that, *inter alia*,⁹⁷⁶ spouses of South African citizens who were in possession of a valid temporary residence permit did not have to be outside South Africa to be granted an immigration permit.⁹⁷⁷ However, the ability of foreign spouses to remain in South Africa while their applications for immigration permits were considered depended on the discretion of the Director-General to extend their temporary residence permits.⁹⁷⁸ If the Director-General refused to extend temporary residence permits the effect was that foreign spouses had to leave the country while their applications for immigration permits were considered.⁹⁷⁹ The court held that such a refusal limited the right to dignity in section 10 of the Constitution.⁹⁸⁰

Having established that the right to dignity was infringed, the court continued to determine whether the limitation was justifiable in terms of section 36 of the Constitution.⁹⁸¹ The court considered the discretion of the Director-General to extend temporary residence permits in the context of the limitation analysis.⁹⁸² One of the problems with the discretionary power was that the Aliens Control Act did not provide any guidance regarding the factors that the Director-

⁹⁷¹ *Affordable Medicines Trusts and Others v Minister of Health and Another* 2006 3 SA 247 (CC).

⁹⁷² *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (CC).

⁹⁷³ 96 of 1991.

⁹⁷⁴ *Dawood and Another v Minister of Home Affairs and Others* [2].

⁹⁷⁵ *Dawood and Another v Minister of Home Affairs and Others* [25] [38].

⁹⁷⁶ Other exceptions were dependent children and aged, infirm and destitute family members.

⁹⁷⁷ *Dawood and Another v Minister of Home Affairs and Others* [25] [38].

⁹⁷⁸ *Dawood and Another v Minister of Home Affairs and Others* [38] [52].

⁹⁷⁹ *Dawood and Another v Minister of Home Affairs and Others* [39].

⁹⁸⁰ *Dawood and Another v Minister of Home Affairs and Others* [39].

⁹⁸¹ *Dawood and Another v Minister of Home Affairs and Others* [40] – [60].

⁹⁸² *Dawood and Another v Minister of Home Affairs and Others* [42] – [44]

General had to take into account when considering extending temporary residence permits.⁹⁸³ The Court found that this was problematic, especially since the rule of law requires legislation to be written in a clear and accessible manner.⁹⁸⁴ This means that the discretionary powers conferred by the Aliens Control Act contravened the rules against vagueness. Furthermore, the court held that there was no legislative purpose for the lack of guidance in the exercise of the discretionary power.⁹⁸⁵ This was despite the fact that the Aliens Control Act pursued a legitimate objective namely to control immigration into South Africa.⁹⁸⁶ Furthermore, none of the abovementioned factors that render discretionary powers justifiable were present.⁹⁸⁷

The decision in the *Dawood* case can be contrasted with the much more deferential approach that the court showed to the discretionary powers in the *Affordable Medicines Trusts* case. The constitutional challenge involved certain provisions and regulations of the Medicines Act that introduced a licencing scheme for health care practitioners to compound and dispense medicine. One of the constitutional challenges that was lodged was against the provisions of the Medicines Act that required the issuing of a licence to be linked to specific premises.⁹⁸⁸ The applicants contended that the linking of a licence to specific premises infringed the right to choose a profession in section 22 of the Constitution.⁹⁸⁹ After an analysis of section 22,⁹⁹⁰ the court decided that the linking of a license to specific premises merely regulated the profession and did not infringe the right to choose a profession.⁹⁹¹ Having discarded of the challenge based on the infringement of section 22, the court proceeded to treat the discretionary powers of the Director-General with great deference.

The degree of deference that the court showed is evident from the constitutional challenge that was lodged against section 22C(1)(a) of the Medicines Act according to which the Director-General can issue a licence to compound and dispense medicine “on the prescribed conditions”.⁹⁹² The applicants contended that by allowing the Director-General to prescribe any conditions, section 22C1(a) was overbroad and vague and in breach of the principle of

⁹⁸³ *Dawood and Another v Minister of Home Affairs and Others* [43], [44] and [55].

⁹⁸⁴ *Dawood and Another v Minister of Home Affairs and Others* [47].

⁹⁸⁵ *Dawood and Another v Minister of Home Affairs and Others* [56] [58].

⁹⁸⁶ *Dawood and Another v Minister of Home Affairs and Others* [52].

⁹⁸⁷ *Dawood and Another v Minister of Home Affairs and Others* [53].

⁹⁸⁸ *Affordable Medicines Trust v Minister of Health* [56].

⁹⁸⁹ *Affordable Medicines Trust v Minister of Health* [56].

⁹⁹⁰ *Affordable Medicines Trust v Minister of Health* [57] – [67].

⁹⁹¹ *Affordable Medicines Trust v Minister of Health* [72].

⁹⁹² *Affordable Medicines Trust v Minister of Health* [14].

legality.⁹⁹³ The court held that this was not overboard because the Director-General was only allowed to impose conditions that were rationally related to the purpose for which the discretionary powers were given.⁹⁹⁴ The legislation served a legitimate governmental purpose, namely to increase access to medicine that is safe for consumption.⁹⁹⁵ According to the court, the exercise of the discretionary power was sufficiently constrained by, *inter alia*,⁹⁹⁶ the fact that the Director-General could only prescribe conditions that were necessary for achieving the purpose.⁹⁹⁷ The court did not investigate the purpose of the discretion apart from the legitimate governmental purpose of the legislation. Instead, the court held that section 22C(1)(a) had to be construed in a manner that is consistent with the Constitution including the doctrine of vagueness if possible.⁹⁹⁸

The applicants further challenged certain provisions of regulations 18(3) and 18(5) of the Medicines Act that set out the factors that the Director-General had to take into account when exercising the discretion to issue a licence. The applicants contended that these regulations did not provide any guidance to the Director-General and therefore amounted to the arbitrary exercise of governmental power and was contrary to the principle of legality.⁹⁹⁹ The court struck down some provisions of the regulations for being *ultra vires* and held that the remaining factors were unambiguous and therefore not void for vagueness.¹⁰⁰⁰ One of the provisions the court did not strike down was regulation 18(5)(f) that empowers the Director-General to take into account any information that he deems necessary when considering a licence to compound and dispense medicine.¹⁰⁰¹ As with the power to prescribe any conditions, the court said that the discretion to take any information into account is constrained by the objectives of the Medicines Act namely to increase medicine that is safe for consumption.¹⁰⁰²

The comparison between the *Affordable Medicines Trust* and *Dawood* cases offered here suggests that the Court shows more deference, and thus applies a more lenient test, when

⁹⁹³ *Affordable Medicines Trust v Minister of Health* [24].

⁹⁹⁴ *Affordable Medicines Trust v Minister of Health* [35].

⁹⁹⁵ *Affordable Medicines Trust v Minister of Health* [17], [21] and [23].

⁹⁹⁶ A further constraint was the obligations of medical practitioners to whom licences were issued. The obligations of medical practitioners, specifically in sub-regulation 18(8), gave an indication of the types of conditions that the Director-General could impose. See [38] – 40] of the judgment.

⁹⁹⁷ *Affordable Medicines Trust v Minister of Health* [38] and [39].

⁹⁹⁸ *Affordable Medicines Trust v Minister of Health* [36].

⁹⁹⁹ *Affordable Medicines Trust v Minister of Health* [107].

¹⁰⁰⁰ *Affordable Medicines Trust v Minister of Health* [111] and [126].

¹⁰⁰¹ *Affordable Medicines Trust v Minister of Health* [126].

¹⁰⁰² *Affordable Medicines Trust v Minister of Health* [126].

constitutional rights are not infringed. Thus, when fundamental rights are not infringed, the court will not easily find that discretionary powers do not pass the legality test for contravening the rule against vagueness. Conversely, when the discretionary powers infringe fundamental rights, the Court shows less respect for the legislator and applies a stricter test. Hence, when fundamental rights are infringed, the court will more easily find that discretionary powers are in breach of the rule against vagueness and therefore do not pass legality-review.

4.1.2.2. Difficulties with the level of deference: the MPRDA as example

The difficulty with the Constitutional Court's approach to vagueness that leads to wide governmental discretion, is that discretionary powers can have a severe negative impact on individual entities or entire industries without infringing fundamental rights.¹⁰⁰³ Despite the negative consequences, the judiciary will show high levels of deference for the vagueness and discretion if fundamental rights are not infringed. The exercise of the power will, of course, amount to administrative action that can be reviewed in terms of the Promotion of Administrative Justice Act.¹⁰⁰⁴ However, the fact that administrative action can be reviewed does not eliminate the negative consequences of the existence of the discretion.¹⁰⁰⁵

This thesis has indicated various instances where wide discretionary powers result in uncertainty that increase risks associated with profitable development of mines and maximising returns on investments.¹⁰⁰⁶ For example, one of the requirements for renewal of mining rights is that right holders must comply with the social and labour plan.¹⁰⁰⁷ The requirements of the social and labour plan are exceptionally vague.¹⁰⁰⁸ This vagueness leads to wide governmental discretion that is not based on objective, closely circumscribed criteria, when the Minister considers applications for renewal of mining rights.¹⁰⁰⁹ Since it is unlikely that the MPRDA is unconstitutional as a result of infringing fundamental rights,¹⁰¹⁰ the Constitutional Court will

¹⁰⁰³ Writing on the National Water Act, 36 of 1998, and commenting on the limitation of judicial review of administrative action, Bronstein 2002 *SALJ* 479 puts this succinctly: "The individualized nature of review means that judges can rarely engage with systemic and contextual problems created by an administrative scheme that over-reaches itself". Also see s 5 below.

¹⁰⁰⁴ 3 of 2000.

¹⁰⁰⁵ Similarly, in *Dawood and Another v Minister of Home Affairs and Others* [48], the court said that the fact that decisions taken in terms of legislation can be taken on judicial review, does not relieve the legislator to protect fundamental rights. The court also said that "the legislature must take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers".

