# THE LEGAL MEANING OF STATE CUSTODIANSHIP IN THE CONTEXT OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT 28 OF 2002

by

**Hendrik Schmidt (SCHHEN013)**

Thesis submitted to the Faculty of Law, University Of Cape Town in fulfilment of the requirements for the PhD degree

**Date of submission:** 14 November 2022

**Supervisor:** Professor Hanri Mostert, DST/NRF SARChI Research Chair: Mineral Law in Africa, Department of Private Law, Faculty of Law, University of Cape Town

University of Cape Town

MINERAL LAW IN AFRICA

mlia@uct.ac.za www.mlia.uct.ac.za

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University of Cape Town

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Hendrik Schmidt (SCHHEN013)

Word Count: 98 811

This thesis was written under the auspices of the DST/NRF SARChI Research Chair: Mineral Law in Africa at the Faculty of Law, University of Cape Town. The views and opinions expressed here are the author's own and should not be attributed to these institutions.

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# Acknowledgements

I would like to thank the following people without whom the completion of this thesis would have been difficult.

My supervisor, Prof Hanri Mostert of the Department of Public Law at the University of Cape Town, for her expert guidance and advice during my study.

To my family and friends for your unconditional support.

In particular to my wife, Cheryl, my heartfelt thanks for her unwavering support and continuous motivation in completing my study.

Also, to my sons, Cameron and Graham, who allowed me the time to complete my studies, my heartfelt appreciation for your unconditional support.

To everyone who assisted and contributed to making this thesis a reality, including the MLiA team members at UCT who over the years took the effort to read and comment on the different chapters. Your input is recognised and sincerely appreciated.

# Abstract

The Mineral and Petroleum Resources Development Act, 2002 introduces a new mineral and petroleum law dispensation in South Africa. The introduction of the new dispensation follows the first democratic election in 1994 that required a reconsideration of the role of the state in the allocation and exploitation of mineral and petroleum resources. The state's right to sovereignty is realised by introducing the principle of state custodianship. Whilst the MPRDA does not define state custodianship, the courts have been hesitant in providing an interpretation.

Historically, the majority of South Africans were excluded from the allocation and exploitation of mineral and petroleum resources caused by racial practices. The notion of state custodianship brings substantive changes to the regulation of mineral and petroleum resources. The state as custodian is responsible for regulating the nation's mineral and petroleum resources in accordance with the objectives determined by the MPRDA. As regulator, the state has been allocated increased control over prospecting and mining activities. This increased control must enhance the transformative goals of the new mineral and petroleum law dispensation whilst simultaneously considering the role of mineral and petroleum resources in the economic development of the country. In accordance with its responsibilities imposed in terms of the Constitution, the state must ensure that everyone benefits from mineral and petroleum exploitation. Such responsibilities must be exercised within the Constitutional imperative to avoid or minimize environmental harm

The state as custodian owes a fiduciary duty towards the nation in respect of the minerals and petroleum resources. This fiduciary duty exists between the state and its citizens. The state must exercise its duty to the standard required of a fiduciary with regards to the property entrusted to it to regulate. Due to the nature of the concept of custodianship, the state is not the owner of mineral and petroleum resources. Whilst the land owner, and in certain instances the mineral rights holder, before the adoption of the MPRDA determined access to minerals, the state as custodian is now responsible for determining access to minerals.

The joint interests of the South African nation as a whole is to be promoted by the state in its role as custodian. The public interest of access to and use of the mineral and petroleum resources determined by the MPRDA and the Constitution must be safeguarded. The implementation of the object of equitable access to minerals is dependent on the state as custodian.

The transformative role of the state is enhanced by the shifting of the basis of mineral law to public law. The administering of a state controlled mineral law system has led to the responsibilities of state custodianship having to be exercised within a public law environment. The interpretation of the state's duties as custodian is dependent on various considerations, some of them being the provisions of the MPRDA, the application of the principles of administrative law and the fiduciary nature of state custodianship.

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# CHAPTER ONE: INTRODUCTION

## 1.1 Introduction

State custodianship is the principle introduced by the Mineral and Petroleum Resources Development Act[1] ("the MPRDA") that significantly changed the legal context of mining in South Africa.[2] It is provided for in the Preamble of the MPRDA, which states that "South Africa's mineral and petroleum resources belong to the nation and the state is the custodian thereof."[3] Section 3(1) of the MPRDA further determines that the mineral and petroleum resources "are the common heritage of all the people of South Africa." This section also provides that the state must fulfil its role as custodian to benefit all South Africans.[4]

Section 24 of the South African Constitution of 1996 ("the Constitution") provides the constitutional basis for introducing the principle of state custodianship in South African mineral law.[5] Section 24 of the Constitution envisions an environment where the nation's commitment to equitable access to South Africa's natural resources is realised,[6] and the public's general interest regarding access to and use of the unsevered mineral riches of the country is safeguarded.[7] Section 24(b)(iii) determines that everyone has the right to have the environment protected through reasonable legislative and other measures that must ensure ecologically sustainable development and use of natural resources that must, in turn, promote justifiable economic and social development.[8] Section 7(2) of the Constitution, which forms part of the Bill of Rights, determines that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights.'[9] Read with section 24 of the Constitution, section 7(2) has

[1] The Mineral and Petroleum Resources Development Act 28 of 2002 published in Government Notice 1273 in Government Gazette 23922 of 10 October 2002. The MPRDA commenced on 1 May 2004 published under Proclamation No. R25 in Government Gazette 26264 of 23 April 2004.

[2] Section 3 of the MPRDA; see H Mostert *Mineral Law Principles and Policies in Perspective* (2012) 80.

[3] Preamble to the MPRDA.

[4] Section 3(1) of the MPRDA states that mineral and petroleum resources are the common heritage of all the people of South Africa. It also determines that the state is the custodian of minerals and petroleum resources for the benefit of all South Africans.

[5] Section 24 of the Constitution of the Republic of South Africa, 1996.

[6] Section 24(b)(iii) of the Constitution.

[7] E Van der Schyff 'Who "owns" the country's mineral resources? The possible incorporation of the public trust doctrine through the Mineral and Petroleum Resources Development Act' *TSAR* 2008 4 757 at 766.

[8] Subsection 24(b)(iii) of the Constitution.

[9] Section 7 of the Constitution forms part of the Bill of Rights in Chapter 2.

spurred the argument that recognising the constitutional rights of section 24 is a constitutional duty of a fiduciary nature[10] that vests in the state.[11]

State custodianship was first mentioned in the 1998 White Paper on A Minerals and Mining Policy for South Africa ("the White Paper"),[12] following the dawn of democracy in 1994.[13] This policy,[14] which precedes the MPRDA, intends to rectify the imbalances and injustices of the past with specific reference to mineral and petroleum resources.[15] The White Paper contains the intention of the government to recognise the State as the custodian of the nation's mineral resources.[16] The White Paper intends that the state-as-custodian must promote exploration and investment in the mining industry so that increased employment and mining output are achieved.[17] It furthermore sets governments' intention to ensure security of tenure for prospecting and mining operations.[18]

Apart from the broad guidelines provided in the White Paper, the MPRDA is silent on the content of the principle of state custodianship. It contains no definition of state custodianship, nor does it attempt to clarify the duties and functions of the state. When determining the content

[10] Section 7(2) of the Constitution determines that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights". The duty of the state therefore to respect, protect, promote and fulfil the rights determined in section 24 of the Constitution is a fiduciary public duty to protect the natural resources. See A Du Plessis 'Climate Change, Public Trusteeship and the Tomorrows of the Unborn' (2015) 31 *SAJHR* 269 at 285.

[11] Du Plessis op cit note 10 269.

[12] The *White Paper on a Minerals and Mining Policy for South Africa*, October 1998, was drafted by officials of the then Department of Minerals and Energy which was subsequently split into the Department of Energy and the Department of Minerals in 2009. The current Department of Mineral Resources and Renewable Energy (DMRE) consists of the merger of the Department of Minerals with the Department of Energy pronounced by the President on 29 May 2019; Mostert op cit note 2 78.

[13] The first democratic elections in South Africa were held on 27 April 1994.

[14] The White Paper on A Minerals and Mining Policy in South Africa, October 1998.

[15] Mostert op cit note 80.

[16] White Paper on a Minerals and Mining Policy for South Africa, October 1998 at para 1.3.2. See HM Van den Berg "Ownership of minerals under the new legislative framework for mineral resources" *Stellenbosch LR* 2009 Volume 20 Part 1: 3 at 168 where reference is made to *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd* 2007 [JOL] 24502 (O). It was argued that the White Paper is a product of the executive branch of state whilst the MPRDA is a product of the legislature and should be read separately. Due to the fact that the White Paper is a product of the MPRDA, it was argued that the White Paper should be an indication of the government's intention when the MPRDA was enacted.

[17] The White Paper on a Minerals and Mining Policy for South Africa, October 1998 at para 1.3.2.i).

[18] The White Paper on a Minerals and Mining Policy for South Africa, October 1998 at para 1.3.2.ii) v).

of state custodianship, the objectives of the MPRDA[19] and the Constitution must therefore be considered.[20]

South African courts have been hesitant to give content to the concept of "custodianship" introduced by the MPRDA. At times, the courts mention the concept without an exposition of its meaning.[21] The Constitutional Court has provided only brief guidance on the principle of state custodianship.[22] In determining whether the MPRDA expropriated unused mineral rights, the Court found that a compulsory deprivation[23] of unused mineral rights had occurred.[24] The Constitutional Court found these unused mineral rights vested in the state as custodian on behalf of its people.[25] It also found that the state was not competing with individuals or businesses. It was merely acting as a "conduit" through which applications for mineral and petroleum resources were to be considered. These remarks provide guidance in determining the substantive content of custodianship.[26]

The principle of state mineral resource custodianship needs to be given content, given the lack of clarity from the provisions of the MPRDA and the judiciary's hesitation to engage with it conceptually. This thesis offers a better understanding of the legal content of the principle of state custodianship of mineral resources.

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[19] Section 2 of the MPRDA.

[20] Constitution of 1996.

[21] See *Agri South Africa v Minister of Minerals and Energy* 2012 (1) SA 171 (GNP); *Minister of Minerals and Energy v Agri South Africa* 2012 (ZASC) 93; *Agri South Africa v Minister for Minerals and Energy* 2013 (ZACC) 9; *De Beers Consolidated Mines Ltd v Regional Manager Mineral Regulation, Free State Division, Department of Minerals and Energy & others* 2009 (JOL) 23667; *Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104; *Minister of Mineral Resources v Sishen Iron Ore Company* (Pty) Ltd 2014 (2) SA 603; *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* 2011 1 All SA 364 (SCA); *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd & others* (3215/06) (2007) ZAFSHC (OPD) 74 where the courts had the opportunity to interpret the concept of custodianship.

[22] H Mostert and M Van den Berg 'Roman Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences' in DN Zillman, A McHarg, A Bradbrook and L Barrera-Hernandez (eds) *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage* (2014) Oxford University Press.

[23] Deprivation in terms of section 25 of the Constitution exists where the rights of mineral holders have been terminated but the state has not been vested with the ownership if such rights; see *Agri South* (ZACC) supra note 21 para 67.

[24] *Agri South Africa* (ZACC) supra note 21 para 68.

[25] Ibid.

[26] Ibid.

## 1.2 Delimitation

This thesis focuses only on mineral resources. A thorough discussion of petroleum resources is excluded because different chapters of the MPRDA regulate petroleum resources.[27] However, brief references will be made to the country's petroleum resources and their regulation where required.

Furthermore, this thesis excludes a thorough discussion of the state's duty towards land. Reference has been made in the apartheid past to the state's duty to act as custodian of land on behalf of certain people.[28] Differences between the legislative introduction of state custodianship for mineral and petroleum resources, on the one hand, and the ongoing political debate about introducing the concept of custodianship in the land context,[29] on the other, place the latter outside the scope of the current inquiry.

## 1.3 Background to the Concept of State Custodianship

Mineral law originates from Roman and Roman-Dutch law and continues to be developed in South Africa.[30] South African mineral law development can be divided into "four generations"[31] of mineral policy and statutory regulation.[32] The mineral law dispensation in terms of the Minerals Act of 1991 promoted privatisation and deregulation of the mining

[27] Petroleum resources are regulated by Chapters 7, 8 and 9 of the MPRDA that have little relevance to the regulation of mineral resources.

[28] E du Plessis 'No Expropriation without Compensation in South Africa's Constitution; for the Time Being' accessed at https://verfassungsblog.de/no-expropriation-without-compensation-in-south-africas-constitution-for-the-time-being/ Verfassungsblog: On Matters Constitutional (09.12.2021) on 18 January 2022; WJ du Plessis 'African Indigenous Land Rights in a Private Ownership Paradigm' *PELJ* 2011 (14) 7 at 45-69 accessed at https://hdl.handle.net/10520/ejc-jlc_conrev1_v11_n1_a4 on 18 January 2022.

[29] HJ Lubbe and WJ du Plessis 'Compensation for Expropriation in South Africa, and International Law: The Leeway and the Limits' *Constitutional Court Review* Vol 11 Issue 1 at 79-112 accessed at https://doi.org/10.2989/CCR.2021.0004 on 18 January 2022.

[30] Mostert note 2at 4. Four distinct "generations" of mineral policy and statutory regulation correlate with the political developments in South Africa, being the colonial period (1867-1910), the period during the existence of the Union of South Africa (1910-1961) the republican period (1961-1994) and the democratic dispensation (1994-onwards).

[31] The "four generations" of mineral law can briefly be described as the period from 1910 with the formation of the Union of South Africa to the 1960's which relied mainly on colonial laws (the first generation) with the second generation being from the 1960's with the adoption of the Mining Rights Act 20 of 1967 and the Mining Titles Act 16 of 1967 until the promulgation of the Minerals Act 50 of 1991. The third generation reflects the period commencing with the Minerals Act 50 of 1991 which purportedly intended to privatise mineral rights. The fourth generation commences with MPRDA and is evidenced by the introduction of the principle of state custodianship. See Mostert op cit note 2 at 17.

[32] H Mostert op cit note 2 at 16.

industry. The mineral rights holder was allowed to determine whether mineral resources were to be exploited.[33]

The focus of this thesis is limited to the mineral law framework introduced by the MPRDA.[34] This limitation is due to the introduction of state custodianship by the MPRDA in post-apartheid democratic South Africa, which is the purpose of this thesis. A discussion of the above mineral law frameworks will indicate the stark difference between the legal position that existed before the introduction of the concept of state custodianship by the MPRDA and the framework that existed in terms of the Minerals Act and the common law.

Compared to the current mineral law dispensation introduced by the MPRDA, the shift in mineral policy is denoted by providing increased state control of prospecting and mining activities.[35] State control of mineral and petroleum mining activities is asserted by introducing state custodianship.[36] It entailed instituting a system of rights and duties for the state, to control the granting, exercising and retention of rights to minerals and petroleum resources.[37]

A state's right to control its mineral and petroleum resources is based on its permanent sovereignty over natural resources.[38] Permanent sovereignty over its natural resources is a basic right to self-determination.[39] As per international law, permanent sovereignty entitles the state to remove natural resources from private ownership.[40] The sovereign rights of states over certain natural resources are not proprietary but fiduciary by nature. As the custodian of mineral resources, the state does not obtain proprietary interests in minerals, but is trusted and tasked to ensure equal access to minerals.[41]

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[33] Ibid at 78; Minerals Act 50 of 1991.

[34] The MPRDA came into operation on 1 May 2004.

[35] Mostert op cit note 2 at 78.

[36] Section 3(1) of the MPRDA.

[37] Mostert op cit note 2 at 78.

[38] Van den Berg op cit note 16 at 144; United Nations General Assembly Resolution 1803 (XVII) titled Permanent Sovereignty over Natural Resources, 14 December 1962

[39] Van den Berg op cit note 16 at 144; United Nations General Assembly Resolution 1803 (XVII) titled Permanent Sovereignty over Natural Resources, 14 December 1962.

[40] General Assembly Resolution 3281 (XXIX) Charter of Economic Rights and Duties of States; United Nations Charter of Economic Rights and Duties of States 12 December 1974; Van den Berg op cit note 16; also see the *White Paper on a Minerals and Mining Policy for South Africa* October 1998 at 1.3.6.1.

[41] P Sand 'Sovereignty bounded: Public trusteeship for common pool resources' (2004) 4 *Global Environmental Politics* 47 at 50.

South African law realised the state's right to sovereignty[42] of natural resources by introducing the principle of state custodianship of such resources.[43] The MPRDA provides for the state's internationally accepted sovereignty over the nation's mineral and petroleum resources.[44] It explicitly allows the state to exercise its sovereignty by introducing the principle of state custodianship.[45] Numerous statutory rights and obligations that intend to give effect to the principle of state custodianship are contained in the MPRDA.[46]

The influence and impact of the MPRDA on the transformation intended by the current mineral law dispensation can only be understood when the conceptual changes contained in the MPRDA are analysed. Determining the legal content of the principle of state custodianship is an important component of understanding such conceptual changes.[47]

## 1.4 Reasons for the Introduction of the Principle of State Custodianship

The mineral law framework under the Minerals Act and the common law created an environment where being a landowner or the mineral right holder was the enabling factor to access minerals.[48] The Minerals Act placed the mineral rights holder[49] in a controlling position as regards the exploitation of mineral rights.[50] The mineral rights holder was entitled to hold and dispose of mineral rights as deemed fit[51] and could also determine whether prospecting or

[42] Section 2(a) of the MPRDA.

[43] Section 2(b) of the MPRDA.

[44] The Preamble and section 2(a) of the MPRDA; MC Wood 'Advancing the Sovereign Trust of Government to Safeguard the Environment for present and Future Generations (Part 1): Ecological Realism and the Need for a Paradigm Shift' (2009) 39 *Environmental Law* 43 at 75.

[45] Section 2(b) of the MPRDA.

[46] Section 2 contains the objectives of the MPRDA whilst section 3 empowers the minister of mineral resources to grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, technical co-operation permit, reconnaissance permit, exploration right and production right.

[47] E Van der Schyff en N Olivier ''n Vonnisbespreking: 'n Perspektief op die impak van die Mineral and Petroleum Resources Development Act 28 of 2002 op voorheen bestaande regte' *Litnet Akademies* Jaargang 11 Nommer 1 Maart 2014.

[48] Mostert op cit note 2 at 57.

[49] The mineral rights holder held rights to minerals either as the owner of the land in respect of which the minerals were found or was the lease holder of mineral rights by virtue of an agreement which was regarded as a real right when registered against the title of the land.

[50] Mostert op cit note 2 at 70.

[51] Ibid at 70.

mining could take place in respect of the minerals held. This meant that the mineral right holder's entitlements were broad enough to prevent exploitation of the mineral resources.[52]

The claims of indigenous groups to communal rights to land were ignored from the start of the colonial period that led to the dispossession of land on the grounds of race-based policies by the apartheid state.[53] The race-based policies of pre-democratic South Africa permitted land ownership predominantly for the white population.[54] The law relating to land applicable to white people was based on the Roman-Dutch property law, which was introduced during the colonial period.[55] The law applicable to land reserved for other race groups were based on customary law as amended by legislation.[56] Access to minerals by the white population occurred in accordance with the Roman-Dutch property law with customary law and the rights to communal land not being considered. This historical position led to an inequitable society. The adoption of the MPRDA, in response to this untenable situation, followed the tenets of a South African democratic society.[57]

Considering the historical background to the MPRDA, and the need to correct past imbalances and inequities, an opportunity to herald a new mineral law dispensation, presented itself.[58] The introduction of state custodianship of mineral resources was necessitated by the failure of the state to use its regulatory powers to benefit all South Africans in previous mineral law dispensations.[59] The failure by the state to use its regulatory and fiduciary powers to protect and promote the mineral and petroleum resources on an equal basis justifies the adoption of state custodianship.[60] One of the main objectives of state custodianship is to provide the means for transforming the previous discriminatory mineral law dispensation by promoting equitable

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[52] *Agri South Africa* (GNP) supra note 21 at 177D-E; *Agri South Africa* (ZACC) supra note 21 at para 43.

[53] OL Zirker 'This land is my land: The evolution of property rights and land reform in South Africa (2002-2003) 18 *Conn J Intl L* 621 – 641 624; E Van der Schyff *Property in Minerals and Petroleum* (2016) at 18.

[54] AJ van der Walt 'Property rights and hierarchies of power: A critical evaluation of land-reform policy in South Africa' (1999) 64 *Koers* 259-294; E Van der Schyff op cit note 53 at 18; Mostert op cit note 2 at 74; DL Carey Miller and A Pope *Land Title in South Africa* (2000) 1-3.

[55] AJ van der Walt 'Dancing with Codes – Protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *SALJ* 258-310; AJ van der Walt 'Property rights and hierarchies of power: A critical evaluation of land-reform policy in South Africa' (1999) 64 *Koers* 259-294;

[56] D van der Merwe 'Land tenure in South Africa: Changing the face of property law' (1990) 1 Stell LR 321 – 335; AJ van der Walt op cit note 53 at 258-310; AJ van der Walt op cit note *53 at* 259-294; E Van der Schyff op cit note *53 at* 19.

[57] Van der Schyff op cit note 53 at 27; Mostert op cit note 2 at 74.

[58] Mostert op cit note 2 at 69.

[59] Ibid at 75.

[60] Ibid.

access to mineral and petroleum resources to all the people of South Africa.[61] Transformation is further pursued by expanding opportunities for historically disadvantaged persons[62] to benefit from the exploitation of mineral and petroleum resources.[63]

The powers of the state-as-custodian are to promote equitable access to and socio-economic development of mineral and petroleum resources in an ecologically sustainable manner.[64] The MPRDA encapsulates the objectives of transformation with regard to mineral and petroleum resources.[65] These objectives focus on ensuring equitable access to mineral resources, eradicating the injustices of the past and facilitating a more competitive mining industry.[66]

The transformative nature of the MPRDA emboldens the law to entrust the state with exercising control over mineral and petroleum resources. It also enables the state to regulate equitable access to these resources. Therefore, access to minerals is not dependent on rights flowing from the conclusion of private agreements, such as prospecting contracts and mining leases concluded before the MPRDA.[67] Equitable access to mineral resources depends solely on the allocation of a right by the state.[68] More importantly, access to mineral resources is provided on a non-discriminatory basis considering past policies of restricted access[69] to land and

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[61] Section 2(b) of the MPRDA.

[62] Section 1 of the MPRDA defines 'historically disadvantaged person' as follows;

(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;

(b) any association, a majority of whose members are persons contemplated in paragraph (a);

(c) any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the member's votes;

[63] Section 2(c) of the MPRDA.

[64] Section 3(3) of the MPRDA determines:

'(3) The Minister must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national policy, norms and standards while promoting economic and social development.'

[65] Section 2 of the MPRDA.

[66] Ibid; Mostert op cit note 2 at 78.

[67] H Van Niekerk Towards a New Understanding of Mineral Tenure Security: The demise of the property-law paradigm (unpublished PhD thesis, UCT 2016) 27.

[68] Mostert op cit note 2 at 81.

[69] The Mining Rights Act of 1967 excluded black people from access to mineral resources. The introduction of the Mining Rights Amendment Act 12 of 1991 and the Minerals Act of 1991 initiated the removal of discriminatory measures but did not remove all such measures. Theses mineral laws reflected the segregation and homelands policies of the governments prior to the first democratic government elected on 27 April 1994. The MPRDA effectively addresses the above discriminatory practices by introducing the principle of state custodianship in terms whereof equal access to minerals is administratively controlled by the state. See Mostert op cit note *2 at* 69.

mineral resources.[70] The MPRDA intentionally terminates the ability of a previous mineral rights holder (in terms of the 1991 Minerals Act) to hold and dispose of mineral rights.[71]

## 1.5 Substantive Content and Legal Extent of State Custodianship

This research intends to contribute to the discipline of mineral law due to the introduction of a new mineral law mineral regime by the MPRDA under the overarching notion of state custodianship. It is therefore important to understand the nature of state custodianship exercised on behalf of the people of South Africa.[72]

The MPRDA heralds increased control by the state over the granting, exercise and retention of rights regarding mineral resources. This thesis analysis to what extent control by the state is increased by introducing the principle of state custodianship.[73] While state custodianship has been described as the administrative ability to grant the right to prospect or mine to others,[74] this thesis argues that the powers of administrative decision-making represent only one dimension of the mineral law system.[75]

The provision in the MPRDA that prospecting and mining rights are limited real rights[76] provides another dimension to the extent that it adds a private law obligation to the current mineral law dispensation.[77] The research explores the transformative effect of the MPRDA as shifting the basis of mineral law into the domain of public law.[78] It has been suggested that, by

[70] Mostert op cit note 2 at 78.

[71] *Agri South Africa* (ZACC) supra para 42; Minerals Act of 1991

[72] E Van der Schyff 'Unpacking the Public Trust Doctrine: A Journey into Foreign Territory' (2010) 12 PER 122 at 130; M Dale, L Bekker, F Bashall, M Chaskalson, C Dixon, G Grobler, C Loxton, M Ash and A Cox *South African Mineral and Petroleum Law* (2005, Service Issue 16, 2014) at 121; PJ Badenhorst, JM Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 670; H Mostert op cit note 2.

[73] Mostert op cit note 2 at 78.

[74] Ibid at 114.

[75] Ibid at 113.

[76] Section 5(1) of the MPRDA.

[77] Mostert op cit note 2 at 114; MO Dale 'Comparative International and African mineral law as applied in the formation of the new South Africa' in E Bastida, T Wälde and I Warden-Fernandez (eds) *International and Comparative Mineral Law and Policy: Trends and Prospects* (2005) The Hague, Kluwer Law International at 824.

[78] Dale et al op cit note 72 at para 91.2.1.

administering a state-controlled mineral law dispensation mandated by statute, the MPRDA has led to the principles of mineral law increasingly being more akin to public law.[79]

The research posits that the state has a fiduciary duty towards the nation's mineral and petroleum resources.[80] The state's fiduciary duty has been defined as the exercise by one party of discretionary power of an administrative nature over another party's interest.[81] The fiduciary responsibility vested in the state with the power to regulate access to and use of natural resources for the benefit of the public will be discussed.[82] This thesis discusses the several duties placed on the state-as-custodian by the MPRDA in the administration of the mineral resources of South Africa. Articulating these duties, as is the intention of this thesis, will assist in determining the content of state custodianship as per the objects of the MPRDA.[83] These duties include the duty imposed on the state-as-custodian to ensure that transformation, socio-economic development and the promotion of employment takes place in the mining industry[84] whilst ensuring optimal mining of mineral resources.[85]

It is posited by this research that by complying with the provisions of the MPRDA, the state is bound to enforce the required standard of care. It must also comply with duties of impartiality,[86] accountability and independence, which resemble the duties of private law trusteeship. Therefore, the system of private-law trusteeship provides an instructive basis for determining the fiduciary responsibilities to be assigned to the state-as-custodian. This thesis analyses whether and to what extent principles relating to private law trusteeship may be relevant in determining the substantive content of the nature of state custodianship.

As stated above, the purpose of the thesis is to determine the legal content of the concept of state custodianship. The extent to which academic opinion and the courts have guided the

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[79] Mostert op cit note 2 at 115; Van Niekerk op cit note 67 at 55.

[80] Van Niekerk op cit note 67 at 55; E Fox-Decent 'The Fiduciary Nature of State Legal Authority' 31 *Queens's Law Journal*, 1 February 2008, available at SSRN: https://ssrn.com/abstract=1090292 accessed on 5 May 2017 at 261.

[81] Ibid at 261.

[82] E Van der Schyff Stewardship Doctrines of Public Trust: Has the Eagle of the Public Trust landed on South African soil? (2013) South African Law Journal 370 at 379.

[83] Sections 21(1), 22(2), 23(5), 28(1) & (2) of the MPRDA.

[84] Regulations published in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002): Mineral and Petroleum Resources Development Regulations as published in Government Notice R 527 in Government Gazette 26275 of 2004.

[85] Section 54(1) of the MPRDA.

[86] Sections 41 and 195 of the Constitution.

development of the principle of custodianship. The principles of public trusteeship and the Public Trust Doctrine[87] will be studied in relation to the environment, water and minerals to provide a deeper understanding of the principle of state custodianship.

## 1.6 The Research Question and Hypothesis

This thesis aims to determine the legal content of state custodianship in the context of mineral resources. A study as to whether the new mineral regime, heralded by the MPRDA, caused mineral law to shift its centre of gravity from private law to public law, and in particular assume an administrative law basis, will be undertaken.[88] The MPRDA attempts to address centuries of inequality caused by preceding mineral law regimes. Its concern is the unequal access to mineral resources that manifested before the current mineral law dispensation under the overarching concept of state custodianship.[89] Furthermore, section 3 of the MPRDA provides that the mineral and petroleum resources belong to the nation. This pronouncement is problematic from a private-law perspective as the nation cannot own mineral resources in terms of the theory of subjective rights.[90] Introducing the principle of state custodianship creates an opportunity to offer a legal perspective on its substantive content. The application of public-law principles, in particular administrative law, assists in defining state custodianship.

The MPRDA does not define the fiduciary responsibilities of the state. The private-law fiduciary relationship between beneficiaries and trustees will contribute to understanding the nature of the state's fiduciary relationship. One of the questions that arise is whether the private-law fiduciary duties, being the duty to impartiality, the duty to independence, the duty to accountability and the duty of care towards the nation, is applicable in defining and limiting the powers of the state-as-custodian. The applicability of the aforementioned fiduciary principles in providing content to the notion of state custodianship is examined. The question also arises whether limitations to state custodianship are found in applying private-law principles. The study scrutinizes these limitations and their applicability to state custodianship.

[87] Van der Schyff op cit note 72.

[88] Mostert & Van den Berg op cit note 22.

[89] Preamble to the MPRDA.

[90] D Watson *Ownership of and Custodianship over Unsevered minerals: The Impact of the MPRDA* (unpublished LLB research paper, University of Cape Town, 2009); Dale et al op cit note 72 at para 121-122.

A further aspect of state custodianship considered is the extent of the legal duties required of the state to fulfil its fiduciary duties and responsibilities as a custodian.[91] The thesis also discusses the extent to which these duties and responsibilities emanating from the Constitution require the state to ensure fulfilment of the MPRDA's transformative ideals.

This thesis examines whether the American doctrine of public trusteeship assists in determining the meaning of state custodianship. It also examines whether the principle of public trusteeship is applicable and the extent to which guidance can be obtained in determining the legal duties and responsibilities of the state, as custodian of the nation's mineral and petroleum resources. This thesis also discusses whether the MPRDA introduces the principle of stewardship. It looks at whether the principle of stewardship is applicable within the context of the duties and responsibilities of the state acting as custodian of the mineral resources.

This research relies on guidance from relevant case law insofar as reference is made to the principle of state custodianship. The MPRDA explicitly assumes control of the allocation of mineral rights and terminates the rights of common law mineral rights holders to exercise control over whether mineral resources should be exploited. The extent of guidance by the courts to provide clarity on the overarching concept of state custodianship is accordingly investigated.

The research, therefore, aims to analyse how state custodianship of mineral resources, as introduced by the MPRDA, shifts mineral law's centre of gravity from private law to public law. The research asks how the new administrative law basis of mineral law is to be understood.

In addressing the above research question, the following questions will be considered:

1. What are the substantive principles that define the concept of state custodianship?
2. What are the legal duties and responsibilities of the state, as custodian?
3. What are the legal limitations to state custodianship?
4. What is the legal content of the fiduciary duties of the state that form part of the concept of state custodianship?
5. To whom is the state, as custodian, responsible for exercising its fiduciary duties?
6. To what standards must the state fulfil its duties and responsibilities as a custodian.

[91] Section 3 of the MPRDA.

These questions are addressed in the ensuing chapters and summarised in the concluding chapter.

## 1.7 Methodology

This thesis intends to develop and understand the meaning and legal content of state custodianship of the nation's mineral and petroleum resources. The context within which the MPRDA introduced the principle of state custodianship will be researched. A comparison of the mineral law regime regulated by the Minerals Act of 1991 with the current mineral law introduced by the MPRDA will be undertaken to indicate the extent of the changes brought about by introducing the principle of state custodianship.

The substantive principles of state custodianship are researched with reference to the theory and concepts that underlie the principles of ownership of unsevered minerals. It will be required to undertake a historical analysis and discussion of the Roman and Roman-Dutch law to determine where the ownership of unsevered minerals is currently vested. Therefore, the methodology will also entail researching the property law principles underlying the nation's ownership of mineral resources.

This thesis furthermore considers underlying principles of the notion of public trusteeship and the American Doctrine of Public Trust to establish whether the underlying principles may be relevant to determine the substantive content of state custodianship. The relevance between the notion of public trust in the American Doctrine of Public Trust and state custodianship will be explored to establish its meaning within the mineral and petroleum resources framework.

In determining whether the notion of state custodianship allocates fiduciary duties to the state, this thesis intends to determine the relevance of private-law fiduciary duties applicable to trustees for the mineral resource context. Insofar as it may be of assistance, relevant case law will be considered.

For purposes of consistency and coherency, it is argued that the notion of state custodianship must be developed primarily with reference to South African law principles. The development of the notion of state custodianship must however be guided by the interpretation of relevant

foreign law concepts, such as the American Public Trust Doctrine and the principle of stewardship, where it may serve to assist the development of South African law in this regard.[92]

## 1.8 Thesis Structure

This thesis comprises five parts. The following structure is followed in addressing the research questions.

**Part One** provides a general introduction to the thesis and comprises one chapter.

Chapter One discusses the background to the research. It deals with the circumstances that led to the introduction of the principle of state custodianship and the underlying reasons for the new mineral law dispensation. It further sets out the research questions and the methodology to be followed.

**Part Two** deals with the relevant legislation for determining the legal content of state custodianship.

Chapter Two examines the mineral law framework that existed after the adoption of the Minerals Act of 1991 until the promulgation of the MPRDA. The perception created by the Minerals Act that it privatised mineral rights before the introduction of democracy in 1994 is discussed, as well as the historically unequal access to mineral and petroleum resources and its detrimental socio-economic consequences. The underlying Roman and Roman-Dutch law that formed the basis of the previous mineral law dispensation is also discussed.

Chapter Three outlines the current mineral law framework introduced by the MPRDA, effective from 1 May 2004. The introduction of state custodianship is discussed with reference to the nation's ownership of the mineral resources and the state being declared custodian thereof. The objectives of the MPRDA are also examined to provide the basis for a study of the underlying principles of the notion of public trusteeship and the American Public Trust Doctrine.

**Part Three** consists of four chapters that undertakes a theoretical study of the legal framework within which the principles underlying the principle of state custodianship are also discussed.

[92] Mostert & Van den Berg op cit note 22.

Chapter Four aims to discuss the theory and concepts that underlie the principles applicable to the concept of state custodianship. A discussion of the historical and legal basis of the principles of ownership is undertaken. It includes deprivation and expropriation of ownership. The purpose is to determine the impact of state custodianship on the ownership of unsevered minerals.

Chapter Five considers case law that has referred to the principle of state custodianship. Reference is made to the courts' hesitation to pronounce on the principle of state custodianship, despite having had the opportunity to do so. The guidance provided by the courts is furthermore considered and discussed as far as is relevant.

Chapter Six addresses the principle of public trusteeship and the American Doctrine of Public Trust in so far as it may be relevant to state custodianship. The comparative principles and theories of public trusteeship and the Doctrine of Public Trust are discussed.

Chapter Seven determines the nature of the fiduciary duties of state custodianship with reference to private law trusteeship. Reliance is placed on the well-established fiduciary principles relating to private law trusteeship. The important fiduciary duties afforded to beneficiaries within the context of private law trusteeship are discussed with reference to the duty of care, the duty of independence, the duty of impartiality and the duty of accountability.

Part Four consists of two chapters discussing the standard to which the state-as-custodian conducts its duties.

Chapter Eight discusses the legal context and the standard to which the state is expected to implement its policies on behalf of the nation as the owner of the mineral resources. The standard to which the state-as-custodian can be expected to deliver services is also discussed.

Chapter Nine discusses the interests of the different stakeholders brought about by adopting the principle of state custodianship. The new regulatory environment requires that the legal interests of various stakeholders are to be balanced by the state as custodian.[93]

**Part Five** deals with the conclusion and summary of the thesis.

Chapter Ten will focus on the research results and provide recommendations on the research and subsidiary questions.

[93] Section 2 of the MPRDA.

# CHAPTER TWO: THE HISTORICAL LEGAL POSITION BEFORE THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT (MPRDA)

## 2.1 Introduction

The discovery of mineral resources in South Africa had a significant impact on its history.[94] In particular, the discovery of diamonds in 1867 and gold in 1884 caused many wars, uprisings, investment of foreign capital and led to the development of the law.[95] Although the law of minerals developed from property law, the first Europeans who arrived in the seventeenth century relied heavily on statutory law to regulate minerals.[96]

The MPRDA distinguishes itself from its predecessors by statutorily introducing the notion of state custodianship and the accompanying administrative decision-making.[97] This chapter focuses on developing mineral and mining law with the inception of the Union in 1910, which led to the eventual introduction of state custodianship by the Minerals and Petroleum Resources Development Act (the MPRDA).[98] First, the legal position that existed before 1991 with the adoption of the Minerals Act is discussed.[99] Secondly, it discusses the legal position that existed after the promulgation of the Minerals Act in 1992[100] until the adoption of the MPRDA[101] currently in force.

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[94] Mostert op cit note 2 at 15 and the reference to M Meredith *Diamonds, Gold and War: The making of South Africa* (2007/2008) Jeppestown, Jonathan Ball Publishers at 2.

[95] Mostert op cit note 2 at 69 and the reference to CW Kiewiet *British Colonial Policy and the South African Republics 1848-1872* (1929) London Longmans Green and Co Ltd at 279. The discovery of diamonds in 1867 in the Orange Free State and gold in 1886 on the Witwatersrand in the Transvaal Republic, led to the South African War during 1899 to 1901 between Britain and the Boer Republics of the Transvaal Republic and the Orange Free State.

[96] Ibid at 15.

[97] Ibid at 18; see section 3 of the MPRDA which introduces the notion of state custodianship over the nation's mineral resources.

[98] Section 3 of the MPRDA.

[99] Minerals Act 50 of 1991.

[100] The Minerals Act 50 of 1991 came into force on 1 January 1992.

[101] The MPRDA.

The development of mineral law takes place within four different 'generations' of statutory law.[102] The four generations[103] are the first statutes regulating minerals and mining during the period between 1910 and the 1960s.[104] The laws during this period reflected piecemeal and haphazard regulation, influenced by colonial laws which existed before the formation of the Republic of South Africa in 1961.[105] The second-generation[106] deals with the mineral and mining laws underpinned by-laws adopted from 1964, such as the Precious Stones Act,[107] the Mining Rights Act[108] , and the Mining Titles Registration Act.[109] The adoption of the Minerals Act in 1991 identifies the third generation, which intended to impose drastic changes regarding privatisation.[110] This generation introduces a strict system of authorisations required for the exercise of mineral rights and the extraction of minerals and ends with the promulgation of the MPRDA in 2004.[111] The MPRDA, as a fourth-generation law, statutorily introduces the notion of state custodianship.[112]

The history of mineral law before 2002 motivates and contextualises the need to adopt the MPRDA and its promulgation in 2004[113] by South Africa's democratically elected government.[114] The historical reasons for the legislative introduction of state custodianship with the adoption of the MPRDA is therefore discussed. Increased control over the granting of mineral rights in accordance with the MPRDA and the shifting of the gravitational centre of

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[102] Mostert op cit note 2 at 16

[103] E van der Schyff *Property in Minerals and Petroleum* (2016) Juta at 99 distinguishes between six different phases in the development of South African mineral law. The first phase is the development of the law in the Cape of Good Hope soon after the arrival of Dutch colonialists in the seventeenth century, the second by the pre-Union legislation followed by the post-Union mining legislation. The fourth phase is the consolidation of mining legislation during the 1960s whilst the fifth phase is marked by the enactment of the Minerals Act 50 of 1991, followed by the MPRDA which came into operation on 1 May 2004.

[104] Mostert op cit note 2 at 17 where 'four generations' of statutory regulation are identified. The 'first generation' of mineral laws and regulation reflects the period 1867 until 1964.

[105] Mostert op cit note 2 at 17. The Republic of South Africa was formed on 31 May 1961.

[106] Ibid at 18. The 'second generation' commenced with the adoption of the Precious Stones Act in 1964 until the adoption of the Minerals Act in 1991.

[107] Precious Stones Act 73 of 1964.

[108] Mining Rights Act 20 of 1967.

[109] Mining Titles Registration Act 16 of 1967.

[110] Mostert op cit note 2 at 18.

[111] Ibid. The 'third generation' reflects the period with the introduction of the Minerals Act in 1991 to the promulgation of the MPRDA in 2004.

[112] Ibid. Also see section 3 of the MPRDA which introduces the notion of state custodianship over the nation's mineral resources.

[113] The MPRDA came into operation on 1 May 2004.

[114] The first democratically elected government was elected on 27 April 1994.

South African mineral law from private law to public law, require a discussion of the mineral law dispensations before the MPRDA. This discussion illustrates the need for the introduction of state custodianship of mineral resources.

## 2.2 Pre-1991 Mineral and Petroleum law

Europeans ignored the rights of indigenous communities to land and minerals with their arrival in South Africa.[115] The development of the Roman-Dutch legal system, introduced as the common law in South Africa, did not recognize communal ownership interests.[116] Two different legal systems, the Roman-Dutch common law system and the indigenous law, developed in various situations within different cultures and response to various conditions.[117] During the colonial and apartheid systems, the laws aimed at different race groups enabled certain racial groups to exploit mineral resources. In contrast, the apartheid government excluded other groups from benefitting directly from the mineral wealth.[118] Forced displacements from land to open up opportunities for mineral exploitation disregarded indigenous communities' claims to land and minerals to the benefit of Europeans.[119]

The Roman-Dutch common law premise that the landowner is the owner of the minerals found on and below the land's surface formed the basis of mineral law in South Africa.[120] This premise is based on the Roman-Dutch principle of *cuius est solum eius et usque ad coelum et ad inferos,* which determines that the land ownership decided the ownership of what lay beneath the surface of private land.[121] However, South Africa's mineral and petroleum exploitation was statutorily controlled and regulated by the state considering this principle.[122] The following section discusses the state's role in the control and development of South

[115] Van der Schyff op cit note 1177 at 97.

[116] Ibid at 97 and the reference to *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) at para 56.

[117]Ibid at para 56.

[118] Ibid at para 97.

[119] Ibid at para 98.

[120] Ibid at para 98 and the reference to *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others* 1996 (4) SA 499 (A) 537 and H Mostert and A Pope (eds) *The Principles of the law of property in South Africa* (2010) Oxford University Press at 269.

[121] Ibid at 99; MO Dale *An Historical and comparative study of the concept of acquisition of mineral rights* (unpublished LLD research paper, University of South Africa, 1979) at 78; GJ Pienaar 'Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief' 1986 *JSAL* at 295.

[122] Van der Schyff op cit note 1177 at 99.

African mineral law and the regulatory powers regarding minerals that existed with the formation of the Union of South Africa until the adoption of the Minerals Act in 1991.[123]

### 2.2.1 The Union of South Africa

With the formation of the Union of South Africa in 1910,[124] precious stones and precious metals were generally reserved to the state,[125] with the state reserving rights to base minerals.[126] The Base Minerals Amendment Act adopted in 1942[127] changed the policy regarding base minerals and metals as first, it applied to both state and private land. Secondly, it intended to ensure that the development of mining base minerals in South Africa could occur without frustration from private holders of mineral rights.[128] The state had the power to force the holder of base mineral rights to prospect for such minerals, failing which the Minster could call for tenders and grant mining leases to prospectors.[129] The purpose of the above act was to enable the state to force holders of mineral rights to seek base mineral rights.[130] It regulated, rather than removed, the mineral right holder's ability to prospect for base minerals.[131]

The state reserved for itself the right to prospect and mine for natural gas by adopting the Natural Oils Act of 1942,[132] with landowners regarded as the holders of the rights to natural oil.[133] The right to prospect, mine, and dispose of minerals such as uranium, thorium, and other

[123] Minerals Act 50 of 1991.

[124] The Union of South Africa was formed on 31 May 1910 and consisted of the Cape Colony, Natal, the Orange Free State and Transvaal.

[125] Van der Schyff op cit note 1177 at 126; Precious Stones Act 44 of 1927.

[126] Van der Schyff op cit note 1177 at 126 and the reference to section 1 of the Gold Law 35 of 1908; section 31(1) of the Land Settlement Act 12 of 1912; Land Settlement Act 23 of 1917; Land Settlement Act 21 of 1956 and the Reserved Minerals Development Act 55 of 1926.