¹⁰⁰⁶ For a synopsis of instances where wide governmental discretion weakens mineral tenure security see chap 4: table 1 sec 2.1.3 table 2 sec 2.3, table 3 sec 2.4.2, table 4 sec 2.4.4; chap 5: table 6 sec 3.2.2.3.

¹⁰⁰⁷ MPRDA, s 24(3)(c).

¹⁰⁰⁸ See chap 4, sec 2.1.2.

¹⁰⁰⁹ See chap 4, sec 2.1.2.

¹⁰¹⁰ See sec 1 above.

probably show high levels of deference when considering whether the requirements for renewal of mining rights contravene the rule against vagueness.

However, the discretionary powers can have a severe negative impact on holders of mining rights. As a result of the discretionary powers, holders of mining rights do not know what is expected from them to comply with the requirements of renewal of rights. If mining rights are not renewed, the risks associated with profitable development of mines increase and mineral tenure security weakens. Furthermore, the existence of these types of broad discretionary powers can dissuade investors from investing in the country's mining industry.¹⁰¹¹ Decreased investment in the country's mining industry not only negatively impacts the industry, but also the entire economy. It is argued below that an extended version of *rationality review* can overcome the difficulties with the level of deference that the Constitutional Court shows for vagueness and discretion when rights are not infringed.

4.2. Rationality review

The Constitutional Court applies a rationality test for legality-review of primary legislation. This rationality test incorporates some form of means-ends analysis. The following section provides an exposition of the strictness of the test that the Constitutional Court requires regarding the means-ends analysis. The section also comments on the suitability of the test to overcome the challenge that excessive regulatory measures in the MPRDA, at times, pose for mineral tenure security.

4.2.1. Test: means-end analysis

The test for rationality review is in general not strict and the Court requires “a very limited connection between means and end”.¹⁰¹² Rationality review does not involve evaluating different options that the legislature has to achieve the stated purpose.¹⁰¹³ It is possible that there is more than one rational way to deal with a specific problem.¹⁰¹⁴ Legislation that uses

¹⁰¹¹ See Dale in Bastida *et al* 834, where the author argues that the requirement for compulsory granting of mining rights that requires that the granting of the right must expand opportunities for historically disadvantaged, “have been perceived by the international investment community as an open-ended discretion”. It is conceivable that the wide discretion that exist as a result of vague requirements of the social and labour plan, can have a similar impact.

¹⁰¹² Bishop 2010 *SAPL* 315.

¹⁰¹³ *Law Society of South Africa v Minister of Transport* [35].

¹⁰¹⁴ *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 3 SA 265 (CC) [45]; *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [114].

any one of the rational alternatives will pass rationality review.¹⁰¹⁵ The judiciary is generally not willing to “second-guess” the option that the legislature chose.¹⁰¹⁶ Furthermore, if there is a rational connection between means and ends, a court “cannot interfere simply because it disagrees with it or considers the legislation to be inappropriate”.¹⁰¹⁷ Rationality review also does not include an element of fairness.¹⁰¹⁸ Reasonableness is not in itself a ground for invalidating legislation.¹⁰¹⁹ Reasonableness and proportionality only become relevant when an act infringes on a fundamental right and it is necessary to determine whether the infringement complies with the limitation clause.¹⁰²⁰

Accordingly, the courts have rarely struck down legislation for being irrational.¹⁰²¹ The reason for the court’s adoption of this lenient test (referred to as “mere rationality” in the remainder of the discussion) and the accompanying unwillingness to interfere in the choices of the legislators stem from the doctrine of separation of powers.¹⁰²² The doctrine of separation of

¹⁰¹⁵ *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* [45].

¹⁰¹⁶ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [114]; *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* 2010 6 BCLR 520 (CC) [66]; Price 2010 *SAPL* 360.

¹⁰¹⁷ *Affordable Medicines Trust v Minister of Health* [77]; *United Democratic Movement v President of the Republic of South Africa* [68]; *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [63]. As regards executive action see *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [90]; *Prinsloo v Van der Linde* [36]; *Democratic Alliance v President of South Africa and Others* [32]; *Albutt v Centre for the Study of Violence and Reconciliation and Others* [51]. Also see Price 2010 *SAPL* 375.

¹⁰¹⁸ *Law Society of South Africa v Minister of Transport* [39].

¹⁰¹⁹ *New National Party v Government of the Republic of South Africa and Others* [24]; *Glenister v President of the Republic of South Africa and Others* [55]; *Law Society of South Africa v Minister of Transport* [35]. See *Affordable Medicines Trust v Minister of Health* [81] where the court referred to *Van Rensburg v South African Post Office Ltd* 1998 (10) BCLR 1307 (E) and held that it is uncertain whether the court in *Van Rensburg* required reasonable legislation. However, the court in *Affordable Medicines Trust v Minister of Health* held that if the court in *Van Rensburg* required reasonable, it could not agree with the court in *Van Rensburg v South African Post Office Ltd*. Regarding the difference between reasonableness and rationality see Price 2010 *SAPL* 357 - 359. In a dissenting judgment in *New National Party v Government of the Republic of South Africa and Others* [122] and [123], O’Regan J argued that, depending on the fundamental right in question, different levels of scrutiny is required to determine the constitutionality of legislation. The case concerned the right to vote. O’Regan held that the right is of such importance that it was appropriate to require that the legislative scheme was reasonable as a threshold requirements. Also see Bishop 2010 *SAPL* 331 in the context of equality cases.

¹⁰²⁰ *New National Party v Government of the Republic of South Africa and Others* [24]; *Affordable Medicines Trust v Minister of Health* [83] citing *S v Lawrence* [45]; *Law Society of South Africa v Minister of Transport* [35] and [38]. See Price 2013 *SALJ* 653 where the author says that reasonableness is also required to determine whether legislatures complied with the constitutional obligation to facilitate public involvement in the legislative process and where administrative decisions are taken on review. For an example of the application of a proportionality analysis when rights are fringed see *Dawood and Another v Minister of Home Affairs and Others* [57] and [58].

¹⁰²¹ Price 2010 *SAPL* 372.

¹⁰²² *New National Party v Government of the Republic of South Africa and Others* [24]; *Affordable Medicines Trust v Minister of Health* [82]; Price 2010 *SAPL* 358-359.

powers is part of the rule of law and requires the court to show respect and deference for the democratically elected branches of government.¹⁰²³

4.2.2. Difficulties with the means-end-analysis test: the MPRDA as example

The “mere rationality” approach is understandable where applicants allege that the legislation under review infringes their fundamental rights and where the exercise of public power amounts to administrative action.¹⁰²⁴ As regards legislation that infringes fundamental rights, the limitation must be justifiable according to section 36 of the Constitution.¹⁰²⁵ One of the factors that must be taken into account in terms of section 36 is the relationship between the limitation and its purpose.¹⁰²⁶ This factor involves a proportionality analysis. It thus seems unnecessary to require anything more than a mere rational connection between the legislation and its purpose as a threshold requirement for the exercise of legislative power.¹⁰²⁷ The question whether the legislation is proportional and reasonable is evaluated in terms of the justification-analysis in section 36 of the Constitution.

Furthermore, when the exercise of public power amounts to administrative action, that action can be judicially reviewed in terms of section 33 of the Constitution and the Promotion of Administrative Justice Act. Grounds for review include the reasonableness and proportionality of the administrative action.¹⁰²⁸ Again, it seems unnecessary to impose a stricter test than “mere rationality” for the legislation to pass constitutional muster.

However, as explained above, legislation, including the MPRDA, can have a severe negative impact on individual entities and on entire industries without infringing fundamental rights. For example, the MPRDA excessively regulates prospecting rights and mining rights by not providing any exceptions regarding the obligations of right holders to prospect and mine

¹⁰²³ Price 2010 *SAPL* 358 – 359.

¹⁰²⁴ Where the legislation under review impacts on fundamental rights, the Constitutional Court has suggested adopting a more stringent test at the threshold-level than mere rationality to determine whether legislation passes constitutional muster. See du Plessis and Scott 2013 *SALJ* 614. Thus, before determining that the legislation infringes fundamental rights and whether the limitation is reasonable and proportional in terms of section 36, the court requires something more than mere rationality. In *Van der Merwe v Road Accident Fund* [57], the court held that the differentiation between patrimonial and non-patrimonial damages for bodily injuries was “not reliable” and was “tenuous at best” and therefore not rational. The differentiation implied the right to equality in section 9(1) of the Bill of Rights. Bishop 2010 *SAPL* 330 – 331 argues that the court in *van der Merwe* went further than applying the most lenient test for rationality review. Also see Price 2010 *SAPL* 380 – 381.

¹⁰²⁵ *Dawood and Another v Minister of Home Affairs and Others* [40].

¹⁰²⁶ Final Constitution, 1996, s 36(1)(d).

¹⁰²⁷ *Law Society of South Africa v Minister of Transport* [38].

¹⁰²⁸ Hoexter *Administrative Law in South Africa* 340 – 346.

continuously.¹⁰²⁹ The effect of the ubiquitous obligation to prospect and mine is that holders of prospecting rights and mining rights may be forced to prospect and mine during times in which they cannot develop mines profitably. It was argued in chapter 4 that, while taking into account the legitimate objective of the government to pursue optimal exploitation of minerals and mineral resources, the obligation to prospect and mine continuously creates unnecessary uncertainty regarding the ability to develop mines profitably.¹⁰³⁰ Accordingly, the obligation unjustifiably weakens mineral tenure security.

These measures weaken mineral tenure security but nevertheless pass the “mere rationality” test that the Constitutional Court requires when reviewing primary legislation for legality: There is a minimal connection between the legislative means and the legitimate governmental ends. In the abstract, forcing holders of prospecting rights and mining rights to conduct operations continuously, is minimally connected to the achievement of a legitimate governmental objective, namely optimal exploitation of minerals and mineral resources.

The next section argues that the difficulties with the judiciary’s approach to “mere rationality” can be overcome with an extended version of legality.

5. A plea for “extended legality”

Following the decision in *Agri SA*, it is unlikely that the Constitutional Court will, in the near future, decide that the MPRDA is unconstitutional for infringing fundamental rights. Consequently, the MPRDA will be subject to “mere rationality” review and not to the stricter standards of reasonableness and proportionality. Some, or all, of the provisions of the MPRDA that weakens mineral tenure security will pass the “mere rationality” test. Furthermore, the judiciary will probably show high levels of deference for wide governmental discretion that is, at times, encountered in the MPRDA. “Mere rationality” and the judiciary’s approach to vagueness that involves governmental discretion, does not justify amending the MPRDA to overcome the challenges that it poses for mineral tenure security. Still, certain provisions of the MPRDA have severe negative consequences for rights holders, investors and the entire mining industry.

¹⁰²⁹ See chap 4 sec 2.4.3.

¹⁰³⁰ Chap 4, sec 2.4.3.

It has been argued that “the type, scope and scale of a specific regulatory scheme needs to be considered directly in any attempt to restrain the abuse of public power”.¹⁰³¹ In this regard the extensive regulatory regime established by the National Water Act,¹⁰³² has been criticised for allowing wide governmental discretion and simultaneously creating high levels of uncertainty about the future of water rights.¹⁰³³ The criticism includes that the uncertainty creates “special costs”,¹⁰³⁴ (or challenges) including corruption, discouraging investment and environmental degradation.¹⁰³⁵ These costs have been associated specifically with erosion of rule-of-law standards.¹⁰³⁶ The “special costs” of the extensive regulatory regime that the MPRDA creates, include weakened mineral tenure security that deters investment. It is argued here that these costs (or challenges) justify extending the judiciary’s approach to legality review in appropriate circumstances. The circumstances include legislation, such as the MPRDA, that brings about large-scale, extensive regulatory change that result in high levels of uncertainty and governmental discretion.

The approach of the judiciary to rationality review has been criticised, in the context of equality cases and a modified approach to rationality review has been suggested.¹⁰³⁷ In equality cases, the judiciary applies “mere rationality” when the right to equality in section 9(1) of the Constitution is infringed.¹⁰³⁸ Opposed to “mere rationality” when section 9(1) is infringed, unfair discrimination that is prohibited by section 9(3) of the Constitution, is subject to proportionality review.¹⁰³⁹ Thus, in case of more serious infringements of section 9(3), proportionality-review applies while “mere rationality” applies in case of less serious infringements of section 9(1). It is accepted here that the right to equality, and especially the prohibition against unfair discrimination, is particularly important in South Africa.¹⁰⁴⁰ A careful approach should therefore be followed in applying jurisprudence regarding the right to equality, and especially unfair discrimination, in any context such as mineral regulation. However, it seems reasonable to apply jurisprudence regarding less serious infringements of

¹⁰³¹ Bronstein 2002 *SALJ* 470.

¹⁰³² 36 of 1998.

¹⁰³³ Bronstein 2002 *SALJ* 478.

¹⁰³⁴ Bronstein 2002 *SALJ* 477.

¹⁰³⁵ Bronstein 2002 *SALJ* 477 – 479; Baxter *Administrative Law* 84 refers to “side-effects which are kaleidoscopically related to the discretionary choice involved”.

¹⁰³⁶ Bronstein 2002 *SALJ* 479.

¹⁰³⁷ Bishop 2010 *SAPL* 314.

¹⁰³⁸ See Price 2010 *SAPL* 347 – 348.

¹⁰³⁹ Price 2010 *SAPL* 347 - 348; Bishop 2010 *SAPL* fn 7.

¹⁰⁴⁰ The right to equality is not only entrenched as a fundamental right, but according to 1(1) of the Final Constitution of 1996, is also one of the founding values of the Constitution.

the right to equality in section 9(1) to overcome the serious consequences that some provisions of the MPRDA have on right holders, investors and the entire mining industry.

According to Bishop, rationality review “fails to do what it is meant to do” in the context of equality cases.¹⁰⁴¹ The author therefore suggests a modified approach to rationality review. This approach demands accepting that the rationality test cannot be applied mechanically but that it is malleable and requires judges to make substantive decisions.¹⁰⁴² According to Bishop, the purpose of rationality review is not only to show that legislation that differentiates between people serves a legitimate governmental purpose, but also to ensure a culture of justification.¹⁰⁴³ Although Bishop advances the modified test only for equality cases,¹⁰⁴⁴ some of the elements of the test can be applied to all rationality review including rationality review of the MPRDA. Such a modified approach to rationality review can be applied, firstly, to overcome the challenges that excessive regulation pose for mineral tenure security. The approach can, secondly, overcome the challenges of vagueness associated with wide governmental discretion that are not addressed by the judiciary’s application of the rule against vagueness.

The remainder of this section argues that Bishop’s modified rationality serves as a basis for “extended legality” that can be used to overcome the challenges to mineral tenure security posed by the MPRDA. The following section examines three features of extended legality and gives examples of cases where the Constitutional Court suggests that it is willing to apply these features. This examination is followed by two examples of how “extended legality” can be applied to overcome the shortcomings of the MPRDA in strengthening mineral tenure security.

5.1. Features of “extended legality”

The first feature of extended legality relates to the level of generality at which the purpose of a legislative provision is cast. In this regard, extended legality requires that the purpose of a legislative provision is formulated at an appropriate level of generality.¹⁰⁴⁵ On the one hand,

¹⁰⁴¹ Bishop 2010 *SAPL* 313.

¹⁰⁴² Bishop 2010 *SAPL* 340 – 342. Even when the approach of the Constitutional Court regarding rationality review is accepted, it is acknowledged that substantive elements play a part. See Price 2010 *SALJ* 582 where the author argues that the question whether the legislation “serve valuable ends” requires “*substantive* judicial review” and Price 2010 *SAPL* 355 where it is stated that the question of legitimacy calls for an “*evaluative* judgment”. According to Michelman in *Constitutional Law of South Africa* 11-1, arbitrariness have “*substantive* overtones”.

¹⁰⁴³ Bishop 2010 *SAPL* 339. Also see Mureinik 1994 *SAJHR* 32.

¹⁰⁴⁴ Bishop 2010 *SAPL* 314.

¹⁰⁴⁵ See Bishop 2010 *SAPL* 325 – 326 where the author uses an example to explain the levels of levels of generality.

the purpose of a legislative provision must not be couched in such general terms that it is impossible to doubt its legitimacy and that inevitably there will be a connection between the purpose and the legislative measures.¹⁰⁴⁶ Examples of these types of purposes include promoting the general welfare and public health and safety.¹⁰⁴⁷ On the other hand, the legislative purpose must not be set as such a level of specificity that it “reduces the means to the end”.¹⁰⁴⁸ In other words, the result of the legislation must not be accepted as its purpose.¹⁰⁴⁹ If the means and the ends are the same, rationality review will be meaningless as all legislation will be a perfect fit for the purposes that it pursues.¹⁰⁵⁰ According to Bishop, the required level of generality is one where “there is a potential for a court to conclude – even if it requires only the most tenuous of connections – that the means fails to serve the end”.¹⁰⁵¹ Furthermore, where legislation serves multiple purposes, extended rationality review requires that all purposes must be taken into account.¹⁰⁵² In case of contradictory purposes, extended rationality requires that a balance must be struck between these purposes.¹⁰⁵³ To ensure that the courts do not unduly interfere in other spheres of government,¹⁰⁵⁴ Bishop argues that the courts must generally accept the purpose advanced by the government unless the purpose is stated at such a level of generality or specificity that it justifies the law automatically.¹⁰⁵⁵

In *van der Merwe v Road Accident Fund*,¹⁰⁵⁶ the Constitutional Court acknowledged the ineffectiveness of setting the purpose of the legislation at an inappropriate level.¹⁰⁵⁷ The court had to decide on the rationality of section 18(b) of the Matrimonial Property Act.¹⁰⁵⁸ The challenge was against section 18(b) that allowed spouses married in community of property to

¹⁰⁴⁶ Bishop 2010 *SAPL* 326 – 327.

¹⁰⁴⁷ Bishop 2010 *SAPL* 327. Bishop criticises the court in *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) for accepting a general appeal to public safety for justifying a law that prevented foreigners from working as security guards.

¹⁰⁴⁸ Bishop 2010 *SAPL* 326.

¹⁰⁴⁹ It seems that this is the case in *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others*. At [16], the court held that the purpose of the Constitution Twelfth Amendment Act of 2005 was to change provincial boundaries. It seems that changing provincial boundaries was rather the effect of the Amendment Act of 2005 and that the true purpose for the circumstances in had to be couched in terms such as “to eradicate cross-boundary municipalities” or to “increase service delivery”. See, for example, [25, [28] [30] [34] [49] [58] and [65] of the judgment.

¹⁰⁵⁰ Bishop 2010 *SAPL* 326.

¹⁰⁵¹ Bishop 2010 *SAPL* 328.

¹⁰⁵² Bishop 2010 *SAPL* 328.

¹⁰⁵³ Bishop 2010 *SAPL* 328.

¹⁰⁵⁴ Bishop 2010 *SAPL* 341.

¹⁰⁵⁵ Bishop 2010 *SAPL* 342.

¹⁰⁵⁶ 2006 4 SA 230 (CC).

¹⁰⁵⁷ Bishop 2010 *SAPL* 327.