[127] Base Minerals Amendment Act 39 of 1942.

[128] Van der Schyff op cit note 1177 at 126 and the reference to MO Dale *An historical and comparative study of the concept of acquisition of mineral rights* (unpublished PhD research paper, University of South Africa, 1979) at 226.

[129] Base Minerals Amendment Act 39 of 1942; see Van der Schyff op cit note 1177 at 127.

[130] Ibid.

[131] Ibid.

[132] Natural Oils Act 46 of 1942.

[133] Section 7 of the Natural Oils Act 46 of 1942; Van der Schyff op cit note 1177 at 127.

materials, is also vested in the state.[134] Landowners or holders of mineral rights were entitled to a royalty. Landowners were also entitled to compensation for the use of their land.[135]

Therefore, the state was actively involved in ensuring that the mineral wealth of South Africa was exploited beneficially and in an orderly manner. [136] Although the state did not assert the right to mine base minerals for itself during this period,[137] it did assume regulatory control of the right to mine. Such control did not extend to an appropriation of the landowner's mineral rights.[138]

The mineral law dispensation discussed above operated within the apartheid land law system. The Native Land Act of 1913[139] and the South African Development Trust Act of 1936[140] formed the cornerstone.[141] In terms of the South African Development Trust Act, the State President of the Republic was the trustee of the trust, while all mineral rights of communities were held in trust on their behalf.[142] As black people were not allowed to own land, the trust's purpose was to acquire mineral rights and administer the trust on their behalf.[143] Therefore, they could not acquire rights to minerals based on acquiring the ownership of the land itself.[144]

The South African Development Trust Act required the written consent of the minister to commence with prospecting or mining activities.[145] It furthermore provided that, subject to the provisions of the act, the trust would be in the same position as a private holder of mineral rights.[146] Consequently, white people were allowed to benefit from the mineral wealth of South Africa, while black people were excluded from the same benefits.[147]

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[134] Ibid at 128; Atomic Energy Act 35 of 1948.

[135] Van der Schyff op cit note 1177 at 128; Natural Oils Act 46 of 1942.

[136] Van der Schyff op cit note 1177 at 128.

[137] Ibid where disagreement is expressed with the judgment in *Minister of Minerals and Energy v Agri SA* 2012 (5) SCA at para 48 which stated that the state asserted for itself the right to mine base minerals during the period discussed.

[138] Van der Schyff op cit note 1177 at 128.

[139] Native Land Act 27 of 1913.

[140] South African Development Trust Act 18 of 1936.

[141] Van der Schyff op cit note 1177 at 128.

[142] South African Development Trust Act 18 of 1936.

[143] Van der Schyff op cit note 1177 at 128; South African Development Trust Act 18 of 1936.

[144] Van der Schyff op cit note 1177 at 128; South African Development Trust Act 18 of 1936.

[145] Section 23 of the South African Development Trust Act 18 of 1936.

[146] Section 23 of the South African Development Trust Act 18 of 1936.

[147] Van der Schyff op cit note 1177 at 128.

### 2.2.2 Mining legislation of the Republic of South Africa before the Minerals Act, 1991

This section deals with legislation adopted by the legislature in South Africa from becoming a republic in 1961[148] until the adoption of the Minerals Act in 1991.[149] Four major statutes were promulgated during the 1960s, which formed the cornerstone of the mineral law dispensation.[150] These acts were the Precious Stones Act of 1964 (PSA), the Mining Rights Act of 1967 (MRA), the Mining Titles Registration Act (MTRA) of 1967, and the Atomic Energy Act (ATE) of 1967.[151]

The PSA reserved the right to mine and dispose of precious stones to the state.[152] This act acknowledged the distinction between the rights to hold precious stones and to mine and dispose of such minerals[153] under various conditions. For instance, the position differed depending on whether mineral right holding was juridically severed from, or followed the juridical destiny of, ownership of the land. A landowner, or holder of the right to precious minerals, was acknowledged to the extent that compensation was payable for the intrusion on his ownership entitlements.[154]

[148] South Africa declared itself a republic on 31 May 1961.

[149] Minerals Act 50 of 1991.

[150] The Precious Stones Act 73 of 1964, the Mining Rights Act 20 of 1967, the Mining Titles Registration Act 16 of 1967 and the Atomic Energy Act 90 of 1967.

[151] The Precious Stones Act 73 of 1964, the Mining Rights Act 20 of 1967, the Mining Titles Registration Act 16 of 1967 and the Atomic Energy Act 90 of 1967.

[152] Section 2 of the Precious Stones Act 20 of 1967.

[153] Section 2 of the Precious Stones Act 20 of 1967.

[154] See sections 45, 52 and 17 of the Precious Stones Act 20 of 1967 which provided for claims licence money, rental and owner's shares.

The MRA and the MTRA distinguished between state land,[155] alienated state land,[156] private land[157] , and land referred to in section 16 of the MRA.[158] However, these acts provided several ways to acquire prospecting or mining rights, the right to prospect for natural oil, and mine and dispose of natural oil and precious metals, vested in the state.[159] The rights of landowners regarding precious metals, base minerals, or natural oil found on or under the surface of their land were confirmed based on their ownership of the land.[160]

Although private rights to minerals were recognised, the state had the right to investigate whether precious metals, natural oil, or base minerals occurred on any land.[161] The authority of the state to exercise this right is indicative of the importance of minerals to South Africa.[162] If the holder of rights to prospect minerals did not exercise those rights, the state could request third parties to exercise such entitlements.[163] The Mineral Laws Supplementary Act[164] adopted in 1975 provided a means to mining companies to obtain mineral rights over land.[165] Furthermore, this act enabled control by the state in that it prohibited the splitting of private mineral rights through testamentary succession without state approval.[166]

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[155] Van der Schyff op cit note 1177 at 130 at footnote 186 describes state land as 'land that is owned by the state, not held by a lessee, and where the state was also the holder of the right to the substances which were to be prospected for and mined on the land.'

[156] Ibid at 130 footnote 187 describes 'alienated state land as land which is not held by the state, (or if so held) which is held by a lessee and the title deed or lease contained a reservation to the state of the right to the particular substance which was to be prospected for and mined on the land.'

[157] Ibid at 130 footnote 188 describes private land as 'land in respect of which the state was not the holder of the right to the metals, minerals or precious stones which were to be prospected or mined for. It was immaterial who held the rights.'

[158] Ibid at 130 footnote 189 describes this as 'land where the rights to precious metals and minerals were held in undivided shares by the state and private entities.'

[159] Ibid at 130 and the reference to section 2 of the Mining Rights Act 20 of 1967 which contained the core principle of the four major acts adopted in the 1960's.

[160] Ibid at 130; the Precious Stones Act 73 of 1964, the Mining Rights Act 20 of 1967, the Mining Titles Registration Act 16 of 1967 and the Atomic Energy Act 90 of 1967

[161] Section 2 of the Mining Rights Act 20 of 1967.

[162] Van der Schyff op cit note 1177 at 131.

[163] Section 15 of the Mining Rights Act 20 of 1967.

[164] Mineral Laws Supplementary Act 10 of 1975.

[165] See Van der Schyff op cit note 1177 at 131; BLS Franklin & M Kaplan *The mining and mineral laws of South Africa* (1982) at 36.

[166] Ibid at 131.

Therefore, the dominium in the minerals or the mineral rights did not vest in the state.[167] It was only the prospecting, mining, and disposal of the minerals which were (to a certain extent) reserved, controlled and regulated by the state.[168] The purpose of the legislation mentioned above was to ensure the optimal exploitation of minerals to develop the economy of South Africa.[169] Of particular note is that issuing a prospecting permit to a black person or any association of black persons or any corporate body or company in which persons held a controlling interest was explicitly prohibited by legislation.[170]

## 2.3 The Minerals Act

The Mining Rights Act of 1967[171] excluded black people from accessing the mining industry.[172] The Minerals Act,[173] which replaced the Mining Rights Act in 1991, did not address the racially discriminatory practices developed during the apartheid era.[174] Independent states[175] and self-governing territories adopted their statutes regarding land and minerals, provided that they were consistent with the Self-Governing Territories Constitution.[176] The Minerals Act did not automatically apply to the independent states and self-governing territories. It was therefore not applicable to all the minerals in the whole of the geographical area of South Africa.[177]

During the late 1980s and early 1990s, the need for a negotiated political settlement necessitated the abolition of apartheid laws to ensure a transitional constitutional

[167] Precious Stones Act 73 of 1964, Mining Rights Act 20 of 1967, the Mining Titles Registration Act 16 of 1967 and the Atomic Energy Act 90 of 1967 and the Mineral Laws Supplementary Act 10 of 1975. Van der Schyff op cit note 1177 at 131; Franklin & Kaplan op cit note 165 at 36.

[168] Van der Schyff op cit note 1177 at 131; Franklin & Kaplan op cit note 165 at 36.

[169] Ibid at 131.

[170] Ibid and the reference to the exception for land owned by black people in the Cape; section 7(3) of the Mining Rights Act 20 of 1967.

[171] Mining Rights Act 20 of 1967.

[172] Mostert op cit note 2 at 69.

[173] Minerals Act 50 of 1991.

[174] Mostert op cit note 2 at 69; Mining Rights Act 20 of 1967.

[175] Self-governing Territories Constitution Act 21 of 1971; see Mostert op cit note 2 at 69 and the reference to Lebowa, Gazankulu, Qwaqwa, Kwa Zulu, Kwa Ndebele, KwaNgwane.

[176] Self-governing Territories Constitution Act 21 of 1971; Mostert op cit note 2 at 69.

[177] Mostert op cit note 2 at 69 and the reference to M Kaplan & MO Dale *A Guide to the Minerals Act 1991* (1992) Durban, Butterworths at 42.

dispensation.[178] During this period, a change in governmental policies on minerals and mining[179] reflected increased privatisation[180] and deregulation of mineral resources.[181] The Minerals Act,[182] which followed the White Paper on the Minerals Policy,[183] repealed various pieces of apartheid-era legislation.[184] However, provisions of the Mining Titles Registration Act[185] that provided transitional measures[186] in the Minerals Act relating to statutory rights registered or registrable in the Mining Titles Office were retained.[187]

The Minerals Act sought to devise a uniform regulation of minerals using a system of 'authorisations' instead of the previous regulatory control by a 'conferral' of rights.[188] The government had the duty to regulate prospecting, exploitation, processing, and utilisation of minerals and enforce health and safety practices and rehabilitation measures.[189] Furthermore, the act sought to introduce a more simplified system of prospecting, mining, and surface rights, than was prevalent under previous legislation.[190] In addition to other measures to simplify the system of mineral rights,[191] all pre-existing classifications of land and minerals became

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[178] Mostert op cit note 2 at 69. The first democratic elections in South Africa were held on 27 April 1994.

[179] *White Paper on the Minerals Policy of the Republic of South Africa* (1986) at 5-6. See PJ Badenhorst 'The revesting of state-held entitlements to exploit minerals in South Africa: privatisation or deregulation*'* 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 113; Mostert op cit note 2 at 57.

[180] Mostert op cit note 2 at *57* describes privatisation within the mineral law context as "the systematic transfer of state functions, actions or property to the private sector, where services, production and consumption could be regarded by market and price mechanisms."

[181] Ibid at 57 with reference to PJ Badenhorst 'The revesting of state-held entitlements to exploit minerals in South Africa: privatisation or deregulation' 1991 *Tydskrif vir die Suid-Afrikaanse Reg* 113 describes deregulation as the "process by which the restrictive effect of state regulation on private enterprise, competition and the creation of jobs was reduced." Also see PJ Badenhorst, H Mostert & M Dendy *Minerals and Petroleum* in WA Joubert (ed) LAWSA Vol 18 2 ed (2007) Durban Lexis Nexis para 1.

[182] The Minerals Act 50 of 1991 came into force on 1 January 1992.

[183] White Paper on the Minerals Policy of the Republic of South Africa (1986).

[184] Mostert op cit note 2 at p 58. The Precious Stones Act 73 of 1964 and an extensive part of the Mining Rights Act 20 of 1967 were repealed with only limited sections of the Mining Titles Registration Act 16 of 1967 being retained.

[185] Mining Titles Registration Act 16 of 1967.

[186] Chapter VII of the Minerals Act 50 of 1991.

[187] Mostert op cit note 2 at p 58 and the reference to PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 5ed (2006) Durban LexisNexis at 668.

[188]Mostert op cit note 2 at p 58 and the reference to Kaplan & Dale op cit note 177 at 10.

[189] Ibid at p 58; Badenhorst, Mostert & Dendy op cit note 181.

[190] Mostert op cit note 2 at 58

[191] Mostert op cit note 2 at p 58 and the measures indicated, which include rules regarding prescribed health and safety standards, rehabilitation, surface use, acquisition of land and the payment of compensation in respect of open cast and surface prospecting operations. Also see Kaplan & Dale op cit note 177 at 12 -15.

irrelevant in that they uniformly referred to land and minerals.[192] The objectives of the Minerals Act were the optimal utilisation of the country's mineral resources, increased mine health and safety, and improved rehabilitation measures.[193]

Common-law mineral rights to precious stones and precious metals were curtailed in that the right to prospect and mine these minerals were vested in the state.[194] The adoption of the Minerals Act terminated all rights to prospect and mine mineral resources awarded by the government in the form of permits or leases before the adoption of the Minerals Act.[195] The consequence was that the 'common law' rights[196] of surface owners and mineral rights holders were 'revived' by the awarding by the government of common-law forms of rights and consents by the owners or holders of such rights.[197] Despite the 'revival' of these rights, the state required the necessary authorisations to conduct activities relating to mineral resources. With the first democratic government election in 1994,[198] the opportunity to rationalise the different conflicting mineral law systems led to adopting the Minerals and Petroleum Resources Development Act.[199] The MPRDA provided the opportunity to address exclusion and racial discrimination embedded in the previous mineral law systems.[200] The following section discusses the effect of the Minerals Act of 1991 on the development of the mineral law, with particular focus on the extent of regulatory control by the state on the mineral resources in South Africa.[201]

### 2.3.1 The Impact of the Minerals Act

The Minerals Act transferred the right to prospect, mine, and dispose of precious metals and minerals to the holder of the common law rights.[202] A mineral rights holder, or someone who

[192] See Mostert op cit note 2 at 58.

[193] Ibid at 59; Kaplan & Dale op cit note 177 at 11.

[194] Mostert op cit note 2 at 59.

[195] Ibid at 59; Kaplan & Dale op cit note 177 at 16.

[196] Mostert op cit note 2 at 59 where reference is made to 'common law' rights such as ownership, leases and servitudes, mineral rights holdings, prospecting contracts or mineral leases).

[197] Ibid at 59; section 5 of the Minerals Act.

[198] The first democratic election in South Africa was held on 27 April 1994.

[199] The MPRDA came into effect on 1 May 2004.

[200] Mostert op cit note 2 at 69

[201] Mostert op cit note 2 at 59; Kaplan & Dale op cit note 177 at 17.

[202] Mostert op cit note 2 at 59.

had acquired the consent of the mineral rights holder, had the right to enter upon the land for purposes of prospecting or mining.[203] Section 5(1) of the Minerals Act, therefore, restated the common law position.[204]

The effect of section 5(1) of the Minerals Act was more limited than the common law position as authorisations to prospect or mine were still required to exercise these rights.[205] However, the intention was to interpret the above section in conformity with the common law.[206] Therefore, the Minerals Act departed substantively from earlier mineral laws by setting a different legal framework.[207]This act merged the different types of minerals by providing a unified definition of 'minerals.' It introduced a unified approach to the different types of land to apply for authorisations to prospect or mine.[208]

The main departure from the previous mineral system was the government's control over the exercise of mineral rights, which implemented a system of authorisations.[209] The previous system consisted of a conferral system where the rights to minerals were vested in the state.[210] The system of authorisations provided the state with a control mechanism to ensure that the three main principles of the Minerals Act, being optimal utilisation of mineral resources, health and safety, and rehabilitation, were advanced.[211] Authorisation from the holder of the mineral rights for the exercise of the mineral rights or authorisation by any person who had obtained the written authorisation of the holder of such mineral rights to prospect for minerals was required.[212] An authorisation was similarly required in terms of the Minerals Act by the holder of the mineral rights or the person who obtained permission from the holder of the mineral rights before mining could occur.[213]

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[203] Section 5(1) of the Minerals Act; Mostert op cit note 2 at 59.

[204] Mostert op cit note 2 at 59.

[205] Section 5(2) of the Minerals Act 50 of 1991; *Balmoral Investments (Edms) Bpk v Minister van Mineraal-en Energiesake* 1995 (9) BCLR 1104 (NC) at 1110; Mostert op cit note 2 at 59.

[206] Ibid at 60; Kaplan & Dale op cit note 177 at 9.

[207] See Mostert op cit note 2 at 60 and the reference to Kaplan & Dale op cit note 177 at 16 and 179.

[208] Mostert op cit note 2 at 60.

[209] Kaplan & Dale op cit note 177 at 5.

[210] Mostert op cit note 2 at 60; Kaplan & Dale op cit note 177 at 16.

[211] Sections 6(2)(b), 9(3)(b) and 9(1) of the Minerals Act 50 of 1991; See Mostert op cit note 2 at 62 and the reference to Kaplan & Dale op cit note 177 at 11.

[212] Section 5(2) of the Minerals Act 50 of 1991; See Mostert op cit note 2 at 63.

[213] Section 5(2) of the Minerals Act 50 of 1991; Mostert op cit note 2 at 63.

According to the Minerals Act, a prospecting permit or mining authorisation could be suspended, canceled, or abandoned; or it could lapse.[214] In particular, failure by the holder to comply with the Minerals Act could lead to a suspension or cancellation of the prospecting permit or mining authorisation.[215] Suspension or cancellation was compulsory[216] where the holder failed to comply with the rehabilitation of the land's surface.[217]

The permission to remove samples of minerals lapsed with the lapsing of the prospecting permission[218] or suspended or canceled in instances of non-compliance or contravention of the Minerals Act.[219] According to the prescribed process, a holder of a permission had to receive a written notice to comply with the conditions of the permission within a specific period.[220] Where the state's security could be jeopardised by the continued existence or issuing or granting of a prospecting right, the Minister of Minerals and Energy could withdraw the permission.[221]

A holder of a prospecting permit, mining authorisation, or any portion of land for which the permit or authorisation was granted could abandon such permit, mining authorisation, or any portion of land by giving notice in writing to the Regional Director of Mineral Development.[222] However, a prospecting permit or mining authorisation could not be alienated, transferred, ceded, or encumbered by a mortgage.[223] Abandonment of such a permit or authorisation could occur by written notice to the Regional Director of Mineral Development, similar to the abandonment of a portion of the related land.[224] Such an abandonment was regarded as a lapsing of the permit or right, to the extent indicated in the written notice to the Regional Director of Mineral Development. Although such an abandonment could be regarded as alienation by the holder of an underlying mineral right, the alienated right could only be re-activated by lodging a new application for authorisation.[225]

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[214] Section 11(1) of the Minerals Act 50 of 1991; Mostert op cit note 2 at 63.

[215] Section 11(1) of the Minerals Act 50 of 1991; Mostert op cit note 2 at 63.

[216] Section 14(1) of the Minerals Act 50 of 1991; Mostert op cit note 2 at 63.

[217] Section 38 of the Minerals Act 50 of 1991; Mostert op cit note 2 at 63.

[218] Section 8(4) of the Minerals Act 50 of 1991.

[219] Section 14(1) of the Minerals Act 50 of 1991.

[220] Section 14(2) of the Minerals Act 50 of 1991.

[221] Section 14(3) of the Minerals Act 50 of 1991.

[222] Section 11(3) of the Minerals Act 50 of 1991

[223] Section 11(1) and 13 of the Minerals Act 50 of 1991.

[224] Section 11(3) of the Minerals Act 50 of 1991.

[225] Mostert op cit note 2 at 63; section 11(2) of the Minerals Act 50 of 1991

A mining authorisation was only issued when the Director of Mineral Development was satisfied that the minerals would be mined optimally, considering how the applicant of a mining authorisation would rehabilitate disturbances of the surfaces.[226] In addition, the Director of Mineral Development had to be satisfied that the applicant had the ability and financial resources to mine such minerals optimally and rehabilitate surface disturbances.[227] Therefore, the system of authorisations introduced by the Minerals Act placed importance on the manner[228] and ability[229] of an applicant to rehabilitate surfaces disturbed by prospecting or mining.[230]

After the adoption of the Constitution of South Africa in 1996, the environmental regulation of mining in terms of the Minerals Act was interpreted more strictly than the legislator initially intended.[231] This interpretation was due to the right to environmental protection in the Constitution[232] and the National Environmental Management Act,[233] which was adopted after the Minerals Act came into force.[234] The consequence was that environmental concerns of those affected by applications for mining authorisations necessitated consideration of objections lodged against applications on environmental grounds before the Director of Mineral Development could take a final decision.[235]

### 2.3.2 Increased State Control

By introducing a system of authorisations that applied to all classes of minerals on all categories of land,[236] the Minerals Act led to increased regulatory control over certain minerals on particular types of land.[237] The Minerals Act, for instance, required state authorisation for base

[226] Section 9(3)(a) and (b) of the Minerals Act 50 of 1991.

[227] Section 9(3)(c) of the Minerals Act 50 of 1991.

[228] Mostert op cit note 2 at 65; Section 6(2)(b) read with section 9(3)(b) of the Minerals Act 50 of 1991.

[229] Mostert op cit note 2 at 65; Section 9(3)(c) read with section 9(5)(c) of the Minerals Act 50 of 1991.

[230] Mostert op cit note 2 at 65; Sections 6(2), 9(3) read with section 9(5) of the Minerals Act 50 of 1991.

[231] Mostert op cit note 2 at 66.

[232] Section 24 of the Constitution.

[233] National Environmental Management Act 107 of 1998.

[234] The Minerals Act came into force on 1 January 1992.

[235] See Mostert op cit note 2 at 66 and the reference to *Director: Mineral Development, Gauteng v Save the Vaal* 1999 (2) SA 709 (SCA).

[236] Ibid at 66 and the reference to Kaplan & Dale op cit note 177 at 11.

[237] Ibid at 66.

metals on private unproclaimed land not needed before the adoption of the Minerals Act.[238] It also required state authorisation for precious stones on 'exempt areas'[239] and tailings.[240]

The Minerals Act provided for a transitional period of two years. During this time, holders of mining leases, claims holders, holders under prospecting and digging agreements for precious stones, holders of debris washing permits, and shareholders in precious stones mines had to reapply for authorisation.[241] These requirements led to the simplification of regulatory control over certain minerals.[242]

The alienation of mineral rights held by the state on state land or alienated state land was encouraged by the Minerals Act.[243] Subject to specific qualifications, the Minerals Act placed the state in the same position as the common law holder of rights to minerals.[244] The Minerals Act, for instance, determined that the owner of alienated state land, or the owner's nominee, was deemed to be the mineral rights holder for purposes of obtaining a prospecting permit.[245] Only an owner of alienated state land, or nominee, could apply for the alienation of mineral rights, consent to remove and dispose of minerals found during prospecting, or consent to mine.[246] In particular, the Minerals Act provided that only the holder of a prospecting lease, permit, or permission in terms of repealed legislation could apply for the above alienations or consents.[247]

Therefore, the Minerals Act caused the previous system where land was proclaimed as public diggings under the Mining Rights Act[248] and alluvial precious stones diggings under the Precious Stones Act to be redundant.[249] Furthermore, the Minerals Act caused the revival of the common law rights of the holders of rights to minerals on previously proclaimed land,

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[238] Section 2(1)(b) of the Minerals Act 50 of 1991; see Mostert op cit note 2 at 66.

[239] Section 3 of the Precious Stones Act 73 of 1964.

[240] Section 5(2) of the Minerals Act 50 of 1991; see Mostert op cit note 2 at 67 and the reference to Franklin & Kaplan op cit 165 at 464.

[241] Section 47(1)(e) of the Minerals Act 50 of 1991.

[242] Mostert op cit note 2 at 67.

[243] Mostert op cit note 2 at 67 and the reference to sections 43, 64 and sections 6(3), 8(2) and 9(2) read with sections 43(2)(a) and 44(2) and 64(2) of the Minerals Act.

[244] Mostert op cit note 2 at 67.

[245] Section 43 of the Minerals Act 50 of 1991.

[246] Section 43 of the Minerals Act; Mostert op cit note 2 at 67.

[247] Section 44(2) of the Minerals Act; Mostert op cit note 2 at 67.

[248] Mining Rights Act 20 of 1967.

[249] Precious Stones Act 73 of 1964.

except to the extent where existing rights were preserved.[250] The common law rights consisted of the full *dominium* in the land, limited real rights such as leases and servitudes, and the rights of the holder of mineral rights in common law where relevant.[251] These surface rights were required in common law to exercise prospecting and mineral rights.[252]

After the two-year transitional period had elapsed,[253] common law rights in diamonds concerning alluvial diggings and the right to use the land's surface for mining and the processing of diamonds were deemed to vest in the state,[254] under the Minerals Act.[255] Consent to prospect or mine alluvial diamonds could then be granted in terms of the Minerals Act.[256] The repeal of the Precious Stones Act resulted in a 'deproclamation' of all precious stones mines.[257]

Existing mining leases and leases of the state's shares in precious stones continued to exist, although the state's shares in such mines, where it was not also the holder of the rights in precious stones, would vest in the common law holder of rights to precious stones.[258] Rights to prospect or mine were regarded as existing rights preserved under the Minerals Act.[259] The common law rights of landowners of previously proclaimed land were also revived, except insofar as existing statutory surface rights were preserved.[260] Provision was made for the holders of statutory mining titles to have the same rights regarding the surface use as those of the common law mineral rights holder.[261] Where the mineral rights holder's common law

[250] Section 47 of the Minerals Act 50 of 1991; See Mostert op cit note 2 at 67 and the reference to Kaplan & Dale op cit note 177 at 8.

[251] See Mostert op cit note 2 at 67.

[252] See Mostert op cit note 2 at 67 and the reference to Kaplan & Dale op cit note 177 at 9.

[253] See section 46 of the Minerals Act 50 of 1991 which referred to the Mining Rights Act 20 of 1967 and the Precious Stones Act 73 of 1964.

[254] Mostert op cit note 2 at 68.

[255] See section 46 of the Minerals Act 50 of 1991.

[256] Sections 6(3) and 9(2) of the Minerals Act 50 of 1991.

[257] See Mostert op cit note 2 at 68.

[258] See Mostert op cit note 2 at 68.

[259] Section 48(1) of the Mineral Act 50 of 1991; see Mostert op cit note 2 at 68.

[260] Section 48 of the Minerals Act 50 of 1991.

[261] Section 47(2) of the Minerals Act 50 of 1991; see Mostert op cit note 2 at 68 and the reference to Kaplan & Dale op cit note 177 at 10.

surface use rights were insufficient for mining purposes, the Minerals Act provided expropriation provisions.[262]

The transitional provisions of the Minerals Act removed all forms of rights that existed in terms of previous legislation and replaced them with common law rights.[263] The Minerals Act contained provisions that incentivised existing mineral right holders to negotiate with the state to acquire the underlying mineral rights or the state's consent to mine after the originally conferred rights under the previous legislation had lapsed.[264] The state also lost the right to be paid royalties after the lapse of the two years transitional period as determined in the Minerals Act.[265] This provision incentivised the holders of pre-existing mining rights on private land to abandon such rights and opt for the revived common law rights.[266] This step ensured that the state would stop receiving royalties before the two-year transitional period had lapsed.[267] The Minerals Act incentivised holders of mining rights on state land and alienated state land to purchase the state's mineral rights. Consequently, the land status changed to private land, thereby enabling the acquisition of the underlying common law rights.[268]

### 2.3.3 Implications for Dominium

The mineral law system that existed before the Minerals Act, vested mineral rights in the state. This system allowed the state to prospect for natural oil and mine and dispose of natural oil, precious metals, and precious stones.[269] However, the Minerals Act restored the common law rights of the original holder of the mineral rights by repealing such rights held by the state.[270] The state, however, retained the right to grant prospecting permits or mining authorisations in terms of the Minerals Act[271] in oil, precious metals, and precious stones.[272] Therefore, the

[262] Sections 24 and 42 of the Minerals Act 50 of 1991; see Mostert op cit note 2 at 68 and the reference to Kaplan & Dale op cit note 177 at 10.

[263] Ibid at 68 and the reference to Kaplan & Dale op cit note 177 at18.

[264] Ibid at 68 and the reference to Kaplan & Dale op cit note 177 at18.

[265] Section 47(1)(d) of the Minerals Act 50 of 1991.

[266] Mostert op cit note 2 at 68 and the reference to Kaplan & Dale op cit note 177 at 18.

[267] Mostert op cit note 2 at 68 and the reference to Kaplan & Dale op cit note 177 at 18.

[268] Mostert op cit note 2 at 68 and the reference to Kaplan & Dale op cit note 177 at 19.

[269] Mostert op cit note 2 at 69 and the reference to Kaplan & Dale op cit note 177 at 5.

[270] Mostert op cit note 2 at 69.

[271] Section 5(2) of the Minerals Act 50 of 1991.

[272] Mostert op cit note 2 at 68 and the reference to Kaplan & Dale op cit note 177 at 5.

Minerals Act extended the common law position applied to base metals on private unproclaimed land to all types of minerals and all types of land.[273]

Owners of alienated state land or their nominees[274] or holders of prospecting rights over state land[275] were able to exclusively acquire common law rights from the state in the form of a consent to prospect or consent to mine.[276] In these instances, mineral rights could also be purchased from the state by the above persons at the exclusion of others.[277] The Minerals Act granted a mineral right holder, or a person who had obtained such a right, the entitlement to enter the land to which the right related. Such entrance was permitted together with the persons, plant, or equipment required to prospect or mine and to conduct prospecting or mining operations on the land and to dispose such.[278]

Holders of mineral rights were not obliged to exercise their rights.[279] This right was in accordance with the common law right of *ius abutendi* in terms of which the holder of the right did not have any obligation to exercise such a right.[280] Where the holder wanted to exercise such a right, it had to do so through the authorisations introduced by the Minerals Act.[281]

The holder of common law mineral rights could decide whether or not to apply for a prospecting permit or a mining authorisation.[282] Where the mineral right holder chose not to apply for a permit or an authorisation, the mineral rights holder had the authority to allow such rights to remain unused and prevent the minerals from being prospected or exploited.[283] Mineral right holders did have the right to grant consent to prospect through a prospecting

[273] Mostert op cit note 2 at 71; see section 5 of the Minerals Act 50 of 1991.

[274] Section 43 of the Minerals Act 50 of 1991.

[275] Section 44 of the Minerals Act 50 of 1991.

[276] Mostert op cit note 2 at 72.

[277] Section 67 of the Minerals Act 50 of

[278] Section 5(1) of the Minerals Act 50 of 1991.

[279] See Mostert op cit note 2 at 70 and the reference to Badenshorst, Mostert & Dendy op cit 181 at 3.11.

[280] See Mostert op cit note 2 at 70 and the references cited.

[281] Mostert op cit note 2 at 70.

[282] See Mostert op cit note 2 at 70.

[283] See Mostert op cit note 2 at 70.

contract[284] or to mine in terms of mining leases.[285] Owners of alienated state land were protected for the loss to apply for a mining lease or an owner's certificate in terms of the transitional measures contained in the Minerals Act.[286] However, in instances of the sale of state land and subject to the reservation of the mineral title to the state, the owners of such land were deemed to be the owners of the mineral rights upon compliance with specific provisions of the Minerals Act.[287] Where the state was the holder of mineral rights, the state could prospect for, mine, and dispose of the particular minerals.[288] Like any other mineral rights holder, the state could also grant written consent to a third party to exercise such mineral rights.[289] Despite the revival of the common law rights of mineral rights holders, they could only exercise their rights provided that the relevant authorisation was obtained from the state.[290] To be granted a permit or authorisations in terms of the Minerals Act, proof had to be furnished of the underlying common law rights or the entitlement to apply based on the consent of the mineral right holder.[291]

The Minerals Act did not regulate how mineral rights had to be obtained, but prescribed the process whereby suitable applicants could obtain common law rights to minerals.[292] This process was similar to that of expropriation.[293] The Minister of Minerals and Energy could consent to someone applying to prospect or mine without the consent of the holder of the mineral rights.[294] The Minister of Minerals and Energy Affairs could also expropriate surface or mineral rights against payment of compensation.[295] To this extent, the Minerals Act dealt

[284] Section 102 of the Deeds Registries Act 47 of 1937 defined a prospecting permit as "a notarial deed in terms whereby the owner of the land from which the rights to minerals has not been excluded, or the registered holder of the right to minerals in land, grants the right to prospect and seek for any mineral or minerals in the land, together with (i) the right to purchase the land or any portion thereof or to purchase the right to any such mineral or minerals; or (ii) the right to lease any right to any such mineral or minerals." See Mostert op cit note 2 at 70.

[285] Mostert op cit note 2 at 70 and the reference to Badenhorst, Pienaar & Mostert op cit 187 at 695.

[286] Alienated state land referred to land which was not owned by the state, or was held by the lessee, and in the title deed or lease of which there is a reservation to the state to a mineral; see Mostert op cit note 2 at 70.

[287] Mostert op cit note 2 at 70.

[288] Section 5(1) of the Minerals Act 50 of 1991; see Mostert op cit note 2 at 71.

[289] Mostert op cit note 2 at 71.

[290] Mostert op cit note 2 at 71.

[291] Mostert op cit note 2 at 71.

[292] Mostert op cit note 2 at 70 and the reference to Kaplan & Dale op cit note 177 at 12.

[293] Mostert op cit note 2 at 70 and the reference to Kaplan & Dale op cit note 177 at 12.

[294] Section 17 of the Minerals Act 50 of 1991; Mostert op cit note 2 at 71.

[295] Section 24 of the Minerals Act 50 of 1991; Mostert op cit note 2 at 71.

with the compulsory sale of land in prescribed circumstances[296] while also providing for the cancellation of permissions and certain rights to water and surface use acquired in terms of prior legislation.[297]

## 2.4 Conclusion

The concept 'state custodianship' of mineral resources was unknown before the promulgation of the MPRDA.[298] The state has, however, been historically expected to fulfil a distinct role in the regulation of minerals in preceding generations of mineral law. Although certain checks and balances were placed on the state in performing their role, (albeit not sufficient), increased regulatory measures placed on the state and control of the mineral resources, were required.

The Minerals Act simplified regulatory control by the state over land and certain minerals by introducing uniform treatment of all minerals.[299] It privatised former state holdings of statutory mineral rights acquired in terms of previous mineral legislation while simultaneously introducing extensive governmental control over the exercise of mineral rights by holders thereof.[300] The measures introduced led to an increase of state control over mineral resources instead of a decrease in regulatory control[301]

Increased state control resulted from the requirement set by the system of authorisations that holders of base mineral rights on private land to prospect or mine required authorisations from the state, a requirement not set by the previous system.[302] A second ground was the broad discretionary powers to grant and renew prospecting permits, prohibitions, and restrictions to prospect on certain types of land, the need for permission to remove samples or minerals found during prospecting, and the discretion awarded to determine the period of a mining authorisation.[303] The increase of government officials' powers under the rehabilitation provisions and the requirement to provide information strengthened the argument that the

[296] Section 42 of the Minerals Act 50 of 1991; Mostert op cit note 2 at 71.

[297] Section 48(3)(b) of the Minerals Act 50 of 1991; Mostert op cit note 2 at 71.

[298] The MPRDA came into effect on 1 May 2004.

[299] Mostert op cit note 2 at 72.

[300] Mostert op cit note 2 at 72.

[301] Mostert op cit note 2 at 72; Badenhorst op cit note 179 at 127.

[302] Mostert op cit note 2 at 72.

[303] Mostert op cit note 2 at 72; Badenhorst op cit note 179 at 129.

Minerals Act increased state control.[304] The state's control concerning entitlements to exploit minerals previously held by the state would be supplemented with control over entitlements to extract base minerals.[305] Previous partial state holding of mineral rights was therefore perpetuated, albeit in a different form.[306]

Dominium of the minerals may previously have been vested in and awarded by the state. Still, the preceding regulatory framework was said to be less strict in its measures of state control than the system of authorisations under the Minerals Act.[307] The system of authorisations introduced a stricter regulation form.[308] The adoption of the Constitutional requirement for environmental protection[309] and the National Environmental Management Act[310] also caused a more strict application of the provisions of the system of authorisations introduced by the Minerals Act than the system of conferrals before its adoption.[311]

The MPRDA replaced the Minerals Act in 2004[312] which changed the conditions under which minerlas is regulated.[313] The state regulates the nation's mineral resources and allocates the wealth generated from it.[314] The state, as custodian, must ensure equitable access to mineral resources, promote economic development through the exploitation of these resources, and advance the social values contained in the Constitution.[315] The next chapter discusses these values of the MPRDA.[316]

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[304] Mostert op cit note 2 at 72: Badenhorst op cit note 179 at 129.

[305] Badenhorst op cit note 179 at 129; Mostert op cit note 2 at 72.

[306] Badenhorst op cit note 179 at 130; Mostert op cit note 2 at 72.

[307] Mostert op cit note 2 at 72; Badenhorst op cit note 179 at 130.

[308] Mostert op cit note 2 at 7; Badenhorst op cit note 179 at 130.

[309] Section 24 of the Constitution of 1996.

[310] National Environmental Management Act 107 of 1998.

[311] Mostert op cit note 2 at 73.

[312] The MPRDA came into effect on 1 May 2004.

[313] *Xstrata South Africa (Pty) Ltd and others v SFF Association* 2012 (5) SA 60 (SCA) at para 1; *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd and Others* (2011) 1 All SA 364 (SCA) at para 20; Van der Schyff op cit note 1177 at 174.

[314] The Preamble to the MPRDA states that the regulation of the nation's mineral and petroleum resources are to be to the benefit of the nation as well as present and future generations; Van der Schyff op cit note 1177 at 174.

[315] Section 24 of the Constitution of 1996; *Agri Sa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 70.

[316] Section 2 of the MPRDA.

# CHAPTER 3: STATE CUSTODIANSHIP AS EXPRESSED IN THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT (MPRDA)

## 3.1 Introduction

Chapter 2 of this thesis[317] discussed how the MPRDA replaced the Minerals Act in 2004.[318] The introduction of the MPRDA changed the mineral law whereby the state continues to regulate minerals and petroleum.[319]

This chapter discusses the interpretation of the concept of state custodianship by the MPRDA. In particular, this chapter considers the relevant sections that provide meaning to state custodianship by its own expression. It posits that the MPRDA's provisions ought to center on the notion of state custodianship.[320] It also discusses the relevant sections of the MPRDA that assist in determining the role and responsibilities of the state as custodian. The discussion considers the long title, Preamble, and the key objects of the MPRDA, which guide in giving meaning to the concept of state custodianship.

## 3.2 The Notion of State Custodianship of Mineral Resources

Historically the state has managed and regulated the exploitation of South Africa's mineral and petroleum resources.[321] The state regulates the nation's mineral and petroleum resources and allocates the wealth generated therefrom.[322] As custodian, the state must ensure equitable access to the mineral and petroleum resources, promote economic development through

[317] See Chapter 2 at 16.

[318] The MPRDA came into effect on 1 May 2004.

[319] *Xstrata South Africa (Pty) Ltd and others v SFF Association* 2012 (5) SA 60 (SCA) para 1; *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd and Others* (2011) 1 All SA 364 (SCA) para 20; E Van der Schyff Property in Minerals and Petroleum (2016) Juta at 174.

[320] Van der Schyff op cit note 319 at 166.

[321] PJ Badenhorst *Mining and minerals* in WA Joubert (ed) *The Law of South Africa* vol 18 (1999) LexisNexis at 6; H Mostert *Mineral Law: Principles and policies in perspective* (2012) at 19 – 114; Van der Schyff op cit note 319 at 39; HR Hahlo & E Kahn *The Union of South Africa - The development of its laws and constitution* (1960) 760 at 764.

[322] The Preamble to the MPRDA states that the regulation of the nation's mineral and petroleum resources are to be to the benefit of the nation as well as present and future generations; Van der Schyff op cit note 319 at 174.

exploiting these resources, and advance the social values contained in the Constitution.[323] These values are expressed in the objects of the MPRDA.[324]

The MPRDA introduced the principle of state custodianship with its promulgation in 2002.[325] It determines that the state is the custodian of the country's mineral and petroleum resources.[326] However, the MPRDA does not contain a definition of the concept of state custodianship.[327]

Some statutes state that the nation has a collective interest in its different natural resources.[328] Most of these statutes relate to the environment and were promulgated before the MPRDA came into force.[329] In particular, these statutes[330] refer predominantly to trusteeship, while the MPRDA incorporates the concept of state custodianship.[331] Despite the difference,[332] these statutes confirm the importance of natural resources and the state's duty to protect them for present and future generations.[333] By realising the objects of the various statutes, the MPRDA gives effect to the state's duty to protect the nation's natural resources.[334] Therefore, these statutes aim to fulfill the constitutional obligation to protect the environment and ensure ecologically sustainable development and use of South Africa's natural resources.[335]

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[323] Section 24 of the Constitution of 1996; *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 70.

[324] Section 2 of the MPRDA.

[325] The notion of state custodianship is statutorily introduced by the MPRDA in the Preamble as well as section 3 of the MPRDA.

[326] Section 3 of the MPRDA.

[327] MPRDA; Van der Schyff op cit note 319 at 166.

[328] The National Water Act 36 of 1998, the National Environmental Management Act 107 of 1998 and the National Environmental Management: Integrated Coastal Management Act 24 of 2008 acknowledge the nation's collective interest in certain of South Africa's natural resources; Van der Schyff op cit note 319 at 230.

[329] The MPRDA came into effect on 1 May 2004.

[330] The National Water Act 36 of 1998; the National Environmental Management Act 107 of 1998 and the National Environmental Management: Integrated Coastal Management Act 24 of 2008.

[331] Section 3 of the MPRDA. The National Water Act 36 of 1998; the National Environmental Management Act 107 of 1998 and the National Environmental Management: Integrated Coastal Management Act 24 of 2008 refer to the concept of trusteeship but do not contain a definition thereof.

[332] Van der Schyff op cit note 319 at 231 refers to *HTF Developers (PTY) Ltd v Minister of Environmental Affairs and Tourism and Others* (2007) 4 All SA 1108 (SCA) para 18 to argue that the court used the terms trustee and custodian as synonyms and linked the concepts directly to the concept of stewardship. The concepts of stewardship, trusteeship and fiduciary obligations are discussed in Chapter 6 at 126.

[333] Van der Schyff op cit note 319 at 230.

[334] Van der Schyff op cit note 319 at 230.

[335] Section 24(b)(iii) of the Constitution states that everyone has the right to have the environment protected, for the benefit of present and future generations through the use of secure ecologically sustainable development and natural resources while promoting justifiable economic and social development.

Section 3 of the MPRDA states that the state is the custodian of mineral and petroleum resources to benefit all South Africans.[336] It also determines that these resources are the common heritage of all South Africa's people.[337] As custodian, the state, acting through the Minister responsible for mineral and petroleum resources, must fulfill certain prescribed functions on behalf of its people.[338] These functions include granting, issuing, refusing, controlling, administering, and managing specified permissions, rights, and permits.[339] The Minister for Mineral Resources, acting on behalf of the state and in consultation with the Minister of Finance, is also responsible for prescribing and levying a fee required under the MPRDA.[340] The MPRDA also places the duty on the Minister to ensure that the mineral and petroleum resources of the country are developed sustainably and within a framework of national environmental policy, norms, and standards.[341] Following the constitutional obligation of the state to develop the petroleum and mineral resources,[342] the Minister must also promote economic and social development.[343] The following section discusses the meaning of "state" within the context of state custodianship on whose behalf the Minister acts.

### 3.2.1 The Meaning of "State" in the Concept of State Custodianship

The MPRDA does not include a definition of the concept of state custodianship.[344] The first reference to the concept of state custodianship is in the Preamble.[345] One of the objects of the MPRDA is to give effect to the principle of state custodianship.[346] The MPRDA acknowledges the right of the state to exercise sovereignty over the country's mineral and petroleum resources.[347] In determining the rights and obligations of the state within the context of the

[336] Section 3(1) of the MPRDA.

[337] Section 3(1) of the MPRDA.

[338] Section 3(2) of the MPRDA.

[339] Section 3(2)(a) of the MPRDA states that the state, acting througth the minister, may issue, refuse, control, administer, and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right.

[340] Section 3(2)(b) of the MPRDA.

[341] Section 3(3) of the MPRDA.

[342] Section 24 of the Constitution of 1996.

[343] Section 3(3) of the MPRDA.

[344] MPRDA; Van der Schyff op cit note 319 at 166.

[345] Preamble to the MPRDA.

[346] Section 2(b) of the MPRDA.

[347] Section 2(a) of the MPRDA.

notion of state custodianship, "state" does not have a fixed and universal meaning.[348] No inherent characteristics have been placed on the meaning of "state" by the courts due to the different meanings in various legislation.[349] The context in which it is used determines its precise meaning.[350]

Every state has the right to exercise permanent sovereignty over its natural resources, wealth, and economic activities, including the right to possess, use, and dispose thereof.[351] The MPRDA confirms this right.

The use of the word "state"' in the MPRDA is distinguished from the concept "government"[352] Government means the organ or structure through which the state functions.[353] The term "state" therefore includes the concept of government through which the state functions.[354] In referring to the concept of custodianship and its duties within the main structure of the MPRDA,[355] the concept of the state incorporating government is a fundamental principle in the interpretation of its meaning.[356] As stated above, the interpretation of the MPRDA and its provisions ought, therefore, to center on the notion of state custodianship.[357]

The international law meaning of the word "state" must be attributed to it within the context of state custodianship.[358] This is due to the internationally accepted right of the state to exercise

[348] Van der Schyff op cit note 319 at 230 and the reference to *Holeni v The Land and Agricultural Development Bank of South Africa* 2009 (4) SA 437 (SCA) para 11 where the meaning of the word "state" was discussed.

[349] *Holeni* supra note 348 at para 11.

[350] Van der Schyff op cit note 319 at 230; *Holeni* supra note 348 at para 11.

[351] Article 1 of the United Nations General Assembly Resolution 3281 (XXIX) Charter of Economic Rights and Duties of States, 12 December 1974; Van der Schyff op cit note 319 at 165; UN Resolution No 1803 (XVII): Permanent sovereignty over natural resources; Resolutions No 2158 (XXI) 14 December 1962 and No 3281 (XXIX); A Ronne 'Public and private rights to natural resources and differences in their protection?' in A McHarg, B Barton, A Bradrook & L Godden (eds) *Property and the law in energy and natural resources* (2010); NJ Schrijver 'Permanent sovereignty over natural resources versus the common heritage of mankind: Complementary or contradictory principles of international law' (1987) *21 Series: Development & Security* 1-23.

[352] Van der Schyff op cit note 319 at 166; FJ van Zyl & JD van der Vyver *Inleiding tot die regswetenskap* (1982) Butterworths at 440.

[353] Van der Schyff op cit note 319 at 166; Van Zyl & Van der Vyver op cit note 352 at 440.

[354] Van der Schyff op cit note 319 at 166 and the reference to H Kelsen *General Theory of law and state* (1945) Cambridge: Harvard University Press at 181.

[355] Sections 2 and 3 of the MPRDA.

[356] Van der Schyff op cit note 319 at 166.

[357] See Chapter 5 at 102; Van der Schyff op cit note 319 at 166.

[358] Van der Schyff op cit note 319 at 165 and the reference to the Montevideo Convention on the Rights and Duties of States signed on 26 December 1934, Article 8 as reaffirmed by Protocol on 23 December 1936.

sovereignty over mineral resources in South Africa.[359] According to international law, a state is defined as a permanent population, a defined territory, a government, and the capacity to have relations with other states.[360] Another definition of a state is a community consisting of a government and citizens within a particular territory.[361] A state is also described as a juristic person with a community living within a fixed territory under an authority that ascribes to certain common rules.[362]

### 3.2.2 The Potential Meaning of "Custodianship" of Mineral Resources

In determining the content of state custodianship, guidance may be found from a comparison with other legislation where the state is appointed to act as 'custodian' over certain natural resources. The Water Services Act,[363] appoints the national government as the custodian of the nation's water resources. The close relationship between custodianship and trusteeship, where the present generation acts as the custodian or trustee of the environment for future generations has been confirmed by the courts.[364] The fiduciary responsibility within the notion of state custodianship or trusteeship has still not been determined.[365] It is however required that the state fulfills its obligation as custodian within the bounds of reasonableness.[366]

Section 24 of the Constitution read with the MPRDA has been interpreted by the courts to appoint the present generation as the custodian or trustee of the environment for the benefit of

[359] Section 2(a) of the MPRDA; Van der Schyff op cit note 319 at 165.

[360] Montevideo Convention on the Rights and Duties of States signed on 26 December 1934, Article 8 as reaffirmed by Protocol on 23 December 1936.

[361] Van Zyl & Van der Vyver op cit note 352 at 440.

[362] JP Verloren van Themaat & M Wiechers *Staatsreg* (1981) Durban, Butterworths at 7; Van der Schyff op cit note 319 at 166; see section 2(a) of the MPRDA.

[363] Water Services Act 108 of 1997.

[364] Van der Schyff op cit note 319 at 179 and the reference to *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) para 19.

[365] In *Hofer and Others v Kevitt NO and Others* 1996 (2) SA 402 (C) at 407B the court stated that the "concept fiduciary duty has no clearly defined meaning."

[366] *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E) at 418B.

future generations.[367] The state is thereby conferred the duty of stewardship in protecting and managing the mineral and petroleum resources of the nation.[368]

No definition of the notion of 'state custodianship' is readily available.[369] A 'custodian' is however defined as 'a person who takes responsibility for taking care of or protecting something.'[370] "Custodianship" is defined as "caring about each other, especially for children and those not able to protect or to provide for themselves, and caring about our country, our custodianship of the land, its waters and its future".[371]

Reference has been made to the custodial role of the courts[372] as well as within fields such as cultural heritage [373]Custodianship of natural resources are referred to when describing the duty of the state towards natural resources in general.[374] These natural resources refer, inter alia, to water, wood, food, air, land and soil.[375] Whilst custodianship within the context of mineral law has been discussed, no definition is provided.[376] The concept of custodianship is

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[367] *HTF Developers* supra note 16 at para 19.

[368] *HTF Developers* supra note 16 at para 19.

[369] Certain dictionaries do not define "custodianship". See for instance Lexicon available at https://www.lexico.com/definition/custodian accessed on 14 February 2022 defines "custodian" as "a person who has responsibility for taking care of or protecting something".

[370] See for instance *Fowlers Concise Dictionary of English Usage* (3ed) accessed at https://www-oxfordreference-com.ezproxy.uct.ac.za/view/10.1093/acref/9780199666317.001.0001/acref-9780199666317?btog=chap&hide=true&jumpTo=custodian&page=46&pageSize=20&skipEditions=true&sort=titlesort&source=%2F10.1093%2Facref%2F9780199666317.001.0001%2Facref-9780199666317 on 14 February 2022.

[371] Lexico accessed at https://www.lexico.com/definition/custodianship on 14 February 2022.

[372] UC Mokoena, EC Lubaale and Z Mopai 'The custodial role of the Constitutional Court at play: a critical analysis of the case *Black Sash Trust v Minister of Social Development'* [2017] ZACC 8 accessed https://hdl.handle.net/10520/EJC-f89d3cd2b on 5 February 2022.

[373] MA Mearns 'The Basotho Cultural Village: cultural tourism enterprise or custodian of indigenous knowledge systems' accessed at https://journals-co-za.ezproxy.uct.ac.za/doi/10.10520/EJC61520 on 5 February 2022.

[374] CM Shackleton 'Will the real custodian of natural resources please stand up' available at https://hdl.handle.net/10520/EJC96909 accessed on 5 February 2022; I Hofmeyr 'Being an ethical custodian of the land' available at https://journals-co-za.ezproxy.uct.ac.za/doi/10.10520/ejc-vp_stock_v11_n6_al accessed on 5 February 2022.

[375]CM Shackleton 'Will the real custodian of natural resources please stand up' available at https://hdl.handle.net/10520/EJC96909 accessed on 5 February 2022; I Hofmeyr 'Being an ethical custodian of the land' available at https://journals-co-za.ezproxy.uct.ac.za/doi/10.10520/ejc-vp_stock_v11_n6_al accessed on 5 February 2022.

**[376]** PJ Badenhorst 'Lapsed prospecting rights : 'the custodian giveth and the custodian taketh away'? *Palala Resources (Pty) LTD v Minister of Mineral Resources and Energy* available at https://journals-co-za.ezproxy.uct.ac.za/doi/10.10520/EJC-610e4c9a2 accessed on 5 February 2022; PJ Badenhorst and H Mostert 'Duelling prospecting rights: a non-custodial second? Regspraak' available at https://journals-co-za.ezproxy.uct.ac.za/doi/10.10520/EJC55203 accessed on 5 February 2022; HM van der Berg 'Ownership of

discussed with reference to the manner in which the MPRDA addresses the particular issue.[377] The content of state custodianship for mineral resources must therefore be determined by the interpretation of the content and context of the MPRDA.[378]

The above merely provides guidelines in determining the meaning of state custodianship of mineral resources. The use of the term 'custodian' within the context of mineral resources therefore requires a more legal and contextual approach to providing meaning to 'state custodianship'. The next section discusses state custodianship within the context of the MPRDA.

## 3.3 State Custodianship of Mineral Resources in the MPRDA

It is submitted that the starting point to establish the meaning and scope of state custodianship of mineral resources should be the legislative text in which the mechanism of custodianship is created. A textual analysis of the relevant provisions of the MPRDA therefore is the point of departure in this thesis. The rest of this chapter deals with the various mentions of state custodianship of mineral resources in the MPRDA, in attempting to establish the legislative intent behind the concept of state custodianship of mineral resources.

Section 3 of the MPRDA is the definitive provision which affirms the state as custodian over the nation's mineral and petroleum resources.[379] It describes the mineral and petroleum resources as the heritage of all the people of South Africa and compels the state to exercise its role as custodian to benefit all South Africans.[380] Section 3(2) of the MPRDA determines the duties of the state as custodian.[381] This section enables the Minister to act on behalf of the state,

minerals under the new legislative framework for mineral resources' available at https://journals-co-za.ezproxy.uct.ac.za/doi/10.10520/EJC54685 accessed on 5 February 2022.

[377] PJ Badenhorst 'Lapsed prospecting rights : 'the custodian giveth and the custodian taketh away'? *Palala **R**esources (Pty) LTD v Minister of Mineral Resources and Energy* available at https://journals-co-za.ezproxy.uct.ac.za/doi/10.10520/EJC-610e4c9a2 accessed on 5 February 2022; I Hofmeyr 'Being an ethical custodian of the land' accessed at https://journals-co-za.ezproxy.uct.ac.za/doi/10.10520/ejc-vp_stock_v11_n6_a1 accessed on 5 February 2022; PJ Badenhorst and H Mostert 'Duelling prospecting rights: a non-custodial second? Regspraak' available at https://journals-co-za.ezproxy.uct.ac.za/doi/10.10520/EJC55203 accessed on 5 February 2022; HM van der Berg 'Ownership of minerals under the new legislative framework for mineral resources' available at https://journals-co-za.ezproxy.uct.ac.za/doi/10.10520/EJC54685 accessed on 5 February 2022.

[378] See Chapter 5 at 104.

[379] Section 3 of the MPRDA.

[380] Section 3(1) of the MPRDA.

[381] Section 3(2) of the MPRDA.

grant, issue, refuse, control, administer, and manage certain permissions, rights, and permits.[382] Below, the focus is on the provisions that may support the interpretation of section 3.

The long title, Preamble, and objects of the MPRDA together form the basis for interpreting concepts such as state custodianship contained in the MPRDA.[383] The objects of the MPRDA provide the background for the interpretation of the MPRDA. The long title and Preamble assist in providing a purposive or contextual interpretation.[384] The next section discusses the long title to the MPRDA, followed by a discussion of the Preamble and the objects of the MPRDA.

### 3.3.1 The long title to the MPRDA

When interpreting sections in an act, long titles remove ambiguities in an act[385] but may not substitute clear and explicit sections.[386] It primarily serves to determine the purpose and scope of an act as it broadly contains its purpose and the issues it intends to deal with.[387] The long title of the MPRDA states that it intends "To make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources, and to provide for matters connected therewith."

The long title of the MPRDA acknowledges the importance of sustainable development.[388] As mineral resources are non-renewable, the Preamble and the objects of the MPRDA provide for a qualified notion of sustainability by incorporating mineral and petroleum resources as part of

[382] Section 3(2)(a) of the MPRDA; H Mostert *Mineral Law Principles and Policies in Perspective* (2012) at 78.

[383] Van der Schyff op cit note 319 at 151.

[384] LM du Plessis 'Statute law and Interpretation' in WA Joubert, J Faris & LTC Harms (eds) *The Law of South Africa* vol 25 2 ed (2001) para 357; Van der Schyff op cit note 319 at 150 is of the view that the long title and preamble to the MPRDA may be regarded as the prelude to the objects of the Act.

[385] LM du Plessis op cit 384 para 349; also see Van der Schyff op cit note 319 at 151 and the reference to *Administrator, Cape v Raat Röntgen & Vermeulen* (Pty) Ltd 1992 (1) Sa 245 (A) 252 B-C 254 C-D; *Diepsloot Residents' & Landowners Association v Administrator, Tvl* 1994 (3) SA 336 (A) 347 E-F 349 D; *SA Metal & Machinery Co Ltd v Cape Town Iron & Steel Works (Pty) Ltd* 1997 (1) SA 319 (A) 323 I; *African National Congress v Lombo* 1997 (3) SA 187 (A) 197 B; *Fourways Mall (Pty) Ltd v SA Commercial Catering & Allied Workers Union* 1999 (3) SA 752 (W) 757 B*; Jooste v Score Supermarket Tracking (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) para 13; *The Azanian People's Organisation (AZAPO) v President of the RSA* 1996 (4) 671 (CC) para 64; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 35; *Agri South Africa v Minister for Minerals and Energy* supra 323 at para 26.

[386]Van der Schyff op cit note 319 at 151; Dedlow v Minister of Defence and Provost Marshal 1915 TPD 543 at 554 B; *Chotabai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at 49 A.

[387] Du Plessis op cit 384 para 361.

[388] Long title of the MPRDA; Van der Schyff op cit note 319 at 152.

the broader ecology.[389] It, therefore, focuses on the exploitation of minerals and petroleum with consideration of the other elements of sustainable development.[390]

The definition of "sustainable development'' requires that the planning, implementation, and decision-making to integrate social, economic, and environmental factors must serve current and future generations.[391] Sustainable development and the objective of creating an internationally competitive regime reflect a requirement to ensure sustainable development within an interpretation required by the MPRDA, based on the above three concepts of the MPRDA.[392] In realising the objectives of the MPRDA, the state is obliged to consider competing objectives in a balanced manner.[393] The MPRDA requires the state, as custodian, to ensure equitable access to the nation's mineral and petroleum resources while achieving the sustainable development thereof.[394]

The notion contained in the long title that the mineral and petroleum resources belong to the nation has been argued to be contrary to municipal law, particularly the principles of private law.[395] Although there is therefore no purpose to interpret its meaning in terms of private-law concepts such as ownership,[396] it may be argued that an understanding of the concept of ownership as it existed before the adoption of the MPRDA may assist in determining the changes it brought about. The concept that "the nation'' has no legal personality and is not regarded as a subject in either municipal or international law forms the basis of this argument.[397] As such, a nation cannot hold ownership or rights in mineral and petroleum resources.[398] Another view is that the MPRDA could merely have stated that the state is

[389] Preamble and section 2(h) of the MPRDA; Van der Schyff op cit note 319 at 153.

[390] Van der Schyff op cit note 319 at 153.

[391] See section 1 of the MPRDA for a definition of 'sustainable development.'

[392] See pages 49 – 60 here below for a discussion of the pillars of the MPRDA; Van der Schyff op cit note 319 at 154.

[393] Van der Schyff op cit note 319 at 154.

[394] Van der Schyff op cit note 319 at 155.

[395] Van der Schyff op cit note 319 at 154; Badenhorst PJ & Mostert H *Mineral and Petroleum Law of South Africa: Commentary and statutes* (Revision Service 10 2014) Juta; Badenhorst PJ 'Ownership of minerals in situ in South Africa: Australia Darning to the rescue?' 2010 (4) *SALJ* 646; PJ Badenhorst PJ & CJ Van Heerden 'Ownership of Historical Mine Dumps: Uncaptured No More?' 2018 (2) *SALJ* 351;

Van der Schyff op cit note 319 at 154; MO Dale et al *South African mineral and petroleum law* (issue 16, 2014).

[396] Van der Schyff op cit note 319 at 154; Dale et al op cit note 395 at 5

[397] Van der Schyff op cit note 319 at 154; Dale et al op cit note 395 at 5.

[398] Van der Schyff op cit note 319 at 154; Dale et al op cit note 395 at 5.

required to regulate the exploitation of the country's mineral and petroleum resources.[399] In this sense, the use of the word "nation' when referring to the mineral and petroleum resources in South Africa has a possessive connotation attached to it within the context of the state as the custodian of the nation's mineral and petroleum resources.[400]

The long title, Preamble, objects, and section 3 of the MPRDA emphasise the nation's interest in mineral and petroleum resources.[401] Therefore, any interpretation should consider that the MPRDA introduced a new mineral and petroleum law dispensation that differs substantively from any previous mineral and petroleum law dispensations.[402] The objective to ensure equitable access to the nation's mineral and petroleum resources while achieving sustainable development requires the nation's interest in the sustainable development of the mineral and petroleum resources to prioritise a landowner's interest in the minerals and petroleum situated on or below his land.[403] Balancing the individual's interest against the nation's interest must be seen and interpreted within this specific context.[404] Chapter Four of this thesis discusses the impact of the MPRDA on the ownership of mineral resources.[405] The following section discusses the Preamble to the MPRDA in determining the state's role as custodian regarding the nation's mineral and petroleum resources.

[399] Van der Schyff op cit note 319 at 154; Dale et al op cit note 395 at 5.

[400] Van der Schyff op cit note 319 at 154 and the reference to paragraph 1.3.2 of the White Paper on a Minerals and Mining Policy for South Africa General Notice 2359, GG 19344 of 20 October 1998 which '…recognise the State as custodian of the nation's mineral resources for the benefit of all' and the reference to paragraph 1.3.6 thereof that 'Government's long-term objective is for all mineral rights to vest in the State for the benefit of and on behalf of all the people of South Africa.' Also see Dale et al op cit note 395 at 5.

[401] Van der Schyff op cit note 319 at 154.

[402] Van der Schyff op cit note 319 at 154.

[403] Van der Schyff op cit note 319 at 154.

[404] See Chapter 4 at 75 for a discussion of the impact of the MPRDA on the ownership of unsevered minerals; Van der Schyff op cit 319 at 155.

[405] Chapter Four at 75.

### 3.3.2 The Preamble to the MPRDA

Preambles may be considered in the interpretation of statutes.[406] The purpose of a statute is generally determined by interpreting the Preamble of a statute.[407] A preamble may be used as an interpretive guide even though the words in the statute may be unambiguous.[408]

The Preamble to the MPRDA enforces its transformative nature.[409] The Preamble acknowledges that the state is the custodian of the nation's mineral and petroleum resources.[410] It thereby recognises the importance of mineral and petroleum resources as a national asset and questions the continued applicability of the common law principle that the ownership of unexploited minerals and petroleum is vested in the landowner.[411] Although Chapter Four discusses the ownership of unsevered minerals, it suffices to emphasise here that under the MPRDA, the landowner no longer has a private interest in the minerals found on or below their land.[412] In particular, the landowner does not have a preferential right to exploit the minerals embedded in their land.[413] A landowner also does not have a right to be compensated for extracting minerals found on or below their land by other parties.[414]

The state as custodian are to regulate the nation's mineral and petroleum resources in accordance with the new regulatory regime imposed by the MPRDA.[415] The MPRDA mandates the state to regulate the country's mineral and petroleum resources to a level not previously experienced in South Africa as custodian.[416] The Preamble reflects the state's

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406 Van der Schyff op cit note 319 at 155; *Ngcobo v Salimba CC, Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA) para 13; *Gardener v East London Transitional Local Council* 1996 (3) SA 99 (E) 105C; *Zeem v Mutual & Federal Insurance Co Ltd* 1996 (4) SA 476 (W) 482 D; *Zulu v Van Rensburg* 1996 (4) SA 1236 (LCC) 1246 *B-E; Niewoudt v Truth and Reconciliation Commission* 1997 (2) SA 70 (SE) 75B; *Williamson v Schoon* 1997 (3) SA 1053 (T) 1062 C-F 1070 D- E; *Gaming Association of SA (KwaZulu-Natal) v Premier, KwaZulu-Natal (No 1)* 1997 (4) SA 494 (N).

407 Du Plessis op cit note 49 para 349; *National Director of Public Prosecutions v Seevnarayan* 2003 (2) SA 178 (C) 194 D-F.

408 *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 112.

409 Van der Schyff op cit note 319 at 157.

410 Preamble to the MPRDA.

411 Preamble to the MPRDA; Van der Schyff op cit note 319 at 158.

412 Preamble to the MPRDA; Van der Schyff op cit note 319 at 158.

413 Ibid.

414 Ibid. Section 54 of the MPRDA allows for the determination of compensation to the owner or lawful occupier of the land where the owner is likely to suffer loss or damage as a result of reconnaissance, prospecting or mining operations.

415 The Preamble and section 3 to the MPRDA.

416 Van der Schyff op cit note 319 at 158.

fiduciary duty as custodian towards the nation.[417] It does so by affirming the state's duty to protect the interest of present and future generations by ensuring ecologically sustainable development and promoting economic and social development.[418] As such, the state must ensure sustainable development, economic development, and social development where the emphasis is not solely on the personal gain of a right-holder but on the benefit for present and future generations.[419]

The Preamble to the MPRDA acknowledges the displacement of communities caused by mining activities during South Africa's racial historical past.[420] As custodian of the nations' mineral and petroleum resources, the state is obliged to ensure that vulnerable groups benefit from exploiting mineral and petroleum resources.[421] The Preamble places a specific emphasis on the duties of the state to socially uplift and promote local and rural development to rectify the imbalances created by past discriminatory practices in the mining sector.[422] These measures are also the state's more general commitment to ensure equitable access to South Africa's mineral and petroleum resources.[423]

In facilitating economic development, the role of a stable mining industry is acknowledged by reaffirming the state's commitment to guarantee security of tenure in respect of mining and prospecting operations.[424] The Preamble to the MRPDA emphasises the need to create an internationally competitive and efficient administration and regulatory regime.[425]Although these aspirations are possibly in conflict with each other,[426] the attainment of these aspirations may be affected by the efficiency of the state in realising the broad objectives of the

[417] For a discussion on the fiduciary nature of state custodianship see Chapter 7 at 145; Van der Schyff op cit note 319 at 158.

[418] The preamble to the MPRDA.

[419] The preamble to the MPRDA; Van der Schyff op cit note 319 at 159.

[420] The relevant section of the preamble recognises 'the need to promote local and rural development and the social upliftment of communities affected by mining' and commits itself 'to eradicating all forms of discriminatory practices in the mineral and petroleum industries.'

[421] Van der Schyff op cit note 319 at 160.

[422] Van der Schyff op cit note 319 at 159.

[423] Ibid.

[424] Preamble to the MPRDA; Van der Schyff op cit note 319 at 160.

[425] Preamble to the MPRDA; Van der Schyff op cit note 319 at 160.

[426] Van der Schyff op cit note 319 at 160.

MPRDA.[427] The state-as-custodian, therefore, must ensure that the various state departments are efficient in realising the objectives contained in the MPRDA.[428]

### 3.3.3 Key Objects of the MPRDA and State Custodianship

One of the key objects of the MPRDA is to give effect to the principle of the state's custodianship of the nation's mineral and petroleum resources.[429] Another object includes the commitment to promote equitable access to the mineral and petroleum resources to all the people of South Africa.[430] The expansion of opportunities for historically disadvantaged persons to enter and participate actively in the mineral and petroleum industries, thereby benefitting from its exploitation, is included.[431] The objects also provide for promoting economic growth, including the development of industries in the mining sector.[432]

The objects to the MPRDA are based on three main pillars.[433] The first pillar is that the ownership of the mineral and petroleum resources is described as the nation's mineral and petroleum resources.[434] Chapter 4 discusses this object more substantively to determine where the ownership of mineral resources is vested.[435] The MPRDA further requires equitable access to the mineral and petroleum resources as the second pillar, while the sustainable development of these resources is the third pillar upon which the present mineral and petroleum law is based.[436] The sections that follow discuss the pillars on which the objects of the MPRDA are based.

[427] Preamble to the MPRDA; Van der Schyff op cit note 319 at 160.

[428] Van der Schyff op cit note 319 at 160.

[429] Section 2(b) of the MPRDA.

[430] Section 2(c) of the MPRDA.

[431] Section 2(d) of the MPRDA.

[432] Section 2(e) of the MPRDA.

[433] Van der Schyff op cit note 319 at 162; section 2 of the MPRDA.

[434] Van der Schyff op cit note 319 at 162; the long title and Preamble to the MPRDA and section 2(b) of the MPRDA.

[435] Chapter 4 at 75.

[436] Section 2 of the MPRDA; Van der Schyff op cit note 319 at 162.

#### 3.3.3.1 The MPRDA's Object of Sustainable Development and State Custodianship

The MPRDA aims to promote economic growth and develop the country's mineral and petroleum resources.[437] This object is the MPRDA's broad aim which encapsulates the other eight objects contained in the Act.[438] The requirement to develop industries and the development of mining and petroleum industries indicates the importance to build an economy based on the extraction of minerals and petroleum.[439] The all-encompassing nature of the requirement to promote economic growth necessitates balancing the competing interests when considering applications for prospecting rights and mining rights.[440] The MPRDA provides particular guidance on how the broad objective of economic growth is to be promoted when considering the other objects contained in section 2.[441]

The MPRDA requires that the nation's mineral and petroleum resources be developed on a sustainable basis.[442] Sustainable development is defined as "the integration of social, economic and environmental factors into planning, implementation, and decision making, to ensure that mineral and petroleum resources development serve present and future generations." The social and economic welfare of all South Africans is, therefore, to be promoted.[443]

The MPRDA goes on to require the Minister to provide a framework of national environmental policy, norms, and standards to ensure the sustainable development of South Africa's mineral and petroleum resources.[444] The sustainable development of South Africa's mineral and petroleum resources has to be undertaken in tandem with promoting economic and social development.[445]

To achieve sustainable development, as stated above, the MPRDA promotes security of tenure concerning prospecting, exploration, mining, and production operations .[446] Security of tenure

[437] Section 2(e) of the MPRDA; Van der Schyff op cit note 319 at 162.

[438] Van der Schyff op cit note 319 at 162.

[439] Van der Schyff op cit note 319 at 162.

[440] Section 2 of the MPRDA; Van der Schyff op cit note 319 at 162.

[441] Section 2 of the MPRDA; Van der Schyff op cit note 319 at 162.

[442] See sections 2(f), (g) and (h) of the MPRDA.

[443] Section 2(f) of the MPRDA.

[444] Section 3(3) of the MPRDA.

[445] Section 3(3) of the MPRDA.

[446] Section 2(g) of the MPRDA; chapter 3 at 47.

provides the basis for legally secured prospecting, mining, exploration, and production activities that are a requisite for the sustainable development of the nation's mineral and petroleum resources.[447] The courts have confirmed the importance of security of tenure as an object of the MPRDA.[448] When considering the transitional provisions contained in Schedule II to the MPRDA, the courts have linked the objects of the MPRDA with the transitional provisions contained in Schedule II.[449] The objective of ensuring security of tenure for prospecting, mining, exploration, and production activities is emphasised.[450] The continued existence of the rights to minerals and the continuation of prospecting, mining, exploration, and production activities under former mineral regimes was thereby secured.[451]

One of the objects of the MPRDA is to give effect to the constitutional mandate to have the environment protected for the benefit of present and future generations.[452] Mining and activities related to the production of mineral resources are to be conducted in a manner that is not harmful to health and upholds the intergenerational interest in a protected environment.[453] Accordingly, sustainable development and social and economic development are compatible due to the definition of sustainable development.[454] The requirement to develop the mineral and downstream petroleum industries envisages an industrial economy that continues to provide jobs after the extraction of mineral resources has ended.[455]

Holders of mining and production rights are to contribute to the socio-economic development of the areas where they operate.[456] This contribution by holders of mining and production rights aims to facilitate justifiable social and economic development.[457] This objective of the MPRDA

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[447] Section 2(g) of the MPRDA; Van der Schyff op cit note 319 at 170.

[448] Van der Schyff op cit note 319 at 170; *Holcim* supra note *319* at para 1; *Agri South Africa* supra note 323 at para 27

[449] Van der Schyff op cit note 319 at 170; *Agri South Africa* supra note 323 para 27. The object of Schedule II of the MPRDA is to provide transitional arrangements for when old order mineral rights are to be converted to rights granted under the MPRDA.

[450] Van der Schyff op cit note 319 at 170; *Agri South Africa* supra note 323 at para 27.

[451] Van der Schyff op cit note 319 at 170; *Agri South* Africa supra note 323 at para 27.

[452] Section 24(b)(iii) of the Constitution.

[453] Van der Schyff op cit note 319 at 170; Section 2(h) of the MPRDA.

[454] Van der Schyff op cit note 319 at 170; see section 1 of the MPRDA for the definition of 'sustainable development'.

[455] Section 2(e) of the MPRDA; Van der Schyff op cit note 319 at 170.

[456] Section 2(i) of the MPRDA.

[457] Sections 2(h) and (i) of the MPRDA; Van der Schyff op cit note 319 at 171.

requires improving people's living conditions by providing access to services such as education, housing, medical treatment, skills development, and employment.[458]

As indicated above, the MPRDA refers to "the nation's mineral and petroleum resources." Although South Africa's mineral and petroleum resources have always been of national importance, their importance is raised by declaring the nation's interest in these resources.[459] It thereby diminishes private interests in the country's unsevered mineral and petroleum resources for the nation's benefit.[460]

The state as appointed custodian of the nation's mineral and petroleum resources regulates the extraction and production activities within a sustainable environment.[461] The state therefore has to regulate within the framework of the social and economic factors, acknowledging the interests of present and future generations.[462] The following section discusses the object of transformation in determining the meaning of state custodianship.

#### 3.3.3.2 The MPRDA's Object of Transformation and State Custodianship

The MPRDA acknowledges the internationally affirmed right of the state to exercise sovereignty over all mineral and petroleum resources within the country.[463] This right enables the state to exercise permanent sovereignty over the natural resources in the country.[464] States must exercise their sovereignty over natural resources for the well-being of their people.[465]

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[458] Ibid.

[459] Van der Schyff op cit note 319 at 171; Preamble, long title and section 2(c) of the MPRDA.

[460] Van der Schyff op cit note 319 at 171.

[461] Section 3 of the MPRDA; Van der Schyff op cit note 319 at 171.

[462] See section 1 for the definition of 'sustainable development.'

[463] Section 2(a) of the MPRDA; para 3.2.1 at 39.

[464] UN Resolution No 1803 (XVII): Permanent sovereignty over natural resources; Resolutions No 2158 (XXI) 14 December 1962 and No 3281 (XXIX): Charter of Economic Rights and Duties of States of 12 December 1974; MR Fowler & JM Bunck *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (1995) Penn State Press at 33; Ingrid deLupis *International Law and the Independent state* (New York: Crane Russack and Company (1974) at 3; SD Krasner 'Sovereignty: An institutional perspective' in James A Caporaso (ed) *The Elusive States: International & Comparative Perspectives* (1989) 1st edition Sage Publications at 89'A de Benoist 'What is sovereignty?' 1999 (translated by Julia Kostova from 'Qu' est-ece Que la Souverainete?' in Elements No 96 (1999) 24 – 35 website at http://www.alaindebenoist.com/pdf/what_is_sovereignty.pdf [accessed 11 June 2023]; N Schrijver 'Self determination of peoples and sovereignty over natural wealth and resources' in OHCHR (ed) *Realizing the Right to Development: Essays in Commemeration of 25 Years of the United Nations Declaration on the Right to Development* (2013) 95 at 101.

[465] UN Resolution No 1803 (XVII): Permanent sovereignty over natural resources of 14 December 1962.

States have the right to determine the property regime under which mineral and petroleum resources are to be owned and regulated.[466] The state's permanent sovereignty over natural resources has been described as establishing states' exclusive jurisdiction over their natural resources in a fixed area where they can exercise sovereign rights.[467] The explicit acknowledgment of the sovereign right of the state over mineral and petroleum resources in the MPRDA may be seen within the historical background of the country and the need to implement corrective measures to ensure a just and equal society.[468] Therefore, the state is enabled to determine the regulatory framework and the nature of the property rights regime it wishes to adopt in regulating the use, exploitation, and protection of mineral and petroleum resources.[469] The MPRDA reaffirms the international right of the state to determine the regulatory framework within its territory.[470]

The previous mineral law regime was based on the state's permanent sovereignty over mineral and petroleum resources and the common law principle of *cuius est solum*.[471] Therefore, the landowner held rights to minerals, while the private property rights regime formed the foundation of the mineral law dispensation.[472] The MPRDA, however, heralds a new mineral law rights regime based on the principle of state custodianship.[473] The following section discusses the duty of the state to expand opportunities for historically disadvantaged persons.

#### 3.3.3.2.1 The Duty of the State in Expanding Opportunities for Historically Disadvantaged Persons

The MPRDA requires the Minister to consider whether to grant rights and consider expanding opportunities for historically disadvantaged persons as one of its objects.[474] The Minister is

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[466] A Ronne 'Public and private rights to natural resources and differences in their protection?' in A McHarg, B Barton, A Bradrook & L Godden (eds) *Property and the law in energy and natural resources* (2010) at 60 – 79.

[467] NJ Schrijver 'Permanent sovereignty over natural resources versus the common heritage of mankind: Complementary or contradictory principles of international law' (1987) *21 Series: Development & Security* 1-23 at 1; Article 1 of the United Nations General Assembly Resolution 3281 (XXIX) Charter of Economic Rights and Duties of States, 12 December 1974; Van der Schyff op cit note 319 at 165; H Hannum *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, University of Pennsylvania Press (1990) at 14.

[468] Van der Schyff op cit note 319 at 164.

[469] Section 2(a) of the MPRDA; Van der Schyff op cit note 319 at 164

[470] Section 2(a) of the MPRDA; Schrijver op cit note 131 at 1-23 at 1; Van der Schyff op cit note 319 at 164.

[471] Under the Minerals Act 50 of 1991; see discussion above at Chapter Two at 53.

[472] Van der Schyff op cit note 319 at 164.

[473] Sections 2 and 3 of the MPRDA; Van der Schyff op cit note 319 at 165; see discussion above at Chapter 2 at 49.

[474]See section 2(d) read with sections 17(4) and 23(1)(d) of the MPRDA.

required to expand opportunities to women and communities, being part of historically disadvantaged persons.[475] As one of the objects, historically disadvantaged persons must be able to participate in the mineral and petroleum industries and benefit from the nation's mineral and petroleum resources.[476]

When considering whether to grant an application for a prospecting right, the type of mineral for which an applicant has applied and the extent of the activities are to be considered by the Minister in determining whether to request an applicant to comply with this object.[477] However, the Minister must consider whether granting a mining right will further expand opportunities for historically disadvantaged persons.[478] This requirement is in addition to the object that requires the promotion of employment and advancement of the social and economic welfare of South Africans.[479] The granting of such a right must also accord with the Charter contemplated in section 100 of the MPRDA[480] and the prescribed social and labour plan.[481]

The transitional provisions differ from the requirements determined for new applications under the MPRDA insofar as adherence to black economic empowerment is concerned.[482] An application for the conversion of an old order mining right must include an undertaking that the holder will give effect to the objectives, in particular sections 2(d) and 2(f) of the MPRDA.[483] Section 2(d) requires that opportunities for historically disadvantaged persons must be substantially and meaningfully expanded, while section 2(f) of the MPRDA requires that the employment and advancement of the social and economic welfare of all South Africans

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[475] Section 2(d) of the MPRDA; also see discussion above at Chapter Two at 49-60.

[476] Section 2(d) of the MPRDA; also see discussion above at Chapter Two at 49-60.

[477] Section 17(4) of the MPRDA; Mostert op cit note 382 at 83.

[478] Section 23(h) of the MPRDA; Mostert op cit note 382 at 83.

[479] Section 2(f) of the MPRDA.

[480] Section 100 of the MPRDA requires the minister to develop a broad-based socio-economic empowerment charter to determine the framework for targets and a time table for effecting the entry into and active participation of historically disadvantaged persons into the mining industry and to benefit from the nation's mineral and petroleum resources.

[481] Section 23(h) read with section 100(2) of the MPRDA; Mostert op cit note 382 at 83.

[482] Ibid at 101; see Schedule II to the MPRDA. Section 1 of the MPRDA defines 'broad-based economic empowerment' as a social or economic strategy, plan, principle, approach or act which is aimed at redressing the results of past or present discrimination on a number of grounds, which include discrimination based on race and gender. Broad-based economic empowerment also includes transforming industries to assist, provide, initiate or facilitate the transfer of the ownership of operations in the extraction of minerals and petroleum, the participation or management control of such operations and the development of the skills of historically disadvantaged persons. See section 1 of the MPRDA for a complete definition of broad-based economic empowerment.

[483] Mostert op cit note 382 at 101.

be promoted.[484] A new application for mineral rights requires that the applicant demonstrate that the granting of the right will further the objects of the MPRDA, in accordance with the broad-based mining charter and the social and labour plan.[485] The transitional provisions may, however, result in unfavourable consequences for particular persons.[486] The conversion process intends to mitigate such unfavourable consequences, which is a less onerous process than applying for new rights for prospecting and mining activities.[487]

Several provisions reflect the MPRDA's objective to expand opportunities for historically disadvantaged persons substantially and meaningfully, for them to enter the mineral and petroleum industries.[488] These objectives reflect in, among other things, the requirements for the application of new mining rights[489] and the conversion of old order mining rights.[490] The MPRDA also contains provisions for the attainment of "broad-based economic empowerment." Broad-based economic empowerment is described as a social or economic strategy plan, principle, approach, or act to redress the results of past or present discrimination based on race, gender, or other disability of historically disadvantaged persons[491] Discrimination on these grounds has taken place in the minerals and petroleum industry, related industries, and the value chain of such industries that require the transformation of these industries.[492]

In accordance with the state's duty acting through the Minister to attain the government's objectives of redressing the historical, social, and economic inequalities as required in the Constitution, the Minister must develop a broad-based socio-economic empowerment charter.[493] The purpose of the Charter, generally known as the Mining Charter, must provide a framework for setting targets and a timetable to effect entry into and participation by

[484] Sections 2(d) and (f) of the MPRDA.

[485] Section 23(1)(h) read with sections 2(d) and 2(f) of the MPRDA; Mostert op cit note 382 at 101.

[486] Mostert op cit note 382 at 101.

[487] Sections 17 and 23 of the MPRDA when compared to Items 6 and 7 of Schedule II to the MPRDA; Mostert op cit note 382 at 101.

[488] Section 2(d) and Chapter 4 of the MPRDA; Mostert op cit note 382 at 111.

[489] Section 23 of the MPRDA.

[490] Item 7 of Schedule II to the MPRDA.

[491] Section 1 of the MPRDA of the definition for 'broad-based economic empowerment'.

[492] Section 1 of the MPRDA of the definition of 'broad based economic empowerment'.

[493] Section 100(2)(a) of the MPRDA

historically disadvantaged South Africans in the mining industry.[494] The Mining Charter must also allow such South Africans to benefit from exploiting the mining and mineral resources and beneficiating mineral resources.[495]

The first Mining Charter came into effect in August 2004[496] and was followed by two other charters, promulgated in 2010[497] and 2019.[498] These Mining Charters provide frameworks, targets, and timetables to enable the transformation of the mining industry.[499] The first Mining Charter provided a scorecard in considering applications for converting old order rights and was therefore supplementary to the requirements contained in the Mining Charter.[500] The scorecard furthermore serves to facilitate the application of the Mining Charter.[501]

The Mining Charter and scorecard also serve as policy documents that may act as guidelines in considering applications for rights.[502] Although the scorecard and Mining Charter served as mere guidelines in considering conversions of old order rights, the MPRDA expressly requires compliance with the provisions of the Mining Charter for applications.[503] No such direct

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494 Section 100(2)(a) of the MPRDA.

495 Section 100(2)(a) of the MPRDA.

496 Broad-based Socio-Economic Empowerment Charter for the South African Mining Industry Government Notice 1639 in Government Gazette 26661 of 13 August 2004; PJ Badenhorst and H Mostert Mineral and Petroleum Law of South Africa (2004) Juta at Ch 23-4; Mostert op cit note 382 at 111.

497 Three Mining Charters have to thus far been promulgated that amended the requirements for the mining industry to be compliant when applying for and being granted the various licenses, permits and authorisations by the department of Minerals and Energy.

498Broad-based Socio-Economic Empowerment Charter for the Mining and Minerals Industry GN 1002 Government Gazette 41934 dated 27 September 2018.

499 Section 100(2)(a) of the MPRDA; Mostert op cit note 382 at 111; also see a discussion of the three Mining Charters in A Heyns and H Mostert 'Three Mining Charters and a Draft: How the Politics and Rhetoric of Development in the South African Mining Sector are Keeping Communities in *Poverty' Law and Development Review* 2018 (11) 801 – 842; M Makgoba *Constructing symbolic agendas with the discourse of black economic empowerment: structural and political change in South African mining* (unpublished doctoral thesis for PhD, Cardiff University 2019); A Heyns *Empowerment through Mine Community Development: How the politics of development perpetuate poverty in mining areas – A legal theoretical basis* (unpublished doctoral thesis for PhD, University of Cape Town 2019).

500 Paragraph 4.11 of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry GN 1639 Government Gazette 26661 dated 13 August 2004.

501 Mostert op cit note 382 at 111; Heyns and Mostert 'op cit note 183 at 801 – 842; A Heyns 'Empowerment through mine community development: how the politics of development perpetuate poverty in mining areas – a legal historical analysis' available at http://handle.net/11427/32685 accessed on 6 February 2022.

502 Mostert op cit note 382 at 112; A Heyns 'Empowerment through mine community development: how the politics of development perpetuate poverty in mining areas – a legal historical analysis' available at http://handle.net/11427/32685 accessed on 6 February 2022.

503 Section 23(1)(h) read with section 100 of the MPRDA; Mostert op cit note 382 at 112; A Heyns and H Mostert op cit note 686 at 801 – 842.

reference to the Mining Charter is made in Schedule II to the MPRDA when conversions of old order rights to rights under the MPRDA were considered.[504]

The mining charter is now required to set out how the objects referred to in sections 2(c), (d), (e), (f), and (i) of the MPRDA can be achieved.[505] These objects in the MPRDA require the promotion of equitable access to the nation's mineral and petroleum resources[506] and substantially and meaningfully expand opportunities for historically disadvantaged persons.[507] It also includes the promotion of economic growth and mineral and petroleum resources development,[508] the promotion of employment and advancement of the social and economic welfare of South Africans[509], and ensuring that holders of mining and production rights contribute to socio-economic development in the areas where they operate.[510]

Mining charter, 2018 gives effect to the objectives as required in section 100(2) by providing nine objectives.[511] These objectives include the affirmation of the international principle of state sovereignty, its right to exercise authority and make laws in respect of its mineral wealth, to deracialise ownership patterns, substantially and meaningfully expand opportunities for historically disadvantaged persons and to utilise and expand the basis of the existing skills for the empowerment of historically disadvantaged persons.[512] The Mining Charter objects also require the advancement of employment, the enhancement of the social and economic welfare of the South Africans, promotion of sustainable growth and competitiveness in the mining industry, facilitating growth and development of the local mining inputs sector, and promoting beneficiation of South Africa's minerals.[513]

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[504] Items 3-9 of Schedule II to the MPRDA; Mostert op cit note 382 at 112.

[505] Section 100(2) of the MPRDA.

[506] Section 2(c) of the MPRDA.

[507] Section 2(d) of the MPRDA.

[508] Section 2(e) of the MPRDA.

[509] Section 2(f) of the MPRDA.

[510] Section 2(i) of the MPRDA.

[511] Paragraph 1 of Broad-based Socio-Economic Empowerment Charter for the Mining and Minerals Industry GN 1002 Government Gazette 41934 dated 27 September 2018; CJ Day *Influence of Stakeholder Interactions on Policy: The Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* (unpublished MA thesis, University of Stellenbosch, 2021).

[512] See paragraph 1(a)-(d) of the *Broad-based Socio-Economic Empowerment Charter for the Mining and Minerals Industry* GN 1002 Government Gazette 41934 dated 27 September 2018.