¹⁰⁵⁸ 88 of 1984.

institute claims for damages for non-patrimonial loss against each other, but not claims for patrimonial loss arising from bodily injury. According to the respondents, the purpose of the differentiation was to regulate proprietary consequences of marriage.¹⁰⁵⁹ In holding that the provision was not rationally related to a legitimate governmental objective,¹⁰⁶⁰ the court held that this generic purpose did not override the specific purpose of the provision under attack, namely to “avoid the futility of spousal claims”.¹⁰⁶¹

The second feature of extended legality involves the level of connection between a legislative provision and its purpose. The extent to which rationality review requires legislation to meet its objectives can be described according to a spectrum that requires different levels of connection between means and end.¹⁰⁶² At its most lenient, rationality review requires a trivial connection between means and end.¹⁰⁶³ Legislation will pass rationality review as long as the law has the potential to further its purpose in some marginal way.¹⁰⁶⁴ According to Bishop, a trivial or hypothetical connection is not sufficient for the modified test that he suggests¹⁰⁶⁵ because it will render rationality review “toothless”.¹⁰⁶⁶ As explained, the Constitutional Court generally requires a very limited connection between means and end, especially when legislation reviewing legislation that do not infringe fundamental rights.¹⁰⁶⁷

At the strictest end of the spectrum the law must be tailored as narrowly as possible to achieve its purpose.¹⁰⁶⁸ At the strictest end of the spectrum, rationality review demands a very close fit between means and end. Stated differently, at the strict end of the spectrum, legislation will pass constitutional muster if, substantially and materially, it advances its objectives.¹⁰⁶⁹ The strict end of the spectrum, according to Bishop, is also too strict for the modified test that he proposes as it will allow too much judicial interference in the affairs of the government.¹⁰⁷⁰ Extended legality, based on a culture of justification, requires exclusion of the two extreme ends of the spectrum and requires judges to find a connection between the means and the end

¹⁰⁵⁹ *Van der Merwe v Road Accident Fund* [33].

¹⁰⁶⁰ *Van der Merwe v Road Accident Fund* [54] and [56].

¹⁰⁶¹ *Van der Merwe v Road Accident Fund* [33] and [34].

¹⁰⁶² Bishop 2010 *SAPL* 229.

¹⁰⁶³ Bishop 2010 *SAPL* 229.

¹⁰⁶⁴ Bishop 2010 *SAPL* 229.

¹⁰⁶⁵ Bishop 2010 *SAPL* 342.

¹⁰⁶⁶ Bishop 2010 *SAPL* 344.

¹⁰⁶⁷ See sec 4.2.1 above.

¹⁰⁶⁸ Bishop 2010 *SAPL* 229.

¹⁰⁶⁹ Bishop 2010 *SALJ* 342.

¹⁰⁷⁰ Bishop 2010 *SAPL* 229.

between the two extremes.¹⁰⁷¹ As discussed in the following paragraphs, the required level of connection between means and end is closely related to the third manner in which rationality can be extended meaningfully, namely, reasons and empirical evidence that justify the legislative means.

The third feature of extended legality concerns the consideration of empirical evidence. In this regard, extended legality requires that the court must consider empirical evidence related to the purpose of the legislation and the extent to which the legislation achieves its purpose.¹⁰⁷² This does not mean that there is, in all instances, an evidentiary burden on the government to prove the purpose of a legislative measure or to present evidence that the legislative choice serves its purpose. On the contrary, as explained above, the court must generally accept the purpose of the legislation that the government asserts.¹⁰⁷³ However, the court must consider empirical evidence, adduced by either party to the dispute, regarding the extent to which the legislative measures achieve its purposes.¹⁰⁷⁴ Upon consideration of such evidence, the court must strike down a legislative provision if necessary.¹⁰⁷⁵

Furthermore, if the legislative purpose is couched at an inappropriate level of generality, the court “should recast the purpose at a level so that, if presented with the right evidence, it could conclude that the purpose was not met”.¹⁰⁷⁶ Similar to the purpose of the legislation, the onus is on the government only to show that the legislation has more than a hypothetical or trivial connection to its purpose.¹⁰⁷⁷ The government does not have to show that the legislation, meaningfully or substantially, serves its purpose.¹⁰⁷⁸ However, the court must consider available empirical evidence regarding the purpose and effect of the legislation.¹⁰⁷⁹

¹⁰⁷¹ Bishop 2010 *SAPL* 344.

¹⁰⁷² Bishop 2010 *SAPL* discusses reasons and empirical evidence separately. However, it features as an element of the modified rationality test that he proposes as is apparent from the reference to the author’s work in the discussion that follows here.

¹⁰⁷³ Bishop 2010 *SAPL* 342 – 343.

¹⁰⁷⁴ In the context of equality cases, Bishop 2010 *SAPL* 342 argues that the complainant can bring evidence showing that a law that differentiates between people, was motivated by “naked preference”.

¹⁰⁷⁵ Bishop 2010 *SAPL* 342.

¹⁰⁷⁶ Bishop 2010 *SAPL* 342.

¹⁰⁷⁷ Bishop 2010 *SAPL* 342.

¹⁰⁷⁸ Bishop 2010 *SAPL* 342.

¹⁰⁷⁹ Bishop 2010 *SAPL* 342. At 343 the author argues that it will be “futile” to place a burden on any of the parties to produce evidence because in many cases there may not be reliable evidence available. The point is that if either party places reliable evidence before the court, the court must consider it.

The decision in *Affordable Medicines Trust*, suggests that the Constitutional Court is willing to consider empirical evidence in certain instances.¹⁰⁸⁰ In this case, the court held that the Medicines Act served a legitimate governmental purpose namely to increase access to medicine that is safe for consumption.¹⁰⁸¹ However, the court did not accept this general purpose as the purpose of some of the factors that the Director-General had to take into account in considering whether to grant a licence to compound and dispense medicine. The factors included the existence of other licensed health facilities in the vicinity of the premises from where the compounding and dispensing of medicines were intended to take place,¹⁰⁸² the geographic area that the applying medical practitioner would serve,¹⁰⁸³ and the estimated number of health care users in the geographic area that the applying medical practitioner would serve.¹⁰⁸⁴ The court rejected the purpose of these factors, asserted by the government, for two reasons.¹⁰⁸⁵ Firstly, the court took the language and context of the factors into account.¹⁰⁸⁶ Secondly, the court relied on empirical evidence raised by the applicants in evidence, namely the National Drug Policy.¹⁰⁸⁷ Having established the true purpose of the factors in terms of the National Drug

¹⁰⁸⁰ Another indication of the Constitutional Court's willingness to consider empirical evidence is *Matatiele Municipality v President of the Republic of South Africa (1)* 2006 5 SA 47 (CC) which concerned the constitutionality of the Constitution Twelfth Amendment Act of 2005. In this case the transfer of Matatiele municipality from Kwazulu-Zulu Natal to the Eastern Cape was in dispute. The court accepted the purpose of the Amendment Act, namely to re-determine the geographical areas of the provinces. (Also see *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* [6] regarding the purpose of the Constitutional Twelfth Amendment Act) However, due to lack of information regarding why the government decided to transfer Matatiele municipality to the Eastern Cape and not to Kwazulu-Natal, the court was not able to finalise the matter. The government was accordingly requested to furnish reasons for its decision to transfer the municipality from Kwa-Zulu Natal to the Eastern Cape. According to the court, at [46] and [84], the constitutional values of accountability, responsiveness and openness required the furnishing of reasons. (See how Sachs J [101] and [102], in a separate judgement, linked the need to furnish reasons specifically to the rule of law and rationality.) However in *Matatiele Municipality and Others v President of the Republic of South Africa and Others (2)* 2007 6 SA 477 (CC) [84], [90] and [101], the court declined to decide the question whether the transfer of the municipality complied with the rationality test. The court found that the inquiry into the rationality of the decision was unnecessary and decided that the transfer of the municipality was invalid because the Kwazulu-Natal legislature did not comply with the public participation requirement in s 118(1)(a) of the Constitution. Contrary to the Constitutional Court's seemingly willingness to investigate the reasons for the legislation choice in *Matatiele Municipality v President of the Republic of South Africa (1)*, the Court refused to investigate the "motives" of the legislator in a similar situation in *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* [73]. Also see how, in a minority judgment, Moseneke in *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [172] – [174] makes use of empirical evidence in deciding that the decision of the Gauteng Provincial legislature to incorporate Merafong municipality into the North West instead of Gauteng was rational

¹⁰⁸¹ *Affordable Medicines Trust v Minister of Health* [21] and [22].

¹⁰⁸² Regulation 18(5)(a); *Affordable Medicines Trust v Minister of Health* [111].

¹⁰⁸³ Regulation 18(5)(c); *Affordable Medicines Trust v Minister of Health* [111].

¹⁰⁸⁴ Regulation 18(5)(d); *Affordable Medicines Trust v Minister of Health* [111].

¹⁰⁸⁵ According to the government, the purpose of these factors were to "enhance the scope for efficient utilisation of resources . . . [and] allow the government to plan and implement its health programme more effectively". See *Affordable Medicines Trust v Minister of Health* [113].

¹⁰⁸⁶ *Affordable Medicines Trust v Minister of Health* [114].

¹⁰⁸⁷ *Affordable Medicines Trust v Minister of Health* [112], [115], [117], [118].

Policy, the court held that the matter required a direct response from the government.¹⁰⁸⁸ However, the government did not provide any explanation for the evidence that contradicted the asserted purpose of the factors.¹⁰⁸⁹ The court accordingly held that the factors were *ultra vires* because the real purpose was not authorized by the empowering statute.¹⁰⁹⁰

5.2. MPRDA: Application of extended legality

Application of extended legality to overcome the challenge of excessive regulation can be illustrated by the obligation of holders of prospecting rights and mining rights to conduct operations continuously.¹⁰⁹¹ The purpose of the obligation can be set at various levels of generality. For example, the purpose can be to regulate prospecting and mining. However, this is not an appropriate level of generality since the legislative provision will, as a matter of course, achieve the purpose.¹⁰⁹² The purpose of the obligation can also be to ensure that holders of prospecting rights and mining rights conduct operations continuously without interruption. If the purpose is set at this level of specificity, the means and the ends are the same with the result that the provisions inevitably can achieve the purpose.¹⁰⁹³

The appropriate level of generality of the purpose of the obligation to prospect and mine continuously is probably to ensure optimal exploitation of minerals and mineral resources. At this level, it *will be possible* for a court, if presented with empirical evidence, to find that the legislative measures fail to achieve their objective.¹⁰⁹⁴ It does not take a lot of persuasion to accept that it is possible to present evidence proving that forcing right holders to prospect and mine, during times in which they cannot do so profitably, in fact hampers optimal exploitation of mineral resources in the long run. Compelling right holders to prospect and mine, during times when they cannot make profits, certainly elevates the possibility that mines will shut-down and, as a result, not exploit any mineral resources.