[513] See paragraph 1(e)-(i) of the *Broad-based Socio-Economic Empowerment Charter for the Mining and Minerals Industry* GN 1002 Government Gazette 41934 dated 27 September 2018.

#### 3.3.3.2.2 The State's Role in Implementing the Remedial Objects of the MPRDA

The MPRDA contains remedial objects that intend to address the injustices of the past.[514] The object of equitable access to the nation's mineral and petroleum resources for all the people of South Africa is included.[515] The MPRDA also requires the expansion of opportunities for historically disadvantaged persons.[516] The active participation of historically disadvantaged persons in the mineral and petroleum industries who are to benefit from exploiting these natural resources is specifically included.[517] As such, the remedial focus of the MPRDA encapsulates the above two objects, which require affirmative action steps in addressing the injustices of the past in ensuring an equal society.[518]

The object that affirmative action measures are aimed at historically disadvantaged persons requires that women and communities affected by past racial discrimination must benefit from affirmative action measures.[519] Secondly, the measures proposed by the MPRDA in its objectives, require the implementation of affirmative action.[520] These measures include the prevention of continued and new discriminatory practices. However, a price is to be paid by the former beneficiaries of historical racial practices to ensure that the constitutional goal of equality is promoted.[521]

The need to expand opportunities to historically disadvantaged persons and facilitate equitable access to mineral and petroleum resources laid the basis for adopting the MPRDA.[522] The former mineral law regime[523] already allocated the rights to the country's mineral and petroleum resources to former beneficiaries of the apartheid past.[524] Very few unallocated

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[514] Sections 2(c) and 2(d) of the MPRDA; See Van der Schyff op cit note 319 at 167.

[515] Section 2(c) of the MPRDA.

[516] Section 2(d) of the MPRDA.

[517] Section 2(d) of the MPRDA.

[518] See Chapter 2 for a discussion on the historical perspective of the exclusion of black people from the minerals and petroleum resources in South Africa; Van der Schyff op cit note 319 at 167.

[519] Van der Schyff op cit note 319 at 167; section 2(d) of the MPRDA; *Minister of Finance v Van Heerden and Another* 2004 (6) SA 121 (CC) para 37-44.

[520] Van der Schyff op cit note 319 at 167; section 2(d) of the MPRDA; *Minister of Finance* supra note 519 at para 37-44.

[521] Van der Schyff op cit note 319 at 167; section 2(d) of the MPRDA; *Minister of Finance* supra note 519 at para 37-44.

[522] Van der Schyff op cit note 319 at 168.

[523] See Chapter 2 for a discussion of the different historical mineral regimes that existed before the adoption of the MPRDA in 2002.

[524] Van der Schyff op cit note 319 at 168.

rights to minerals were therefore available for allocation to historically disadvantaged persons at the commencement of the MPRDA to facilitate equitable access to the nation's mineral and petroleum resources.[525] Only mineral rights in state land and trust land were available for distribution to previously disadvantaged persons.[526]

A new dispensation that would introduce a fundamental change to the then existing regime to ensure equitable access to mineral and petroleum resources was required.[527] This change required opening up the system in a radical manner to release mineral rights already allocated under the previous mineral law regime to ensure equitable access to mineral rights.[528] The release of South Africa's mineral and petroleum resources from the effect of the previous discriminatory land policy was thereby implemented.[529] The required change of the mineral law system also impacts the application of the *cuius est solum* principle according to which the landowner was regarded as the mineral rights holder except to the extent that mineral rights were removed from landownership.[530] Chapter Four discusses the impact of the new mineral law system on the ownership of mineral rights.[531]

As stated above, the MRDA allowed for the system's opening up to release mineral rights by including transitional provisions.[532] The transitional provisions contained in Schedule II of the MPRDA provided that mineral rights would become available where "old order" rights were not converted as provided for in the Schedule and therefore lapse.[533] In instances where no application for the transition of old order rights to new order rights was made, the lapsing of such rights to minerals allowed for the re-allocation of rights to previously disadvantaged persons.[534] The MPRDA requires that sustainable development objectives are met to serve present and future generations.[535] The state, as custodian, is responsible for transforming the

[525] Ibid at 169.

[526] Ibid.

[527] The MPRDA came into effect on 1 May 2004 and replaced the Minerals Act 50 of 1991; Van der Schyff op cit note 319 at 169.

[528] Ibid.

[529] Ibid.

[530] Ibid.

[531] See Chapter Four at 75

[532] Schedule II of the MPRDA.

[533] The transitional provisions are contained in Schedule II of the MPRDA. For a discussion on the impact of the MPRDA and the transitional provisions here below at 71.

[534] Van der Schyff op cit note 319 at 169.

[535] See sections 2(f), (g) and (h) of the MPRDA.

mineral and petroleum industry by allowing equitable access to mineral rights. The following section discusses the state's role as custodian in implementing the objects of the MPRDA.

## 3.4 State Custodianship and Control by the State: Powers and Duties

The objective to ensure equitable access to mineral and petroleum resources, create economic development, and protect the environment while ensuring the mineral and petroleum resources industries' development required broader state control.[536] The MPRDA introduced broader state control over the granting, exercising, and retaining rights regarding South Africa's mineral and petroleum resources.[537]

Chapter 4 of the MPRDA expresses the regulatory strategy of the legislation, in that it allows the state the right to grant, refusal, control, administering, and managing of permissions, rights, and permits.[538] The MPRDA expressly authorises the state-as-custodian to grant all rights to prospect[539] and mine.[540] In addition to defining prospecting and mining activities under section 1, definitions of a prospecting right and a mining right are included.[541] The Minister must grant a prospecting right or a mining right provided the requirements listed in the respective sections have been complied with by an applicant.[542] The state, acting through the Minister, is also permitted to prescribe or levy any fee payable, including royalties as determined by an act of Parliament.[543]

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[536] Section 2 of the MRPDA; Mostert op cit note 382 at 78.

[537] Mostert op cit note 382 at 78.

[538] Chapter 4 contains sections 9 – 56 of the MPRDA

[539] Prospecting is defined in section 1 of the MPRDA as the 'intentional 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; (b) in or on any residue stockpile or residue deposit, 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.'

[540] The definition of mining is contained in section 1 of the MPRDA and forms part of the definition of 'mine.' The definition states that when the word mine is 'used as a verb, in 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.'

[541] See the definitions of a 'right to prospect' and a 'right to mine' in section 1 of the MPRDA;

[542] Section 23(1) of the MPRDA contains a number of requirements with which an applicant must comply to be granted a mining right.

[543] Section 3(2)(b) of the MPRDA.

The effect of the MPRDA is that it allowed the state to do explicitly what it had been doing implicitly under the 1991 dispensation.[544] Previously, the state reserved the right to prospect for and mine certain minerals.[545] The MPRDA does not expressly reserve for the state any type of mineral,[546] but only allows the state to grant, refuse, control, administer and manage rights, permissions, and permits to prospect and mine for minerals.[547] Due to the broad definition of a "mineral"[548] the state is able to exercise control over mineral-related activities pertaining to many minerals.[549]

The MPRDA determines how the state is required to exercise control[550] The obligations of applicants, the Minister, and officials from the department are prescribed,[551] as explained below.

### 3.4.1 The Powers of the Minister when Acting on behalf of the State

The powers granted to the Minister is a distinctive aspect of the new mineral law system.[552] The Minister is afforded the power to grant, renew, suspend or cancel rights under its provisions.[553] The Minister has the power to grant consent for the alienation of prospecting and mining rights. At the same time, the Minister may under certain circumstances initiate the suspension or cancellation of rights, permits, and permissions.[554] Ministerial consent is required for amending prospecting and mining rights.[555] As environmental issues are concerned, the Minister can instruct the regional manager to prevent pollution or degradation

[544] Ibid.

[545] Section 2(1) of the Mining Rights Act 20 of 1967 and s 2 of the Precious Stones Act 73 of 1964.

[546] Mostert op cit note 382 at 81.

[547] Section 3(2) of the MPRDA; Mostert op cit note 382 at 81.

[548] Section 1 of the MPRDA defines a mineral as 'any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes (a) water, other than water taken from land or sea for the extraction of any mineral from such water, (b) petroleum, or (c) peat.'

[549] Mostert op cit note 382 at 82; PJ Badenhorst, H Mostert & M Dendy 'Minerals and Petroleum' in WA Joubert (ed) *LAWSA* Vol 18 2 ed (2007) LexisNexis at para 13.

[550] Mostert op cit note 382 at 82.

[551] Mostert op cit note 382 at 82.

[552] Mostert op cit note 382 at 90.

[553] Chapter 4 of the MPRDA; Mostert op cit note 382 at 90.

[554] Section 47 of the MPRDA; also see discussion at 29-31 above.

[555] Section 107 of the MPRDA.

or cause an area to be safe.[556] In these instances, the Minister may instruct the regional manager to recover the costs for urgent remedial measures.[557]

The Minister therefore exercises regulatory discretion according to specified statutory criteria.[558] Although the Minister's powers have been described as significant, they are not regarded as unfettered powers.[559] The Minister must consult with interested and affected parties before any decision can be made when exercising discretion under the MPRDA. The Minister must act on the advice of the Regional Mining Development and Environmental Committee.[560] Transfers of rights are furthermore subject to the consent of the Minister, who must consider the relevant criteria.[561] In the instance of conflicting applications, the MPRDA determines the order in which applications are to be processed.[562] Where more than one application is received for a prospecting right, mining right, or a mining permit for the same mineral and land on the same day, it must be regarded as having been received at the same time.[563] In these instances, the Minister must give preference to applications received from historically disadvantaged persons.[564] Where applications are received on different days, those applications must be considered in the order in which they were received.[565] The Minister's discretion to consider competing applications are therefore limited by the provisions of the MPRDA.[566]

The criteria determined for the different rights, permissions, and permits limit the exercise of ministerial powers.[567] The Minister must grant an application where the applicant has met all

[556] Section 45 of the MPRDA.

[557] Section 45 of the MPRDA.

[558] Mostert op cit note 382 at 90.

[559] Mostert op cit note 382 at 90.

[560] Section 10(2) of the MPRDA; Mostert op cit note 382 at 90.

[561] See sections 13 – 36 of Chapter 4 of the MPRDA regarding the requirements to be considered by the Minister in deciding on whether to grant or refuse a right, permission or permit; Mostert op cit note 382 at 91.

[562] Section 9 of the MPRDA.

[563] Section 9(1) of the MPRDA.

[564] Section 9(2) of the MPRDA.

[565] Section 9(1) of the MPRDA; MO Dale 'Comparative International and Africa mineral law as applied in the formation of the new South Africa' in E Batisda, T Wälde and I Warden-Fernandez (eds) *International and Comparative Mineral law and Policy: Trends and Prospects* (2005) The Hague, Kluwer Law International 824 at 833.

[566] Section 9 of the MPRDA; Mostert op cit note 382 at 91; MO Dale, L Bekker, F Bashall, M Chaskalson, C Dixon, GL Grobler & CDA Loxton *South African Mineral and Petroleum Law* (2005) Lexis Nexis Butterworths at MPRDA – 153.

[567] See sections 14, 17, 23, 27 and 32 of the MPRDA for the criteria to which the Minister's discretion is bound in considering whether to grant the respective rights, permissions and permits; also see discussion above at 33. 54 and 68.

the requirements.[568] The broad-based socio-economic Mining Charter guides the exercise of the Minister's powers, whose responsibility is to determine a framework for transforming the minerals industry.[569] The Mining Charter must contain targets and a timetable to ensure the active participation and entry of historically disadvantaged South Africans into the mining industry.[570] The requirements that South Africans benefit from exploiting the mineral resources and that beneficiation in the minerals industry are there to guide the Minister's discretion.[571]

The exercise of ministerial discretion is furthermore subject to the PAJA.[572] Administrative conduct and decisions have to be in accordance with the principles of reasonableness, lawfulness, and procedural fairness.[573] The principles of administrative justice is incorporated by stating that any administrative process or decision must be taken within a reasonable period and in accordance with the above principles of natural justice.[574] The Minister is required to provide written reasons for decisions taken.[575]

The above provisions are a consequence of the Constitutional requirement that every person has the right to administrative action that is lawful, reasonable, and procedurally fair.[576] Proper and accountable administration by the Minister acting on behalf of the state insofar as the nations' mineral and petroleum resources is required.[577] The guidelines provided by the MPRDA and the PAJA provide limitations on the exercise of the powers by the Minister acting on behalf of the state under the MPRDA.[578] These limitations agree with the Constitutional requirement that rights may be limited to the extent that it is reasonable and justifiable in an

[568] Mostert op cit note 382 at 91; also see sections 14, 17, 23, 27 and 32 of the MPRDA for the criteria to which the Minister's discretion is bound in considering whether to grant the respective rights, permissions and permits; also see discussion above at 33, 54 and 68.

[569] Section 100(2) of the MPRDA; Mostert op cit note 382 at 91.

[570] Section 100(2) of the MPRDA.

[571] Section 100(2) of the MPRDA; Mostert op cit note 382 at 91.

[572] Promotion of Administrative Justice Act 3 of 2000.

[573] Promotion of Access to Justice Act 3 of 2000 read with section 33 of the Constitution of 1996; Badenhorst, Mostert & Dendy op cit note 549 at para 25-31.

[574] Section 6(1) of the MPRDA; Mostert op cit note 382 at 91.

[575] Section 6(2) of the MPRDA; Badenhorst, Mostert & Dendy op cit note 549 para 27; Mostert op cit note 382 at 91.

[576] Section 33 of the Constitution of 1996.

[577] Section 6(2) of the MPRDA; Section 33 of the Constitution; Mostert op cit note 382 at 92.

[578] Ibid at 92.

open and democratic society based on human dignity, equality, and freedom.[579] Failure to adhere to the above principles may lead to a judicial review under the provisions of PAJA.[580]

In addition to the prescribed requirements,[581] specific requirements such as those relating to the concentration of mineral resources and the prevention of unfair competition are not described.[582] The consideration of these requirements requires the exercise of a regulatory judgment by the Minister.[583] The MPRDA, therefore, sets the regulatory framework for the exercise of the Minister's discretion when acting on behalf of the state.[584] The Minister's administrative powers for granting, refusing, converting, or withdrawing rights are regulated by the MPRDA.[585] The administrative conduct and decisions of the Minister may also be taken on judicial review in instances where the internal appeal provided for in the MPRDA has been exhausted.[586] Such an internal appeal provides a mechanism for a person aggrieved by an administrative decision under the MPRDA to appeal to the Minister or Director-General.[587]

### 3.4.2 Duty of the State in the Awarding of Rights, Permissions, and Permits

The MPRDA regulates the granting of prospecting rights and mining rights.[588] In addition to the granting, issuing, refusal, control, administering, and management of rights by the Minister, provision is also made for the cancellation and abandonment of rights.[589] Criteria against which applications for rights, permissions, and permits have to comply, the period for which they are granted, their renewal, and the activities to be undertaken to grant rights, permits, and

[579] Section 36(1) of the MPRDA; Mostert op cit note 382 at 92.

[580] Section 6 of PAJA; Mostert op cit note 382 at 92.

[581] See sections 17, 23 and 32 of the MPRDA which prescribes the requirements for prospecting rights, mining rights and retention rights respectively.

[582] MO Dale et al op cit note 566 – 199;

[583] Ibid at MPRDA – 199.

[584] Section 6 of the MPRDA read with PAJA.

[585] Section 13-36 of the MPRDA; Mostert op cit note 382 at 92.

[586] Section 96 of the MPRDA provides for an internal appeal in terms whereof administrative conduct or decisions may be appealed to the Minister; Mostert op cit note 382 at 92; section 6 of the MPRDA.

[587] Section 96 of the MPRDA; Mostert op cit note 382 at 92.

[588] Mostert op cit note 382 at 82.

[589] Section 56 of the MPRDA; Mostert op cit note 382 at 82.

permissions are provided.[590] The respective obligations of applicants for permits, permissions, and rights and the duties of the department dealing with minerals and energy, including that of the Minister, are also provided.[591]

The MPRDA is prescriptive insofar as the discretion of the Minister in making decisions about the granting of rights,[592] permissions[593] , and permits, are concerned.[594] Except for issuing retention permits,[595] the Minister must issue the above rights, permits, and permission upon compliance with the criteria in the relevant sections.[596] In the instance of retention permits, the Minister may issue a retention permit upon compliance with the criteria.[597] The exercise of the discretion of the Minister is further restricted by determining the maximum number of instances, the periods for which, and the conditions upon which rights, permits, and permissions may be renewed.[598] The power of the Minister to act on behalf of the state as custodian of the nation's mineral and petroleum resources is therefore prescribed and limited by the provisions of the MPRDA.[599]

[590] Sections 13-15 of the MPRDA deal with reconnaissance permissions, sections 16–19 of the MPRDA regulate prospecting rights, sections 22-25 contain provisions regarding mining rights, section 27 with mining permits whilst sections 31 -35 deal with retention permits.

[591] Sections 13-15 of the MPRDA deal with reconnaissance permissions, sections 16-19 of the MPRDA regulate prospecting rights, sections 22-25 contain provisions regarding mining rights, section 27 with mining permits whilst sections 31 -35 deal with retention permits.

[592] Sections 17(1) and 23(1) of the MPRDA regulates the discretion of the Minister in respect of prospecting and mining rights respectively.

[593] Section 14(1) of the MPRDA regulates the discretion of the Minister in respect of reconnaissance permissions.

[594]Section 27(6) regulates the discretion of the Minister with respect to mining permits whilst section 32(1) and (2) of the MPRDA with the discretion of the Minster regarding retention permits.

[595] See section 32(1) of the MPRDA which reads that the Minister may issue a retention permit if the holder of the prospecting right has complied with a number of prescribed criteria contained in this section.

[596] See section 14(1) of the MPRDA in respect of reconnaissance permissions, sections 17(1) and 23(1) of the MPRDA regarding the discretion of the Minister in respect of prospecting and mining rights respectively and section 27(6) with respect to mining permits.

[597] Section 32(1) of the MPRDA.

[598] See section, 18(3), 24(3), 27(8) and 34 of the MPRDA regarding the exercise of discretion by the Minister in the renewal of prospecting rights, mining rights, mining permits and retention permits respectively.

[599] Section 3(2) of the MPRDA read with chapter 4 of the MPRDA. Chapter 4 of the MPRDA prescribes the power of the minister in respect of mineral and environmental regulation.

### 3.4.3 Content of Rights Granted by the State as Custodian

The rights awarded by the state under the MPRDA are created by statute.[600] As a creature of statute, the content of these rights is determined predominantly by its provisions[601] Rights under the MPRDA are limited real rights regarding the mineral and the land and not only to the land as was the position in common law.[602] Under the previous mineral law dispensation, the common law determined that rights to minerals were partly contractual and partly statutory or administrative in nature[603] Due to the statutory nature of the rights awarded by the state, the requirements prescribed by the MPRDA determine the exercise of discretion by the Minister as to whether to grant a right.[604]

The state's duty to ensure the optimal exploitation of the nation's mineral and petroleum resources are also regulated. The MPRDA requires that rights, permits, or permissions are to be used or, failing to do so, face the risk of losing such rights, permits or permissions.[605] The MPRDA thereby attempts to prevent the concentration of rights to minerals and the hoarding thereof.[606] However, the Minister must afford a holder, alleged not to have used the rights granted, reasonable opportunity to provide reasons as to why the right should not be suspended or canceled.[607] In considering the response of the holder of the right, the ministerial discretion to extend periods or to give an exception to the "use it or lose it principle" is not provided for in the MPRDA.[608]However, the Minister has to direct the holder to take remedial steps after considering the response of the holder of the right.[609]

The state must comply with just administrative action in deciding whether or not to extend timeframes or grant an exception to a holder not to use a right granted.[610] Reasons that could justify the Minister not to suspend or cancel the right could be related to economic conditions

[600] Section 5(1) of the MPRDA; Mostert op cit note 382 at 85.

[601] Mostert op cit note 382 at 85.

[602] Section 5(1) of the MPRDA; Mostert op cit note 382 at 85.

[603] Mostert op cit note 382 at 85.

[604] See sections 17, 23 and 31 of the MPRDA for the different requirements to be considered by the Minister for granting a prospecting right, mineral right and retention permit respectively; Mostert op cit note 382 at 85.

[605] The 'use it or lose it' principle; see Mostert op cit note 382 at 86.

[606] Mostert op cit note 382 at 86.

[607] Section 47 of the MPRDA; Mostert op cit note 382 at 86.

[608] Mostert op cit note 382 at 86.

[609] Section 47(3) of the MPRDA.

[610] Dale et al op cit note 566 at MPRDA – 245; Mostert op cit note 382 at 86.

and market factors that justify the suspension of mining activities.[611] A holder may decide not to use the right in suitable instances due to a lack of sufficient demand for a particular mineral.[612]

The obligation of the holder of a prospecting right or a mining right to commence activities within a certain timeframe reflects the importance of the "use it or lose it'' principle.[613] Failure to comply with the timeframes to commence activities as required may constitute an offence.[614] Furthermore, the MPRDA requires that the holder of a mining right or mining permit keep proper records of mining activities and financial records of mining activities.[615] Failure by a holder of a mining right or a holder of a mining permit to submit monthly returns, an audited annual financial report or financial statements, an annual report containing the extent of the holders' compliance with the provisions of sections 2(d) and (f), the Mining Charter under section 100 and the prescribed social and labour plan, may result in the suspension or cancellation of the right to mine.[616]

### 3.4.4 Duty of the State and the Negotiability of Rights

The MPRDA requires ministerial consent for the cession, transfer, letting, subletting, assignment, alienation, or disposal of prospecting and mining rights or interest in such a right or a controlling interest in a company or close corporation.[617] The change of a controlling interest in companies listed on a stock exchange does not require ministerial consent.[618] The purpose of this requirement is to transfer prospecting and mining rights to persons who qualify to be granted rights according to the criteria set by the MPRDA.[619] A person qualifies to be a cessionary, transferee, lessee, sublessee, assignee, or the person to whom the right is to be alienated or disposed of satisfies the requirements determined for applicants of prospecting[620]

[611] Dale et al op cit note 566 at MPRDA – 245; Mostert op cit note 382 at 86.

[612] Dale et al op cit note 566 at MPRDA – 245.

[613] See sections 19(2)(b) and 25(1)(b) of the MPRDA for the timeframes wherein the holders of a prospecting right and mining right must commence their activities respectively.

[614] Section 98 of the MPRDA; Mostert op cit note 382 at 87.

[615] Section 28(1) of the MPRDA; Mostert op cit note 382 at 87.

[616] Section 28 read with section 47 of the MPRDA.

[617] Section 11(1) of the MPRDA.

[618] Section 11(1) of the MPRDA.

[619] Section 11 of the MPRDA; Mostert op cit note 382 at 88; Dale et al op cit note 566 at MPRDA – 161.

[620] Section 17 of the MPRDA.

and mining rights.[621] The Minister must give consent for such alienation or disposal.[622] Such a person to whom a prospecting or a mining right is to be alienated or disposed of must also be capable of complying with the obligations and terms and conditions attached to that right.[623]

The negotiability of the above rights provides commercial value to such rights in that they may be alienated or disposed of, subject to compliance with the requirements determined in the MPRDA.[624] Various commercial transactions are allowed, including transferring a right to be "otherwise disposed of'' as expressly provided for in the MPRDA.[625] Allowing for the transfer or cession of a right, the conveyancing of a prospecting right, mining right, exploration right, or petroleum right registered in the mineral and petroleum registration office is allowed.[626]

An interest in any prospecting or mining right may be disposded of.[627] The disposal of an undivided share in such a right is subject to the permission of the Minister.[628] The MPRDA also provides for the transfer of interests in shares arising due to unincorporated joint ventures.[629] Consent in particular circumstances is not required where the encumbrance by a mortgage is to serve as security to obtain a loan or guarantee to fund or finance a prospecting or mining project from a bank or financial institution.[630] No consent will be required where the institution undertakes that any sale or disposal pursuant to the mortgage foreclosure will be subject to Ministerial consent.[631] It is not possible to mortgage reconnaissance permissions and retention permits.[632] However, mining permits may be mortgaged for project funding subject to ministerial consent but may not be transferred, ceded, let, sublet, alienated, or disposed of.[633] As such, it is not possible to foreclose on reconnaissance and retention permits.[634]

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[621] Section 23 of the MPRDA.

[622] Section 11(2(b) of the MPRDA; Mostert op cit note 382 at 88.

[623] Section 11(2(a) of the MPRDA; Mostert op cit note 382 at 88.

[624] Section 11(2(a) and (b) of the MPRDA; Mostert op cit note 382 at 88.

[625] Section 11(1) of the MPRDA; Mostert op cit note 382 at 88.

[626] Mostert op cit note 382 at 88; Dale et al op cit note 566 at MPRDA – 162.

[627] Section 11(1) of the MPRDA.

[628] Section 11(1) of the MPRDA; Mostert op cit note 382 at 89.

[629] Section 11(1) of the MPRDA; Mostert op cit note 382 at 89.

[630] Section 11(3) of the MPRDA.

[631] Section 11(3) of the MPRDA.

[632] Section 14(5) and section 36 of the MPRDA; Mostert op cit note 382 at 90.

[633] Section 27(8)(b) of the MPRDA.

[634] Mostert op cit note 382 at 90; Dale op cit 565 at 831.

The MPRDA provides less onerous provisions for the transfer of rights than previous mineral law dispensations.[635] Previous mineral law dispensations required that new applications be lodged for the authorisation to prospect or mine when the common law mineral rights on which the prospecting or mining was based were obtained.[636]

### 3.4.5 Duty of the State to Preserve the Security and Continuity of Tenure between the Prospecting Phase and the Mining Phase

The state must ensure the preservation of security and continuity of tenure between the prospecting and mining phase.[637] The Minister may issue a retention permit if certain conditions have been met.[638] These conditions include where an applicant has completed prospecting activities and has determined the existence of a mineral reserve but would be uneconomical to mine due to prevailing market conditions.[639]

A retention permit provides for situations where an applicant has invested in prospecting activities, but due to market conditions, would suffer undue hardship should activities cease, thereby breaching the conditions of the prospecting right.[640] Breaching the conditions of a prospecting right could cause the applicant to lose the right to apply for a mining right.[641] The issuing of a retention permit suspends the terms and conditions of a prospecting right during the duration of the retention permit. The duration of the retention permit runs concurrently with the prospecting right for which it was issued.[642]

The Minister has a discretion to issue or refuse a retention permit to a holder of a prospecting permit.[643] A retention permit may be refused on grounds statutorily prescribed.[644] Refusal of a

[635] The Minerals Act 50 of 1991 did not allow for the transfer of prospecting or mining rights and applicants had to apply afresh when obtaining the underlying common law mineral rights on which the prospecting right or mining right was based.

[636] Mostert op cit note 382 at 90.

[637] Section 31 of the MPRDA.

[638] Section 32(1) of the MPRDA; Mostert op cit note 382 at 83.

[639] Section 32(1)(a)–(d) of the MPRDA; Mostert op cit note 382 at 84.

[640] Mostert op cit note 382 at 84.

[641] Mostert op cit note 382 at 84.

[642] Section 32(2) of the MPRDA.

[643] See sections 32 and 33 of the MPRDA.

[644] Section 33(a)-(c) of the MPRDA.

retention permit may occur after the Minerals and Petroleum Board,[645] upon request by the Minister to research whether a mineral can be mined economically, has established that the mineral can be mined profitably.[646] A retention permit may also be refused if the prospecting operations and feasibility study have not been completed.[647] Where the granting of a retention permit will lead to a concentration of the particular mineral resource under the applicant's control, which may lead to a possible limitation of equitable access to mineral resources, the Minister may also refuse a retention permit.[648]

Although issuing a retention permit vests within the discretion of the Minister, the Promotion of Access to Justice Act (PAJA)[649] allows for a judicial review of the refusal of the Minister to issue a retention permit.[650] Therefore, the provisions of PAJA ensure that the legal effect of the provisions relating to the issuing of a retention permit[651] is similar to that where the Minister must grant a renewal of a prospecting and mining right where all the conditions under the MPRDA are complied with.[652]

### 3.4.6 Duty of the State and the Transitional Provisions of the MPRDA

The MPRDA provides for a transitional period between the previous mineral law dispensation under the Minerals Act[653] and the current dispensation introduced by the MPRDA.[654] The transitional provisions contained in Schedule II to the MPRDA provide for the continued

[645] The Minerals and Petroleum Board is established under section 57 of the MPRDA whilst section 58 provides for its functions. Its main functions are to advise the Minister on any matter to be referred to it, give advice as to the transformation and downscaling of the minerals and petroleum industries and to advise the Minister on objections referred by it to the Minister.

[646] Section 33(a) of the MPRDA.

[647] Section 33(b) of the MPRDA.

[648] Section 33(c) of the MPRDA.

[649] Section 6(2) of the Promotion of Access to Justice Act 3 of 2000.

[650] Mostert op cit note 382 at 84.

[651] Section 32 of the MPRDA.

[652] Sections 18(3) and 24 of the MPRDA compels the Minister to grant a renewal of a prospecting and mining right respectively when all the conditions as prescribed have been met; Dale et al op cit note 566 at MPRDA – 305; Mostert op cit note 382 at 84.

[653] Minerals Act 50 of 1991.

[654] The transitional provisions are contained in Schedule II of the MPRDA provided different periods for which different rights remained in force. For instance, unused old order rights remained in force for a period of one year under item 8 of Schedule II, whilst under item seven, an old order mining right continued in force for a period not exceeding five years; Mostert op cit note 382 at 92.

existence of rights and authorisations recognised by the previous mineral law regime for a limited period.[655] The transitional provisions allow for the conversion of previously recognised prospecting and mining rights and authorisations to be converted into prospecting and mining rights granted.[656]

The Minister could only convert rights and conversions acknowledged by the previous mineral law dispensation upon application, failing which the rights and authorisations would cease to exist after prescribed periods contained in Schedule II to the MPRDA had lapsed.[657] The strict conversion process prescribed by Schedule II ensured that the state-controlled conversion process broadens access to mineral resources and implement empowerment goals in the mining industry.[658] The transitional provisions also served to provide that detriment suffered due to the transition from the previous mineral law dispensation to the current mineral dispensation, was to be controlled by the state.

Although the transitional periods have lapsed, the extent and nature of the transitional provisions indicate the state's role as custodian in ensuring that the objectives were implemented during the transitional period.[659] The impact of the transitional provisions on state control and ownership of minerals by holders of previously held mineral rights regarding the previous mineral law dispensation is discussed in Chapter Four.

### 3.4.7 Duty of the State to Collect, Store and Protect Data

The holder of a prospecting right or reconnaissance permission must keep a record of prospecting or reconnaissance activities, the results, and expenditure incurred therewith as well as borehole data and core-log data insofar as it is relevant.[660] A prospecting right holder is further required to submit reports on progress and data in the prescribed manner and required intervals to the Regional Manager regarding prospecting activities.[661] The Regional Manager is required to submit the progress reports and data indicated above to the Council for

[655] See Items 4-9 of Schedule II to the MPRDA.

[656] See Items 4-9 of Schedule II to the MPRDA.

[657] See Items 4-9 of Schedule II to the MPRDA; see Mostert op cit note 382 at 92.

[658] See section 2 for the objects of the MPRDA; Mostert op cit note 382 at 92.

[659] Schedule II to the MPRDA provided that authorisations acknowledged under the previous mineral law regime had to be converted within various periods of up to 5 years; see items 4-9 of Schedule II to the MPRDA.

[660] Section 21(1)(a) of the MPRDA.

[661] Section 21(1)(b) of the MPRDA.

Geoscience, who must advise the Minister on all required information regarding prospecting activities.[662]

The MPRDA prohibits the destruction or disposal of any record, borehole core data, or core-log data without the written directions of the Regional Manager in consultation with the Council for Geoscience.[663] A duty, therefore, exists on the state to collect, store and protect data obtained from holders of prospecting rights and activities flowing therefrom.[664] These duties enable the state-as-custodian to control and give effect to the objects of the MPRDA.[665]

## 3.5 Conclusion

The MPRDA introduces a new mineral law dispensation that appoints the state as the nation's mineral resources custodian.[666] As the MPRDA does not contain a definition of state custodianship,[667] the need for such a definition remains open for discussion. Currently, the interpretation of this concept relies on an interpretation of its provisions. In interpreting the concept of state custodianship, the values as expressed in the MPRDA must be considered.[668] However, the need to interpret the values, provides the opportunity to develop the concept of state custodianship in the ensuing chapters of this thesis.

The powers of the Minister in acting on behalf of the state in respect of the mineral and petroleum resources are regulated.[669] The manner in which and the criteria against which the state considers applications for permissions, permits, and rights, indicate that the current mineral law system is administrative in nature.[670] The state's duties regarding mineral and

[662] Section 1(B) of the MPRDA.

[663] Section 21(2) of the MPRDA.

[664] Section 21 of the MRDA; Mostert op cit note 382 at 87.

[665] Mostert op cit note 382 at 87.

[666] Ibid at 87.

[667] MPRDA; Van der Schyff op cit note 319 at 166.

[668] As custodian, the state must ensure equitable access to the mineral and petroleum resources, promote economic development through the exploitation of these resources, and advance the social values contained in the Constitution. These values are expressed in the objects of the MPRDA contained in section 2.

[669] Section 3 and Chapter 4 of the MPRDA which deals with mineral and environmental regulation.

[670] See Chapter 4 of the MPRDA; Mostert op cit note 382 at 82; Dale op cit 565 at 832.

petroleum resources are also strictly prescribed by the MPRDA.[671] In this regard, the state is bound to ensure that the three pillars on which the MPRDA is based are effectively promoted and given effect.[672] These three pillars[673] refer to the ownership of mineral and petroleum resources being regarded as the nation's mineral and petroleum resources, equitable access to these resources, and lastly, the sustainable development thereof[674] In the absence of a definition, the requirement to define the state's responsibilities with reference to the above three pillars, once again allows for the formulation of the duties of the state-as-custodian. Various interpretations may, however, lead to different definitions of the concept of the state-as-custodian which may, or may not, assist in determining the correct interpretation. The following chapters of this thesis intends to provide guidance on determining the content of state custodianship.

As custodian of the nation's mineral and petroleum resources, it has various duties, including its duty to develop codes and [675] standards[676] which require frameworks, targets, and timetables. These mechanisms must ensure the entry of historically disadvantaged persons into the mining industry and allow all South Africans to benefit from exploiting such resources.[677] Whilst the MPRDA provides guidance on the administrative duties of the state-as-custodian, its substantive duties towards the nation still require determination.

Broader state control over granting, exercising, and retaining rights to South Africa's mineral and petroleum resources is introduced by the MPRDA.[678] Although broader state control intends to enable the state to implement the objects of the MPRDA, it has allowed the state to do what it has been doing implicitly before the promulgation of the MPRDA in 2004.[679] The

[671] See in particular section 109 of the MPRDA. Also see the Preamble, Chapter 2 regarding the fundamental principles of the MPRDA, Chapter 4 and Chapter 7 which deals with general and miscellaneous provisions.

[672] Van der Schyff op cit note 319 at 162; section 2 of the MPRDA

[673]Van der Schyff op cit note 319 at 162.

[674] Long title to the MPRDA; Van der Schyff op cit note 319 at 152.

[675] Section 100(1)(b) of the MPRDA requires the Minister to develop a code of good practice for the minerals industry.

[676] Section 100(1)(a) of the MPRDA requires the development of a housing and living conditions standard for the minerals industry by the Minister in consultation with the Minister for Housing.

[677] Section 100(2) of the MPRDA.

[678] Mostert op cit note 382 at 78.

[679] Mostert op cit note 382 at 78.

required extent of state control to ensure optimal implementation of the duties and responsibilities of the state-as-custodian, still need to be determined.

While the MPRDA does not contain a definition of state custodianship, it does state who the owner of the mineral resources is.[680] The "nation'' is declared to be the owner of mineral and petroleum resources.[681] It also states that the mineral and petroleum resources are the common heritage of all the people of South Africa.[682] Determining the consequences of the nation being declared owner of mineral and petroleum resources, assists in determining the role of the state-as-custodian towards the nation. The next chapter discusses where ownership of mineral resources is vested concerning the nation being declared the owner.

[680] Sections 2(c) and 3(2) of the MPRDA.

[681] Sections 2(c) and 3(2) of the MPRDA.

[682] Section 2(1) of the MPRDA.

# CHAPTER FOUR: HISTORY OVERHAULED? STATE CUSTODIANSHIP AND THE OWNERSHIP OF UNSEVERED MINERALS

## 4.1 Introduction

One of the fundamental aims of the Mineral and Petroleum Resources Development Act (MPRDA) is to give effect to the state's custodianship of the nation's mineral and petroleum resources.[683] In fulfilling this principle, the MPRDA declares that the state is the custodian of the mineral and petroleum resources to benefit all South Africans.[684] It also provides that these resources are the common heritage of all the people of South Africa.[685] The MPRDA introduces a new regulatory regime regarding mineral and petroleum resources and, within the context of this chapter, the ownership of minerals.[686]

Before adopting the MPRDA, land ownership included ownership of unsevered minerals in terms of the *cuius est solum* principle. As stated in chapter 3, the consequence of landownership excluded most South Africans from access to minerals.[687] Therefore, it was necessary to revisit the basis of access to minerals than on the ownership of land to ensure equal access to minerals. The principle of state custodianship was introduced to facilitate broader access which caused questions about the continued applicability of the *cuius est solum* principle. But the MPRDA's declaration that the state is the *custodian* of the nation's mineral and petroleum resources raises the question of where the ownership of unsevered minerals[688] vests since the promulgation of this Act.[689]

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[683] Section 2(b) of the MPRDA.

[684] Section 3(1) of the MPRDA; PJ Badenhorst & H Mostert "*Mineral and Petroleum Law of South Africa" (*Revision service 10, 2014) at 13-4; *S v Meepo* 2008(1) SA 104 (NC) 110G.

[685] Section 3(1) of the MPRDA; Badenhorst & Mostert op cit note 684 at 13-4; *S v Meepo* supra note 684 at 110G.

[686] Mostert H Mineral Law Principles and Policies in Perspective Juta (2012) 146.

[687] Chapter 3 at 37.

[688] Unsevered minerals refers to minerals that have not yet been severed from the earth by exploration, mining or any other form of mining activities.

[689] Section 3(1) of MPRDA; Badenhorst & Mostert op cit note 684 at 13-4. The MPRDA came into operation on 1 May 2004.

Various arguments have been advanced as to where the ownership of unsevered minerals is said to vest since the promulgation of the MPRDA.[690] These arguments vary from upholding the common law position that the ownership of unsevered minerals vests in the owner of the land[691] to ownership passing to the state.[692] This chapter discusses the development of the law regarding the ownership of minerals. It also discusses the different arguments in determining where ownership of unsevered minerals is said to vest following the adoption of the MPRDA.

## 4.2 Historical Development of Ownership of Minerals

As stated in Chapter Three, the state exercises sovereignty over mineral resources.[693] The power to grant mineral rights emanates from this sovereignty of the state. Every state has the right to exercise permanent sovereignty over its natural resources, wealth, and economic activities. These rights include the right to possess, use, and dispose such.[694] These rights furthermore enable the state to exercise permanent sovereignty over a country's natural

[690] Badenhorst & Mostert op cit note 684 at 13-4. HM Van den Berg 'Ownership of minerals under the new legislative framework for mineral resources' 2009 *Stell LR* 139; PJ Badenhorst 'Ownership of minerals in situ in South Africa: Australia Darning to the rescue?' *2010 (4) SALJ* 646; J Glazewski *Environmental Law in South Africa* in *Journal of Environmental Law* Vol 14, No 2 (2002) 266; E Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (2006) (unpublished doctoral thesis North West University 241; H Mostert and M Van den Berg 'Roman-Dutch Law, Custodianship, and the African Subsurface: The South African and Namibian Experiences' in Donald N Zillman, Aileen McHarg, Adrian Bradbrook and Lila Barrera-Hernandez (eds) *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission and Storage* Oxford University Press; PJ Badenhorst & CJ Van Heerden 'Ownership of Historical Mine Dumps: Uncaptured No More?*'* 2018 (2) *SALJ* 351; WA Joubert *The Law of South Africa* Vol 18 2 ed 2007 para 101; E Van der Schyff 'South African mineral law: A historical overview of the State's regulatory power regarding the exploitation of minerals' *New Contree* No 64 (July 2012) H Mostert 'Land as a "national asset" under the Constitution: The system change envisaged by the 2011 Green Paper on Land Policy and what this means for property law under the constitution' *PER* 2014 Vol 17 No 2; Mostert op cit 686 at 142-150; E Van der Schyff 'Who owns the country's mineral resources? The possible incorporation of the public trust doctrine through the Mineral and Petroleum Resources Development Act' *TSAR* 2008-4 757-767.

[691] Badenhorst and Mostert op cit 684 at 1-10; *Rocher v Registrar of Deeds* 1911 TPD 311 at 315; *Vanston v Frost* 1930 NPD; *Minister of Minerals and Energy v Agri SA* 2012 (5) SA 1 (SCA) at 32; BLS Franklin and M Kaplan *The Mining and Mineral Laws of South Africa* Durban Butterworths (1982) at 4; GJ Pienaar *Legal aspects of private airspace development* 1987 *CILSA* 94 at 100.

[692] Badenhorst & Mostert op cit note 684 at 13-4

[693] Chapter Three at 37.

[694] Article 1 of the United Nations Charter of Economic Rights and Duties of States; E van der Schyff *Property in Minerals and Petroleum* Juta (2016) at 165.

resources.[695] States have a duty to exercise their sovereignty over natural resources for the well-being of its people.[696]

The internationally affirmed right of the state to exercise sovereignty over all mineral and petroleum resources within the country is acknowledged by the MPRDA.[697] The rights of the state-as-custodian must therefore also be considered within the context of international law.[698] States have the right to determine the property regime in terms whereof mineral and petroleum resources are to be owned and regulated.[699] The state's permanent sovereignty over natural resources has been described as establishing exclusive jurisdiction of states over their natural resources in a fixed area where they can exercise sovereign rights.[700] The sovereign right of the state over mineral and petroleum resources may be seen within the historical background of the country and the need to implement corrective measures to ensure a just and equal society.[701] The state is therefore enabled to determine the regulatory framework and the nature of the property rights regime it wishes to adopt in regulating the use, exploitation and protection of the mineral and petroleum resources.[702] The international right of the state to determine the regulatory framework within its territory is also affirmed.[703]

Similar to other mineral law regimes, the previous mineral law regime was based on the state's permanent sovereignty over mineral and petroleum resources and the common law. Due to the common law principle of *cuius est solum*,[704] rights to minerals were held by the landowner. The private property rights regime formed the foundation on which the mineral law

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695 UN Resolution No 1803 (XVII) of 14 December 1962: Permanent sovereignty over natural resources; Resolutions No 2158 (XXI) and No 3281 (XXIX) of 12 December 1974: Charter of economic rights and duties of states.

696 UN Resolution No 1803 (XVII) of 14 December 1962: Permanent sovereignty over natural resources.

697 Section 2(a) of the MPRDA.

698 See Van der Schyff op cit note 694 at 165 and the reference to the Montevideo Convention on the Rights and Duties of States signed on 26 December 1934, Article 8 as reaffirmed by Protocol on 23 December 1936.

699 A Ronne 'Public and private rights to natural resources and differences in their protection?' In A McHarg, B Barton, A Bradrook & L Godden 9eds) *Property and the law in energy and natural resources* (2010) 60 – 79.

700 NJ Schrijver 'Permanent sovereignty over natural resources versus the common heritage of mankind: Complementary or contradictory principles of international law' (1987) 21 *Series: Development & Security* 1-23 at 1.

701 See Van der Schyff op cit note 694 at 164.

702 Section 2(a) of the MPRDA; Van der Schyff op cit note 694 at 164

703 Section 2(a) of the MPRDA; NJ Schrijver op cit 700 at 1; Van der Schyff op cit note 694 at 164.

704 In terms of the Minerals Act 50 of 1991; also see discussion above at Chapter 2 at 23

dispensation was based.[705] However, a new mineral law rights regime based on the principle of state custodianship is introduced by the MPRDA.[706]

To determine where the ownership of unsevered mineral resources vests, this section discusses the historical development of such ownership. This section discusses the historical development of ownership in Roman law, Roman-Dutch law, and early South African law.

### 4.2.1 Roman Law

Roman law treated minerals in terms of property law rules.[707] Accordingly, Roman law allowed private ownership of mines and minerals, subject to limitations and strict regulation.[708] Roman law regarded dominium as an absolute form of ownership.[709] The absolute nature of dominium includes reference to both the content and the concept of dominium.[710] Within the context of the content of dominium, absoluteness referred to a right to use, enjoy and destroy, which, in principle, was unrestricted. Restrictions, however, on the use of moveable and immovable property existed from Roman times.[711] However, the view that Roman *dominium* was absolute is questioned as a development of later civilian legal tradition based on political considerations.[712] The political considerations included drawing a contrast between dominium and restricted feudal interests, confirming capitalism's ethical grounds, and distinguishing between communal and state interests.[713] In Roman Law, ownership of property was restricted

[705] Van der Schyff op cit note 694 at 164.

[706] Sections 2 and 3 of the MPRDA; Van der Schyff op cit note 694 at 165; see discussion above at Chapter Three at 37.

[707] These limitations and strict regulation included the rights of the surface owner and the *cuius est solum est usque ad caelum et ad inferos* principle. CG Van der Merwe *Sakereg* 2ed (1989) Durban Butterworths at 552; Badenhorst & Mostert op cit 684 at 1-3; Mostert op cit note 686 at 5.

[708] Mostert & Van den Berg op cit 690.

[709] H Scott 'Absolute ownership and legal pluralism in Roman law: Two arguments' *Acta Juridica* 2011 23.

[710] Scott op cit note 709 at 24 and the reference to P Birks 'The Roman law concept of dominium and the idea of absolute ownership' 1985 *Acta Juridica* 1 wherein the distinction between absoluteness of content and to the concept itself is made.

[711] Scott op cit note 709 at 24. See examples mentioned that limited the use of moveable property were the use of a sword and the mistreatment of slaves. Limitations on the use of moveable property include the reference to the Twelve Tables which contained rules regarding the distance from the boundary of his property an owner was allowed to build.

[712] Scott op cit note 709 at 23 and the reference to AJ van der Walt 'Bartolus se omskrywng van dominium en die interpretasie daarvan sedert die vyftiende eeu' 1986 49 *THRHR* 305 and AJ van der Walt 'The South African law of ownership: A historical and philosophical perspective' 1992 *De Iure* 446.

[713] Scott op cit note 709 at 24; Gezler J 'Roman ideas of ownerships of landownership' in S Bright & J Dewar (eds) Land law: Themes and Perspectives 1988 81at 83.

on pragmatic grounds whilst no principled rule was developed to ensure that ownership remained unrestricted.[714] South Africa's uncodified property law also regards dominium as an absolute form of ownership.[715]

Reference to the absoluteness of dominium as a concept includes a wide range of attributes that provides for inviolability.[716] Inviolability means that the ownership of a thing cannot be transferred without the owner's consent.[717] A separation between the factual holding and legal title of dominium exists in accordance with the maxim' ownership has nothing to do with possession'.[718] The other attributes of dominium in Roman law were first that it differentiated from other forms of superiority such as the power of the *paterfamilias* over his wife and children,[719] Second, ownership was the only legal relationship that existed between a person and a thing[720] , and lastly, the owner had the right to exclude others from the thing he owned.[721]

However, the conceptual absoluteness of Roman dominium did not prevent Roman law from acknowledging that factual holding of the property could lead to legal title.[722] Possession could lead to ownership in a variety of ways, being *traditio*, *occupatio,* and *usucapio*.[723] The maxim that ownership had nothing to do with possession intended to distinguish ownership as a legal relationship independent from possession.[724] The difference between ownership and possession also lay in the actions which protected these rights, being the *vindicatio* in the instance of ownership and interdicts where another was in possession of a thing.[725]

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[714] Scott op cit note 709 at 23 and the reference to A Rodger *Owners and Neighbours in Roman La*w (1972) Oxford: Clarendon Press ch 2.

[715] Scott op cit note 709 at 23.

[716] Ibid at 24.

[717] Scott op cit note 709 at 25.

[718] Ibid at 25 and the reference to the maxim formulated by the Roman jurist Ulpian in D 41.2 12.1 (Ulpian Book 70 Ad Edictum).

[719] Ibid at 25; Birks op cit note 15 at 25-26. This attribute of dominium is referred to as differentiation.

[720] Scott op cit note 709 at 25; Birks op cit note 15 at 26-27. This attribute was referred to by Birks as singularity as a unique form of entitlement in Roman law.

[721] Scott op cit note 709 at 25; P Birks "The Roman law concept of dominium and the idea of absolute ownership" 1985 *Acta Juridica* at 27-29. This attribute was referred to as exclusivity of ownership.

[722] Scott op cit note 709 at 26.

[723] Ibid. *Traditio* entailed conveyance by physical delivery, *occupatio* was original acquisition of a *res nullius* by taking possession thereof and *usucapio* an original acquisition by continuous possession.

[724] Ibid.

[725] Ibid and the reference to WW Buckland *A text-book of Roman Law from Augustus to Justinian* 3 ed revised by P Stein (1963) at 733-734 and HF Jolowicz & B Nicholas *Historical Introduction to the Study of Roman Law* 3 ed (1972) 259- 261.The rei vindicatio applied against anyone who was in possession of the thing regardless of

Despite the maxim that ownership had nothing in common with possession, ownership was in practice much more reliant on possession due to the absence of formalities in registering ownership.[726] In Roman law, as is the case with South African law, a person's possession of a thing can only be successfully challenged upon proof of ownership by the other party.[727] Due to the above lack of formalities, Roman dominium was not independent on factual possession of the thing owned but rather closely aligned.[728]

The traditional view that Roman ownership allowed for a unique species of entitlement, also referred to as the singularity principle, has been argued to be misleading.[729] Due to the *bona fide* possessor being able to obtain ownership by *occupatio,* enforced through the introduction of the *actio Publiciana,* legal pluralism arose. According to civil law, a person could own a thing whilst such thing could also fall within the *bona fide* possession of another according to Praetorian law and protected by the Praetorian *actio Publiciana*. The *actio Publiciana* allowed for another form of ownership, as the bonitary owner became the owner when a true owner transferred a thing without the necessary formal process of transfer of ownership (the *res mancipi*) but used the traditio method of transfer of ownership (simple delivery). The bonitary owner was the true owner of the thing and could defend his title in the same way as the *dominus* (owner in civil law)—this position allowed for the plurality of legal orders regarding dominium. The above led to a position where two bodies of rules which existed alongside each other regulated the transfer of ownership.[730] The same Urban Praetor enforced the civil and praetorian law that applied to the same class of people. [731] In practice, the ownership of the dominus was deprived by the Praetor of all meaningful content as he could not use, enjoy or destroy the thing.[732]

Therefore, the Roman civil law did not serve as the only system of rules whereby dominium was transferred in Roman law and was therefore not the singular system for transferring

how they obtained possession, how long they had it or how long the owner did not have possession thereof. Ownership did not depend on possession or exploitation of the thing.

[726] Scott op cit note 709 at 27 and the reference to HF Jolowicz & B Nicholas *Historical Introduction to the Study of Roman Law* 3 ed (1972) at 211.

[727] Scott op cit note 709 at 26.

[728] Scott op cit note 709 at 31.

[729] Ibid. See footnote 709 above.

[730] Ibid at 32.

[731] ibid.

[732] Ibid. The consequence was that the pluralistic nature of the two concepts of dominium and possession by a bonitary possessor was limited as the *dominus* did not have full enjoyment of his rights as owner in civil law.

dominium. Additional aspects of ownership that played a role in determining effective ownership included using the Roman or non-Roman means of transfer of ownership, the litigant, or the thing. Several different forms of ownership, rather than the single concept of *dominium*, *were* applied in Roman law. The concept of absolute ownership appears to be a much later invention and challenges the classical Roman concept of absolute ownership.[733]

The Roman law conceptualised mineral rights with reference to *usufruct.*[734] Roman-Dutch law also developed the principle of *cuius est solum eius est usque ad caelum et ad inferos*.[735] This rule entails that as the landowner is the owner of everything beneath the surface, the landowner is also the owner of minerals below the surface.[736]

### 4.2.2 Roman-Dutch Law

Roman-Dutch law regarded property ownership as one of unity rather than diversity, which meant that one individual couldn't have ownership of the surface while another could be the owner of the minerals underground. Horizontal severance of property was therefore not possible.[737] Roman-Dutch law regarded the right to mine for minerals as a prerogative of the state, but it lacked further provisions regarding mineral rights.[738]

### 4.2.3 Development of Ownership in Early South Africa

Although the British occupation of the Cape of Good Hope from 1795 to 1803 and the subsequent annexation by the British of the Cape in 1806 took place, property law continued to form the basis of mineral law in South Africa.[739] Although Roman-Dutch law was not

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[733] Ibid.

[734] HP Viljoen and PH Bosman *A Guide to Mining Rights in South Africa (*1979) Johannesburg Lex Patria Publishers at 8;

[735] Van der Merwe op cit note 707 at 551; Viljoen & Bosman op cit note 734 at 8; Badenhorst & Mostert op cit 684 at Ch 1, 3 and 910; Franklin & Kaplan op cit note 691 at 4-5; Mostert op cit note 686 at 10; J De Boer *Winning van Delftstoffen in het Roemeinse Recht* (1978) Leiden Universitaire Pers Leiden.

[736] HR Hahlo & E Kahn E *The Union of South Africa* (1960) London Stevens and Sons Limited at 761; Badenhorst & Mostert op cit 684 at 1-3; JW Wessels *The History of the Roman-Dutch Law* (1908) Grahamstown African Book Company at 486; Mostert op cit note 686 at 5.

[737] Hahlo & Kahn op cit 736 at 762; Mostert op cit note 686 at 5.

[738] Mostert op cit note 686 at 6; Badenhorst & Mostert op cit 684 at Ch 1 & 2.

[739] Zimmerman R 'Synthesis in South African Private Law: Civil Law, Common Law and Usus Hodiernus Pandectarum' (1986) (103) South African LJ 259 at 272; Mostert op cit note 686 at 6; Badenhorst & Mostert op cit cit 684 at 1-3; Van der Merwe op cit 707 at 559; Viljoen and Bosman op cit note 734 at 12.

replaced after the British annexation and occupation of the Cape of Good Hope from 1795 onwards, the English common law became more influential because of administrative and legal reforms.[740] Property law has continued to provide the context for the development of concepts in mineral law, although the state has regulated the mining of minerals from a very early period.[741]

With the exploration of the country's mineral wealth in 1867, Roman-Dutch principles were still applicable in mineral law.[742] The landowner held the mineral rights with regards to minerals found on or below the land.[743] Since the nineteenth century, mineral rights were regarded as limited real rights in respect of the land and could therefore be registered.[744] Due to British colonial policy's influence, reserving mineral rights to the state upon the grant of land was introduced with the adoption of John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure in 1813.[745]

Understanding the common law rule of *cuius est solum est usque ad caelum et ad inferos* evolved, primarily because of how the rights and duties of the mineral rights holder and the surface owner came to be conceptualized. Moreover, the notion of severance of minerals gained a foothold in the law.[746] Questions about the theoretical basis of mineral law have been raised following these developments, an aspect that still requires resolution.[747] It is, therefore, necessary to determine whether the state, as custodian of minerals and petroleum, is the owner of unsevered minerals. The following section discusses the *cuius est solum* rule to determine whether the state, as custodian, is the owner of South Africa's minerals and petroleum.

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[740] R Richardson & J Van Helton 'The Development of the South African Gold-Mining Industry, 1895- 1918' (1984) *The Economic History Review* 319 at 320; HJ Erasmus 'Thoughts on Private Law in future South Africa' (1994) 5 *Stellenbosch L Review* 105 at 109.

[741] Mostert op cit note 686 at 6.

[742] DH Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) Butterworths; Mostert op cit 686 at 7; Van der Merwe op cit note 707 at 553; Proclamation on Conversion of Loan Places to Quitrent Tenure, 1813 of 6 August 1813 which reformed the rights to holding land in the Cape Colony and reserved rights to precious stones, gold and silver to the state upon the grant of the land.

[743] Mostert op cit note 686 at 7; *Agri South Africa v Minister of Minerals and Energy* 2012 (1) SA 171 (GNP).

[744] Mostert op cit note 686 at 7.

[745] See Chapter 2 above at 16 for a more in-depth discussion of the development of the mineral law in South Africa; Mostert op cit note 686 at 7; Van der Merwe op cit 707 at 553; Sir John Cradock's *Proclamation on Conversion of Loan Places to Quitrent Tenure* of 1813 of 6 August 1813.

[746] Van Zyl op cit 742; Mostert op cit note 686 at 7.

[747] Ibid.

### 4.2.4 The Cuius est Solum Rule and the Unlawful Extraction of Minerals

The *cuius est solum* principle affords the landowner the right to the surface, and all that lies beneath it in 'all the fullness that the common law allows'.[748] This principle implies that the landowner owns all minerals found on or beneath the surface.[749] The notion of 'severance' limits this *cuius est solum* principle.[750] Severance entails that the mineral rights relating to the land could be separated from title to the land, alienated, or dealt with separately.[751] The consequence of severance is that whilst the landowner remained the owner of the minerals *in situ*; the owner no longer had control over the minerals.[752] Once severance had taken place, resulting in the right to mine being severed from the landowner's rights, the mineral rights holder was entitled to search for minerals, mine them, and dispose of such minerals for their account.[753] As such, the operation of the principle of *cuius est solum* was limited by the fact that the landowner had no right to extract minerals after severance had taken place.[754] Until such severance had taken place, the landowner was the mineral rights holder and could therefore apply to extract the minerals found on or below the land's surface.[755]

The applicability of remedies available in unlawful extraction of minerals from land within the context of mineral law depends on whether the *cuius est solum* principle is still applicable.[756] The landowner will still apply the necessary common law remedies available to owners in instances where there is unlawful extraction of minerals, should the *cuius est solum* principle

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[748] Van der Merwe op cit note 707 at 551; Viljoen & Bosman op cit 734 at 7; Mostert op cit note 686 at 7; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) at 509B.

[749] BLS Franklin 'Mining and Minerals' in WA Joubert (ed) *LAWSA* Vol 18 (1983) Durban Butterworths at 4-6; Mostert op cit 686 at 7; *Erasmus and Lategan v Union Government* 1954 (3) SA 415 (O) at 417; *Rocher v Registrar of Deeds* supra note 9 at 315.

[750] Mostert op cit note 686 at 7.

[751] FT Cawood and RCA Minnitt 'A Historical Perspective on the Economics of the Ownership of Mineral Rights Ownership' (1998) *South African Institute of Mining and Metallurgy* at 369ff; Mostert op cit note 686 at 7.

[752] Mostert op cit note 686 at 7; *Apex Mines Ltd v Administrator Transvaal* 1986 (4) SA 581 (T) at 591 C-D.

[753] Mostert op cit note 686 at 7; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) at 379; *Hudson v Mann* 1950 (4) SA 485 (T) at 488B-D; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) at 534F-G.

[754] Mostert op cit note 686 at 8.

[755] Ibid; Van der Schyff op cit note 690 at 757-767; Badenhorst & Van Heerden op cit note 690 at 351; Van den Berg op cit note 690 at 139; Badenhorst op cit note 690 at 646.

[756] Mostert op cit note 686 at 8; Van der Schyff op cit note 690 at 757-767; Badenhorst & Van Heerden op cit note 690 at 351; Van den Berg op cit note 690 at 139; Badenhorst op cit note 690 at 646.

apply.[757] If the *cuius est solum* principle does not apply due to abrogation following statutory interference, the landowner will still apply remedies related to the land but not related to the minerals.[758] The Proclamation on Conversion of Loan Places to Quitrent Rental issued by Sir John Cradock in 1813 appears to be the first instance where the *cuius est solum* principle was abrogated.[759]

With the discovery of gold and diamonds in the nineteenth century, the *cuius est solum* principle was amended statutorily[760] Legislation vested the Crown with the right to mine precious minerals and stones on Crown land or land subject to the reservation of title.[761] The effect was to deprive the owner of beneficial use or occupation of the surface and therefore suspend the beneficial ownership with regard to the surface. State control over mineral rights was the reason for statutory interference with the *cuius est solum* principle.[762]

It is unclear to what extent the *cuius est solum* principle has remained intact in mineral law following continuous legislative amendments.[763] According to certain authors, the *cuius est solum* principle remains intact,[764] whilst others are of the view that the MPRDA has abolished the principle.[765] As such, continued private law ownership of minerals in South Africa remains controversial.[766] Whether the continued private law ownership of minerals exists is important to determine the state's relationship as custodian to the nation's minerals.

Because prospecting and mining operations remained mostly unaffordable for landowners, the practice of severing mineral rights from land ownership developed.[767] Severance of mineral rights from the surface rights of the land enabled third parties to become holders of the mineral rights.[768] The following section discusses the severance of mineral rights from land ownership.

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[757] Mostert op cit note 686 at 8.

[758] Ibid.

[759] Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure of 1813 of 6 August 1813.

[760] Mostert op cit note 686 at 8; Wessels op cit note 736 at 487.

[761] Crown land was land that belonged to the Crown of the United Kingdom and which held the rights to minerals. See Wessels op cit note 736 at 487; Mostert op cit note 686 at 8.

[762] Mostert op cit note 686 at 8; Badenhorst & Mostert op cit note 684 at 1-27.

[763] Mostert op cit note 686 at 8.

[764] MO Dale, L Bekker, FJ Bashall, M Chaskalson, C Dixon, G Grobler, C Loxton, M Ash, A Cox *South African Mineral and Petroleum Law* Durban Lexis Nexis Butterworths (2005) at MPRDA-10.

[765] Badenhorst & Mostert op cit note 684 at 13-3.

[766] Mostert op cit note 686 at 8.

[767] Van der Merwe op cit note 707 at 553; Badenhorst & Mostert op cit note 684 at para 40.

[768] Van der Merwe op cit note 707 at 553; Badenhorst & Mostert op cit note 684 at para 40.

### 4.2.5 South African Property Theory and the Severance of Mineral Rights from Land Ownership

The South African property law distinguishes between the right of land ownership and limited rights in respect of land.[769] The right of land ownership may be explained by two different theories, described as a 'bundle of rights' and the other regards ownership as a concept of unity.[770] Ownership in this first instance comprises of the right to dispose of the property (*ius disponendi*), the right to use the property (*ius utendi*), the right to draw fruits (*ius fruendi*), and the right to neglect the property (*ius abutendi*).[771] While the last-mentioned property theory supported Anglo-American legal systems, South African property law doctrine never included this theory.[772]

The other theory regards ownership as a concept of unity with the above entitlements forming part of the whole.[773] Ownership is characterised by concepts such as 'elasticity', 'exclusivity', 'independence', and 'unlimited duration', defined by the relationship it creates between persons in respect of things.[774] Independence characterises ownership in South African private law.[775] Other rights to property are derived from ownership, and their content is more circumscribed.[776] If rights are real by nature and benefit a person other than the property owner, then such a right is a limited real right or an *ius in re aliena.*[777] South African law allows for the development of new real rights and those acknowledged by the Roman-Dutch law.[778] South Africa does, therefore, not have a closed list of limited real rights.[779]

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[769] Mostert op cit note 686 at 8.

[770] Ibid. AM Honoré 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence* (1961) Oxford University Publishers at 113.

[771] Mostert op cit note 686 at 8. Honoré op cit 770 at 113; Lewis C 'The modern concept of ownership of land' 1985 *Acta Juridica* 241 at 243ff.

[772] Van der Merwe op cit note 707 at 179; Mostert op cit note 686 at 9.

[773] Van der Merwe op cit note 707 at 179; Mostert op cit note 686 at 9.

[774] This theory allows for greater entitlement by the owner of the thing to enjoy extensive rights which are explained by virtue of its ability to exclude others from the use and enjoyment of such thing, the independent nature of ownership and the unlimited duration of such a right thereto. Van der Merwe op cit note 707 at 179; Mostert op cit note 686 at 9.

[775] Van der Merwe op cit note 707 at 176; Mostert op cit note 686 at 9.

[776] Van der Merwe op cit note 707 at 176; Mostert op cit note 686 at 9.

[777] Van der Merwe op cit note 707 at 176; Mostert op cit note 686 at 9.

[778] Ibid.

[779] ibid.

Problems exist where rights pertaining to land that does not fall within the traditional Roman-law categories of limited real rights (servitudes or real security rights) come into existence.[780] Furthermore, the South African legal system only permits the registration of real rights and does not allow for the registration of personal rights except in exceptional circumstances. In an attempt to resolve the classification of a right as a real right or a personal right, a test was developed to determine whether a new type of land right may be registered.[781] This test determines the intention with which a particular right is created, in particular, whether the right created binds the landowner in a personal capacity or the capacity as a landowner.[782] This inquiry is the 'subtraction from dominium' test.[783] Because property law is regarded as inherent to mineral law, the right to minerals was regarded as a 'subtraction from the dominium' and treated in terms of the principles of servitudes.[784]

As indicated above,[785] the Cradock proclamation introduced the notion of severance of mineral rights in 1813.[786] The idea that mineral rights could exist independently of the land ownership in which they are found was thereby established. By 1911, legislation[787] and case law[788] confirmed the severance of mineral rights under the influence of principles of English law.[789]

The right to minerals existed separately from the ownership of the land once the right was severed.[790] This position contrasts with other *iura in re aliena,* such as servitudes, that provide for the lapsing of such rights once acquired by the landowner whose land they burden. This situation does not apply to mineral rights.[791] The question of whether mineral rights can be

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[780] Ibid.

[781] Ibid; CG Van der Merwe and A Pope *A* 'Part III – Property' in F de Bois (ed) *Wille's Principles of South African Law* (2007) Cape Town Juta at 434ff.

[782] Ex parte Geldenhuys 1926 OPD 155 at 162; Mostert op cit note 686 at 9.

[783] Ex parte Geldenhuys supra note 782 at 162; Mostert op cit note 686 at 9.

[784] Mostert op cit note 686 at 9; Franklin op cit note 749 at para 6.

[785] See discussion at 84 above.

[786] Section 4 of Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure of 1813 of 6 August 1813; Mostert op cit note 686 at 10.

[787] Section 70(1) of the Deeds Registries Act 47 of 1937 as repealed by the Mining Titles Registration Amendment Act 24 of 2003; section 53 as amended by the Minerals and Energy Laws Amendment Act 111 of 2005; Mostert op cit note 686 at 10; section 70(1) of the Deeds Registries Act 47 of 1937.

[788] *Taylor and Claridge v Van Jaarsveld and Nellmapius* 1885-1888 (2) SAR TS 137 at 141; *McDonald v Versveld* 1885-1888 (2) SAR TS 234 at 236; *Pearce v Oliver and Noyce* 1889-1890 (3) SAR TS 79 at 81; Mostert op cit note 686 at 10.

[789] Mostert op cit note 686 at 10; Viljoen & Bosman op cit note 734 at 10.

[790] Viljoen & Bosman op cit note 734 at 10; See Mostert op cit note 686 at 11.

[791] Viljoen & Bosman op cit note 734 at 10; Mostert op cit note 686 at 11.

regarded as *iura in re aliena* therefore arises.[792] Based on the characteristic of independence, mineral rights do not accord with the distinction between ownership and limited real rights.[793]

Where the mineral rights were not separated from the land ownership, they vested in the landowner.[794] Where the mineral rights were separated from the land ownership, they were held under different titles despite both the mineral rights and surface rights vested in one person. Severance entitled the holders of the mineral rights to enter the property relating to their rights and search for minerals.[795] Upon any minerals being found, they could be removed subject to the relevant statutory provisions.[796] The landowner, however, remained the owner of the minerals until they were extracted.[797] While the holder of the mineral rights who removed the minerals from the land became the owner of such minerals, the same principle does not apply to the question of who the owner of unsevered minerals is. The following section discusses ownership of unsevered minerals concerning the position before and after the promulgation of the MPRDA.

## 4.3 Ownership of Unsevered Minerals

This section discusses the ownership of unsevered minerals. The determination of where the ownership of unsevered minerals is vested is important in providing content to the notion of the state's custodianship over mineral resources. In determining where the ownership of unsevered minerals is vested, the interpretations provided by the courts are discussed, followed by a discussion of the different views held by academic authors.

### 4.3.1 Interpretation by the Courts

The courts have been hesitant to provide guidance on where ownership of unsevered minerals is vested.[798] The interpretation of the enactment that the state is the custodian of the nations'

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[792] *Trojan Exploration* supra note 748 at 520C; Mostert op cit note 686 at 11.

[793] See Mostert op cit note 686 at 11.

[794] *Trojan Exploration* supra supra note 748 at 520C; see Mostert op cit note 686 at 11.

[795] Ibid; *Ex parte Pierce* 1950 (3) SA 628 (O) at 634.

[796] See Mostert op cit note 686 at 11; Hahlo & Kahn op cit note 54 at 763; *Ex parte Pierce* supra note 795 at 634.

[797] See Mostert op cit note 686 at 11; Hahlo & Kahn op cit note 736 at 763;

[798] *Minister of Minerals and Energy v Agri South Africa (CALS amicus curiae)* 2012 ZASCA; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC); *Minister of Mineral Resources v Sishen Iron Ore Co (Pty) Ltd* 2014 (2) SA (CC).

mineral resources for the benefit of all South Africans was left open by the High Court when requested to interpret the ownership of unsevered minerals.[799] However, the above phrase was interpreted by the Supreme Court of Appeal "to encapsulate in non-technical language the notion that the right to mine vests in the state."[800]

The Supreme Court of Appeal also held that it was unnecessary to determine the meaning of section 3(1) of the MPRDA as it stated that nothing could be gained by attempts to determine these concepts and categorise them into private law concepts such as ownership.[801] Whether ownership of mineral resources changed from the common law position was also, despite being raised, not determined by the Constitutional Court.[802] However, the Constitutional Court has stated that the MPRDA vested all mineral and petroleum resources in the nation[803] or the state.[804] While the courts' interpretation of this issue is still awaited, the following section discusses the different academic views on where the ownership of unsevered minerals is vested.

### 4.3.2 Vesting of Unsevered Mineral and Petroleum Resources: Differing Academic Views

Different views exist as to where the ownership of unsevered mineral resources is vested.[805] One view is that the ownership of unsevered minerals and petroleum vest in the state,[806] whilst another view is that a distinction must be drawn between mineral and petroleum resources and minerals and petroleum itself.[807] The collective wealth of mineral and petroleum resources in accordance with this view 'belongs' to the nation whilst the owner of the land remains the owner of unsevered minerals despite not exploiting such minerals.[808] A third view is that the

[799] *Mininter of Minerals and Energy s*upra note 798; Badenhorst and Mostert op cit note 684 at 13-4.

[800] *Minster of Minerals and Energy* supra note 798 at 86; Badenhorst and Mostert op cit note 684 at 13-4.

[801] *Minster of Minerals and Energy* supra note 798 at 86; Badenhorst and Mostert op cit note 684 at 13-4.

[802] *Bengwenyama Minerals* supra note 798;

[803] *Minister of Mineral Resources v Sishen* supra note 798 per Jafta J at para 10, 16 and 44; Badenhorst and Mostert op cit note 684 at 13-4.

[804] *Minister of Mineral Resources supra* note supra 798 per Jafta and Moseneke DCJ at para 108; Badenhorst and Mostert op cit note 684 at 13-4.

[805] For a discussion see pages 88-94 here below.

[806] PJ Badenhorst and H Mostert 'Artikel 3(1) en (2) van die Mineral and Petroleum Resources Development Act 28 of 2002: 'n Herbeskouing' *(*2007) *TSAR* 469 at 476.

[807] Badenhorst and Mostert op cit note 684 at 13-6; Dale, Bekker, Bashall, et al op cit note 764 at MPRDA-122.

[808] Badenhorst and Mostert op cit note 684 at 13-7987986; Dale, Bekker, Bashall, et al op cit note 764 at MPRDA-122.

landowner remains the owner of the unsevered minerals and petroleum resources subject to the public trust doctrine.[809] These different views are discussed to provide guidance on whether the state is the owner of unsevered minerals or is regarded as the custodian of minerals and petroleum without being the owner of such mineral and petroleum resources.[810]

#### 4.3.2.1 Vesting in the State

Badenhorst and Mostert are of the view that the ownership of unsevered minerals and petroleum appears to vest in the state.[811] In accordance with this view, the *cuius est solum* principle, which, in terms of the common law, vests the ownership of unsevered minerals in the landowner, may have been abrogated by section 3(1) of the MPRDA.[812] The view that the *cuius est solum* principle is abrogated is supported by the rule of interpretation required by the MPRDA.[813] The MPRDA requires that its provisions prevail in instances where the common law is inconsistent with the MPRDA.[814] This view that the ownership of unsevered minerals vests in the 'custody of the state' has also been considered but not decided upon by the Constitutional Court.[815]

According to Badenhorst and Mostert, the term 'custodianship' is a misnomer as the MPRDA seeks to achieve more than mere custodianship of mineral resources.[816] The MPRDA seeks the vesting of mineral and petroleum resources in the state.[817] It also aims to give effect to the internationally accepted right of the state to exercise sovereignty over mineral and petroleum resources.[818] However, the concept of sovereignty regulates the relationship between states

[809] Glazewski op cit 690 at 468; Van der Schyff op cit note 690 at 241-244.

[810] See Van den Berg op cit note 690 at 149 -158 for a discussion on the various views on the ownership of mineral rights.

[811] Badenhorst and Mostert op cit note 684 at 13-5.

[812] Ibid at 13-5.

[813] Section 4(2) of the MPRDA; Badenhorst and Mostert op cit note 806 at 476; Badenhorst & Mostert op cit note 684 at 13-5.

[814] Section 4(2) of the MPRDA; Badenhorst and Mostert op cit note 806 at 476; Badenhorst & Mostert op cit note 684 at 13-5.

[815] *Bengwenyama Minerals* supra note 798 at para 63; Van den Berg op cit note 690 at 149.

[816] Badenhorst and Mostert op cit note 806 at 476; Badenhorst & Mostert op cit note 684 at 13-5; Van den Berg op cit note 690 at 150.

[817] Badenhorst and Mostert op cit note 806 at 476.

[818] Section 2(a) of the MPRDA; Badenhorst & Mostert op cit note 684 at 13-5.

rather than a state and its citizens.[819] The concepts of custodianship and sovereignty are therefore said to be mutually exclusive.[820]

In establishing the reasoning for the legislature using the concepts 'custodianship' and 'sovereignty', the law of the sea may have served as a guideline in the formulation of section 3(1) of the MPRDA.[821] Accordingly, it would result in the mineral and petroleum resources vesting in the 'people of South Africa' with the state merely being the custodian for the benefit of the people. In accordance with the private law of property, mineral and petroleum resources *in situ* would under the above provisions become *res publicae*.[822]

According to this view and due to the abrogation of the *cuius est solum* principle, ownership of unsevered minerals has become possible.[823] Ownership of unsevered minerals has become possible due to creating a new *res* or thing, classified as *res publicae,* despite possible problems with the characteristic of independence of minerals *in situ.*[824] Accordingly, only mineral and petroleum resources should be regarded as *res publicae* and not the individual minerals as such.[825]

The comparison between the MPRDA that regulates mineral law and the law of the sea is subject to two provisos.[826] The first proviso relates to the difference in the nature of the objects mineral law intends to regulate, whilst the second relates to the historical classification of the nature of the deep seabed as opposed to minerals. Before the deep seabed was classified as the common heritage of humankind, it was regarded as *terra nullius* or *terra communis.*[827] *T*he ownership of unsevered minerals was the ownership of individuals in a private capacity.[828]

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[819] Ibid at 13-5; Dale MO 'Mining Law' 2002 *Annual Survey* 573.

[820] Badenhorst & Mostert op cit note 684 at 13-5; Chamber of Mines Memorandum to the Director-General: Minerals and Energy Affairs Part 3 chapter 2 (1989) at para 2.2.2.2.

[821] Badenhorst & Mostert op cit note 684 at 13-5.

[822] Badenhorst & Mostert op cit note 684 at 13-6; PJ Badenhorst and H Mostert 'Revisiting the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the constitutional property clause: An analysis in two parts*' (*2004) *Stell LR* 22 at 33. See *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd* [2007] JOL 23667 (O) where the court refrained from deciding whether minerals in situ are *res publicae* or not.

[823] Badenhorst and Mostert op cit note 822.

[824] Ibid; Van den Berg op cit note 690 at 153; PJ Badenhorst, J Pienaar and H Mostert Silberberg and Schoeman The Law of Property (4 ed) 2003 Lexis Nexis Butterworths Durban.

[825] Badenhorst and Mostert op cit note 822 at 153; Badenhorst, Pienaar and Mostert op cit note 824.

[826] Badenhorst and Mostert op cit note note 684.

[827] Ibid; Churchill R and Lowe V *The Law of the Sea* 3 ed (1999) Manchester University Press.

[828] Badenhorst and Mostert op cit note 684 at 13-6.

It has also been said that section 3(1) of the MPRDA may merely be socialistic rhetoric forming the basis of a broad range of recent legislative measures without any rights conveyed to the state.[829] The Preamble to the MPRDA supports this statement as it acknowledges that the mineral and petroleum resources belong to the nation and that the state is the custodian thereof.[830]

#### 4.3.2.2 Vesting of the Resource vs Vesting of the Minerals/Petroleum

Another view is that a distinction must be drawn between mineral and petroleum resources on the one hand and minerals and petroleum on the other.[831] In accordance with this view, the collective wealth of mineral and petroleum resources 'belongs' to the nation whilst the landowner remains the owner of unsevered minerals despite not exploiting such minerals.[832] No provision is said to exist where the MPRDA vests the ownership of unsevered minerals and petroleum in anyone else than the landowner. Therefore, the argument is that the MPRDA does not vest ownership of minerals in the state[833] or the public.[834]

The general public is not vested with private-law rights to use mineral resources.[835] The *cuius est solum* rule has therefore not been abrogated.[836] According to this view, ownership of the land includes rights to the surface and all that is beneath the surface in accordance with the common law.[837] This view was one of the two possibilities that the Constitutional Court considered without deciding upon the matter.[838] As per private law and public law principles, ownership of mineral and petroleum resources cannot vest in the 'nation' or 'people' as both these concepts do not have legal personality enabling them to attain ownership or any rights to the above resources.[839] The view that the owner of the land is the owner of the minerals is

[829] Ibid; Badenhorst and Mostert op cit note 822 at 377–383.

[830] Badenhorst and Mostert op cit note 684 at 13-6; Van den Berg op cit note 690 at 139 at 150.

[831] Badenhorst and Mostert op cit note 684 at 13-6; Dale, Bekker, Bashall, et al op cit note 764 at MPRDA-122; Van den Berg op cit note 690 at 150.

[832] Badenhorst and Mostert op cit note 684 at 13.-6; Dale, Bekker, Bashall et al op cit note 764 at MPRDA-122.

[833] Badenhorst and Mostert op cit note 684 at 13-7; Dale, Bekker, Bashall et al op cit note 764 at MPRDA-10.

[834] Badenhorst and Mostert op cit note 684 at 13-7; Dale, Bekker, Bashall et al op cit note 764 at MPRDA-12; Van den Berg op cit note 690 at 150.

[835] Dale, Bekker, Bashall, et al op cit note 764 at MPRDA-121 and MPRDA 123.

[836] Dale, Bekker, Bashall, et al op cit note 764 at MPRDA-121.

[837] Ibid; Badenhorst and Mostert op cit note 684 at 13-7.

[838] Badenhorst and Mostert op cit note 684 at 13-7; *Bengwenyama Minerals* supra 798.

[839] Badenhorst and Mostert op cit note 684 at 13-7; Dale, Bekker, Bashall, et al op cit note 764 at MPRDA-4.

criticised because where unlawful exploitation of minerals or petroleum takes place, the application of these principles leads to a gap in the provisions of the MPRDA.[840]

#### 4.3.2.3 Vesting in Landowner Subject to the Public Trust Doctrine

According to Glazewski and Van der Schyff, custodianship does not lead to unsevered minerals and petroleum ownership.[841] The landowner remains the owner of the unsevered minerals and petroleum resources subject to the public trust doctrine.[842] This view is criticised because the public-trust doctrine is applicable only when the resource vests sovereign ownership in the state.[843] In the instance of mineral and petroleum resources, the MPRDA states that it 'belongs' to the nation, with the state being the custodian thereof.[844] This section discusses the different views regarding ownership of unsevered minerals.[845]

#### 4.3.2.4 The View that the Mineral and Petroleum Resources are Res Publicae

The view exists that mineral and petroleum resources are res publicae.[846] This view has been criticised.[847] Things (res) can be classified as either *res extra commercium* (things outside commerce) that cannot be privately owned or res in commercio (things in commerce) that can be privately owned.[848] Res communes (common things), res publicae (public things) and res universitas (things belonging to corporate bodies) all form part of res extra commercium (things outside commerce).[849] *Res publicae* (public things) are those things that belong to the

[840] Badenhorst and Mostert op cit note 684 at 13-7; Dale, Bekker, Bashall, et al op cit note 764 at MPRDA-4.

[841] Glazewski J 'Environmental Law in South Africa' in *Journal of Environmental Law* Vol 14, No 2 (2002) 266 at 468; Van der Schyff op cit note 690 at 241-244.

[842] Glazewski op cit note 841 at 468; Van der Schyff op cit note 690 at 241-244.

[843] Dale, Bekker, Bashall, et al op cit note 764 at MPRDA-4; Van den Berg op cit note 690 at 151.

[844] Dale, Bekker, Bashall, et al op cit note 764 at MPRDA-115; Van den Berg op cit note 690 at 151.

[845] See discussion below at 88-96.

[846] Badenhorst and Mostert op cit note 684 at 13-4; Badenhorst and Mostert op cit note 806 at 476.
Van den Berg op cit note 690 at 151.

[847] Dale, Bekker, Bashall et al op cit note 764 at MPRDA-120; Van den Berg op cit note 690 at 151.

[848] Van der Merwe op cit note 707 at 31; Badenhorst, Pienaar & Mostert op cit 824 at 24; Dale, Bekker, Bashall et al op cit note 764 at MPRDA-120; Van Den Berg op cit note 690 at 151.

[849] Van den Berg op cit note 690 at 151.

state but not in its private capacity.[850] The public has access to and can enjoy the benefit of res publicae.[851]

*Res publicae* are things that belong to the state in public ownership and not private ownership.[852] *Res publicae* are controlled by the state and may impose restrictions on the use and benefit from *res publicae*.[853] The state may therefore adopt legislation to restrict the use and benefit obtained from *res publicae*.[854]

Minerals have never been regarded as *res publicae* in Roman law or Roman-Dutch law.[855] However, it has been argued that although minerals were excluded from being classified as *res publicae*, new categories of *res publicae* have been developed independently of the common law.[856] For unsevered minerals to be regarded as a thing, it must however be independent. Van den Berg is of the view that there is no clear indication that unsevered minerals is to be considered things.[857]

It has been argued that reference to minerals as *res publicae* should be read as the mineral and petroleum resources as a whole and not minerals resources *in situ.*[858] The collective wealth of mineral resources must be considered to be *res publicae*.[859] A distinction must therefore made between the collective wealth of the mineral and petroleum resources and the collective mineral and petroleum resources. [860] It is he collective mineral and petroleum resources that are to be considered.[861]

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[850]Van der Merwe op cit note 707 at 31; Badenhorst PJ, Pienaar JM & Mostert op cit note 824 at 26; Van den Berg op cit note 690 at 151.

[851] Van der Merwe op cit note 707 at 31.

[852] Van der Merwe op cit note 707 at 31; Badenhorst PJ, Pienaar JM & Mostert op cit note 824 at 26; Van den Berg op cit note 690 at 151.

[853] Van den Berg op cit note 690 at 151.

[854] Badenhorst PJ, Pienaar JM & Mostert op cit note 824 at 28; Van den Berg op cit note 690 at 151.

[855] Dale, Bekker, Bashall et al op cit 764 at MPRDA-121; Van den Berg op cit note 690 at 151.

[856] Van der Merwe op cit note 707 at 31; Van den Berg op cit note 690 at 151; Badenhorst and Mostert op cit note 806 at 477.

[857] Van den Berg op cit note 690 at 151.

[858] Badenhorst and Mostert op cit note 806 at 477; *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd* [2009] JOL24502 (O*)*; Van den Berg op cit note 690 at 152.

[859] Dale, Bekker, Bashall et al op cit note 764 at MPRDA-121; Van den Berg op cit note 690 at 152.

[860] Badenhorst and Mostert op cit note 806 at 477; Van den Berg op cit note 690 at 152.

[861] Van den Berg op cit note 690 at 153.

#### 4.3.2.5 The View that it is not Important to Determine where Ownership is Vested

The view has also been held that it is of lesser importance to determine whether ownership of unsevered minerals is vested in the people, the state, or private landowners.[862] This is due to the ownership of unsevered minerals in the past being subject to mineral rights, prospecting rights, and mining rights in terms of the common or statutory law before the MPRDA or the transitional measures provided therein.[863] Only upon the severance of minerals, was ownership of minerals possible.[864]

### 4.3.3 Decisions by the Courts on Ownership of Unsevered Minerals

The Supreme Court of Appeal[865] has held that with the introduction of the MPRDA, landowners retained the ownership of minerals subject to the state's right to mine or rights allocated to applicants by the state.[866] Similar to the position before adopting the MPRDA, the ownership of minerals and petroleum is only acquired once severed from the land.[867] The Minerals Act[868] reserved the right to prospect and mine minerals for the state; no such provision expressly reserves these rights for the state in terms of the MPRDA.[869] The rights to prospect and mine minerals were vested in the holders of the mineral rights.[870] However, state authorisation was required by the holders of the mineral rights to exercise such prospecting rights or mining rights.[871] For the state to grant the rights to prospect or mine, an *ex lege* acquisition or transfer of these rights had to occur first before the state could grant the rights in terms of the MPRDA.[872]

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[862] Badenhorst and Mostert op cit note 684 at 13-7.

[863] Ibid.

[864] Ibid.

[865] *Minster of Minerals and Energy* supra 798.

[866] Badenhorst and Mostert op cit note 684 at 13-8.

[867] Ibid.

[868] Minerals Act 50 of 1991.

[869] Badenhorst and Mostert op cit note 684 at 13-8.

[870] Ibid.

[871] Minerals Act 50 of 1991; Badenhorst and Mostert op cit note 684 at 13-9.

[872] Badenhorst and Mostert op cit note 684 at 13-9.

The decision of the High Court[873] supported this view and found that an *ex lege* acquisition and not a transfer of prospecting and mining rights took place with the adoption of the MPRDA.[874] The High court found that the state had acquired the substance of the property rights from the initial holders of the common-law mineral rights and therefore expropriated these rights with the adoption of the MPRDA.[875] However, the Supreme Court of Appeal found no expropriation of the substance of the mineral rights by the state under the MPRDA[876] due to the absence of the two elements of expropriation, being deprivation and acquisition of the rights by the state.[877] The court also found that no substantial content of the mineral rights vested in the Minister.[878] The right to mine was never vested in the holders of mineral rights but always controlled by and vested in the state who allocated the rights to those who wanted mine.[879] Therefore, holders of mineral rights in terms of the Minerals Act were also not deprived of the right to mine.[880]

However, the Constitutional Court held that the MPRDA deprived the holders of mineral rights of some of their entitlements which they held before the MPRDA came into operation.[881] However, no expropriation occurred as the state did not acquire these entitlements upon the transitional provisions terminating the mineral rights.[882] Upon termination of the mineral rights, the state as the custodian did not acquire any rights or entitlements of former holders of mineral rights but was entitled by public law to grant rights to minerals and petroleum.[883] The MPRDA, therefore, empowered the state to grant rights to minerals and did not derive its power from an *ex lege* transfer or acquisition of entitlements of former holders of mineral rights.[884]

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873 Agri SA v Minister for Minerals and Energy CC [2013] ZACC 9.

874 Badenhorst and Mostert op cit note 684 at 13-9.

875 Agri South Africa supra note 117; Badenhorst and Mostert op cit note 684 at 13-9.

876 *Minister of Minerals and Energy* supra note 798 at 99; Badenhorst and Mostert op cit note 684 at 13-9.

877 *Minster of Minerals and Energy* supra note 798 at 90; Badenhorst and Mostert op cit note 684 at 13-9.

878 *Minster of Minerals and* Energy supra note 798 at 90; Badenhorst and Mostert op cit note 684 at 13-9.

879 *Minster of Minerals and Energy* supra note 798 at 85; Badenhorst and Mostert op cit note 684 at 13-9.

880 *Minster of Minerals and Energy* supra note 798 at 90; Badenhorst and Mostert op cit note 684 at 13-9.