If the purpose of the obligation to prospect and mine continuously is set at this level of generality, the effectiveness of extended rationality in this scenario can be illustrated further as follows: It is arguable that there may be a minimal connection between the obligations to

¹⁰⁸⁸ *Affordable Medicines Trust v Minister of Health* [116].

¹⁰⁸⁹ *Affordable Medicines Trust v Minister of Health* [116].

¹⁰⁹⁰ *Affordable Medicines Trust v Minister of Health* [119].

¹⁰⁹¹ See sec 4.2.2 above.

¹⁰⁹² See s 5.1 above regarding the appropriate level of generality.

¹⁰⁹³ See s 5.1 above.

¹⁰⁹⁴ See sec 5.1 above.

prospect and mine continuously and optimal exploitation of mineral resources. However, such a minimal connection is insufficient for extended legality and the inquiry cannot end there.¹⁰⁹⁵ If evidence is presented regarding the possible negative effect of the lack of any exceptions regarding these obligations, extended rationality review requires answers from the government. The government does not have to show that legislative choices are reasonable or that the legislative measures substantially further their objectives.¹⁰⁹⁶ However, extended legality requires some justification *for the absence of any exceptions* that will allow right holders to interrupt operations and retain their rights. It is arguable that the government can achieve the objective of optimal exploitation without forcing right holders to continue operations if they clearly run the risk that they will make significant losses. The failure to provide any exceptions regarding the obligations to prospect and mine continuously renders the connection between means and end is too wide; i.e. not close enough. This means that the obligations to prospect and mine continuously are not rationally related to the legitimate government objective of optimal exploitation of minerals and mineral resources. In this regard, the MPRDA violates rule-of-law standards.

A closer connection between means and end can be established here by providing exceptions regarding the obligations of holders of prospecting rights and mining rights to prospect and mine without any interruptions. To minimise the risks and disadvantages that are associated with situations when mineral resources are not exploited optimally, the exceptions should be limited and closely circumscribed. According to the suggestions in chapter 4:¹⁰⁹⁷ Holders of prospecting rights and mining rights must be allowed to interrupt operations and retain rights when they can prove that they are unable to develop mines profitably as a result of objective market-related and infrastructure-related reasons. Establishing a closer connection between means and end, considers and protects the competing interests of the government (optimal exploitation of mineral resources) and of right holders (freedom to choose when to interrupt operations). To comply with extended legality, the MPRDA should be amended to allow holders of prospecting rights and mining rights to interrupt operations while retaining their rights in appropriately circumscribed circumstances.

¹⁰⁹⁵ See sec 5.1 above.

¹⁰⁹⁶ See sec 5.1 above.

¹⁰⁹⁷ Chap 4, sec 2.4.3.

Application of extended legality to overcome vague drafting and wide governmental discretion that is not based on objective, closely circumscribed criteria can be illustrated by using the social and labour plan. Section 24(3) of the MPRDA places an obligation on the Minister to renew mining rights if certain criteria are met. According to section 24(3)(c), one of the criteria is that right holders must comply with the prescribed social and labour plan. The objectives of the social and labour plan indicate the purpose of section 24(3)(c). The objectives include promoting employment and advancing the social and economic welfare of all South Africans.¹⁰⁹⁸ Further objectives are to contribute to the transformation of the mining industry¹⁰⁹⁹ and to ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they operate.¹¹⁰⁰ These are without doubt important objectives. Furthermore, these objectives probably are at the appropriate level of generality for the purpose of section 24(3)(c). At this level of generality, it will be possible for a court to find, if empirical evidence is presented, that the legislative provision does not achieve its purpose. Identical to the obligation to prospect and mine continuously, an inappropriate level of generality will be to regulate prospecting and mine. Similar to the obligation to prospect and mine continuously, it is also inappropriate to reduce the means to the end. It will thus be inappropriate if the purposes are to ensure that holders of mining rights promote equitable access to mineral resources, to advance employment and to contribute towards socio-economic development in the areas where they operate.

The difficulty with the social and labour plan is that its requirements are extremely vague.¹¹⁰¹ This vagueness leads to wide and uncircumscribed governmental discretion when the Minister considers applications for renewals of mining rights.¹¹⁰² Since it is unlikely that the Constitutional Court will find that the MPRDA infringes fundamental rights, the Court will probably show high levels of deference for this vagueness and discretion.¹¹⁰³ It is thus expected that the Court will apply a lenient test when considering whether the vagueness and discretion violate the rule against vagueness.¹¹⁰⁴ Still, similar to the obligation to prospect and mine without interruption, the vagueness and discretion can have austere negative consequences for individual entities and for the mining industry. If mining rights are not renewed, holders of

¹⁰⁹⁸ Reg 41(a). Also see MPRDA, s 2(f).

¹⁰⁹⁹ Reg 41(b). Also see MPRDA, ss 2(c) and (d).

¹¹⁰⁰ Reg 41(c). Also see MPRDA, s 2(f).

¹¹⁰¹ See chap 4, sec 2.1.2.

¹¹⁰² See chap 4, sec 2.1.2

¹¹⁰³ See sec 1 and sec 4.1.2.1 above.

¹¹⁰⁴ See sec 4.1.2.1 above.

mining rights and investors face risks regarding profitable development of mines maximising returns on investments. Such obstructions to profit-making can deter investment into the country's mining industry.

Extended legality can be used to overcome the difficulties with vague drafting and wide discretion. It is arguable that it is not only the purpose of section 24(3)(c) that must be determined, but also the purpose of the vagueness and the discretion. The objectives pursued by the social and labour plan probably require some leeway regarding precise drafting and also require some discretion on the part of the government. However, the means used, namely vague drafting and discretion, must be rationally connected to the purpose. In this regard, the vagueness and discretion certainty have a minimal connection to the objectives pursued. Any amount of vagueness and discretion has the potential to further the objectives of the social and labour plan. However, according to extended legality, a minimal connection between means and end is not sufficient.¹¹⁰⁵ As with the obligation to prospect and mine continuously, the government does not have to show that the vagueness and discretion (the means) is necessary to, meaningfully and substantially, further the purpose or that the means and the ends are proportional.¹¹⁰⁶

Extended legality requires rejecting the two extremes, namely mere rationality and proportionality, and finding a middle-way that will protect the interests of the government and the interests of right holders.¹¹⁰⁷ Such a middle-way can be reached by accepting that the *extent of the vagueness and the discretion* are not rationally related to the objectives pursued. The extent of the vagueness and the discretion result in the connection between means and ends being too wide and therefore not rationally related. The extent of the vagueness and the discretion thus violate the principle of legality and rule-of-law standards.

A closer connection between means and end can be established, and compliance with legality ensured, by amending the requirements of the social and labour plan to be less vague. According to the suggestion offered in chapter four regarding bursary plans:¹¹⁰⁸ The social and labour plan should be amended to express the bursaries that mining companies must give to employees and to external applicants as a percentage of a company's profit during a specified

¹¹⁰⁵ See s 5.1 above.

¹¹⁰⁶ See s 5.1 above.

¹¹⁰⁷ See s 5.1 above.

¹¹⁰⁸ Chap 4, sec 2.1.2.

time. A closer fit between means and will create more certainty than the current requirement in this regard, namely, that mining companies must provide the government with budgets and timeframes regarding their bursary plans.

6. Summative remarks

Some provisions of the MPRDA pose challenges to mineral tenure security as a result of three features, namely vague and unclear drafting (“simple vagueness”), excessive regulatory measures and wide governmental discretion that is not based on objective, closely circumscribed criteria (“compound vagueness”). This chapter argues that justification for amending the MPRDA to overcome these challenges can be found in the Constitutional framework. The Constitutional framework provides this justification despite the fact that it is unlikely that the Constitutional Court will, in the near future, declare the MPRDA unconstitutional for infringing fundamental rights. The principle of legality, as an aspect of the rule of law, provides justification for amending the MPRDA to overcome the difficulties with mineral tenure security in the Constitutional framework.

The principle of legality includes the rule against vagueness and rationality review. In case of “simple vagueness”, the approach of the Constitutional Court to the rule against vagueness is sufficient to justify that some provisions of the MPRDA violate the rule against vagueness. The rule against vagueness, according to the jurisprudence of the judiciary, can thus be invoked to overcome the challenges that “simple vagueness” in the MPRDA poses for mineral tenure security.

However, regarding “compound vagueness” and the means-end analysis of rationality review, the approach of the Constitutional Court falls short to justify amending the MPRDA to overcome the challenges that wide discretionary powers, i.e. “compound vagueness”, and excessive regulatory measures pose for mineral tenure security. This chapter argues that these challenges can be overcome by “extended legality” and specifically “extended rationality”. “Extended legality” should be applied only to legislation, such as the MPRDA, that establishes large-scale regulatory regimes that do not infringe fundamental rights but that have a significant negative impact on individuals and entire industries. “Extended legality” incorporates three features.

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First “extended legality” requires setting the purpose of a legislative measure at the appropriate level of generality. Second, “extended legality” requires an appropriate level of connection between legislative means and objectives. The third feature of “extended legality” requires a court to consider empirical evidence regarding the extent to which legislative measures achieve legitimate governmental objectives.

Chapter 8

CONCLUSIONS AND RECOMMENDATIONS FOR LEGISLATIVE CHANGE

1. Introduction

South Africa's mineral resource wealth does not guarantee local or foreign investment into its mining industry. Stability, certainty and predictability of the regulatory framework, above all, is what motivates investment.¹¹⁰⁹ Mineral tenure security is an aspect of such a regulatory framework. There are ample studies confirming that mineral tenure security is important for mining investors.¹¹¹⁰

Conceptually, mineral tenure security defies a single definition.¹¹¹¹ The concept includes aspects regarding certainty of right holders for the entire life duration of a mine, i.e., throughout the different phases of the mining sequence.¹¹¹² The requirements of the concept depend on whether a specific regulatory regime is based predominantly in public law or private law.¹¹¹³ This thesis proposes that mineral tenure security means the stability of rights granted for the life of a mine.¹¹¹⁴ The certainty created by mineral tenure security is achieved through minimization of risks and uncertainties that may prevent profitable development of such mines.¹¹¹⁵ Mineral tenure security includes, on this premise, certainty that prospecting and mining can occur and that it can be interrupted when necessary to ensure profitable development.¹¹¹⁶ Profitable development further requires the ability to transfer and mortgage rights to raise funds for mineral development projects.¹¹¹⁷

¹¹⁰⁹ Chap 1, sec 1.

¹¹¹⁰ Chap 1, sec 1.1.

¹¹¹¹ Chap 1, sec 1.1.

¹¹¹² Chap 1, sec 1.1.

¹¹¹³ Chap 1, sec 1.2.

¹¹¹⁴ Chap 1, sec 1.2.

¹¹¹⁵ Chap 1, sec 1.2.

¹¹¹⁶ Chap 1, sec 1.2.

¹¹¹⁷ Chap 1, sec 1.1 and sec 1.2.

Before the MPRDA came into operation, South African mineral law straddled public law and private law.¹¹¹⁸ That is to say, in the regime immediately preceding the MPRDA, mineral tenure security was influenced by the rules of public law as well as the rules of private law.¹¹¹⁹ The premise of this thesis is that the MPRDA changed the theoretical underpinnings of the regulatory regime pertaining to minerals and established a regulatory regime that is predominantly based in administrative law.¹¹²⁰ According to the MPRDA, mineral resources are the common heritage of the people of South Africa and the state is the custodian thereof for the benefit of the nation as a whole. Through the implementation of a rigorous regulatory regime in the form of the MPRDA, the government abolished private holding of minerals and mineral resources as well as rights to minerals.¹¹²¹

Upon the abovementioned premise, the thesis follows **two courses of inquiry**.¹¹²² First, the thesis investigates **whether the rules of private law continue to strengthen mineral tenure security**. The outcome of this inquiry is that rules of private law play a very limited role in strengthening mineral tenure security. Furthermore, in certain instances, the rules of private law places limitations on mineral tenure security. This outcome leads directly to the second inquiry namely **how the MPRDA provides tenure security to holders of rights to minerals regarding some of the aspects of the concepts that are traditionally connected to private law**. The outcome of this inquiry is a set of recommendations to address difficulties encountered with mineral tenure security in the current regime. The thesis' conclusions may be summarised as follows:

2. Mineral tenure security and the rules of private law

Traditionally, ownership of minerals and mineral resources protect mineral tenure security by allowing holders of rights to minerals to prospect and mine, to choose not to prospect and mine and to dispose of minerals found.¹¹²³ Furthermore, traditionally, the nature of rights, as real rights in property, can strengthen mineral tenure security as a result of the private-law rules of registration and enforceability of real rights.¹¹²⁴ In the current regulatory regime, the private-

¹¹¹⁸ Chap 2, sec 1.

¹¹¹⁹ Chap 2, sec 3.1.

¹¹²⁰ Chap 2, sec 3.2.1 and sec 3.2.2.

¹¹²¹ Chap 2, sec 3.2.1 and sec 3.2.2.

¹¹²² Chap 1, sec 2.

¹¹²³ Chap 3, sec 2.1 and sec 3.1.

¹¹²⁴ Chap 6, sec 1.

law rules of ownership and the nature of rights, play a limited role in strengthening mineral tenure security.

2.1. Ownership and mineral tenure security

Ownership of unmined minerals no longer plays a role in strengthening mineral tenure security.¹¹²⁵ In this regard, ownership of unmined minerals traditionally impacts on mineral tenure security by influencing the abilities of holders of rights to minerals to prospect and mine and to choose not to prospect and mine.¹¹²⁶ In the regime under the MPRDA, ownership of unmined minerals no longer has any bearing on these abilities.¹¹²⁷ The abilities to prospect and mine and to choose not to prospect and mine flow from the administrative provisions of the MPRDA only.¹¹²⁸ Holders of rights to minerals are allowed to prospect and mine and to choose not to prospect and mine only as far as the MPRDA allows them.¹¹²⁹ Thus, in the current regulatory regime, ownership of unmined minerals has no effect on creating certainty or minimizing risks and uncertainties that may prevent profitable development of mines.¹¹³⁰

Apart from not having any impact on mineral tenure security, ownership of unmined minerals has very little practical impact in general.¹¹³¹ This research casts doubt on the continued suitability of analysing rights to minerals from a private law paradigm.¹¹³² The time has perhaps come to accept that the custodianship-model in section 3 of the MPRDA must be interpreted from a public law paradigm and not from a private law paradigm.¹¹³³

Ownership of mined minerals, however, continues to play a limited role, however, in the provision of mineral tenure security.¹¹³⁴ Traditionally, ownership of mined minerals strengthened mineral tenure security by allowing holders of rights to remove and dispose of minerals.¹¹³⁵ In this regard, ownership of mined minerals traditionally confers the *rei vindicatio* on holders of rights.¹¹³⁶ The availability of the *rei vindicatio* means that right holders

¹¹²⁵ Chap 3, sec 2.2.

¹¹²⁶ Chap 3, sec 2.1.

¹¹²⁷ Chap 3, sec 2.2.

¹¹²⁸ Chap 3, sec 2.2.

¹¹²⁹ Chap 3, sec 2.2.

¹¹³⁰ Chap 3, sec 2.2.

¹¹³¹ Chap 3, sec 4.

¹¹³² Chap 3, sec 4.

¹¹³³ Chap 3, sec 4.

¹¹³⁴ Chap 3, sec 3.2.

¹¹³⁵ Chap 3, sec 3.1.

¹¹³⁶ Chap 3, sec 3.1.

have a strong real remedy at their disposal to vindicate minerals that were mined and carried away by an unauthorized entity, or minerals that were stolen after they were extracted by holders of prospecting rights, mining rights and mining permits.¹¹³⁷ The MPRDA does not confer a remedy on right holders to vindicate minerals and it is therefore necessary to rely on the rules of private law, and especially the *rei vindicatio*, to confer such a remedy on holders of rights.¹¹³⁸ Thus, in the current regulatory regime, the rules of private law continue to create certainty, albeit to a very limited extent, and to minimise risks and uncertainties that may prevent profitable development of mines.¹¹³⁹

However, the rules of the *rei vindicatio* do not solve all problems relating to vindication of minerals.¹¹⁴⁰ This is specifically apparent in situations where the government needs to vindicate minerals that were mined without the necessary permission in the form of mining rights or mining permits.¹¹⁴¹ The inability of the *rei vindicatio* to address these situations casts doubt on whether a private law paradigm is suitable for the protection of mineral tenure security.¹¹⁴² In the administrative regime created by the MPRDA, the Act should be amended to regulate situations where it is necessary for right holders or for the government to vindicate minerals.¹¹⁴³ Such an amendment is necessary to prevent the necessity of relying on rules of private law that are ill-suited in the current regulatory regime, to protect mineral tenure security.¹¹⁴⁴

2.2. Limitations of a private-law rights-based approach

The MPRDA classifies prospecting rights and mining rights as limited real rights.¹¹⁴⁵ The Act is silent regarding the nature of mining permits.¹¹⁴⁶ According to the rules of private law and the *subtraction from dominium* test used by the courts to determine the nature of rights, mining permits can be classified as limited real rights.¹¹⁴⁷ From a private-law paradigm, holders of rights to minerals acquire these limited real rights through a derivative method of acquisition

¹¹³⁷ Chap 3, sec 3.1.

¹¹³⁸ Chap 3, sec 3.2.

¹¹³⁹ Chap 3, sec 3.2.

¹¹⁴⁰ Chap 3, sec 4.

¹¹⁴¹ Chap 3, sec 4.

¹¹⁴² Chap 3, sec 4.

¹¹⁴³ Chap 3, sec 4.

¹¹⁴⁴ Chap 3, sec 4.

¹¹⁴⁵ Chap 6, sec 1.

¹¹⁴⁶ Chap 6, sec 2.1.

¹¹⁴⁷ Chap 6, sec 2.

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when the government grants rights.¹¹⁴⁸ Generally, registration of rights is a requirement for the derivative acquisition of real rights.¹¹⁴⁹ Before registration, rights are personal in nature. This means that, generally, unregistered rights are not enforceable against third parties.¹¹⁵⁰ Before registration, rights are enforceable only against the other contracting party.¹¹⁵¹ One exception to this is found in the doctrine of notice.¹¹⁵² According to the doctrine of notice, unregistered rights are enforceable against persons who had knowledge of their existence.¹¹⁵³

According to these rules of private law, rights to minerals are personal rights when the Minister grants them.¹¹⁵⁴ At this stage, rights are enforceable against the government (the other contracting party) and against the current landowner (according to the doctrine of notice).¹¹⁵⁵ However, rights are unenforceable against third parties, for example, subsequent landowners who did not have knowledge of the existence of the rights.¹¹⁵⁶ If private parties can prevent right holders from exercising their rights as a result of non-registration, the risks that mines cannot be developed profitably and that returns on investments cannot be maximised, increase.¹¹⁵⁷ The rules of derivative acquisition of real rights thus weaken mineral tenure security.¹¹⁵⁸

The private-law rules explained above operate in a system where rights in land are registered in the Deeds Office that adheres to a hierarchical approach to rights.¹¹⁵⁹ According to the hierarchy, registered real rights are stronger and better enforceable than unregistered personal rights.¹¹⁶⁰ The hierarchical approach to rights means that registered prospecting rights, mining rights and mining permits are real and thus stronger and better enforceable than rights that are personal as a result of non-registration. Such a hierarchical approach to rights not only weakens mineral tenure security but is also against the transformative nature of the MPRDA.