881 *Agri South Africa* supra note 873 at 2, 51, 53 and 66; Badenhorst and Mostert op cit note 684 at 13-9.

882 *Agri South Africa* supra note 873 at 68-71; Badenhorst and Mostert op cit note 684 at 13-9.

883 *Agri South Africa* supra note 873; Badenhorst and Mostert op cit note 684 at 13-10.

884 Badenhorst and Mostert op cit note 684 at 13-10.

The minority judgment was of the view that acquisition by the state of some of the entitlements did indeed take place.[885]

The question as to where the ownership of unsevered minerals vests, therefore, remains undecided. The apprehension by the courts to provide guidance on where ownership of minerals vests has not assisted the varying academic views on the issue. Although ownership of minerals is yet to be determined, the state has to ensure equitable access to opportunities in the mining industry and transform the mineral and petroleum sector. The state must exercise its responsibilities within the context of the constitutional transformation of the ownership of mineral and petroleum resources.[886] The following section discusses this requirement.

## 4.4 Constitutional Transformation of the Ownership of Mineral and Petroleum Resources

A more substantive transformation of the mineral and petroleum sector was required to ensure equitable access to opportunities in the mining industry.[887] The unequal access to mineral and petroleum resources excluded most people in South Africa from ownership of land.[888] The common-law principles of *cuius est solum eius est usque ad coelum* and *solum eius esse debet usque ad coelum* ensured that a landowner could exercise his ownership in the air above and in the ground below the property to the exclusion of others.[889]

The maxim *plena in re potestas* gave an owner unlimited and unrestricted entitlement over the property, which effectively increased the number of ownership entitlements contained in the notion of ownership.[890] Ownership is an abstract notion that comprises more than the sum of its entitlements and can continue to exist even if it is stripped of all these entitlements.[891] The

[885] *Agri South Africa* supra note 873 at 80-81 and 86; Badenhorst and Mostert op cit note 684 at 13-9.

[886] *Bengwenyama Minerals* supra note 798; Van der Schyff op cit note 694 at 26.

[887] Ibid at 26.

[888] *Bengwenyama Minerals* supra note 798; Van der Schyff op cit note 694 at 26.

[889] Van der Schyff op cit note 694 at 20; Pienaar GJ *Sectional Titles and Other Fragmented Property Schemes* (2010) Juta at 25; Dale op cit note 207 at 78; Franklin & Kaplan op cit 691 at 4; Pienaar GJ 'Die ruimtelike aspek van eiendomsreg op onroerende grond – Die cuius est solum beginsel' (1989) 52 THRHR 216-227.

[890] Pienaar *Sectional Titles and Other Fragmented Property Schemes* op cit note 889 at 27; H Mostert and A Pope (eds) The principles of the law of property in South Africa (2010) 91-95; AJ Van der Walt Constitutional property law 3 ed (2011) at 1-3; J Van Wyk Planning law 2 ed (2012) Juta at 204.

[891] J Van der Walt 'Dancing with codes – Protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *SALJ* 258-311 Mostert and Pope op cit 890 at 93-94; AJ Van der Walt & GJ Pienaar *Introduction to the law of property* 6 ed (2009) Juta at 41-42.

courts have held that ownership of immovable property entails the unrestricted and exclusive control that a person has over a thing and includes all rights of use and abuse.[892]

The fact that ownership has been perceived as absolute does not mean that it cannot be restricted.[893] Therefore, ownership can be subject to restrictions either in the form of public-law limitations or in the form of conflicting rights held by other people.[894] The application of the Roman-Dutch common-law maxims was overruled by developing fragmented property schemes such as sectional title[895], share-block schemes,[896] and property time-sharing.[897] These developments caused the idea of ownership to become more 'depersonalised' and caused property law which formed part of private law, to become exposed to public law.[898] These developments also indicate that ownership as a legal concept is inherently limited and can be adapted to accommodate reform and progress according to the needs of society as required from time to time.[899]

With the inclusion of the property clause in the Bill of Rights in the Constitution of South Africa, the private law sphere of property law evolved to accommodate the rights-based paradigm of constitutional property law.[900] The constitutional dispensation provided opportunities for the statutory creation of new rights in property that do not originate from within ownership.[901] As such, weak and insecure rights are being reinforced statutorily outside the parameters of the civil-rights ownership paradigm.[902] Accordingly, the Constitutional Court has held that ownership will not, as a matter of principle, trump other rights and interests in

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[892] *Johannesburg Municipal Council v Rand Township Registrar* 1910 TPD 1314 at 1319; *Dadoo Ltd v Krugesrdorp Municipal Council* 1920 AD 530 at 537.

[893] Van der Schyff op cit note 694 at 22; GJ Pienaar GJ 'Registration of informal land-use rights in South Africa – Giving teeth to (toothless) paper tigers?' (2000) *TSAR* 442-468.

[894] Van der Schyff op cit note 694 at 22; Pienaar *Sectional Titles and Other Fragmented Property Schemes* op cit 890 at 28.

[895] Sectional titles were introduced by the Sectional Titles Act 66 of 1971.

[896] The Share-block Control Act 90 of 1980 introduced the share-block schemes in South Africa.

[897] Property Time-Sharing Control Act 75 of 1983.

[898] Van der Schyff op cit note 694 at 24.

[899] Van der Schyff op cit note 694 at 24; According to Van Wyk *J Planning law* 2 ed (2012) Juta at 204 ownership is described as reflecting 'the political, ideological and economic foundation of a society'

[900] Van der Schyff op cit note 694 at 24; Van der Walt op cit note 891at 101.

[901] Van der Schyff op cit note 694 at 24; Van der Walt op cit note 891 at 101.

[902] Van der Schyff op cit note 694 at 24; Extension of Security of Tenure Act 62 of 1996.

property or influence the definition or content of other rights in the property.[903] The social responsibility and common obligations resulting from the constitutional regime contextualise the scope of ownership within the private-property law paradigm.[904] Ownership is said to have lost its absoluteness to pursue social justice.[905]

Transformation of the mineral and petroleum law is motivated by the broader constitutional imperatives of reform.[906] To enable equitable access to the country's mineral and petroleum resources, the link between private land ownership and mineral and petroleum resources exploitation had to be severed.[907] The MPRDA did so by replacing the previous mineral and petroleum system with a stricter regulatory system.[908] The MPRDA replaced the previous mineral and petroleum legal system to terminate the previous discriminatory, unequal and unjust system by determining that the mineral and petroleum resources belong to the nation.[909]

The MPRDA rejected the common law *cuius est solum* principle to establish equitable access to South Africa's mineral and petroleum resources.[910] The abrogation of the *cuius est solum* principle has arguably been confirmed by the Constitutional Court in stating that the ownership of all mineral and petroleum resources is vested in the nation and that the MPRDA vested all

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[903] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others Amici Curiae)* 2005 (5) SA 3 (CC) paras 29, 36-38; *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) at para 51 and 56; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 20.

[904] AJ Van der Walt 'Developments that may change the institution of private ownership so as to meet the needs of a non-racial society in South Africa' (1990) 1 *Stell LR* 26-48; AJ Van der Walt 'Tradition on trial: A critical analysis if the civil law tradition in South African property law' *(*1995) 11 *SAJHR* 169-206; DM Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403-509.

[905] Van der Schyff op cit note 694 at 25.

[906] Joubert WA & Faris JA (ed) *Law of South Africa (LAWSA)* 1999 at para 17 where it is stated that the following clauses of the Constitution exercise important influence over the new mineral and petroleum system, being the property clause (section 25); the guarantee of just administrative action (section 33) and the environmental rights contained in the Constitution (section 24).

[907] Joubert & Faris op cit note 906 at para 16; Van der Schyff op cit note 694 at 26.

[908] Van der Walt op cit note 891 at 370; see Van der Schyff op cit note 694 at 27 and the reference to the publication of the White Paper in 1998, 'A minerals and mining policy for South Africa' which indicated that the government intended changing the law that regulated the exploitation of minerals and petroleum in South Africa.

[909] Preamble to the MPRDA; Van der Schyff op cit note 694 at 27; Joubert & Faris op cit note 906 at 16 which refers to Dale MO, Bekker L, Bashall FJ, et al *South African Mineral and Petroleum Law* Durban Lexis Nexis Butterworths (2005) at MPRDA-8 where it is stated that sections 7(3)(b) and (c) and sections 48(2)(b)(ii) and (iii) of the Mining Rights Act 27 of 1967 entrenched racial discrimination relating to prospecting permits and claim licences and section 61(4) in respect of the transfer of claims. These discriminatory measures were removed with the promulgation of the Minerals Act 50 of 1991 which had the effect of excluding "black" and "coloured" persons from the mining industry.

[910] Van der Schyff op cit note 694 at 27; Mostert op cit 686 at 7.

minerals in the state.[911] This apparent contradiction where both the state and the nation are vested with ownership of the mineral and petroleum resources contextualises the property-rights regime in terms of which mineral and petroleum resources and other natural resources are regulated.[912]

## 4.5 Conclusion

The development of the notion of constitutional property and the redefinition of ownership preceded the adoption of the MPRDA.[913] The introduction of state custodianship by the MPRDA must therefore be seen within this context.[914] Consequently, an institutional regime change concerning the ownership of South Africa's mineral and petroleum occurred.[915] This regime change was necessitated by public interest requirements and constitutional demands, necessitating radical interference with existing property law concepts in natural resources law.[916] The legislative framework removed mineral and petroleum rights from the private sphere by placing the rights under the custodianship of the state.[917] This legal position may lead to a decline in the role of private property for the public's benefit.[918]

Past injustices or a threat to the demand for a natural resource in certain instances require removing the resource from private control and re-allocating rights relating to the resource.[919] The possible threat to private property rights in respect of minerals and petroleum results from increasing global demand for natural resources and is not unique to South Africa.[920] Changes

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[911] *Minister of Mineral Resources v Sishen* supra 798 paras 11,16, 44 and 63; Van der Schyff op cit note 694 at 27.

[912] Ibid at 27.

[913] Ibid at 27.

[914] Ibid at 27.

[915] Van der Walt op cit 899 at 396; Van der Schyff op cit note 694 at 27.

[916] Ibid at 27.

[917] Van den Berg op cit note 690 at 139.

[918] Van der Walt op cit note 891 at 403-411; Van der Schyff op cit note 694 at 28; JL Sax 'Some thoughts on the decline of private property' (1983) *Wash LR* 481; J Page 'Reconceptualising property: Towards a sustainable paradigm' (2011) 1 *Prop LR* at 86-95.

[919] Van der Schyff op cit note 694 at 28.

[920] Scott A *The evolution of resource property rights* (2008) Oxford University Press.

in the continuously developing legal rights and principles to meet new challenges and conditions may cause further development of the concept of property.[921] The promulgation of the MPRDA, together with other natural resource legislation, has changed the property rights regulatory regime concerning natural resources substantially, thereby introducing a transformative institutional change in the regulatory system.[922]

This transformative regime replaced the previous system based on private property rights, which was the basis of the regulation and development of South Africa's mineral and petroleum resources.[923] The current regime introduced by the MPRDA is based on a public property regulatory regime regarding mineral and petroleum resources.[924] The development of mineral law is known to keep pace with modern requirements and the adoption of the law regarding proprietary rights relating to land.[925] The development of the mineral law pertaining to property in private law was due to changing public values caused by differing public needs, the evolution of the concept of the property leading to differing property rights regimes.[926]

As stated above,[927] different forms of ownership rather than the single concept of *dominium* were applied in Roman law. The concept of absolute ownership appears to be a later invention and challenges the classical Roman concept of absolute ownership.[928]

South Africa's uncodified property law system that emanates from Roman and Roman-Dutch law allows for the reconsideration of the absoluteness of the Roman concept of *dominium*.[929] The more pragmatic and flexible approach to Roman ownership provides for access to and

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[921] Gutto SBO *Property and land reform: Constitutional and jurisprudential perspectives* (1995) Butterworth-Heinemann at 17; Van der Schyff op cit 694 at 28.

[922] Ibid at 29.

[923] Ibid.

[924] Ibid.

[925] *West Driefontein Gold Mining Company Ltd v Brink and Others* 1963 (1) SA 304 (W) at 307; *Henderson and Another v Hanekom* 1903 SC Cape 513 at 519; *Neebe v Registrar of Mining Rights* 1902 TS 65 at 92; Van der Schyff op cit cit note 694 at 29.

[926] CG Van der Merwe & MJ De Waal *The law of things and servitudes* (1983) Butterworths at para 15-20; Carey Miller DL & Pope A *Land title in South Africa* (2000) Juta at 295; Van der Walt AJ 'Resisting orthodoxy again: Thoughts on the development of post-apartheid South Africa' (2002) 17 *SAPL* at 258 -278; Van der Schyff op cit note 694 at 30.

[927] See discussion above at 78-80.

[928] Scott op cit 709 at 34.

[929] Ibid.

easier reconciliation with other forms of title and may be better applied to the issues and concerns of South Africa.[930]

The concept of property in an uncodified property law system as in South Africa allows for an amended concept of ownership of unsevered minerals to accommodate the notion of state custodianship. The public nature of unsevered minerals under the custodianship of the state allows for the subrogation of the *cuius est solum* principle to the extent that separate ownership of unsevered minerals is justified.[931] The separation of ownership of unsevered minerals does not lead to ownership of the minerals being vested in the state.[932] Similarly, the state's responsibility as custodian does not automatically lead to the state being the owner.[933]

The common law has developed to the extent that the concept of *res publicae* includes mineral and petroleum resources.[934] The state's regulatory control of mineral resources empowers the state to grant rights to prospect and mine for minerals.[935]Although there is no empowering provision in the MPRDA that determines where ownership of the mineral's vests, the landowner is no longer the owner of unsevered minerals.[936] It would be impractical to accept that the landowner is the owner of minerals but cannot exercise any rights thereto.[937]

The impractical nature of vesting the ownership of minerals in the landowner and the uncodified nature of the South African property law has led to the development of the concept of unsevered mineral ownership. This development of the common law nature of ownership, rather than being classified as an exception to private law theory,[938] is in accordance with the development of *res publicae* to include mineral and petroleum resources.[939] This interpretation of section 3 of the MPRDA warrants the development of ownership of minerals to exclude the landowner from owning it.

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[930] Ibid.

[931] Van den Berg op cit note 690 at 150.

[932] Ibid; Badenhorst and Mostert op cit 684 at 13-4.

[933] Van den Berg op cit note 690 at 150; Badenhorst and Mostert op cit 806 at 478.

[934] Van den Berg op cit note 690 at 155.

[935] Section 5 of the MPRDA; Van den Berg op cit note 690 at 155.

[936] Van den Berg op cit note 690 at 155.

[937] Ibid at 150;

[938] Van den Berg op cit note 690 at 155.

[939] Ibid

With the introduction of state custodianship, the state controls all mineral rights on behalf of the nation and exercises the capacity to transfer these rights to exploit minerals.[940] Public ownership and not private ownership of the collective mineral and petroleum resources are vested in the state.[941] First, two consequences arise that mineral and petroleum resources should be considered to be *res publicae*[942]and second, that the state has regulatory control over unsevered minerals.[943]

The South African demand for natural resources is linked to the sustainable and beneficial use of its mineral and petroleum resources as in the instance of different legal regimes to meet the standards of the resource sector in the twenty-first century.[944] The South African demand for equitable access to natural resources has led to the notion of property law in South Africa being developed.[945] The MPRDA regulates the mineral and petroleum resources within the context of the changing property law.[946]

The courts interpret and contribute to the changing mineral law regime due to the demands placed on the sustainable and beneficial use of mineral and petroleum resources. The state, as custodian of mineral and petroleum resources, is responsible for the sustainable and beneficial use of mineral and petroleum resources. The next chapter discusses the interpretation of the courts in determining the content of state custodianship.

[940] Van den Berg op cit note 690 at 156.

[941] Ibid.

[942] Van den Berg op cit note 690 at 155

[943] Ibid.

[944] Van der Schyff op cit note 694 at 30; A McHarg, B Barton, A Bradbrook & L Godden 'Property and the law in energy and natural resources in A McHarg, B Barton, A Bradbrook & L Godden (eds) *Property and the law in energy and natural resources* (2010) at 1-16.

[945] Van der Schyff op cit note 694 at 31.

[946] Ibid.

# CHAPTER FIVE: JUDICIAL INTERPRETATION OF STATE CUSTODIANSHIP

## 5.1 Introduction

Chapter four discusses the consequences of the introduction of state custodianship by the Mineral and Petroleum Resources Development Act on ownership as a requirement to be awarded mineral rights during previous mineral law regimes.[947] Despite its far-reaching consequenes on ownership, reference to state custodianship is however only made in sections 2[948] and 3[949] and the Preamble of the MPRDA.[950] As stated above, the MPRDA contains no definition of state custodianship.[951]

The MPRDA designates the state as custodian of mineral and petroleum resources to ensure that the objectives stipulated therein, are reached.[952] The legislature furthermore prescribes the regulatory duties of the state acting through the relevant Minister[953] The interpretation of these regulatory duties contained in the MPRDA assist to provide meaning to the concept of state custodianship.

The courts have provided interpretations as to the meaning of the concept of state custodianship when dealing with the various sections of the MPRDA. Although the courts have provided guidance on the concept of state custodianship in determining the issues placed before them,[954]

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[947] Section 2(b) of the MPRDA determines as an object that effect be given to the state's custodianship of the nation's mineral and petroleum resources. Section 3(1) states that the mineral and petroleum resources are the common heritage of all the people of South Africa and that the state is the custodian thereof.

[948] Section 2(b) of the MPRDA determines as an object that effect be given to the state's custodianship of the nation's mineral and petroleum resources.

[949] Section 3(1) states that the mineral and petroleum resources are the common heritage of all the people of South Africa and that the state is the custodian thereof.

[950] The Preamble to the MPRDA states that: "Acknowledging that South Africa's mineral and petroleum resources belong to the nation and that the state is the custodian thereof"; Section 2(b) of the MPRDA determines as an object that effect be given to the state's custodianship of the nation's mineral and petroleum resources. Section 3(1) states that the mineral and petroleum resources are the common heritage of all the people of South Africa and that the state is the custodian thereof.

[951] See section 1 of the MPRDA.

[952] See section 2 of the MPRDA. See in particular sections 2 (c) and 2 (d) of the MPRDA; *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and other*s [2010] ZACC 26; *Agri South Africa v Minister of Minerals and Energy* 2012 (1) SA 171 (GNP) 171; *Minister of Minerals and Energy v Agri South Africa (CALS amicus curiae)* 2012 ZASCA 93; *Agri SA v Minister for Minerals and Energy* CC [2013] ZACC 9.

[953] Section 5 of the MPRDA.

[954] *Agri South Africa* supra note 952 at 171; *Minister of Minerals and Energy v Agri South Africa* supra note 952 at 93; *Agri SA v Minister for Minerals* (CC) supra 952 at 9; *Baleni and Others v Minister of Mineral Resources*

they have been hesitant to define the concept of state custodianship.[955] This chapter discusses those decisions that assist in interpreting the concept of state custodianship with reference to the regulatory duties contained in the various sections of the MPRDA. This section examines the courts' findings in accordance with the guidelines for interpretation set out therein.

## 5.2 Guidelines in Interpreting the Concept of State Custodianship

Although the courts have not defined the concept of state custodianship, they have contributed to the interpretation of state custodianship with reference to the facts and circumstances of each case. As mentioned above, the courts have developed several guidelines. Of particular importance is the guideline that the meaning of state custodianship be considered within its broader social and historical context.[956]

The broader social and historical context of the MPRDA is discussed to give effect to the guideline by the courts to interpret the context of state custodianship. This chapter also discusses the issue of the exercise of control by the state as custodian. Lastly, this chapter considers the introduction of a new administrative system by the MPRDA with the right of the state to receive royalties.

### 5.2.1 Contextual Considerations

Legislation must be interpreted with reference to the Constitution.[957] The Constitution serves a society historically based on division, injustice, and exclusion and where progress is

2019 (2) SA 453 (GP); *Bengwenyama Minerals* supra note 952 at 26; *Macassar Land Claims Committee v Maccsand* CC 2016 ZASCA 167; *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41; *Aquila Steel (SA) Ltd v Minister of Mineral Resources and others* 2017 (3) SA 301 (GP); *Chamber of Mines v Minister of Mineral Resources* 2018 All SA 391 (GP); *Xstrata SA (Pty) Ltd and others v SFF Association* [2012] 2 All SA 617 (SCA); *Minister of Mineral Resources and others v Sishen Iron Ore Company (Pty) Ltd and Another* [2013] ZACC 45.

[955] See *Agri South Africa (CC)* supra note 952 at 9.

[956] *Agri South Africa* supra note 952 at 93; *Agri South Africa (CC) supra note 952* at 9. *Baleni* supra note 954 para 35; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC).

[957] Section 39 of the Constitution of South Africa; *Baleni* supra note 954 para 35; *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12 para 53; *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd & Others* [2009] JOL 24502 (O).

envisaged by enhancing the dignity of all citizens and all-inclusive governance.[958] When interpreting legislation, the context in which society finds itself and the Constitution's goals of social justice, democratic values, and fundamental human rights must be considered.[959]

#### 5.2.1.1 The Broader Social and Historical Context of the MPRDA

The courts have found that the "spirit of transition and transformation characterizes the constitutional enterprise as a whole."[960] The Constitution, therefore, envisages a society continuously transformed from one formerly founded on racially discriminatory principles to one based on an open democratic society.[961]

The courts have held that, in interpreting the MPRDA, the spirit, purport, and object of the Bill of Rights must be promoted.[962] The broader social and historical context of the MPRDA has to be considered when promoting the objects of the MPRDA,[963] even where the words to be interpreted are unambiguous.[964]When interpreting the concept of state custodianship, the relevant constitutional and statutory provisions must be considered.[965]

The purpose of the MPRDA plays a vital role in statutory interpretation.[966] In particular, where legislation intends to rectify the results of past racially discriminatory laws or practices, the purpose of the legislation needs to be determined to address the wrongs targeted by the legislation.[967] Applying a generous construction over a legalistic or merely textual one ensures that the constitutional guarantees are protected.[968] One of the primary objects of the MPRDA

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[958] *Makate v Vodacom (Pty) Ltd* 2016 (4) 121 CC at para 87; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) 1079 at para 21.

[959] *Bato Star Fishing* supra note *956*; *Baleni* supra note 954 para 35.

[960] *Bato Star Fishing* supra note *956*.

[961] *De Beers v Ataqua* supra 957 at 21.

[962] Section 39(2) of the Constitution; *Baleni* supra note 954 para 35.

[963] Ibid para 35; *Bato Star Fishing* supra note *956*.

[964] *Baleni* supra note 954 para 35; *Bato Star Fishing* supra note *956*; *Mistry v Interim National Medical and Dental Council* [1998] (4) SA 1127 (CC).

[965] *Maledu* supra note 954 at para 45; *Department of Land Affairs v Goedgelegen* supra 957 at para 53.

[966] *Baleni* supra note 954 at 35; *Department of Land Affairs v Goedgelegen* supra 957 at para 11.

[967] *Department of Land Affairs v Goedgelegen* supra 957 at para 53

[968] Ibid para 53 where the court stated that in construing the phrase "as the result of past discriminatory laws or practices" contained in section 2(1) of the Restitution Act, the rights of claimants provided for in the Constitution for the restitution of land, must be provided with the fullest possible protection. Also see *De Beers Consolidated Minesv Ataqu* supra 957 at paras 28 and 52 where reference is made to *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) [2007] ZACC* 12.

is to rectify the results of past racially discriminatory laws and practices and to transform the sector and the empowerment of individuals previously excluded from the exploitation of mineral and petroleum resources.

Section 4 of the MPRDA determines that when an interpretation of a provision of the MPRDA is required, any interpretation that is reasonable and consistent with its objects must be preferred to an interpretation inconsistent with such an objective.[969] The MPRDA provides that insofar as the common law is inconsistent with the MPRDA, the latter must prevail.[970]

In considering the historical background to the MPRDA, the courts have reflected on the previous apartheid system and the resultant economic power of white South Africans compared to the majority of South Africans still suffering from unemployment and abject poverty.[971] The courts have held that the MPRDA is a legislative measure adopted by a democratic parliament, operating in a constitutional democracy responding to gross economic inequality.[972] Following the prescripts of the Constitution, the courts found that the objective of the MPRDA is to remedy past discrimination by enabling equitable access to opportunities in the mining sector.[973]

The South African economy is reliant on the mining sector for revenue to address issues caused by the previous apartheid government. Issues such as failing state-owned companies, high unemployment rates particularly among the youth, poor living standards and a lack of investment in human capital that have not been addressed, create economic, financial, security and other concerns.[974] These concerns must be addressed by state-as-custodian of the mineral resources that lead to the re-industrialisation of the economy.[975] To this extent, the MPRDA introduces a new system requiring of the state to act as custodian of the mineral resources. The section below discusses the nature of the features of the new system.

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[969] Section 4 of the MPRDA; *Bengwenyama Minerals* supra 952 para 30.

[970] Ibid.

[971] *Agri South Africa (*CC) supra note 952 at para 1.

[972] *Maledu* supra note 954 at para 33; Agri South Africa (CC) 9 supra note 952 at para 2.

[973] *Maledu* supra note 954 at para 33.

[974] Daily Maverick 'As a doomed ANC clings to our colonial economy, a violent uprising looms, warns analyst Moeletsi Mbeki' available at https://www.dailymaverick.co.za/article/2022-03-07-as-a-doomed-anc-clings-to-our-colonial-economy-a-violent-uprising-looms-warns-analyst-moeletsi-mbeki/ accessed on 6 October 2022.

[975] Daily Maverick 'As a doomed ANC clings to our colonial economy, a violent uprising looms, warns analyst Moeletsi Mbeki' available at https://www.dailymaverick.co.za/article/2022-03-07-as-a-doomed-anc-clings-to-our-colonial-economy-a-violent-uprising-looms-warns-analyst-moeletsi-mbeki/ accessed on 6 October 2022.

#### 5.2.1.2 Transformation and Empowerment Objectives of the State as Custodian

One of the primary objects of the MPRDA is the transformation of the sector and the empowerment of individuals previously excluded from the exploitation of mineral and petroleum resources.[976] State custodianship is described as the centre of the transformative nature of the dispensation introduced by the MPRDA.[977] The MPRDA seeks to attain transformation and empowerment by making the state the custodian of mineral and petroleum resources for the benefit of all South Africans.[978]

As custodian, the state is responsible for expanding mining opportunities in the mining industry to historically disadvantaged persons and benefiting from its exploration.[979] The purpose of the MPRDA is to address the gross economic inequality and facilitate equitable access to opportunities in the mining sector.[980] The MPRDA enables the state to attain this objective by placing the control of the exploitation of mineral and petroleum resources with the state, acting through the relevant Minister.[981] It also requires the promotion of equitable access to the nation's mineral and petroleum resources[982] and ensuring that the holders contribute mining and production rights to the socio-economic development of the areas where they operate.[983] The state must develop a code of good practice for the mining industry in attaining these objectives, also known as the Mining Charter.[984] The MPRDA requires that the Mining Charter must be a broad-based socio-economic charter to address the historical, social, and economic inequalities by enabling the entrance of historically disadvantaged persons.[985]

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[976] Section 2 of the MPRDA*; Maledu* supra note 954 at para 45.

[977] *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 at para 84.

[978] Section 3(1) of the MPRDA; *Baleni* supra note 954 para 42; *Bengwenyama* supra note 952 at 26.

[979] Section 2(d) of the MPRDA.

[980] *Baleni* supra note 954 para 42; Agri South Afria (CC) supra note 952 at paras 1 & 2.

[981] Section 5 of the MPRDA; *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 para 31.

[982] Section 2(c) of the MPRDA.

[983] Section 2(i) of the MPRDA.

[984] Section 100(2) of the MPRDA; *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 para 31.

[985] Section 100(2) of the MPRDA; *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 para 31.

While the MPRDA brought about change to the ownership of mineral and petroleum resources "by placing it in the hand of the nation with the state as custodian,"[986] the MPRDA also acknowledges the need to uplift communities affected by mining and to promote local and rural development.[987] The MPRDA provides entrance for historically disadvantaged persons into the mining sector, by stating that where the state receives more than one application for a prospecting right, mining right, or a mining permit on the same day, preference must be given to applications[988] received from historically disadvantaged South Africans.[989]

#### 5.2.1.3 Transitional Provisions of the MPRDA and State Custodianship

The MPRDA contains transitional provisions[990] that allow for old-order mineral rights[991] to be converted to rights granted in terms of the MPRDA, being new-order mineral rights.[992] The courts have had the opportunity to deliver judgment only on the fate of unused old-order rights,[993] which were required to be converted to new-order rights in terms of the MPRDA.[994] With old-order rights, Schedule II to the MPRDA contains the transitional provisions to which

[986] Baleni supra note 954 para 43.

[987] Ibid.

[988] Section 9 of the MPRDA.

[989] The MPRDA defines historically disadvantaged South Africans as "(a)ny person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect."

[990] Schedule II to the MPRDA.

[991] Old order rights are rights that have been granted in terms of the previous administrative system, including rights and authorisations granted in terms of the Minerals Act 50 of 1991.

[992] A new order mineral rights is a right for which application has to be lodged in terms of the MPRDA. Schedule II to the MPRDA provides for different time periods in terms whereof old order rights have to be converted to new order mineral rights in terms of the Schedule II to the MPRDA. In the instance of for example unused old order mineral rights, applications had to be made within a period of one year as provided for in Item 8 of Schedule II to the MPRDA.

[993] Table 3 to Schedule II of the MPRDA contains 11 different categories of unused old order rights. These include mineral rights in terms of the common law (categories 1 and 2), consent to prospect (categories 3 and 4), a prospecting lease, prospecting permit, prospecting license or prospecting permission referred to in the Minerals Act 50 of 1991 (categories 5 and 6), a consent to mine issues or granted in terms of the Minerals Act (categories 7, 8 and 9), a right to dig or mine referred to in Section 47 of the Minerals Act and the common law (category 10) and any permission to mine in terms of legislation adopted by the former independent states, being the Bophuthatswana Land Control Act 39 of 1979, the Venda Control Act 6 of 1986, the Lebowa Minerals Trust Act 9 of 1987, the Rural Areas Act (House of Representatives) 9 of 1987, the Transformation of Certain Rural Areas Act 94 of 1998 and the common law mineral right attached thereto and a prospecting permit or mining permit issued in terms of the Minerals Act.

[994] *Agri South Africa* supra note 952.

old-order mineral rights have to convert.[995] At the commencement of the MPRDA,[996] mineral rights granted in the previous administrative system were classified as old-order rights.[997]

#### 5.2.1.3.1 Old-order Rights not Converted in terms of the MPRDA

Old-order mineral rights that were not converted in terms of the provisions of the MPRDA, courts held that these rights cease to exist after the expiry of the various prescribed time limits in terms of which such rights were to be converted in accordance with the prescripts of the MPRDA.[998] Neither Schedule II nor the MPRDA contains any provision that expressly indicates the fate of old order rights when they cease to exist after the period for the transition of the old order mineral right to a right granted in terms of the MPRDA has lapsed.[999] The court in one instance held that a person intending to prospect or mine mineral or petroleum resources may only do so in terms of rights acquired and held in terms of the MPRDA, and that the rights of the holder of mineral rights under the previous Mineral Act had disappeared.[1000]

Although the courts have been reluctant to provide meaning to the concept of state custodianship,[1001] it has held that the unconverted old order rights cease to exist with reference to their holder only upon expiry of the period allowed for the conversion of the old order right.[1002] Upon expiry of the last-mentioned period, the mineral and the land to which the unconverted and expired old order right related reverted to the state as custodian of mineral and petroleum resources.[1003] The state acting as custodian is then entitled to grant new rights in respect of the minerals and land relating to the unconverted and expired mineral rights.[1004] In interpreting the transitional provisions of the MPRDA concerning the rights of holders of unused old-order mineral rights as contained in Schedule II to the MPRDA, the courts have in

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[995] The transitional provisions contained in Schedule II provide for different time periods within which the various old order mineral rights had to be converted following the MPRDA coming into effect on 1 May 2004; *De Beers* note 13 para 46.

[996] The MPRDA came into effect on 1 May 2004.

[997] See Schedule II of the MPRDA.

[998] *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 at para 107 and the reference to Item 7(8) of Schedule II of the MPRDA; *Agri South Africa (CC)* supra note *952*.

[999] See Schedule II to the MPRDA; *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 at para 107;

[1000] *Agri South Africa supra* note 952 para 10.

[1001] In *Agri South Africa* supra note 952 no consideration was given to ascribe a meaning to the concept of state custodianship.

[1002] *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 at para 108.

[1003] See Schedule II of the MPRDA; *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 at para 108.

[1004] Ibid para 108.

certain instances failed to provide content to the notion of state custodianship.[1005] In one instance, the court found that it was insignificant that the state's responsibilities were called custodianship. The courts have also found that private ownership of mineral rights was contradictory to the notion of state custodianship,[1006] particularly where ownership of minerals in terms of the MPRDA lies with the nation.[1007]

No provision in the MPRDA prevents the state from assuming its role as custodian and allocating a new prospecting or mining right where old order rights[1008] have not been converted and have expired.[1009] Provided certain criteria for accepting an application for a prospecting or mining right are met,[1010] the state has the authority to accept an application for a prospecting or mining right relating to the mineral and land over which unconverted old order mineral rights have ceased to exist.[1011] The state may only grant rights in terms of the MPRDA regarding those old order rights that were unconverted and expired in terms of the MPRDA, read with the transitional arrangements.[1012] The loss of old-order rights through the operation of the transitional provisions of Schedule II to the MPRDA is due to the failure of old-order right holders to apply for conversion of such old-order rights, rather than the introduction of the MPRDA itself.[1013] With reference to Mostert, the court held that the rights granted and issued under the MPRDA could prevail for a longer period than those held before the MPRDA.[1014]

The courts held that the transitional provisions of the MPRDA were to ensure that the holders of mineral rights would broadly hold the same rights as those under the previous dispensation after the rights were converted as per the transitional provisions.[1015] The transitional provisions

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[1005] *Agri South Africa* supra supra note 952.

[1006] Ibid at 191.

[1007] See Preamble and section 2 of the MPRDA.

[1008] In *Agri South Africa* supra supra 952 at 194 the court stated that "the state acquired the substance of the property rights of the erstwhile holder of quasi-servitudes. The fact that the state's competencies are collectively called custodianship matters not."

[1009] *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 at para 108.

[1010] Sections 17(1)(b) and 23(1)(a) of the MPRDA requires a mine works programme in terms whereof optimal exploitation is to be conducted; section 23(1)(f) requires compliance with environmental criteria and section 23(1)(h) requires a social and labour plan for an application to be accepted.

[1011] Sections 16(2)(b) and 22(2)(b) of the MPRDA; *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 at para 109.

[1012] Schedule II of the MPRDA; *Sishen Iron Ore supra note 2* para 110 and the reference to section 17 and 23 of the MPRDA with regard to the requirements for the granting of the various rights.

[1013] *Agri South Africa* supra 952 para 91.

[1014] Ibid; see H Mostert Mineral Law: Principles and Policies in Perspective Juta at 99.

[1015] Agri South Africa supra note 952 para 94.

obliged the relevant Minister[1016] to grant rights to holders of old-order rights on the proviso of compliance with the conditions of the MPRDA.[1017] The power of the Minister to grant rights to new applicants where they did not have rights before did not mean that the rights of the holders of old-order rights were taken away and subsequently acquired by the Minister and granted to new applicants.[1018]

In instances where old order rights ceased to exist, the state assumes its custodial responsibility by issuing prospecting or mining rights, provided the requirements of the MPRDA are met.[1019] In doing so, the primary objects of the MPRDA were fulfilled, which objects include the need to transform the mining industry to ensure that it is more equitable and inclusive, to mine minerals optimally, and to preserve and create new jobs.[1020]?

#### 5.2.1.3.2 Does the MPRDA Cause Expropriation or Deprivation of Rights?

In determining whether the MPRDA caused an expropriation or deprivation of the rights of previous holders of old order mineral rights, the courts have held that an expropriation takes place when the state acquires property in the public interest, which always had to be accompanied by compensation.[1021] The extent to which the provisions of section 25 of the Constitution has been limited, must be established when determining whether a deprivation has occurred. The limitation of a property right has furthermore to be reasonable and justifiable in terms of section 36 of the Constitution.[1022]

Upon applying the above test, the courts held that the MPRDA as a law of general application was not arbitrary and had the effect of depriving previous holders of old-order rights of elements of the pre-existing mineral right.[1023] The courts have found that the MPRDA did not cause the expropriation of the rights of previous mineral rights holders as the state had not acquired the rights that the previous mineral rights holders lost.[1024] The acquisition of rights by

[1016] Sections 17 and 23 of the MPRDA requires the Minister to exercise the right to grant rights.

[1017] Agri South Africa supra note 952 para 94.

[1018] Ibid.

[1019] *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 at para 110.

[1020] Ibid.

[1021] *Agri South Africa (CC)* supra note 952 paras 48, 58 & 59.

[1022] Ibid para 200; also see reference to *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA t/a Wesbank v Minister of Finance* [2002] ZACC 5 at paras 58 – 59.

[1023] *Agri South Africa (CC)* supra note 952 para 53.

[1024] Ibid para 58.

the state did not have to be the same as the rights lost by previous mineral right holders.[1025] Although an exact correlation was not required, "substantial similarity" or "sufficient congruence" between the substance of the rights lost and that acquired by the state was required to establish expropriation.[1026]

The courts have found that a balance had to be struck between individual property rights and the equally important duty of the state to ensure that benefits emanating from mineral resources reach all South Africans.[1027] In doing so, the MPRDA is the legal instrument by which compulsory deprivation of the rights of old-order mineral right holders had taken place by the state, acting as custodian. Therefore, the state had not acquired any mineral rights of previous holders of mineral rights in terms of the previous administrative system at the commencement of the MPRDA.[1028]

Furthermore, the MPRDA requires, as one of its objectives,[1029] the transformation and empowerment of those previously disadvantaged from having equal access to mineral and petroleum resources. As discussed above,[1030] the MPRDA provides for a Mining Charter in terms of section 100 to effect these objectives.[1031] The following section discusses how the courts have interpreted the state's right to control the right to mine required by the MPRDA.

### 5.2.2 Issues of Control

The MPRDA vests all the mineral resources in the state as custodian on behalf of all South Africans.[1032] The state confers the right to exploit minerals by way of mining rights according to the MPRDA.[1033] The courts have held that the right to mine is controlled by the state and allocated to those who wish to exercise it.[1034] The courts have also confirmed that the right to

[1025] *Agri South Africa (CC)* supra note 952 para 58.

[1026] Ibid; also see *Reflect-All 1025 CC and others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* [2009] ZACC 24 at para 64 and *Harksen v Lane NO and Others* [1997] ZACC 12 at paras 32-33.

[1027] *Agri South Africa (CC)* supra note *952* para 62.

[1028] Ibid para 68.

[1029] Section 3 of the MPRDA.

[1030] See discussion at 53-58 above.

[1031] Section 100 of the MPRDA.

[1032] *Xstrata* supra note 954 at 1.

[1033] Section 23 of the MPRDA; *Xstrata* supra note 954 at para 1.

[1034] *Maledu* supra note 954 at para 167; Agri South Africa supra note 952 para 85.

mine has always been controlled and vested in the state, allocating it according to government policy.[1035]

#### 5.2.2.1 Control by the State as Custodian

State control of mining was to ensure maximum exploitation of the country's mineral wealth.[1036] It does so by ensuring that landowners do not sterilize minerals with respect to their private ownership of land.[1037] Under the Minerals Act,[1038] no value was found from the presence of minerals on or under the land.[1039] The value was due to a mining authorisation granted regarding the mineral rights, thereby allowing the exercise of those rights.[1040] Two factors determined the value of mineral rights in the previous administrative system: (i) the expectation of minerals in payable quantities; and (ii) the expectation that the necessary mining authorisation would be obtained.[1041] The court held that the value of minerals, therefore, differed based on the statutory dispensation that prevailed at any given time.[1042]

The state's power as custodian to manage and administer mining rights enables it to control the mining industry.[1043] The granting of mineral rights is, therefore, a fundamental part of the administrative power of the state to control the mining sector.[1044] The custodial rights of the state consist of various functions and objectives that the state must consider when fulfilling its role as custodian in terms of the MPRDA as a whole.[1045] The functions and objectives of the state as custodian require that it grant, issue, refuse, control, administer, and manage various rights, permissions, and permits according to the requirements contained in the MPRDA.[1046] In exercising control over the mining industry, the state is empowered to ensure the sustainable

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[1035] *Maledu* supra note 954 at para 29.

[1036] M Kaplan and MO Dale *A Guide to the Minerals Act* 1991 at 172.

[1037] *Agri South Africa* supra note 952 para 69.

[1038] Minerals Act 50 of 1991.

[1039] *Holcim v Prudent Investors* [2010] ZASCA 109 paras 37; *Agri South Africa* supra note 952 at para 70.

[1040] *Holcim* supra 1039 at para 37; Agri South Africa supra note 952 para 70.

[1041] Ibid.

[1042] *Agri South Africa* supra note 952 para 70.

[1043] *Chamber of Mines v Minister of Minerals and Energy* supra 954 para 154.

[1044] Ibid.

[1045] Ibid para 154 the court referred to the division of the various functions and varying roles between the Minister, the Director-General and the Advisory Board as provided for in section 58 in holding that the state's functions and objectives as custodian are multi-faceted.

[1046] Section 3(20 of the MPRDA.

development of mineral and petroleum resources while promoting economic and social development.[1047]

In promoting the objective of economic and social development, the state could, by legislation, allocate to itself rights of ownership and regulate the exploitation of minerals by the owners of mineral rights.[1048] Although the state in the past owned minerals on state land, which established a strong link between the ownership of mineral rights and the right to exploit those minerals before the MPRDA, the state has no residual competence to exploit or own minerals.[1049]

The right to mine is not merely a regulatory matter. It is an instance of the exercise of the substantive powers of the state.[1050] The exercise of the substantive powers of the state can be contrasted with the private law rights of property.[1051] The allocation of mineral rights is, however, a regulatory matter as determined by the MPRDA.[1052]

#### *5.2.2.2 Introduction of a New Administrative System*

The courts found that the MPRDA is *sui generis* in nature in that it contained distinctive and unique features.[1053] In addition to introducing a new regulatory system regarding the legal nature of rights to minerals, it also affected an institutional change.[1054] This institutional change brought about by introducing the new system by the MPRDA was evident by the change in the allocation of various functions to the different role-players as provided for in the MPRDA.[1055] A discussion of the nature of the system introduced by the MPRDA and the nature of the administrative powers of the state as custodian follows.

##### 5.2.2.2.1 The Exclusive Nature of the System Introduced by the MPRDA

[1047] Section 3(4) of the MPRDA.

[1048] *Agri South Africa (CC)* supra note 952 para 35.

[1049] Ibid.

[1050] *Agri South Africa supra* note 952 para 99; see Mostert op cit note 68 at Chapters 6-8.

[1051] Agri South Africa supra note 952 para 99.

[1052] Ibid; see Mostert op cit note 68 at Chapters 6-8.

[1053] In *Chamber of Mines v Minister of Minerals and Energy* supra 954 at para 156 the court described the MPRDA as "…an omnibus repository to a variety of Constitutional Rights."

[1054] Ibid.

[1055] Ibid para 156 which referred to the different allocated powers between the various role players such as the Minister of Minerals, the Director General of the department and the Minerals Council.

The MPRDA introduced a new administrative system that replaced the previous system of common law rights.[1056] The courts found that these two systems are mutually exclusive.[1057] The mutual exclusiveness of the two systems is caused by the MPRDA declaring the state as custodian of the mineral and petroleum resources.[1058] The mutual exclusiveness also arose from the MPRDA declaring that these resources belong to the nation.

The previous common law system exercised control through statutory authorisations to prospect or mine.[1059] These common law rights were replaced with similar rights granted by the Minister of Mineral Resources under the MPRDA.[1060] The courts found that the statutory authorisations granted in terms of the common law rights system were "fused" into prospecting and mining rights granted in terms of the MPRDA.[1061] Therefore, the new mining right is composed of the common law right and the mining license held separately under the previous system.[1062] Insofar as the holder of a common-law mineral right required a mining license, the MPRDA requires a mining right to be granted before mining can commence.[1063]

Upon considering the Preamble to the MPRDA and the provisions relating to the state's custodianship of mineral and petroleum resources, the courts held that a person intending to prospect or mine mineral and petroleum resources might only do so in terms of rights acquired and held in terms of the MPRDA.[1064] Accordingly, the rights of holders of common law mineral rights reflected in the previous Minerals Act[1065] were extinguished.[1066] Holders of common law rights held under the Minerals Act no longer have the exclusive right to prospect and mine for minerals[1067] and compete against anyone for such rights in terms of the MPRDA. Therefore, their right to prevent others from coming onto their land to prospect and mine was

[1056] *Holcim* supra 1039 at paras 20 & 23.