¹¹⁴⁸ Chap 6, sec 2.1.

¹¹⁴⁹ Chap 6, sec 2.1.

¹¹⁵⁰ Chap 6, sec 2.1.

¹¹⁵¹ Chap 6, sec 2.1.

¹¹⁵² Chap 6, sec 2 and especially fn 793.

¹¹⁵³ Chap 6, sec 2 and especially fn 793.

¹¹⁵⁴ Chap 6, sec 2.1.

¹¹⁵⁵ Chap 6, sec 2.1.

¹¹⁵⁶ Chap 6, sec 2.1.

¹¹⁵⁷ Chap 6, sec 2.1.

¹¹⁵⁸ Chap 6, sec 2.1.

¹¹⁵⁹ Chap 6, sec 2.2.

¹¹⁶⁰ Chap 6, sec 2.2.

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Furthermore, the MPRDA suggests that the consequence of non-registration of rights is that the government can take administrative steps against right holders to ensure that they comply with their obligation to register rights.¹¹⁶¹ The Act does not suggest that right holders can be prevented from exercising their rights by private parties due to non-registration.¹¹⁶²

On face-value, the MPRDA and the MTRA must be criticised for reiterating the rules of property-law regarding registration and enforceability of rights to minerals.¹¹⁶³ It remains to be seen how the courts interpret the provisions of the MPRDA and MTRA regarding registration and enforceability of rights.¹¹⁶⁴ This research suggests that registration in the Mineral and Petroleum Titles Registration Office should follow a different approach than registration in the Deeds Office.¹¹⁶⁵ According to this approach, registration is an important aspect of mineral tenure security.¹¹⁶⁶ Similar to registration of rights in the Deeds Office, registration in the Mineral and Petroleum Registration Office serves the important function of publicizing rights.¹¹⁶⁷ However, the consequences of registration, from a private-law paradigm, namely that private parties can prevent right holders from exercising their rights, have a negative impact on mineral tenure security and should not be followed.¹¹⁶⁸

It is desirable that the MPRDA and the MTRA are amended to remove the possibility that the courts may interpret their provisions regarding registration and enforceability to denote that private parties can prevent right holders from exercising their rights if rights are not registered.¹¹⁶⁹ This can be achieved by removing the semantic classification of prospecting rights and mining rights as limited real rights through the elimination of all references to “limited real rights”.¹¹⁷⁰

Apart from indicating that classification of rights to minerals as limited real rights weakens mineral tenure security, this thesis also argues that it may not be appropriate to continue to analyse rights to minerals according to private-law categories of rights.¹¹⁷¹ In this regard, it is

¹¹⁶¹ Chap 6, sec 2.2.

¹¹⁶² Chap 6, sec 2.2.

¹¹⁶³ Chap 6, sec 2.1.

¹¹⁶⁴ Chap 6, sec 2.2.

¹¹⁶⁵ Chap 6, sec 2.2.

¹¹⁶⁶ Chap 6, sec 2.2.

¹¹⁶⁷ Chap 6, sec 2.2.

¹¹⁶⁸ Chap 6, sec 2.2.

¹¹⁶⁹ Chap 6, sec 2.2.

¹¹⁷⁰ Chap 6, sec 2.2.

¹¹⁷¹ Chap 6, sec 3.

argued that rights to minerals, granted in terms of the MPRDA, are not statutorily conferred limited real rights with the same characteristics as common-law real rights.¹¹⁷² Instead, the government administratively grants certain abilities to right holders, for example, to transfer and mortgage rights, that resemble characteristics of private-law limited real rights.¹¹⁷³

3. Mineral tenure security in the MPRDA

As stated, the second course of inquiry investigates how the administrative regime that the MPRDA establishes provides mineral tenure security to holders of rights to minerals regarding some aspects of the concept that traditionally have strong connections with private law.¹¹⁷⁴ The aspects of the concept that are analysed are: the abilities to prospect and mine, to remove and dispose of minerals, to choose not to prospect and mine, and to transfer and mortgage rights.¹¹⁷⁵

This thesis accepts that an evaluation of the certainty of right holders to prospect and mine, to remove and dispose of minerals, to choose not to prospect, and to transfer and mortgage rights, requires that legitimate government reasons and objectives for limiting the abilities are taken into account.¹¹⁷⁶ Although unfettered freedom regarding these abilities will best serve mineral tenure security, the government has legitimate and important reasons for limiting the abilities in the pursuit of important objectives such as optimal exploitation of mineral resources and transformation of the mining industry.¹¹⁷⁷ Optimal mineral tenure security is understood here to mean a regulatory regime that creates a state of certainty in relation to rights to minerals that is most attractive to investors, whilst supporting the legitimate and important objectives of the government.¹¹⁷⁸

This thesis demonstrates that, considering legitimate governmental objectives, the MPRDA is reasonably successful in strengthening optimal mineral tenure security. However, through an analysis of the abilities of holders of rights to minerals to prospect and mine, to choose not to prospect and mine and to transfer and mortgage their rights, certain shortcomings of the current regulatory regimes emerge. These shortcomings, often, increase risks associated with

¹¹⁷² Chap 6, sec 3.

¹¹⁷³ Chap 6, sec 3.

¹¹⁷⁴ Chap 1, sec 2.

¹¹⁷⁵ Chap 1, sec 2.

¹¹⁷⁶ Chap 4, sec 2; chap 5 sec 2.

¹¹⁷⁷ Chap 4, sec 2; chap 5 sec 2.

¹¹⁷⁸ Chap 4, sec 2; chap 5 sec 2.

profitable development of mines and maximising returns of investments.¹¹⁷⁹ Such an increase in risks weaken mineral tenure security.

3.1. Shortcomings of the current regulatory regime

The first shortcoming of the current regulatory regime is that the MPRDA is at times drafted in unclear and imprecise language that causes uncertainty. While it is accepted that vaguer drafting is at times necessary to pursue complex and conflicting objectives,¹¹⁸⁰ this research reveals instances where the MPRDA is unnecessarily vague and imprecise.¹¹⁸¹ Imprecise and vague drafting that is not in pursuit of any legitimate governmental objective is unacceptable and unreasonably weakens mineral tenure security.¹¹⁸² Vague and imprecise drafting is also unacceptable when the objective that the government pursues can be achieved adequately with clearer and more precise language.¹¹⁸³

The second shortcoming of the current regulatory regime is that it allows wide governmental decision-making power that is not based on objective and closely circumscribed criteria when decisions are made in certain instances.¹¹⁸⁴ Again, it is accepted that closely circumscribed criteria for decision-making will not in all instances be appropriate due to the complexity that the decision-making power pursues.¹¹⁸⁵ However, wide discretion that is not in pursuit of any

¹¹⁷⁹ See renewals of mining permits, chap 4 sec 2.1.2; requirements of the social and labour plan, chap 4 sec 2.1; removal of samples for testing, identification and analysis, chap 4 sec 2.2; commencement of prospecting and mining operations, chap 4 sec 2.4.1; obligation to prospect and mine continuously, chap 4 sec 2.4.3; requirements for consent to transfer prospecting rights and mining rights, chap 5 sec 3.2.1.2; requirements for consent to transfer controlling interests in unlisted companies, chap 5 sec 3.2.2.2; proposed amendments in terms of the 2008 Amendment Act: transfer of any interest in listed companies requires ministerial consent, chap 5 sec 3.2.2.1; requirements for consent for the transfer of controlling interests in listed companies, chap 5, sec 3.2.2.2.

¹¹⁸⁰ Regarding vague drafting that may be necessary to pursue the objectives of the Mining Charter see chap 5 sec 3.2.1.2.

¹¹⁸¹ For a synopsis of vague drafting identified in this thesis see chap 4: table 1 sec 2.3.1, table 3 sec 2.4.2, table 4 sec 2.4.4; chap 5: table 5 sec 3.2.1.3, table 7 sec 4.3.2 and table 8, sec 4.4.5.

¹¹⁸² Requirements for renewal of prospecting rights and mining rights: “relevant provisions” and “any other law”, chap 4 sec 2.1.2; obligation to commence prospecting and mining: “relevant date”, chap 4 sec 2.4.2; lapsing of rights upon liquidation, chap 5 sec 4.4.1; lapsing of rights upon deregistration, see chap 5 sec 4.4.2; lapsing upon cancellation, see chap 5 sec 4.4.3.

¹¹⁸³ Requirements for renewal of prospecting rights and mining rights: “relevant provisions” and “any other law”, chap 4 sec 2.1.2; obligation to commence prospecting and mining: “relevant date”, chap 4 sec 2.4.2; requirements for consent to transfer prospecting rights and mining rights: “26% black ownership requirement”, chap 5 sec 3.2.1.3 and sec 4.3.1; lapsing of rights upon liquidation, chap 5 sec 4.4.1; lapsing of rights upon deregistration, chap 5 sec 4.4.2; lapsing upon cancellation, chap 5 sec 4.4.3.

¹¹⁸⁴ For a synopsis of wide governmental discretion identified in this thesis see chap 4: table 1 sec 2.1.3, table 2 sec 2.3, table 3 sec 2.4.2, table 4 sec 2.4.4; chap 5: table 6 sec 3.2.2.3.