[1057] Ibid.

[1058] See discussion at Chapter Three at 37; Preamble to the MPRDA.

[1059] *Holcim* supra 1039 at para 20; see sections 6 & 9 of the Minerals Act 50 of 1991.

[1060] Sections 5(1), (2) and 3(a)(c) of the MPRDA; *Holcim* supra 1039 at para 21.

[1061] Sections 5(1), (2) and 3(a)(c) of the MPRDA; *Holcim* supra 1039 at para 21.

[1062] Ibid para 21.

[1063] Section 5(4) of the MPRDA; *Holcim* supra 1039 at para 22.

[1064] *Agri South Africa supra* note 952 para 10.

[1065] Section 5 of the Minerals Act 50 of 1991.

[1066] Agri South Africa supra note 952 para 10.

[1067] Ibid.

extinguished.[1068] So too were their rights to sell, use it as security, or bequeath it to another, extinguished by the MPRDA.[1069] Consequently, it was held that the loss of the rights mentioned above constituted a deprivation of the previous common law holders' rights.[1070]

The introduction of the state as custodian under the MPRDA requires that new rights are acquired from the state.[1071] With exception to the transitional provisions contained in the MPRDA, which provided pre-existing right holders with certain rights, no reference is made in the main body of the MPRDA to the holders of rights that existed in terms of the previous administrative system.[1072] Accordingly, the courts held that the only relevance of common law mineral rights is that they are merely a part of the transitional arrangements of the MPRDA.[1073] Under the MPRDA, the state as custodian is deemed responsible for ensuring that mining operations continued uninterrupted, despite a new and mutually exclusive administrative system that terminated the previous system.[1074] The following section discusses the nature of the administrative powers exercised by the Minister acting on behalf of the state as custodian under the MPRDA.

#### 5.2.2.2.2 The Nature of the Administrative Powers of the State as Custodian

The Minister's granting of a right has been interpreted as a unilateral administrative act in terms of the statutory powers contained in the MPRDA.[1075] Therefore, granting rights is not contractual in nature as it takes place outside the ambit of, and despite a contract between the successful applicant and the Minister.[1076] The courts have found that granting a right by the

[1068] Ibid.

[1069] Ibid.

[1070] Section 25(1) of the Constitution determines that no-one may be deprived of property except in terms of a law of general application. Arbitrary deprivation of property is not permitted in terms of section 25(1) of the Constitution; *Agri South Africa supra note 952* para 10.

[1071] See *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP) at 109-110; *Holcim* supra 1039 at para 25.

[1072] Ibid para 25 with reference to *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* op cit note 125 at 109-110.

[1073] Ibid para 25 with reference to *De Beers Consolidated Mines Ltd v Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy and Another* [2008] ZAFSHC 40.

[1074] *Holcim* supra 1039 at paras 20 & 23.

[1075] *Baleni* supra note 954 para 41.

[1076] *Minister of Mineral Resources v Mawetse (SA) Mining Corporation* [2015] ZASCA 82 at para 24.

Minister is a unilateral or authoritative administrative act performed without the other party's agreement.[1077]

The power of the Minister to develop a Mining Charter in terms of section 100(2)(a) of the MPRDA was held to be separate by nature from the power of the Minister to issue regulations in terms of section 107(k)(l) of the MPRDA.[1078] The issuing of regulations in accordance with the previous section is the exercise of administrative power.[1079] By authorizing the Minister to develop a Mining Charter in section 100 of the MPRDA, the last-mentioned section indicates the discreet nature of the provision and power conferred.[1080]

To determine the nature of the powers conferred, the source of the power is a relevant but non-determinative factor.[1081] However, the nature of the function and the subject matter of the exercise of power are relevant considerations.[1082] In formulating the nature of the function, policy and administrative issues are located along a continuum, where a function is characterised as more administrative in nature depending on the degree to which the subject matter is more closely connected to the implementation of legislation.[1083] Where the subject matter is more closely related to policy matters, the more likely the exercise of the power will not be regarded as an administrative action.[1084] Where the Constitution requires the implementation of legislation, this responsibility is administrative in nature and subject to administrative review.[1085] However, constitutional responsibilities to develop policy and initiate legislation are not administrative actions.[1086]

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[1077] Ibid para 24 with reference to L Baxter *Administrative Law Juta* (1984) at 351.

[1078] *Chamber of Mines v Minister of Minerals and Energy* supra note 954 at para 141 which referred to *Minister of Mineral Resources v Mawetse (SA) Mining Corporation* supra note 130 at 82 where it was found that the granting of a mineral right in terms of the MPRDA is a unilateral administrative act.

[1079] *Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA).

[1080] *Chamber of Mines v Minister of Minerals and Energy* supra note 954 para 149.

[1081] *President of the Republic of South Africa v SARFU* 2000 (1) SA 1 (CC) at para 141; *Chamber of Mines v Minister of Minerals and Energy* supra note 954 para 150.

[1082] *President of the Republic of South Africa* supra note 1081 at para 141; *Chamber of Mines v Minister of Minerals and Energy* supra note 954 para 150.

[1083] *President of the Republic of South Africa* supra note 1081 at para 141; *Chamber of Mines v Minister of Minerals and Energy* supra note 954 para 150.

[1084] *President of the Republic of South Africa* supra note 1081 at para 141; *Chamber of Mines v Minister of Minerals and Energy* supra note 954 para 151.

[1085] Section 33 of the Constitution; *President of the Republic of South* supra note 1081 at para 141.

[1086] Ibid; *Chamber of Mines v Minister of Minerals and Energy* supra note 954 para 151.

The courts have applied the purposive approach in interpreting the language used in the MPRDA, the nature thereof, and the purpose for which it was enacted.[1087] Furthermore, the MPRDA empowers the Minister to develop a socio-economic charter within six months of adopting the MPRDA.[1088] In applying the purposive approach to determine the nature of the power referred to in section 100 of the MPRDA, the court found guidance in the meaning attached to state custodianship as described in the MPRDA.[1089] The fact that the mineral and petroleum resources are the common heritage of all the people of South Africa and that the state is the custodian thereof must be read with the objects of the MPRDA, in particular, the recognition of the state's right to sovereignty over all mineral and petroleum resources.[1090]

The MPRDA determines that the purpose of the Mining Charter is to fulfill the objectives of the MPRDA.[1091] The responsibility of the Minister to develop the Mining Charter to give effect to the objects of the MPRDA requires the making of complex policy choices.[1092] When the MPRDA is considered as a whole, the function of developing a Mining Charter is to be regarded as inherent to developing a legislative instrument rather than the implementation of an administrative function under the MPRDA.[1093] The development of the Mining Charter is therefore not an administrative process nor a decision envisaged by the MPRDA.[1094]

Although the MPRDA did not define state custodianship, it was nevertheless held that custodianship constituted a "fundamental foundational principle" of the MPRDA.[1095] The extent, breadth, and meaning of the power conferred by state custodianship determined the character of the Minister's powers in terms of section 100 of the MPRDA.[1096] As custodian, the

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[1087] *Chamber of Mines v Minister of Minerals and Energy* supra note 954.

[1088] See section 100 of the MPRDA; *Chamber of Mines v Minister of Minerals and Energy* supra note 954 para 151.

[1089] Section 3 of the MPRDA determines that mineral and petroleum resources are the common heritage of all the people of South Africa. It also states that the state is the custodian thereof for all the people of South Africa. See *Chamber of Mines v Minister of Minerals and Energy* supra note 954 at para 151.

[1090] Section 2 of the MPRDA.

[1091] Section 100 of the MPRDA.

[1092] Section 100 of the MPRDA; *Chamber of Mines v Minister of Minerals and Energy* supra note 954 at para 155.

[1093] Ibid.

[1094] See section 6 of the MPRDA; *Chamber of Mines v Minister of Minerals and Energy* supra note 954 at para 155.

[1095] Ibid para 153.

[1096] *Chamber of Mines v Minister of Minerals and Energy* supra note 954 at para 153 the court held as follows: "In my view the meaning, scope and breadth of the power conferred by custodianship determines the character,

state has the power to control, administer and manage mining rights.[1097] Custodianship is therefore described as being a "broad, all-embracing institutional principle." It confers the state with directional authority, governing power, and oversight over mineral resources."[1098]

#### 5.2.2.2.3 The Nature of Rights in terms of the MPRDA

The holder of mineral rights has historically reaped benefits in accordance with legislative policy, informed by the political imperatives at a given time.[1099] Mineral rights had value due to government policy that allowed mineral rights to gain financial value.[1100] Although the Minerals Act[1101] afforded value to mineral rights, the MPRDA divested the value of unused mineral rights.[1102] In particular, the courts held that the MPRDA extinguished common law rights, thereby divesting them of any value.[1103]

The courts held that the state's right to mine was a statutory gift to mineral right holders. The abolishment of the common law rights was without consequence, as even without their abolition, mineral right holders would have been in the same position.[1104] The granting of mineral rights in terms of the MPRDA was not limited to previous mineral rights holders, thereby causing a loss of value to mineral right holders due to the loss of exclusivity to be allocated the right to exploit minerals.[1105] Therefore, it was not necessary for the MPRDA to have extinguished common law mineral rights, as anyone could now be granted the right to exploitation in terms of the MPRDA.[1106] The MPRDA did, therefore, not expropriate old-order mineral rights, as the extinguishing of a "statutory monopoly" in favour of mineral right holders

function, the subject matter and in turn, the nature of the powers conferred on the First Respondent by Section 100." The first respondent in this instance was the Minister of Mineral Resources.

[1097] Section 3(2) of the MPRDA; see *Chamber of Mines v Minister of Minerals and Energy* supra note 954 at para 154.

[1098] Ibid.

[1099] See the minority judgment of Nugent JA (Mhlantla JA concurring) in *Agri South Africa* supra note 952 at para 106.

[1100] Ibid.

[1101] Minerals Act 50 of 1991.

[1102] See the minority judgment of Nugent JA (Mhlantla JA concurring) in *Agri South Africa* supra note 952 at para 111.

[1103] Ibid.

[1104] Ibid para 114.

[1105] Ibid para 115.

[1106] Ibid at para 117.

not to exploit their minerals deprived them of the value ascribed to the mineral rights and not of their property rights.[1107]

In terms of the MPRDA, a mining right is a limited real right regarding the minerals to which it relates.[1108] A mining right is the equivalent of a license to conduct mining activities under legislatively prescribed rights and conditions as determined by the MPRDA.[1109] The severance of minerals from the land ownership was affected by statute and not the common law.[1110] The severance of minerals ensured that minerals could be dealt with as separate real rights.[1111] Their registration in the Deeds Registry against the title deeds of the land provided the basis for their protection against third parties in the past.[1112] Developing the concepts underlying mineral rights in the South African mining law is the consequence of "creative judgments."[1113] These creative judgments developed the common law rights insofar as they placed the right to mine within the framework of a known South African system of legal rights, hence the development of the term common law rights.[1114]

Ownership of land did not enhance the owner's right to mine except to the extent that the landowner had more control over the use of the property.[1115] The underlying principle is that the state has always had the entitlement to control and allocate the right to mine.[1116] Therefore, the origin of the term common law mineral rights cannot detract from the true nature of the rights nor the fact that the right to mine originated from legislation.[1117] The state has historically allocated the exercise of mineral rights to whom the state deems appropriate.[1118] With only a few exceptions, the state has not claimed ownership of minerals as a separate entity from the ownership of the land. It has allowed the landowner to remain the owner of the minerals.

[1107] Ibid.

[1108] Section 5 of the MPRDA.

[1109] *Maledu* supra note 954 at para 35.

[1110] *Agri South Africa* supra note 952 para 52.

[1111] Ibid.

[1112] Ibid; *Houtpoort Mining and Estate Syndicate Ltd v Jacobs* 1904 TS 105.

[1113] *Agri South Africa* supra note 952 para 68.

[1114] Ibid para 68.

[1115] Ibid para 61.

[1116] Ibid para 61.

[1117] Ibid para 68.

[1118] Ibid para 69.

Therefore the private ownership of minerals is of little value as it can only exclude others from mining them.[1119]

### 5.2.3 Financial Considerations (The Right of the State to Receive Royalties)

The development of the right to mine as part of private ownership to one where the state controls the right to mine was evident in Roman law.[1120] In Roman times, the state used permits, authorisations, and the requirement to pay royalties in return for the grant of a right to mine.[1121] Two significant systems were developed regarding the right to mine, one being the Dominial system and the other the Regalian or Royalty system.[1122]

Under the Dominial system, the state owns the minerals, where land ownership is vested in the state.[1123] In terms of the Regalian system, the state controls the allocation of the right to mine in return for royalties, despite who the landowner may be.[1124] The control by the state to allocate the right to mine in the Regalian system is justified by the fact that the minerals are not privately owned but owned by the people collectively.[1125] This last-mentioned system, whereby the state controls the allocation of the right to mine, bears semblance to the MPRDA.[1126] The Preamble states that the mineral and petroleum resources "belong to the nation" and that the state is the custodian thereof.[1127]

In determining whether the MPRDA abolished the obligation to pay royalties under an agreement concluded under the previous dispensation, the courts considered the objects of the MPRDA.[1128] As part of its objects, the MPRDA requires that the state give effect to the

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[1119] The dispensation under the repealed Minerals Act 50 of 1991 allowed the landowner to sterilize the minerals in the event that the landowner also possessed the right to mine the minerals. Where the landowner no longer had the right to mine the minerals on or below the surface of the land, this ability was lost; see *Agri South Africa supra note 952* para 68.

[1120] *Agri South Africa supra* note 952 at 29.

[1121] Ibid.

[1122] Ibid.

[1123] Ibid.

[1124] Ibid.

[1125] Ibid.

[1126] See Preamble to the MPRDA,

[1127] Preamble to the MPRDA; Agri South Africa supra note 952 at 30.

[1128] Section 2 of the MPRDA; *Xstrata* supra note 954 at para 7.

accepted international sovereignty of its mineral and petroleum resources and the principle of custodianship.[1129] Furthermore, the MPRDA requires the state as custodian to exercise its obligations to the benefit of all South Africans.[1130] The state, as custodian, grants all rights in terms of the MPRDA.[1131] The above result destroyed all mineral rights in terms of the common law, with custodianship of mineral rights vesting in the state.[1132]

In determining whether royalties payable in terms of an agreement based on the previous common law system were contrary to the Constitution and the MPRDA, the courts found that the content and effect of the continued payment of royalties in terms of the previous system was contrary to the newly introduced system and the provisions of the MPRDA.[1133] The state's duty to exercise its custodianship of minerals and petroleum for the benefit of all South Africans entitled it to receive royalties in return for the right to mine those minerals.[1134] This duty is a statutory entitlement of the state in terms of both the MPRDA and the Mineral and Petroleum Resources Royalty Act.[1135] The payment of royalties to both the state and the landowner in accordance with the tenets of the previous mineral system is inconsistent with the MPRDA and potentially unfair.[1136]

The imposition of a double obligation to pay royalties in terms of agreements concluded before introducing the new mineral system, and the current statutory obligations were unfair as they could endanger the financial viability of marginal mining operations.[1137] This result would be inconsistent with the obligation[1138] to promote the sustainable development of the country's mineral and petroleum resources.[1139] However, the transitional provisions of the MPRDA did provide for the continued payment of royalties to communities and specific persons upon the exercise of discretion by the Minister.[1140] In interpreting the various sections of the MPRDA,

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[1129] Section 2 of the MPRDA; *Xstrata* supra note 954 at para 7.

[1130] Section 2 of the MPRDA; *Xstrata* supra note 954 at para 7.

[1131] Ibid.

[1132] Ibid para 8.

[1133] Ibid para 16.

[1134] See section 25(2)(q) of the MPRDA; *Xstrata* supra note 954 at para 16.

[1135] Mineral and Petroleum Resources Royalty Act 28 of 2008; *Xstrata* supra note 954 at para 22.

[1136] Ibid.

[1137] Ibid.

[1138] Section 3(3) of the MPRDA.

[1139] *Xstrata* supra note 954 at para 22.

[1140] Item 11 of Schedule II to the MPRDA. Item 11 expressly refers to the exclusion of items 7(7) and 7(8) of Schedule II and requires continued payment of royalties to communities. Item 11(3) requires the continued

the courts have provided interpretations as to the meaning of the concept of state custodianship. This section examines the court decisions in defining state custodianship.

## 5.3 A Judicial Determination of the Concept of State Custodianship

The courts have not defined the concept of state custodianship. However, as stated above, they have contributed to the interpretation of state custodianship. This contribution is limited to the facts and circumstances of each case placed before it for interpretation. Although several guidelines have been developed by the courts, one being that the MPRDA has to be considered within its broader social and historical context, it is difficult to define 'state custodianship.'[1141]

As stated above,[1142] the object of the MPRDA is to give effect to the state's custodianship of the mineral and petroleum resources.[1143] Although the MPRDA does not define the concept of state custodianship, it is nevertheless a fundamental principle of the MPRDA.[1144] The courts have also stated that state custodianship empowers the state to facilitate broader and equitable access to mineral and petroleum resources.[1145] Therefore, the courts held that the extent, breadth, and meaning of the power conferred by state custodianship determines the character and nature of the powers of the Minister.[1146] The state, as custodian, has the power to control, manage and administer mining rights.[1147] Custodianship is also described as an all-embracing institutional principle that allows the state to govern, the power to provide direction to the

payment of royalties to a natural person on terms and conditions as the minister may require. The minister may require the continued payment of royalties to a natural person where undue hardship would be suffered should the Minister exercise discretion not to allow the continued payment of royalties or where the person uses the royalties for social upliftment; also see *Xstrata* supra note 954 at para 22.

[1141] *Agri South Africa* supra note 952 at 171; Agri South Africa (CC) supra note 952 at 9. *Baleni* supra note 954 para 35; *Bato Star Fishing* supra note *956*.

[1142] See discussion at Chapter Three at 49-60

[1143] See section 3 of the MPRDA.

[1144] *Chamber of Mines v Minister of Minerals and Energy* supra note 954 para 155

[1145] *Maledu* supra note 954 at para 50; *Agri South Africa (CC)* note 952 para 68.

[1146] *Chamber of Mines v Minister of Minerals and Energy* supra note 954 at para 153 the court held as follows with regard to the nature of the powers of the Minister to develop a Mining Charter in accordance with Section 100 of the MPRDA: "In my view the meaning, scope and breadth of the power conferred by custodianship determines the character of the function, the subject matter and in turn, the nature of the powers conferred on the First Respondent by Section 100."

[1147] See section 3(2) of the MPRDA; *Chamber of Mines v Minister of Minerals and Energy* supra note 954 at para 154.

mining industry, and oversight over mineral resources.[1148] The power to grant mining and other rights is an inherent part of the broader power of the state to control the mining industry. This power is an administrative and fundamental part of state custodianship.[1149] The role of the state as custodian, when viewed against the structure of the MPRDA, consists of various functions and objectives the state has to consider when exercising its role as determined in the MPRDA.[1150] The power of the state to grant, refuse, control, administer and manage several rights and permits in accordance with the requirements determined by the MPRDA was in accordance with its role as state custodian.[1151]

State custodianship does not make the state owner of mineral and petroleum resources.[1152] Instead, as custodian, the state has the responsibility to ensure that the resources are exploited for the benefit of the whole nation.[1153] In fulfilling this responsibility, the MPRDA determines the procedure to be followed and the requirements to be adhered to when applying for a mining or prospecting right.[1154] The MPRDA represents a significant shift in the regulation of mineral rights in South Africa by vesting privately owned mineral rights in the state as custodian.[1155] It enforces the principle that rights be used or risk being lost by the holder of the rights, thereby abolishing a right-holder's right to sterilize the mineral rights by not executing them.[1156] Under the previous system, exploitation could only occur with the owner's consent of the mineral rights. In contrast, and in terms of the MPRDA, mineral rights owners can no longer do so by relying on their ownership.[1157] The MPRDA does away with mineral rights emanating from the common law whereby such rights were held privately and exploited if authorised by the state.[1158] Only the state, acting as custodian and subject to the requirements of the MPRDA,

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[1148] Ibid.

[1149] *Chamber of Mines v Minister of Minerals and Energy* supra note 954 at para 154.

[1150] See section 3(2) of the MPRDA.

[1151] Section 3(2)(a) of the MPRDA; *Chamber of Mines v Minister of Minerals and Energy* supra note 954 at para 154.

[1152] Agri South Africa (CC) supra note 952 para 68.

[1153] Section 3(1) of the MPRDA; *Maledu* supra note 954 at para 50 where reference is made to Mostert H and Van den Berg M 'Roman-Dutch law, Custodianship, and the African Subsurface: The South African and Namibian Experiences' in DN Zillman et al (eds) *The Law of Energy Underground*: Understanding New Developments in Subsurface Production, Transmission and Storage (2014) Oxford University Press at 80.

[1154] *Maledu* supra note 954 at para 51; see sections 5, 22, 25, 54 and 55 of the MPRDA.

[1155] *Aquila Steel* supra note 954.

[1156] *Agri South Africa (CC)* note 952 at paras 1-3; *Mawetsu* supra 1076 paras 16 & 20.

[1157] *Aquila Steel* supra note 954.

[1158] Section 5 of the MPRDA; *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 at para 84.

may grant prospecting rights, exploration rights, mining rights, and production rights.[1159] The state is the custodian of the mineral resources on behalf of all the people of South Africa and no longer the common law owner of the land, [1160]

On occasion, the courts have expressly indicated that there would be no need to ascribe a meaning to the provisions of the MPRDA that describe the state as the custodian of mineral and petroleum resources and that these belong to the nation.[1161] It has, however, been held that the state held sovereignty over its mineral rights because the state was vested with the right to mine and was entitled to allocate this right to mine.[1162] The courts have also found, without an in-depth discussion, that the sections of the MPRDA designating the state as the custodian of the nation's mineral resources "encapsulate[s] in non-technical language the notion that the right to mine vests in the state."[1163] As such, there was no reason to categorise concepts such as ownership in terms of private law.[1164]

As stated before, as custodian of mineral and petroleum resources, the state is not a contender for the right to prospect or mine minerals. Still, its purpose is to act as a facilitator by ensuring equitable access to mineral and petroleum resources.[1165] The MPRDA does not allow the state to be a beneficiary of the mineral and petroleum dispensation.[1166] The courts found that defining the word "custodian" was unnecessary as whatever it meant did not mean that the state had acquired the mineral rights and become the owner.[1167]In determining the meaning of state custodianship, it is necessary to obtain guidance from other sources, such as the American public trust doctrine or the principles of public trusteeship that may have been introduced by environmental legislation in South Africa after the adoption of the Constitution. The next chapter discusses both the American Trust Doctrine and the public trust principles within this context.

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[1159] See section 3)2) of the MPRDA; *Minister of Mineral Resources v Sishen Iron Ore* supra note 954 at para 84.

[1160] *Baleni* supra note 954 at para 41.

[1161] *Agri South Africa supra* note 952 para 86.

[1162] Ibid.

[1163] Ibid.

[1164] Ibid.

[1165] *Agri South Africa (CC)* supra note 952 para 68 the court stated that the state "was not seeking or supposed to be co-contender with people or business entities for the right to prospect or mine those minerals. It is a facilitator or conduit through which broader and equitable access to mineral and petroleum resources can be realised'"

[1166] *Agri South Africa (CC)* supra note 952 para 68.

[1167] Ibid para 71.

# CHAPTER SIX: PUBLIC TRUSTEESHIP, PUBLIC TRUST DOCTRINE, AND CUSTODIANSHIP

## 6.1 Introduction

This chapter discusses the notion of public trusteeship and the public trust doctrine to determine whether the principles guiding public trusteeship and public trust assist in providing a clear meaning to state custodianship of mineral and petroleum resources. The state has in the past been regarded as the custodian of *res publicae* property.[1168] State custodianship of mineral and petroleum resources differs from state custodianship of *res publicae* developed in the common law.[1169] This difference is because the public does not have an unrestricted right of access to and use of the nation's mineral and petroleum resources and consumed when exploited.[1170] With the introduction of the MPRDA, the notion of state custodianship introduces the statutory expansion of things regarded as *res publicae*.[1171] As a result, mineral and petroleum resources are considered as *res publicae*.[1172]

Section 24 of the South African Constitution provides the basis for realising the nation's right to natural resources.[1173] The MPRDA, together with several statutes relating to the environment,[1174] was adopted to give effect to the nation's right to natural resources.[1175] Van der Schyff argues that section 24 of the Constitution and the adoption of statutes regarding natural resources[1176] have introduced a doctrine of public trust in South African law for natural resources.[1177]

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[1168] Chapter Four at 90.

[1169] Ibid.

[1170] Chapter Four at 92-94.

[1171] Chapter Four at 101.

[1172] Chapter Four at 100-102.

[1173] Section 24 of the Constitution of 1996.

[1174] National Water Act 36 of 1998; National Environmental Management Act 107 of 1998; National Environmental Management: Integrated Coast Management Act 24 of 2008.

[1175] Sections 2 and 3 of the MPRDA.

[1176] National Water Act 36 of 1998; National Environmental Management Act 107 of 1998; National Environmental Management: Integrated Coast Management Act 24 of 2008.

[1177] E van der Schyff *Property in Minerals and Petroleum* (2016) Juta at 231; MC Blumm 'The public trust doctrine – A twenty-first century concept' (2010) 16 *Hastings West-Northwest Journal of Environmental Law*

According to Van der Schyff, introducing the doctrine of public trust would accord with the notion that stewardship as an ethical norm is a consequence of public trusteeship.[1178] Due to the courts equating trusteeship with custodianship, it is argued that the same principles would apply to the notion of state custodianship.[1179] The MPRDA is the only statute that introduces state custodianship, while statutes that deal with other natural resources incorporate the notion of public trusteeship.[1180]

The state's responsibility to protect and manage these resources ensures that the nation's interests are realised.[1181] The courts have interpreted this duty as one of stewardship: to protect and manage the natural resources.[1182] This duty appoints the present generation as the custodian or trustee of the environment for the benefit of future generations.[1183]

The Anglo-American public trust doctrine may provide guidance in determining the meaning of state custodianship within the context of the MRPDA.[1184] This doctrine incorporates the state's fiduciary responsibility to uphold and protect the public's interest regarding natural resources.[1185] It is, however, acknowledged that the Anglo-American public trust doctrine does not form part of the South African law regarding mineral and petroleum resources.[1186]

This chapter discusses the origins of the public trust doctrine, the principles of the Anglo-American public trust doctrine, and whether the MPRDA introduces the public trust doctrine, or tenets thereof, only insofar as it assists in determining the meaning of state custodianship of mineral and petroleum resources.[1187] As the public trust doctrine is said to contain a

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*and Policy* 105-112 at 107; P Sand 'Sovereignty bounded: Public Trusteeship for common pool resources' (2004) 4 *Global environmental politics* 47-71 at 50; M Turnipseed R Sagarin P Barnes et al 'Reinvigorating the public trust doctrine: Expert Opinion on the potential of a public trust mandate in US and international environmental trust law' (2010) 52 *Environment: Science and Policy for Sustainable Development* 5 at 11.

[1178] Van der Schyff op cit note 1177 at 231; R Barnes *Property rights and natural resources* (2009) Portland Hart Publishing at 247; MC Blumm & RD Guthrie 'Internationalizing the public trust doctrine: Natural law and constitutional and statutory approaches to fulfilling the Saxion vision' (2012) 45 *UC Davis LR* 742 – 804.

[1179] *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2007] 4 All SA 1108 (SCA) at para 19; Van der Schyff op cit note 1177 at 231

[1180] National Water Act 36 of 1998; National Environmental Management Act 107 of 1998; National Environmental Management: Integrated Coast Management Act 24 of 2008.

[1181] See discussion at Chapter 4 at 94-96.

[1182] *HTF Developers* supra note 1179 para 19.

[1183] *HTF Developers* supra note 1179 para 19.

[1184] Van der Schyff op cit note 1177 at 231.

[1185] Van der Schyff op cit note 1177 at 231.

[1186] Ibid.

[1187] See paragraph 2 of this chapter.

stewardship ethic, the following section discusses whether state custodianship comprises a stewardship ethic and the extent thereof within the context of the provisions of the MPRDA.

## 6.2 'Stewardship' and State Custodianship

Stewardship is an ethical norm that is not a well-known concept to property law in South Africa.[1188] The notion of stewardship is defined as the careful and responsible management of an object entrusted to a person's care.[1189] Stewardship of the environment includes the duty by the responsible person to care for the environment, conserve resources, and protect and preserve the resources.[1190] This duty is owed to current and future generations, both by the holder of the natural resource and the community.[1191]

Section 24 of the Constitution determines that property is to be held in trust by the current generation for the benefit of future generations[1192] and thereby implores the protection of the environment for present and future generations.[1193] Section 24, therefore, provides the basis for the acceptance of the ethical norm of stewardship into South African law.[1194] Although the notion of protecting the environment for future generations has developed primarily within the realm of environmental law, this development will influence the understanding and development of the rights to land and other natural resources.[1195]

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[1188] Van der Schyff op cit note 1177 at 232 who indicates that no South African property law textbook discusses the term 'stewardship'. Also see R Bratspies 'Finessing king Neptune: Fisheries management and the limits of international law' (2001) 25 *Harvard Environmental LR* 213 – 258; JL Sax 'Property rights and the economy of nature: Understanding Lucas v South Caroline Coastal Council (1993) 45 *Stanford LR* 1433 – 1454; J Goldstein 'Green wood in the bundle of sticks: Fitting environmental ethics and ecology into real property law' (1998) 25 *Boston College Environmental Affairs LR*.

[1189] Van der Schyff op cit note 1177 at 232.

[1190] Ibid and the reference to Barnes op cit note 1178 at 156; Sax op cit 1188 at 1433-1454; Goldstein op cit 1188 at 347-430.

[1191] Barnes op cit note 1178 at 248; Van der Schyff op cit note 1177 at 232.

[1192] Ibid at 233; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) para 102.

[1193] Van der Schyff op cit note 1177 at 233; *Fuel Retailers Association* supra 1192 para 102; J Sax 'Some thoughts on the decline of private property' (1983) 58 *Walsh LR* 481 – 496; C Sbert 'Re-imagining mining: The earth charter as a guide for ecological mining reform' (2015) 6 *IUCNAEL E Journal* 66 – 95.

[1194] Van der Schyff op cit note 1177 at 234.

[1195] Ibid.

Van der Schyff argues that the MPRDA incorporates the notion of stewardship concerning mineral and petroleum resources.[1196] By incorporating the notion of stewardship in respect of mineral and petroleum resources, the MPRDA serves as an example of transforming the rights of property owners regarding previously owned mineral rights to minerals found on or below the surface of their land.[1197] This transformation was necessary to address the racially-based [1198] discriminatory laws that existed before the MPRDA came into effect.[1199] Discrimination based on racial grounds is contrary to the purpose of allocating property to individuals within a private property-based system, as such allocation intends to benefit socially desirable goals.[1200] With the advent of the democratic dispensation in South Africa, the property law system changed by adopting newly introduced public values.[1201]

Newly introduced public values may have been influenced by political motivation for change, leading to the introduction of a novel property concept by the MPRDA.[1202] Therefore, the introduction of the stewardship ethic represents the need for the minerals and petroleum industry to transform for the benefit of all generations.[1203] As future generations must benefit from the extractive industry, the approach to minerals may change. Minerals may in future be regarded as the common ownership of people, or minerals may come to be controlled through public trusts.[1204] This need to transform the property system from a private ownership system to one reflecting the need to address the past racial discrimination through the introduction of the stewardship of mineral and petroleum resources is therefore reflective of the public values of a South African democratic society.[1205] Section 24 of the Constitution read with the MPRDA

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[1196] Ibid.

[1197] Ibid. The MPRDA terminated the rights of holders to mineral rights with respect to minerals found on or below their land, or where in instances where the mineral rights had been severed from the ownership of the land, from the holders of such mineral rights. The rights that were terminated include the right to alienate the mineral rights or to sterilise the mineral rights by not allowing the extraction of such minerals to take place. Also see *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

[1198] Van der Schyff op cit note 1177 at 234.

[1199] Ibid.

[1200] J Sax op cit 1193 at 484.

[1201] J van Wyk *Planning law* 2 ed (2012) Juta 1-9; Van der Schyff op cit note 1177 at 234; JM Pienaar *Land reform* (2014) Juta 52-140.

[1202] Van der Schyff op cit note 1177 at 234.

[1203] Ibid and the reference to C Sbert op cit note 1193 at 66-95; E Gudyanas 'Transitions to post-extractivism: Directions, options, areas of action' in M Lang & D Mokrani Beyond development: Alternative visions from Latin America (2013) *Transnational Institute* 165-188.

[1204] Van der Schyff op cit note 1177 at 234 and the reference to C Sbert op cit note 1193 at 88.

[1205] Van der Schyff op cit note 1177 at 234.

appoints the present generation as the custodian or trustee of the environment for the benefit of future generations.[1206] Therefore, the state's responsibility to protect and manage mineral and petroleum resources can be said to be conferring upon the state the duty of stewardship.[1207]

As stated above, the public trust may provide guidance to determine the meaning of state custodianship within the context of the MRPDA.[1208] While the notion of stewardship forms the cornerstone of public trusteeship, the terms stewardship and public trusteeship are often used as synonyms.[1209] Therefore, the notions of stewardship and public trusteeship give rise to a fiduciary responsibility towards the community and the environment.[1210] This doctrine therefore serves to incorporate the state's fiduciary duty to uphold and protect the public's interest regarding natural resources.[1211] The following section discusses the origins of the public trust doctrine, which includes the concept of stewardship ethic of the present generation towards natural resources.

## 6.3 Origins of the Public Trust Doctrine

The many differing interpretations among scholars regarding the origin and classification of the public trust doctrine reflect the uncertainty of the doctrine.[1212] Since the public trust

[1206] *HTF Developers* supra note 1179 para 19; see fn 1173 at 125.

[1207] Ibid.

[1208] Van der Schyff op cit note 1177 at 231; see fn 1187 at 126.

[1209] Barnes op cit note 1178 at 247. P Sand 'Sovereignty bounded: Public trusteeship for common pool resources' (2004) *4 Global Environmental Politics* 47 – 71 is of the view that public trusteeship is found in different forms even in the same legal system; see fn 1242 at 132.

[1210] Van der Schyff op cit note 1177 at 235.

[1211] Ibid at 231.

[1212] Certain scholars argue that the public trust doctrine has its origins in *res publicae* whilst others argue that the origins of the doctrine is to be found in both the concepts of *res publicae* and *res communes*. See J Searle 'Private property rights yield to the environmental crisis: perspectives on the public trust doctrine' (1988-1989) 41 *South Carolina Law Review* at 898 for the view that the public trust doctrine has its origins in both res publicae and res communes whilst RJ Lazarus 'Changing conceptions of property and sovereignty in natural resources: questioning the public trust doctrine' (1985-1986) 71 *Iowa L Rev* at 710 is of the view that the origins of the doctrine are to be found in the Roman concept of *res communes*. Also see HC Dunning 'The public trust: a fundamental doctrine of American property law' (1988-1989) 19 *Environmental Law* 519; JL Sax 'Liberating the public trust doctrine from its historical shackles' (1980–1981) 14 *U.C. Davis L Rev* at 185; JL Huffman 'A fish out of water: the public trust doctrine in a constitutional democracy' (1988-1989) 19 *Environmental Law* at 540; JL Sax 'The public trust doctrine in natural resources law: effective judicial intervention' (1970) 68 *Michigan Law Review* at 475. Also see MC Blumm 'The public trust doctrine and private property: The accommodation principle' (2010) 27 *Pace Environmental Law Review* 649 – 667 where it is indicated that the Anglo-American public trust doctrine was used to determine the changing interaction of the boundaries between public and private rights by amending the definition of private property or developing a public easement on private property.

doctrine ensured that the public had the right of access to navigable waters and fishing, the public trust doctrine is considered to have its origins in the concept of *res publicae.*[1213]

The early development of the law in the United States of America followed English common law, because it was an English colony until independence in 1776.[1214] According to English law, property was classified as *jus publicum*, as opposed to *jus privatum*, which was held in trust for the benefit of the public.[1215] A public trust protected the public's right to access navigable waters for navigation, commerce, trade, and fishing.[1216] Property classified as *jus publicum* was protected by the public trust and could only be alienated subject to certain conditions, including the public's right to navigate and fish in navigable waters.[1217]

The courts confirmed the existence of the public trust doctrine in American law in 1892.[1218] The Supreme Court held that the beds and water of navigable waterways could not be owned privately.[1219] The court also held that the state had an obligation to act in accordance with its public trust duties by neither alienating navigable waters nor abdicating its responsibilities over such waters.[1220] The limitation that the state was not allowed to alienate public trust property could not be circumvented or removed by statute.[1221] Therefore, the Supreme Court distinguished between property that the state could own and alienate and property that the state had the duty to act for the benefit of the public interest held in public trust.[1222] The state could

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[1213] Sax 'The public trust doctrine in natural resources law: effective judicial intervention' op cit note 1212 at 475.

[1214] America became independent from England in 1776. See JM Scheb and Sharma H *An introduction to the American Legal System* (2002) Wolters Kluwer at 16.

[1215] Property classified as *jus publicum* was held in trust for the benefit of the people by the King of England. See DJ Gardner 'The United States Supreme Court expands the public trust doctrine' (1989) 24 *Land and Water Law Review* at 348; CF Wilkinson 'The headwaters of the public trust doctrine: some thoughts on the source and scope of the traditional doctrine' (1988-1989) 19 *Environmental Law* at 431.

[1216] Dunning op cit 1212 at 519; Searle op cit note 1212 at 900;

[1217] A Reiser 'Ecological preservation as a public property right: an emerging doctrine in search of a theory' (1991) 15 *Harvard Environmental Law Review* at 398.

[1218] Wilkinson op cit note 1215 at 455 for a discussion of *Illinois Central Railroad v Illinois* 146 U.S. 387 (1892) where the public trust doctrine in American law was confirmed; Lazarus op cit note 1212 at 710. Also see Huffman op cit note 45 at 535 – 539 where it was stated that the sovereign rights of nations over environmental resources are fiduciary and not proprietary by nature; P Sand op cit 1177 at 47 – 72.

[1219] Searle op cit note 1212 at 901.

[1220] Ibid; CN Brown 'Drinking from a deep well: The public trust doctrine and western water law' (2006) 34 *Florida State University Law Review* 12.

[1221] AB Klass 'Modern public trust principles: recognizing rights and integrating standards' (2006) 82 *Notre Dame L Rev* at 4.

[1222] Wilkinson op cit note 1215 at 455 for a discussion of *Illinois Central Railroad v Illinois* 146 U.S. 387 (1892); Klass op cit note 1221 at 4.

only alienate property belonging to the public trust in instances where it would promote the public interest or prevent diminishment.[1223]

The public trust doctrine was developed further by Sax during the 1970s.[1224] Sax indicated that the courts had applied the public trust doctrine to create a public interest in public lands that imposed an environmental obligation on the state.[1225] He argued that the courts had provided the public with a right to challenge the state on public trust issues.[1226] Sax believed that the public trust doctrine afforded the public with a right to approach the courts in instances where the state did not adhere to its public trust duties.[1227] The public trust doctrine afforded the public a right against the state while remaining flexible enough to protect any modern environmental concern.[1228] The public trust doctrine could be used either by the public to enforce environmental protection by the state,[1229] against private persons offending the public trust doctrine, or by private parties holding each other accountable for not adhering to it.[1230] Sax was also of the view that the public trust doctrine imposes a duty on the state to ensure that public trust property is available for public use and serves a public purpose.[1231] Property subject to the public trust doctrine was not capable of being alienated, while the public purposes for which the property is to be used must be for identified uses.[1232]

Critics have argued that the public trust doctrine should be limited to its original purpose: to regulate access to the seashore and the beds of navigable waters.[1233] However, the public trust

[1223] Sax 'The public trust doctrine in natural resources law: effective judicial intervention' op cit note 1212 at 487; Dunning op cit 1212 at 520.

[1224] Sax 'The public trust doctrine in natural resources law: effective judicial intervention' op cit note 1212 at 487; Klass op cit note 1221 at 6.

[1225] Sax 'The public trust doctrine in natural resources law: effective judicial intervention' op cit note 1212 at 487; Klass op cit note 1221 at 6.

[1226] Sax 'The public trust doctrine in natural resources law: effective judicial intervention' op cit note 1212 at 473.

[1227] Ibid at 474; Reiser op cit note 1217 at 394; Lazarus op cit note 1212 at 642.

[1228] Sax 'The public trust doctrine in natural resources law: effective judicial intervention' op cit note 1212 at 474; Reiser op cit note 1217 at 394; Lazarus note 1212 at 642.

[1229] Sax 'The public trust doctrine in natural resources law: effective judicial intervention' op cit note 1212 at 474; op cit note 51 at 394; Lazarus op cit note 1212 at 642.

[1230] AB Klass op cit note 1221 at 7.

[1231] Sax 'The public trust doctrine in natural resources law: effective judicial intervention' op cit note 1212 at at 478.

[1232] Ibid.

[1233] Dunning op cit note 1212 at 517; Lazarus op cit note 1212 at 691.

doctrine developed by the courts in the US includes the protection of environmental rights.[1234] The public trust doctrine does not require a total prohibition on the alienation of public trust lands to private persons.[1235] In appropriate instances where economic interests are to be furthered, the state may detract from the interests of public trust uses.[1236] Such detraction from the public trust uses has to be in the interests of the public trust beneficiaries.[1237] The public trust doctrine is, by nature, a mechanism to hold the state accountable.[1238] The following section discusses the Anglo-American public trust doctrine to determine whether the doctrine assists in providing meaning to the concept of state custodianship.

## 6.4 The Anglo-American Public Trust Doctrine

The principle underlying the notion of public trust is that certain natural resources are managed and protected on behalf of the citizens by the state.[1239] Trusteeship by the state is therefore required to ensure that the state acts in the best interest of its citizens.[1240] The state is required to do so where the interests of an individual property owner conflict with those of the public.[1241] As stated above, the terms stewardship and public trusteeship are often used as synonyms[1242] which give rise to a fiduciary responsibility towards the community and the environment.[1243]

The stewardship ethic, which forms part of the legal notion of public trusteeship, may manifest differently in different property regimes.[1244] The various manifestations of the stewardship ethic may occur even in the same legal system.[1245] Therefore, recognising the notion of public trusteeship does not indicate the existence of a particular property rights regime.[1246]

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[1234] Klass op cit note 1221 at 6.

[1235] Ibid at 10.

[1236] Ibid.

[1237] Ibid at 4.

[1238] JP Power 'Reinvigorating the natural resource damage actions through the public trust doctrine' (1995) 4 *NYU Environmental Law Journal* 420.

[1239] Barnes op cit note 1178 at 22; Van der Schyff op cit note 1177 at 234.

[1240] Barnes op cit note 1178 at 247.

[1241] Barnes op cit note 1178 at 22; Van der Schyff op cit note 1177 at 235; Sand op cit note 1147 at 47 – 72.

[1242] Barnes op cit note 1178 at 247; see fn 1209 at 129.

[1243] Van der Schyff op cit note 1177 at 235.

[1244] Sand op cit note 1147 at 48.

[1245] Ibid; Blumm & Guthrie op cit note 1178 at 807.

[1246] Blumm op cit note 1212 at 649-667.

The public trust doctrine is furthermore used to hold property in trust for the benefit of the people.[1247] The doctrine prevents the state from alienating the property held in trust to private persons.[1248] It was initially used to protect access to navigable waterways and submerged lands for navigation, fishing, and commerce in the US.[1249] The public trust doctrine also recognised that certain lands were so valuable that the state should not alienate them during its development.[1250] Therefore, the public trust doctrine in its early stages of development contained elements of *res publicae*.[1251] However, there is disagreement about the definition, nature, and applicability of the public trust doctrine.[1252] These criticisms relate to uncertainty and inconsistency in the application of the doctrine.[1253] The public trust doctrine has, however, also been welcomed for its flexibility in adapting to the changing needs of people over time.[1254]

Although natural resources may be allocated to private or public users, certain natural resources are part of a public trust. The natural resources forming part of the trust is inalienable.[1255] Authorities that act as public trustees must protect and manage specific natural resources.[1256] When the public trustee causes the natural resource to deteriorate, a citizen may approach the courts to ensure that the public trustee adheres to the duty to protect and manage the particular natural resource.[1257] The state's sovereign right to manage and control certain natural resources is fiduciary and not proprietary.[1258]

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[1247] GR Scott 'The expanding public trust doctrine: a warning to environmentalists and policy makers' (1998-1999) 10 *Fordham Environmental Law Journal* 15.