¹¹⁸⁵ Chap 4, sec 2.1.2 regarding discretion that may be necessary to pursue the objectives of the social and labour plan.

governmental objective or that is simply unnecessary for the objective pursued, result in an unnecessary and unjustifiable weakening of mineral tenure security.¹¹⁸⁶

Closely connected to the second shortcoming, the third shortcoming of the current regulatory regime is that the MPRDA, in certain instances, excessively regulates the abilities of holders of rights to minerals.¹¹⁸⁷ Excessive regulation, that is disproportionate to the objectives pursued, unjustifiably limits mineral tenure security.¹¹⁸⁸

3.2. Recommended solutions

Vague and unclear drafting, excessive regulatory measures and wide discretionary powers that are at times encountered in the MPRDA, pose challenges for mineral tenure security. Despite these challenges, it is unlikely that the Constitutional Court will, in the near future, decide that the MPRDA is unconstitutional for infringing fundamental rights.¹¹⁸⁹ This thesis argues that although the MPRDA does not infringe fundamental rights, justification for its amendment, to strengthen mineral tenure security, can be found in the Constitutional framework.¹¹⁹⁰ Specifically, the justification for the MPRDA's amendment can be found in the constitutionally developed principle of legality, as derived from the rule of law, which includes the rule against vagueness and rationality review.¹¹⁹¹

The rule against vagueness requires that legislation must be clear and accessible so that those who are affected by it will have reasonable certainty regarding what is expected from them to act in accordance with the legislation.¹¹⁹² Rationality review involves some sort of analysis between the legislative means and legitimate governmental objectives that the legislation pursues, i.e. a means-end analysis.¹¹⁹³ The rule against vagueness draws attention to the

¹¹⁸⁶ Requirements for renewal of mining rights: compliance with social and labour plan, chap 4 sec 2.1.2; Removal of samples for testing, identification and analysis: no guidelines regarding quantities of minerals, chap 4 sec 2.2; commencement of prospecting and mining operations: extension of periods, chap 4 sec 2.4.1; proposed 2008 amendments, transfer of controlling interest in listed companies: no criteria for granting consent, chap 5 sec 3.2.2.2.

¹¹⁸⁷ For a synopsis of excessive regulatory measures identified in this thesis see chap 4: table 4 sec 2.4.4; chap 5: table 6.sec 3.2.2.3.

¹¹⁸⁸ Requirement to prospect and mine continuously without interruption, chap 4 sec 2.4.4; proposed 2008 amendments, transfer of any interest in unlisted companies other than controlling interest requires ministerial consent, chap 5 sec 3.2.2.1.

¹¹⁸⁹ Chap 7, sec 1 and sec 5.

¹¹⁹⁰ Chap 7, sec 1.

¹¹⁹¹ Chap 7, sec 2.

¹¹⁹² Chap 7, sec 3.1.

¹¹⁹³ Chap 7, sec 3.2.

challenges that vague and unclear drafting pose for mineral tenure security¹¹⁹⁴ while rationality review speaks to the challenge that excessive regulatory measures pose for mineral tenure security.¹¹⁹⁵

The rule against vagueness can be invoked to justify amending the MPRDA where vague and unclear drafting weakens mineral tenure security and creates unnecessary uncertainty regarding profitable development of mines and maximising returns on investments.¹¹⁹⁶ In this regard, the Constitutional Court's approach to "simple vagueness" justifies amending certain provisions of the MPRDA.¹¹⁹⁷ Furthermore, the rule against vagueness can be invoked when wide governmental discretionary powers, not based on objectively circumscribed criteria, unnecessarily creates uncertainty and increases the risks of right holders and investors regarding profit-making.¹¹⁹⁸ In this regard, the Constitutional Court's approach to "compound vagueness" falls short of justifying the challenge that wide governmental discretion in the MPRDA poses for mineral tenure security.¹¹⁹⁹ The deficiency in approach to "compound vagueness" is a result of the level of deference that the judiciary shows to wide governmental discretion when legislation does not infringe fundamental rights.¹²⁰⁰ The challenge that "compound vagueness" poses for mineral tenure security can be overcome by adopting an extended approach to legality, in particular an extended approach to rationality review.¹²⁰¹

The Constitutional Court's approach to rationality review of legislation that does not infringe fundamental rights requires a very lenient test, namely "mere rationality".¹²⁰² "Mere rationality" requires a very limited connection between the legislative means and the legitimate governmental objectives that it pursues.¹²⁰³ As with "compound vagueness", the Constitutional Court's approach to rationality review, in particular the means-end analysis, is insufficient to overcome the challenge that excessive regulatory measures poses for mineral tenure security.¹²⁰⁴ Similar to "compound vagueness", this deficiency is a result of the judiciary's

¹¹⁹⁴ Chap 7, sec 3.1.

¹¹⁹⁵ Chap 7, sec 3.2.

¹¹⁹⁶ Chap 7, sec 4.1.

¹¹⁹⁷ Chap 7, sec 4.1.1.

¹¹⁹⁸ Chap 7, sec 4.1.

¹¹⁹⁹ Chap 7, sec 4.1.2.

¹²⁰⁰ Chap 7, sec 4.1.2.1.

¹²⁰¹ Chap 7, sec 4.2.2.2.

¹²⁰² Chap 7, sec 4.2.1.

¹²⁰³ Chap 7, sec 4.2.1.

¹²⁰⁴ Chap 7, sec 4.2.2.

approach to rationality review when legislation does not infringe fundamental rights.¹²⁰⁵ The challenge that excessive regulatory measures in the MPRDA pose for mineral tenure security can be overcome by adopting an extended approach to rationality review.¹²⁰⁶

Such an extended approach to rationality review, and legality in general, is justifiable in the light of two interrelated factors. The first factor is the scale and extent of the regulatory regime that the MPRDA establishes for the mining industry.¹²⁰⁷ The second factor is the potential negative impact, of some aspects of this large-scale regulatory regime, on individuals (right holders and investors) and on the entire mining industry.¹²⁰⁸ The negative impact is particularly apparent in the uncertainty that the MPRDA creates regarding profit-making in certain instances.

“Extended legality” incorporates three features.¹²⁰⁹ Firstly, the purpose of a legislative measure must be set at an appropriate level of generality.¹²¹⁰ The appropriate level of generality is one that *allows the possibility* for a court to find that the means chosen by the legislature does not further legitimate governmental objectives.¹²¹¹ Secondly, the level of connection required between the legislative means and legitimate governmental objectives, i.e. the means-end analysis, must exclude the two extreme tests.¹²¹² In this regard, the most tenuous connection (a very limited connection) and proportionality and reasonableness (a very strong connection) must be excluded.¹²¹³ “Extended legality” requires finding a middle-ground between the two extreme tests for the means-end analysis.¹²¹⁴ Thirdly, “extended legality” requires that a court must consider empirical evidence regarding the extent to which the legislative means achieves legitimate governmental objectives.¹²¹⁵ Consideration of empirical evidence does not mean that the government has an onus to prove that the legislative means achieve legitimate governmental objective.¹²¹⁶ Instead, any party before the court may present empirical evidence regarding the extent to which to which the legislative means achieves legitimate governmental

¹²⁰⁵ Chap 7, sec 4.2.2.

¹²⁰⁶ Chap 7, sec 4.2.2.

¹²⁰⁷ Chap 7, sec 5.

¹²⁰⁸ Chap 7, sec 4.1.2.2 and sec 4.2.2.

¹²⁰⁹ Chap 7, sec 5.1.

¹²¹⁰ Chap 7, sec 5.1.

¹²¹¹ Chap 7, sec 5.1.

¹²¹² Chap 7, sec 5.1.

¹²¹³ Chap 7, sec 5.1.

¹²¹⁴ Chap 7, sec 5.1.

¹²¹⁵ Chap 7, sec 5.1.

¹²¹⁶ Chap 7, sec 5.1.

objectives.¹²¹⁷ Upon consideration of this evidence, the court must strike legislation down for being irrational if it is clear that the legislative means do not achieve legitimate governmental objectives.¹²¹⁸ The court must further strike down legislation down if the empirical evidence shows that the negative impact of the legislative means are disproportionate to achieving legitimate governmental objectives.¹²¹⁹

This thesis demonstrates how the three features of “extended legality” overcome the challenges that wide governmental discretion “compound vagueness” and excessive regulatory measures pose for mineral tenure security.¹²²⁰

4. Final remarks

It was stated in chapter one that logic requires accepting that in regimes pertaining to minerals that are predominantly based in administrative law, administrative aspects of the concept “mineral tenure security” will be more important than those aspects of the concept that are traditionally associated with rules of private-law. The conclusions in this thesis substantiate that this is indeed the case and that future research on mineral tenure security requires analysis of the administrative-law aspects of mineral tenure security. In this regard, the right to administrative justice comes to the fore. Regarding the rules of private-law, future research can investigate the continued role of the rules of private law in mineral law more generally. The MPRDA does not regulate all aspects of mineral law traditionally associated with rules of private law comprehensively and it is therefore necessary to rely on private-law rules at times. The compatibility of these rules with the administrative regime established by the MPRDA needs to be investigated.

Future evaluation of mineral tenure security thus requires analysing whether the MPRDA complies with the rules of just administrative action. Furthermore, due to the administrative nature of the regime, governmental discretion throughout the different phases of development of a mine should be investigated in detail. Limiting discretion in decisions, regarding the ability of holders of rights to minerals to continue from the exploration phase to the mining phase will, for example, be paramount to strengthen mineral tenure security. Governmental discretion that

¹²¹⁷ Chap 7, sec 5.1.

¹²¹⁸ Chap 7, sec 5.1.

¹²¹⁹ Chap 7, sec 5.1.

¹²²⁰ Chap 7, sec 5.2.

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can result in time delays when applicants apply for renewal of rights or when key documents are processed also comes to mind as an aspect of mineral tenure security that requires future analysis.

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