[1248] Ibid.

[1249] Dunning op cit 1212 at 519.

[1250] Klass op cit note 1221 at 699.

[1251] Property which could be of use or belonged to the people was *res publicae*; P du Plessis *Textbook on Roman Law* 3ed (2005) Oxford University Press at 154.

[1252] GR Scott op cit note 1247 at 32; Power op cit note 1238 at 420; Lazarus op cit note 1212 at 710.

[1253] Power op cit note 1238 at 420; Lazarus op cit note 1212 at 710; MC Blumm 'Public property and the democratization of western water law" A modern view of the public trust doctrine' (1989) *19 Environmental Law* 573 – 604 indicates that the public trust doctrine has in many instances been treated as a public property right of access to certain resources for public resources.

[1254] Power op cit note 1238 at 420; Klass op cit note 1221 at 699; Lazarus op cit note 1212 at 710.

[1255] Sand op cit note 1177 at 48.

[1256] Van der Schyff op cit note 1177 at 236; Sand op cit note 1177 at 48.

[1257] Ibid.

[1258] Van der Schyff op cit note 1177 at 236; Sand op cit note 1177 at 48.

The notion of the state's sovereign right to manage and control certain natural resources does not indicate a link between public trusteeship and trust law as found in private law.[1259] The notion of public trust over natural resources belongs to public law, while the concept of trusts belongs to the system of private law.[1260] As such, the word "trust" refers to the fiduciary responsibility of the state within the context of public trusteeship and not the juristic entity that is a trust.[1261] The requirements for creating and operating a private law trust disqualify the public trust doctrine as a legal trust.[1262]

For a public trust to apply, a natural resource must be protected for future generations, be available for use by a community of citizens, and be placed under the custody or fiduciary control of the state.[1263] The state must ensure that the resource is used, protected, managed, and conserved in the public interest to guarantee access and use for current and future generations.[1264] The state does so by using its administrative powers.[1265] Public trusteeship or state custodianship is therefore regarded as a stewardship doctrine.[1266]

The Anglo-American public trust doctrine is only one of the legal manifestations of the notion of public trusteeship.[1267] The public trust doctrine in American law refers to either a common-law doctrine, also known as the 'traditional public trust doctrine,' or a statutory doctrine adopted in constitutional or statutory law.[1268] The state exercised dominium and sovereignty over watercourses and the land beneath, known as a fiduciary dominium.[1269] In terms of the

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[1259] Ibid; J Stevens 'The public trust: A sovereigns ancient prerogative becomes the people's environmental right' (1980) 14 *UC Davis LR* 195-232.

[1260] Van der Schyff op cit note 1177 at 236; P Sand 'The concept of public trusteeship in the transboundary governance of biodiversity' in LJ Kotze & T Marauhn (eds) *Transboundary governance of biodiversity* (2014) 34- 64.

[1261] Van der Schyff op cit note 1177 at 236; Sand op cit note 1260 at 34- 64.

[1262] Dunning op cit note 1212 at 519.

[1263] Van der Schyff op cit note 1177 at 237; Sand op cit note 1260 at 34- 64.

[1264] J Brewer & GD Libecap 'Property rights and the public trust doctrine as environmental protection and natural resource conservation' (2009) 53 *The Australian Journal of Agricultural and Resource Economics* 1-17 at 4; Van der Schyff op cit note 1177 at 237.

[1265] Brewer & Libecap op cit note 1264 at 4.

[1266] Sand op cit note 1260 at 34- 64.

[1267] Van der Schyff op cit note 1177 at 237.

[1268] MC Blumm (ed) The public trust doctrine in 45 states (2014) Lewis & Clark Law School Legal Studies Research Paper accessed on 20 December 2021 at http://dx.doi.org/10.2139/ssrn.2235329; GR Scott The expanding of the public trust doctrine: A warning to environmentalists and policy makers (1988) 10 Fordham Environmental LJ 1-70.

[1269] Van der Schyff op cit note 1177 at 238 and the reference to *Martin v Waddell's Lessee* 41 US 367 (Pet) (1842).

fiduciary dominium, the state had the duty to protect the use of navigable watercourses for commerce, navigation, and fishing purposes.[1270] Therefore, the public trust doctrine was regarded as a 'public ownership and public access' doctrine.[1271]

The public trust doctrine acknowledges that certain resources are so important to society that they do not form part of private ownership nor unrestricted state ownership.[1272] The state owns certain resources, not as a private-law owner, but as a fiduciary owner: the dominium of the property is vested in the state as representative of the nation.[1273] The state does not have the right to sell the property it owns as a fiduciary owner.[1274]

The state must protect certain natural resources for the benefit of current and future generations following the changing needs of society.[1275] This duty is arguably an inherent characteristic of the state's permanent sovereignty.[1276] Due to the expansion of the public trust doctrine, the fiduciary obligation of the state to protect the public use of and access to certain resources according to the doctrine has extended to other resources and the use and access to those by the public.[1277]

The scope of the public trust doctrine was expanded in the USA to limit private property rights.[1278] The extension of the operation of the public trust doctrine to property rights was justified by acknowledging a pre-existing title in favour of the state.[1279] The pre-existing title in favour of the state acknowledges that the state initially owned the property and that any private-law owner had acquired private-law rights subject to the pre-existing title of the

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[1270] Blumm op cit note 1177 at 105.

[1271] Ibid.

[1272] Turnipseed op cit 1177 at 8. P Sand 'The concept of public trusteeship in the transboundary governance of biodiversity' op cit 1260 at 34 states that the public trusteeship requires a natural resource, used by a community and to be protected for intergenerational purposes and that is placed under the custody or fiduciary control of the state. See Van de Schyff op note 1177 at 237.

[1273] Van der Schyff op cit note 1177 at 240 and the reference to *Shively v Bowlby* 152 US 1 (1984).

[1274] Ibid and the reference to *Shively v Bowlby* 152 US 1 (1984).

[1275] Ibid at 241.

[1276] Ibid and the reference to *Borough of Neptune City v Borough of Avon-by-the-Sea* 61 NJ 296 (1972) at 309.

[1277] Ibid.

[1278] MC Blumm 'The public trust doctrine and private property: The accommodation principle' op cit note 1212 at 650.

[1279] AB Manzetti 'The fifth amendment as a limitation on the public trust doctrine in water law' (1983) 15 *Pacific LJ* 1291-1319 at 1305. The Anglo-American public trust doctrine refers either to the common-law doctrine or to a doctrine established by statute. See Van der Schyff op cit note 1177 at 238 and the reference to JL Sax 'Liberating the public trust doctrine from its historical shackles' (1980) op cit 1279; GR Scott op cit note 1247 at 70.

state.[1280] The state continuously supervised trust resources regardless of whether such resources were in public or private ownership.[1281]

The public trust doctrine harmonises private and public rights and transforms their content, rather than eradicates private property rights.[1282] This doctrine does not lead to total state ownership of property.[1283] The private ownership of property, such as that of trust land, continues to exist on the condition that the public purposes of the public trust were adhered to by the private-law owner.[1284] An easement, being a right to use someone's property, commonly held by members of the public, is created by the operation of the public trust doctrine, burdening the owner of the resource with the fiduciary duty of the public trust.[1285] The content of the easement determines whether the owner's rights to property are subject to the fiduciary duty.[1286] The courts must oversee trust resources. The public has a right to approach a court to enforce its vested interest in these resources.[1287] When private property rights are applied inconsistently with the public trust values, the state can revoke such rights without compensation.[1288]

The public trust doctrine enables the state to maintain jurisdiction over the property to meet the changing demands of the public.[1289] Due to its pre-existing title, the state always had a title in

[1280] JL Huffman 'Background principles and the rule of law: Fifteen years after Lucas' (2008) 35 *Ecology Law Quarterly* 1-29 at 27. This argument prevented instances where in the instance a private law owner lost his rights to private property, such loss being regarded as a taking by the state as it was argued that the private law owner acquired such rights with the knowledge of the state being the previous title holder and knew the risks attached to the property.

[1281] Blumm op cit note 1212 at 650.

[1282] Ibid; MC Blumm 'The public trust doctrine – A twenty-first century concept' op cit note 1177 at 105 – 106; M Turnipseed, R Sagrin, P Barnes, MC Blumm. P Parenteau, & PH Sand 'Reinvigorating the public trust doctrine: Expert opinion on the potential of a public trust mandate in the US and international law environmental law' op cit note 1177 at 5- 14.

[1283] Blumm op cit note 1212 at 661.

[1284] Ibid.

[1285] Van der Schyff op cit note 1177 at 243 and the reference *Marks v Whitney* 491 P 2d 374 (Cal. 1971) and *Glass v Goeckel* 473 Mich 667 at 673 (2005).

[1286] Sax op cit 1212 at 487.

[1287] Van der Schyff op cit note 1177 at 244 and the reference to *Citizens for Responsible Wildlife Management et al v State of Washington* 124 Wn App 566 (2004) 570.

[1288] Ibid.

[1289] Manzetti op cit note 1279 at 1306.

the property. Consequently, no compensation needs to be paid when the state reasserts its title.[1290]

Establishing the American public trust doctrine by statutory law requires acknowledging the intergenerational importance of a particular resource and the vesting of a fiduciary duty in the state to ensure that the public trust in the resource is protected.[1291] Where the public trust doctrine is incorporated by statute, the fiduciary responsibility of the state may - depending on the context and provisions of the statute - lead to a natural resource being regarded as public property.[1292] In other instances, the statute's context may indicate that the legislature intended to provide for the mere regulation of the use of a resource held in private ownership where the public interest in such a resource is also acknowledged and accommodated.[1293] However, the public interest determines the degree and nature of the public use and access to a certain resource.[1294] Whether the resource is owned by the state or by a private owner, the public trust doctrine restricts the owner's rights to the resource.[1295] The following section discusses whether the MPRDA introduces the public trust doctrine or elements of public trusteeship statutorily.

## 6.5 Does the MPRDA Introduce a Public Trust Doctrine or Elements of Public Trusteeship?

Although the South African common law does not acknowledge the public trust doctrine, Van der Schyff argues that the constitutional environmental right[1296] created the opportunity for environmental and natural resource law to incorporate the public trust doctrine or principles thereof.[1297] As indicated,[1298] the MPRDA statutorily introduced state custodianship in South African mineral and petroleum law.[1299]

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[1290] Ibid; RE Walston 'The public trust doctrine in the water rights context: The wrong environmental remedy' (1982) 22 *Santa Clara LR* 63-85.

[1291] Van der Schyff op cit note 1177 at 245.

[1292] Ibid.

[1293] Ibid.

[1294] Ibid.

[1295] Ibid.

[1296] Section 24 of the Constitution.

[1297] Blumm & Guthrie op cit note 1178 at 788.

[1298] See discussion at Chapter Three at 38.

[1299] Sections 2 and 3 of the MPRDA.

### 6.5.1 Incorporation of Public Trust Doctrine subject to Interpretation

Whether the MPRDA introduces the public trust doctrine or its principles will be dependent on an interpretation of the MPRDA and its provisions as it does not explicitly refer to public trusteeship or the public trust doctrine.[1300] The courts may consider foreign law when interpreting the Bill of Rights.[1301] Concepts found in foreign law, such as 'public trusteeship,' linked to the environmental right contained in section 24 of the Constitution, may be considered by a court in determining whether a statute has incorporated the doctrine of public trusteeship or its principles.[1302]

The courts have not yet decided the question as to whether the MPRDA introduces the doctrine of public trust.[1303] However, Van der Schyff argues that the question as to whether the MPRDA introduces the doctrine of public trusteeship is important, as the introduction of a stewardship ethic in mineral and petroleum law will impact the interpretation of its provisions.[1304]

### 6.5.2 Fiduciary Duty

The MPRDA places a custodial authority upon the state, accompanied by a fiduciary responsibility towards a particular beneficiary regarding a certain subject matter.[1305] This fiduciary principle is reflected in statutes that regulate natural resources such as water,[1306] environmental management [1307] , and coastal management.[1308]

The MPRDA is said to statutorily impose a fiduciary responsibility on the state as custodian, as in the instance of the public trust doctrine.[1309] The MPRDA does not vest proprietary interest

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[1300] Chapter Three for a discussion on the provisions of the MPRDA.

[1301] Section 39(1)(c) of the Constitution; *Fuel Retailers Association* supra 1192.

[1302] Van der Schyff op cit note 1177 at 246.

[1303] *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) at para 86 where it was stated that it did not matter whether the MPRDA introduced the public trust doctrine into South African law.

[1304] Van der Schyff op cit note 1177 at 246.

[1305] Ibid.

[1306] National Water Act 36 of 1998.

[1307] National Environmental Management Act 107 of 1998.

[1308] National Environmental Management: Integrated Coastal Management Act 24 of 2008.

[1309] Van der Schyff op cit note 1177 at 246.

in mineral or petroleum resources in the state.[1310] The state's fiduciary responsibility as provided for in the MPRDA determines the state's interest in fulfilling its responsibility as custodian.[1311] One such fiduciary responsibility is the state's duty to ensure the sustainable development of South Africa's mineral and petroleum resources.[1312] The state must do so within a national environmental policy containing norms and standards while promoting economic and social development.[1313] In complying with this duty, the state, acting through the Minister, is expressly granted the power to grant, issue, refuse, control, and manage various rights, permits, and permissions.[1314]

As custodian of the nation's mineral and petroleum resources, the state must comply with its duties as prescribed in the MPRDA. The fiduciary responsibility is entrenched in section 24 of the Constitution.[1315] Administrative law remedies may also be applied to ensure that the state, as the custodian, executes its fiduciary duties and responsibilities to the standard required by the Constitution[1316] and the MPRDA.[1317]

The MRPDA identifies 'the nation' as the beneficiary of the state's custodial authority.[1318] The South African nation has been described as a 'timeless, non-legal entity that includes current and future generations.'[1319] As such, 'the nation' is regarded as a community associated with a particular territory with shared interests in South Africa's mineral and petroleum resources.[1320] As the beneficiary of the state's custodial authority, the nation's interests, as opposed to that of an individual or entity, are advanced.[1321] A person or single entity may only benefit if the

[1310] Ibid; Agri SA v Minister for Minerals and Energy supra note 1197.

[1311] Van der Schyff op cit note 1177 at 246.

[1312] Section 3(3) of the MPRDA.

[1313] Section 3(3) of the MPRDA.

[1314] Section 3(2) of the MPRDA. This section also requires that the state determine levies, fees and considerations payable in terms of any statute related to the exploitation of mineral and petroleum resources.

[1315] Section 38 of the Constitution 1996 grants the court the power to grant appropriate relief in favour of anyone alleging that a right in terms of the Bill of Rights have been infringed.

[1316] Section 24 of the Constitution 1996.

[1317] Van der Schyff op cit note 1177 at 247.

[1318] Sections 2 and 3 of the MPRDA.

[1319] Van der Schyff op cit note 1177 at 247.

[1320] Ibid at 247.

[1321] Ibid at 248.

benefits provided by the MPRDA to allow persons or single entities to apply for a variety of rights, permissions, and permits reflect the public interest.[1322]

While the nature and content of the public's interest vary over time, the Constitution and the MPRDA determine the current public interest of the South African nation in its mineral and petroleum resources.[1323] The constitutional values and its fundamental rights intend to protect the current and future generations by protecting and advancing sustainable ecological development and the use of natural resources.[1324] In doing so, the Constitution requires that justifiable economic and social development must be promoted.[1325] Therefore, approval of applications in terms of the MPRDA will depend on an interpretation of the requirements determined by the Constitution and not solely on economic principles.[1326]

### 6.5.3 Changes in the Public Interest

Changes in the public interest ought to be contained in legislation to reflect the public interest of the majority of the nation.[1327] The MPRDA, as the statutory instrument introducing state custodianship, determines its substantive content.[1328] The MPRDA requires that every action and decision taken by the state must advance the objects of the MPRDA.[1329] Where opposing or conflicting public interests exist, such interests must be weighed against the objects contained in the MPRDA.[1330] The state has the responsibility to choose between competing public interests and not private individuals.[1331]

The statutory requirement that the community benefits from the notion of state custodianship do not exclude an individual from benefiting from the provisions of the MPRDA.[1332] However, the interests of the individual must yield to the public interest determined by the needs of the

[1322] Ibid at 248.

[1323] Section 24 of the Constitution; Van der Schyff op cit note 1177 at 249; Barnes op cit 1178 at 69.

[1324] Section 24(b)(iii) of the Constitution; Van der Schyff op cit note 1177 at 249.

[1325] Section 24(b)(iii) of the Constitution.

[1326] Section 24(b)(iii) of the Constitution; Van der Schyff op cit note 1177 at 249.

[1327] Ibid at 249.

[1328] Sections 2 and 3 of the MPRDA.

[1329] See sections 2, 3 and 5 of the MPRDA.

[1330] Section 2 of the MPRDA; see discussion at Chapter Three discussion at 49.

[1331] Van der Schyff op cit note 1177 at 249; Walston op cit 1290 at 63-93.

[1332] Van der Schyff op cit note 1177 at 250.

current and future generations.[1333] The MPRDA determines the limitation of the interests of the individual in the nation's mineral and petroleum resources.[1334] Considering the above, the MPRDA protects the interest of identified beneficiaries rather than those of an individual.[1335]

The MPRDA deals with the mineral and petroleum resources of the nation as a whole and the separate mineral and petroleum resources.[1336] The total mineral and petroleum resources found in South Africa are the nation's entitlement to these resources and not the individual mineral and petroleum resources units.[1337] However, the individual may still have access to the individual resources units, which form the object of private use rights granted in terms of the provisions of the MPRDA.[1338] Any rights to individual mineral or petroleum units acquired by an individual are subject to the nation's title in such minerals and therefore subject to the public's interest.[1339]

As indicated before, the MPRDA statutorily introduces state custodianship in South African mineral and petroleum law.[1340] The MPRDA furthermore does not explicitly refer to public trusteeship or the public trust doctrine.[1341]A comparison between the principles of the public trust doctrine and the provisions of the MPRDA, however, indicates that similarities exist between the requirements for the public trust doctrine to be present and the fiduciary duty required of the state by the introduction of state custodianship.

## 6.6 Conclusion

The principles contained in the Constitution and the MPRDA provide an agreement between the requirements for the stewardship principle underlying the public trust doctrine and the provisions of the MPRDA that aim to determine the notion of state custodianship.[1342] It is submitted that Van der Schyff is correct insofar it is argued that the introduction of the notion

[1333] Ibid.

[1334] Ibid.

[1335] Ibid.

[1336] See sections 2 and 5 of the MPRDA; Van der Schyff op cit note 1177 at 250.

[1337] See the long title and sections 2 and 3 of the MPRDA.

[1338] Section 5 of the MPRDA; Van der Schyff op cit note 1177 at 250.

[1339] Van der Schyff op cit note 1177 at 250.

[1340] Sections 2 and 3 of the MPRDA.

[1341] See Chapter Three for a discussion on the provisions of the MPRDA.

[1342] Van der Schyff op cit note 1177 at 250.

of state custodianship by the MPRDA is said to have introduced the stewardship doctrine statutorily[1343] together with the ethic of stewardship in South African mineral and petroleum law.[1344]

In accordance with Van der Schyff, a statutory stewardship doctrine of public trust consists of stewardship principles, as the word 'doctrine' refers to a 'principle, set of guidelines, dogma, view, belief, and policy.'[1345] The Anglo-American public trust doctrine is one of several manifestations of how a sovereign's fiduciary and stewardship doctrines can be recognised.[1346] It is therefore submitted that the statutory introduction of the stewardship trust doctrine of public trust should not be equated with the Anglo-American public trust doctrine.[1347]

The state must ensure that the resource is used, protected, managed, and conserved in the public interest to guarantee access and use for current and future generations.[1348] The state does so by using its administrative powers.[1349] Therefore, public trusteeship or state custodianship may be regarded as a stewardship doctrine.[1350]

The view that the public trust doctrine has been accepted into South African law has been criticised.[1351] In accordance with this view, it is argued that the introduction of the public trust doctrine into South African mineral law is unnecessary due to the unclear scope of the doctrine and the unnecessary efforts in attempting to fit the doctrine within the framework of South African law.[1352] Section 24 of the South African Constitution, in any event, provides for a right to the environment, with several environmentally-related laws giving effect to this constitutional right.[1353] Despite the above criticism, it is argued that the public trusteeship and

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[1343] Ibid.

[1344] Ibid at 250. Van der Schyff argues that 'the philosophical ethic of public trusteeship has seeped into South African mineral and petroleum law'.

[1345] Van der Schyff op cit note 1177 at 251. Van der Schyff indicates that notions of stewardship similar to the Anglo-American public trust doctrine are found in India, Pakistan, Brazil, Equador, Canada, Kenya, Uganda and Nigeria; Blumm & Guthrie op cit note 1178 at 741-808.

[1346] Van der Schyff op cit note 1177 at 251.

[1347] Ibid.

[1348] Brewer & Libecap op cit note 1264 at 4; Van der Schyff op cit note 1177 at 237.

[1349] Brewer & Libecap op cit note 1264 at 4.

[1350] Sand op cit note 1260 at 34- 64.

[1351] HM van den Berg 'Ownership of minerals under the new legislative framework for mineral resources' 2009 *Stell LR* 139 at 149.

[1352] Ibid.

[1353] Section 24 of the Constitution 1996; National Environmental Management Act 108 of 1998; National Water Act 36 of 1998; National Environmental Management: Integrated Coast National Water Act 36 of 1998; National

the public trust doctrine do, however, assist in providing guidance in determining the scope of the state's fiduciary duty as state custodian by establishing the requirements for the existence of public trusteeship and the public trust doctrine that aim to fulfill environmental protection.

As stated above, the introduction of state custodianship has impacted the mineral law regime under which the nation's mineral and petroleum resources are to be regulated.[1354] The next chapter discusses how the notion of state custodianship has accepted the principles of fiduciary responsibility in dispensing with the state's duty as custodian of mineral and petroleum resources.

Environmental Management Act 107 of 1998; National Environmental Management: Integrated Coast Management Act 24 of 2008Management Act 24 of 2008

[1354] Van der Schyff op cit note 1177 at 251; *Agri South Africa (*CC) supra note 1197 paras 80 and 91.

# CHAPTER SEVEN: THE FIDUCIARY NATURE OF STATE CUSTODIANSHIP

## 7.1 Introduction

During the colonial and apartheid periods, the Government failed to use its regulatory powers to ensure that natural resources benefited all South Africans.[1355] The failure to do so led to the adoption of legislation[1356] to ensure that natural resources are protected and that all South Africans benefit therefrom.[1357] Consequently, the state is entrusted with limited powers to regulate the use and enjoyment of natural resources.[1358]

This chapter discusses the state's relationship with the people whom it is entrusted to govern. This relationship is said to be of a fiduciary nature in that it provides the basis for the state's legal authority to adopt, administer and enforce the law.[1359] The fiduciary authority and duty of the state operate by law, mainly by virtue of the fiduciary principle.[1360]

This chapter furthermore discusses the legal nature of fiduciary duties and their applicability to the concept of state custodianship.[1361] A discussion of the state's sovereignty enables it to fulfill its fiduciary duties and responsibilities, followed by a discussion of the nature of the duties of the state as custodian resulting from the MPRDA.

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[1355] W Freedman 'Conservation, Sustainable use of Natural Resources and the Notion of Public Trusteeship' in A Du Plessis *Local Government and Environmental Law in South Africa* (2015).

[1356] The National Environmental *Management* Act 107 of 1998; National Environmental Management: Integrated Coastal Management Act 24 of 2008; National Environmental Management: Biodiversity Act 10 of 2004; National Water Act 36 of 1998.

[1357] A du Plessis 'Climate Change, Public Trusteeship and the Tomorrows of the Unborn' *SAJHR* (2015) 31 269 at 284.

[1358] Ibid.

[1359] E Fox-Decent 'The Fiduciary Nature of State Legal Authority' 2005 31 *Queen's L.J.* 259 at 262

[1360] Ibid at 263

[1361] The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

## 7.2 The Constitutional and Legislative Framework for State Custodianship

The state's obligations to fulfill the democratic values concerning natural resources have been considered a constitutional duty of a fiduciary kind.[1362] In South Africa, the Constitution provides the basis for the authority and duty of the state to regulate mineral and petroleum resources on behalf of all South Africans.[1363] The Constitution provides that everyone has the right to an environment protected through reasonable legislative and other measures that secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.[1364] The Constitution further requires the state to respect, protect, promote, and fulfill the Bill of Rights to achieve the democratic values of human dignity, equality, and freedom.[1365]

Legislative obligations and responsibilities have been imposed on the state in exercising its fiduciary duties with regard to mineral and petroleum resources.[1366] The Mineral and Petroleum Resources Act (MPRDA) introduces the concept of state custodianship.[1367] The concept of state custodianship is therefore regarded as a creature of statute.[1368] The MPRDA regulates the state's fiduciary powers.[1369] The state's powers are limited to the extent determined by the relevant constitutional and legislative enactments.[1370] The MPRDA furthermore provides that mineral and petroleum resources are the common heritage of all the people and that the state is the custodian.[1371] As custodian, the state is responsible for regulating mineral and petroleum resources to benefit all South Africans.[1372]

[1362] Du Plessis op cit note 1357 at 284.

[1363] Section 24 of the Constitution of South Africa.

[1364] Section 24(b)(iii) of the Constitution of South Africa.

[1365] Sections 7(1) and (2) of the Constitution of South Africa.

[1366] MPRDA 28 of 2002; Freedman op cit note 1355.

[1367] Sections 2(b) and 3 of the MPRDA.

[1368] Sections 2(b) and 3 of the MPRDA.

[1369] MPRDA 28 of 2002; Freedman op cit note 1355.

[1370] Ibid.

[1371] Section 3(1) of the MPRDA.

[1372] Section 3(1) of the MPRDA.

The state's responsibility as custodian is said to have created a fiduciary duty whereby the state has the responsibility to develop the country's mineral and petroleum resources.[1373] To determine the content of the fiduciary nature of state custodianship, a comparison with the notion of trusteeship is required as both concepts embrace the idea of fiduciary responsibility.[1374] Public trusteeship is regarded as an underlying philosophy that can manifest itself differently regarding different legal constructs.[1375] The main elements of the concept of public trusteeship relate to a natural resource used by a specific community, destined to be protected for future generations and placed under the custodial or fiduciary control of state authority.[1376] The state authority is responsible for ensuring that the natural resource is used, managed, and protected in accordance with the public interest for the access and use of the present and future generations.[1377] Consequently, it has been argued that the concept of public trusteeship or state custodianship may thus be described as a stewardship doctrine.[1378]

This comparison is necessitated because water-related legislation links the two notions by the use of legislation.[1379] In the National Water Act,[1380] the national government is appointed as the public trustee of the nation's water resources. In contrast, in the Water Services Act,[1381] the national government's role as custodian of the nation's water resources is confirmed. It has also been argued that the courts confirm the close relationship between custodianship and trusteeship, where the present generation acts as the custodian or trustee of the environment for future generations.[1382] However, the courts have not assisted in determining the content of fiduciary responsibility within the notion of state custodianship or trusteeship.[1383] However,

[1373] E van der Schyff *Property in Minerals and Petroleum* 2016 Juta at 179.

[1374] Ibid at 179.

[1375] Ibid at 237.

[1376] Ibid.

[1377] Ibid at 237.

[1378] Ibid.

[1379] Ibid at 179.

[1380] National Water Act 36 of 1998.

[1381] Water Services Act 108 of 1997.

[1382] Van der Schyff op cit note 1373 at 179 and the reference to *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) para 19.

[1383] In *Hofer and Others v Kevitt NO and Others* 1996 (2) SA 402 (C) at 407B the court stated that the "concept fiduciary duty has no clearly defined meaning."

when a state functionary is appointed in terms of legislation, all that can reasonably be done must be affected to ensure that the state fulfills its obligation as custodian.[1384]

Courts are entitled to consider foreign law in the interpretation of the Bill of Rights, such as in the instance of section 24 of the Constitution.[1385] Concepts such as public trusteeship or sustainable development are closely linked to section 24 of the Constitution, and therefore consideration to foreign law may be given by the courts.[1386] As the MPRDA is part of the environmental and natural resources legislation envisaged in terms of section 24 of the Constitution, it is part of the legislation that has set the basis for incorporating a doctrine of public trust or principles of public trusteeship.[1387] The fiduciary duty to protect the environment and the natural resource base is regarded as a fiduciary duty of a public nature.[1388] Chapter 3 discusses the legislative framework that determines the content of state custodianship within the context of the MPRDA.[1389]

## 7.3 Sovereignty of the State

This section discusses the state's sovereignty, which provides the legitimacy for a state to fulfill its duties and responsibilities towards its subjects. In particular, the legitimacy of the state as custodian to regulate its mineral resources is discussed. In South Africa, the MPRDA expressly states that it relies on the internationally accepted right of a state to regulate its mineral and petroleum resources.[1390]

The internationally accepted right of a state to exercise sovereignty over all mineral and petroleum resources provides the legitimacy of a country to regulate its natural resources.[1391]

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[1384] *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E) at 418B.

[1385] Van der Schyff op cit note 1373 at 245.

[1386] Ibid; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 CC.

[1387] Van der Schyff op cit note 1373 at 245; MC Blumm 'Internationalising the public trust doctrine: Natural law and constitutional and statutory approaches to fulfilling the Saxion vision' 2012 45 *UC Davis LR* 741 – 808 at 788.

[1388] Du Plessis op cit 1357 at 285.

[1389] See Chapter Three at 37.

[1390] Section 2(a) of the MPRDA.

[1391] Section 2(a) of the MPRDA; JD van der Vyver 'Nationalisation of mineral rights in South Africa' 2012 *De Jure* 125 at 139; see Article 1(2) of *International Covenant on Civil and Political Rights* adopted by the United Nations General Assembly Resolution 2200A (XXI) in terms of article 49 of the Charter of the United Nations

International law provides for the sovereignty of a state to enable it to fulfill its duties and responsibilities towards its citizens.[1392] The United Nations acknowledges the sovereign right of states to dispose of their natural wealth and resources in accordance with their national interest.[1393] The United Nations also regards the right of nations to exercise permanent authority over natural resources as integral to the right to self-determination.[1394]In Africa, the Organisation of African Unity (OAU) confirmed this sovereign right of states.[1395] The OAU adopted the African Charter on Human and People Rights that provides that all people shall have a right to dispose of their wealth and natural resources, and it is exercised in the people's interest.[1396]

For the exercise of power emanating from *de facto* sovereignty to be legitimate, such exercise must be in accordance with the demands of legality under the rule of law.[1397] However, for exercises based on mere *de facto* sovereignty to be legitimate, such exercises must be in accordance with the fiduciary requirements of legality, which establishes *de iure* sovereignty.[1398] The ongoing legitimization of the exercise of authority is important to ensure that *de iure* sovereignty exists.[1399]

The state's fiduciary obligation flows from the relationship between the state and the subject, which establishes *de facto* sovereignty. At the same time, the institutions that function to

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accessed on https:/www.ohchr.org/en/professionalinterest/pages/ccpr.aspx on 10 August 2018; also see Article 1(2) of *International Covenant on Economic, Social and Cultural Rights* adopted by United Nations General Assembly Resolution 2200A (XXI) in terms of article 27 of the Charter of the United Nations and accessed on https:/www.ohchr.org/en/professionalinterest/pages/ccpr.aspx on 10 August 2018.

[1392] General Assembly Resolution 626 (VII) *Right to exploit freely natural wealth and resources* of 21 December 1952; General Assembly Resolution 2158 (XXI) *Permanent Sovereignty over Natural Resources* of 29 November 1966.

[1393] Ibid.

[1394] Declaration on the Granting of Independence to Colonial Countries and Peoples General Assembly Resolution 1514 of 14 December 1960.

[1395] The Organisation of Africa was established on 25 May 1963 in Addis Ababa, Ethiopia and disbanded on 9 July 2002 when it was replaced by the African Union (AU); see https;//www.dirco.gov.za as accessed on 11 August 2018.

[1396] Article 2(1) of the African Charter on Human and People Rights of 27 June 1981.

[1397] LD Duhaime *Latin Law Dictionary* at www.duhaime.org accessed on 10 August 2018 defines *de facto* and *de jure* governments as follows: "A government *de jure* but not *de facto* is one deemed lawful, which has been supplemented. A government *de jure* and also *de facto* is one deemed lawful, which is present or established. A government *de facto* is one deemed unlawful but which is present or established. Any established government, be it lawful or not, is a government *de facto*."

[1398] Fox-Decent op cit note 1359 at 284.

[1399] Ibid.

maintain statehood are required to ensure *de jure* sovereignty.[1400] Jurisdiction, therefore, arises under the state's claim to sovereignty over a certain area.[1401] The state's claim to sovereignty thus ensures that persons within the state's territory are subject to its legal authority.[1402] The legislative, executive and judicial powers that establish sovereignty assume different institutional forms and purposes to facilitate the ongoing confirmation of a legal order intended to serve its subjects and protect their rights. As such, sovereign powers are administrative.[1403] When the state exercises its sovereign powers, a fiduciary obligation arises; the content of which is the rule of law.[1404] The principle of the rule of law is specifically referred to in the South African Constitution as one of the founding values of the South African sovereign democratic state.[1405]

The state's fiduciary obligations may display a private law character in that the obligation may relate to an entitlement of the state's subjects that is in the state's care.[1406] Although these duties resemble the duties of the state as fiduciary, the fiduciary duty of the state is much broader in that it does not depend on the identification of acknowledged legal interests between the state and its subjects.[1407] For a legal interest to enjoy the protection of the state's fiduciary duty, such an interest must reflect a substantial interest entrusted to an authority that has discretionary powers of an administrative nature[1408] over the legal interest of the citizen.[1409]

From the above, it is necessary to determine the legal nature of the fiduciary trust when considering the content of state custodianship. Therefore, the following section discusses the origin and legal nature of the fiduciary trust concerning South Africa's mineral and petroleum resources.

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[1400] Ibid at 285.

[1401] Ibid.

[1402] Ibid.

[1403] Ibid at 310.

[1404] Ibid.

[1405] Section 1(c) of the Constitution of South Africa.

[1406] Fox-Decent op cit note 1359 at 309.

[1407] Ibid at 309.

[1408] *Anderson v Canada (Attorney General)* 2002 58 OR (3d) 417 (CA), reviewed 2003 2 SCR 40 where the Supreme Court confirmed that the Crown of Canada owed a fiduciary duty to a citizen to place pension funds for disabled people it administered, into interest bearing accounts.

[1409] Fox-Decent op cit note 1359 at 309.

## 7.4 The Legal Nature of the Fiduciary Duties

A typical fiduciary relationship is present in instances where a person stands in a position of confidence towards another and where there is a duty to protect the interests of that person.[1410] A fiduciary relationship also exists in instances where a person occupies a position of trust towards another and thereby acquires a fiduciary duty towards that person.[1411]

The fiduciary principle comprises a three-part relationship.[1412] The three-part relationship requires one party to consent to another party to act on behalf of a third party.[1413] However, instances exist where the exercise of discretionary power by a party is exercised independently and not based on the consent of another party.[1414] In those instances where consent is absent, the exercise of power over another is based on a trust-like obligation: the party subjected to power is said to have reposed trust in the party exercising the trust, being the fiduciary.[1415] It is essential to examine the basis of the state's authority to exercise fiduciary authority over its subjects in understanding the three-part relationship between the state and its people.[1416] The requirements to determine whether the fiduciary relationship exists consist of trust, loyalty, and fairness.

### 7.4.1 The Requirement of Trust

The role of trust in a fiduciary relationship has a moral and conceptual basis.[1417] The fiduciary principle reflects a presumption that the party who exercises power over another in the absence of consent does so on the basis that the party subjected to power has placed its trust in the fiduciary.[1418] The presumption of trust is required to provide the legal basis for the exercise of the fiduciary principle where the beneficiary's consent is factually or in principle unattainable.

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[1410] *Provident Fund for the Clothing Industry v Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund* 1981 (3) SA 539 (W) at 542D – E.

[1411] *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) para 30.

[1412] A Baier '*Trust and Antitrust'* Ethics (1985) 96 231 at 236.

[1413] Fox-Decent op cit note 1359 at 263.

[1414] Ibid 263.

[1415] Ibid at 263.

[1416] ibid.

[1417] Ibid.

[1418] Fox-Decent op cit note 1359 at 263.

By virtue of the fiduciary principle, the fiduciary is entrusted to act to benefit the beneficiary.[1419]

### 7.4.2 The Requirement of Loyalty

Due to the requirement that the fiduciary principle requires that the fiduciary duty of loyalty be complied with, the fiduciary principle in public law can have no application.[1420] Contrary hereto, it has been argued that the public duties of the courts to apply and enforce the duties of procedural fairness and reasonableness of administrative law towards the individual resembles the duty of loyalty required of a fiduciary duty in private law.[1421] It is argued that the state's authority to exercise fiduciary authority over its subjects in particular with regard to the fiduciary duty of loyalty required, is also present in those instances where consent is absent. As stated above, the exercise of power over another is based on a trust-like obligation: the party subjected to power is said to have reposed trust in the party exercising the trust, being the fiduciary. The duty of loyalty suggests that where beneficiaries have competing interests against the fiduciary, loyalty must take the form of fairness,[1422] which is discussed below.

### 7.4.3 The Requirement of Fairness

The fiduciary principle requires an authority to act on behalf of different classes of beneficiaries. The fiduciary duty of fairness is said to operate to conform with the principle of dignity in ensuring an absence of arbitrary discrimination.[1423] The exercise of the fiduciary's duty to act reasonably ensures and is compatible with the individual's right to dignity and therefore complies with the legal requirement that the fiduciary acts on behalf of the beneficiary even in the event of different classes of beneficiaries.[1424] Where the fiduciary is authorised to

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[1419] Ibid.

[1420] *Harris v Canada* 2002 (2) FC 484 at 178 (TD); PB Miller "Justifying Fiduciary Duties" (2013) Vol 58 McGill Law Journal 969-1023 at https://lawjournal.mcgill.ca/article/justifying-fiduciary-duties/ [Accessed on 10 June 2023]; DA DeMott "Breach of Fiduciary duty: On justifiable expectations of loyalty and their consequences" Ariz L Review 48 (2006) at 925; WA Gregory "The fiduciary Duty of Care: A Perversion of Words" Akron L Review 38 at 181; EJ Criddle "Liberty in Loyalty: A Republican Theory of Fiduciary Law" 95 Tex L Rev (2016-2017).

[1421] PD Finn *Fiduciary Obligations* 1977 The Federation Press at 13.

[1422] Fox-Decent op cit note 1359 at 267.

[1423] PD Finn 'The Forgotten "Trust": The People and the State' in M Cope *Equity Issues and Trends* 1995 131 at 138.

[1424] Fox-Decent op cit note 1359 at 266; Finn op cit note 1423 at 138.

act on behalf of the beneficiary, the fiduciary is compelled to do so in the beneficiary's best interests.[1425]

The fiduciary is obliged to act in the interest of the beneficiaries as a whole, but in the instance of different classes, must act fairly between them.[1426] Therefore, the fiduciary must make decisions considering the rights and interests of the different classes of beneficiaries.[1427] Where one beneficiary suffers to the advantage of another beneficiary on arbitrary grounds, the fiduciary's duty of loyalty towards the suffering beneficiary is violated.[1428]

### 7.4.4 Trust, Loyalty, and Fairness as the Rule of Law

While the fiduciary relationship provides the legal authority for the state as fiduciary to act on behalf of its subjects, it also provides for the constraint of its exercise of public powers.[1429] A state that adheres to its fiduciary mandate provides reasons for its subjects to obey its laws and thereby fulfills its basic function to secure a legal regime that protects the rights of all its citizens.[1430] By providing a legitimate basis for its legal authority, the state can provide enforcement mechanisms and demand that its subjects adhere to the rule of law. The state's impartial duty of loyalty that it owes to its subjects enables it to claim legal authority to govern and expect allegiance from its subjects.[1431] The fiduciary principle and the relational conception between the parties explain why all subjects over whom the state exercises power are beneficiaries of the rule of law regardless of their civil status.[1432]

In exercising its legal authority, the administrative state has developed a wide range of rights that were not recognized by common law, such as the legal positions relating to discrimination (formerly regulated by freedom of contract) and formalizing labour relations.[1433] The importance of public law in establishing the rule of law is illustrated by the progressive and democratic strides made to ensure democracy and when the importance of public law is

[1425] Fox-Decent op cit note 1359 at 267.

[1426] Finn op cit note 1423 at 138.

[1427] Ibid.

[1428] Fox-Decent op cit note 1359 at 267.

[1429] Ibid at 271.

[1430] LL Fuller *The Morality of Law* 2ed 1969 Yale University Press at 202; Fox-Decent op cit note 1359 at 271.

[1431] Fox-Decent op cit note 1359 at 272.

[1432] Ibid; Fuller op cit note 1430 at 202; Fox-Decent op cit note 1359 at 271.

[1433] Ibid at 283.

compared with the common law. [1434] However, the ability of the private law regime to determine rights and obligations independently of statute ensures that private law can ensure a legal relationship with public law without reference to statutes in creating its own set of rights and obligations.[1435]

The fiduciary relationship between the state and the subject justifies and clarifies the public obligations of the state as a consequence of its role in regulating the subject as a legal person. The legislature retains authority to govern the private law order and displace it with public law as the fiduciary authority.[1436] The following section examines the nature of the state's fiduciary duty with its citizens with reference to the MPRDA.

## 7.5 Defining Fiduciary Duties in terms of the MPRDA

The White Paper on a Minerals and Mining Policy for South Africa,[1437] which contains the government's policy on managing South Africa's mineral and petroleum resources, indicates the government's initial intention that the state will manage the nation's minerals custodian.[1438] This policy choice was confirmed by adopting the MPRDA, stating that the state is the custodian of mineral and petroleum resources for the benefit of all South Africans.[1439] The notion of state custodianship provided for in the MPRDA to regulate mineral resources is important for allocating wealth to address past inequalities.[1440]

The MPRDA acknowledges that the country's mineral resources are regulated in the nation's interest and benefits present and future generations.[1441] In attaining this goal, the Mineral and Petroleum Resources Development Act (MPRDA) enables equitable access to resources to all the people of South Africa and, by means of its exploitation, promotes the development of

[1434] Ibid; Fuller op cit note 1430 at 202.

[1435] Fox-Decent op cit note 1359 at 283.

[1436] Ibid at 284.

[1437] White Paper on a Minerals and Mining Policy for South Africa General Notice 2359 Government Gazette 19344 20 October 1998.

[1438] Ibid at paragraph 1.3.2 (v).

[1439] Section 3(1) of the MPRDA determines:

(1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans."

[1440] Van der Schyff op cit note 1373 at 174; L Fernandes 'Natural Resources, agriculture and property rights' (2006) 57 *Ecological Economics* 359 at 359.

[1441] Preamble to the MPRDA.

mineral resources and advances the social values contained in the Constitution.[1442] As custodian of the nation's minerals, the minister responsible for mineral and petroleum resources is tasked with certain clear and prescribed responsibilities.[1443] These responsibilities relate specifically to granting, issuing, refusing, controlling, administering, and management rights, permissions, and permits as provided in the MPRDA.[1444] As the representative of the custodial state, the minister has to ensure the sustainable development of South Africa's mineral resources concerning the national environmental policy, norms, and standards while promoting economic and social development.[1445]

### 7.5.1 The State's Fiduciary Duty of Trust

The state's fiduciary responsibility as custodian of South Africa's mineral resources is established by incorporating the concept of public trusteeship.[1446] The word "trust" refers to the fiduciary responsibility of the state.[1447] The fiduciary duty of trust by the state as custodian of South Africa's mineral resources towards the nation is discussed.[1448]

In support of the argument that a stewardship exists in the instance of custodianship or trusteeship, it has been argued that the present generation holds the earth in trust for the next generation.[1449] Therefore, the current generation acts as the "transient caretakers"[1450] who hold

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[1442] *Agri SA v Minister of Minerals and Energy* 2013 (4) SA 1 CC para 70.

[1443] Section 3(2) of the MPRDA states:

(2) As the custodian of the nation's mineral and petroleum resources, the State acting through the minister, may –

(a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and

(b) in consultation with the Minister of Finance, prescribe and levy, any fee payable in terms of this Act."

[1444] Section 3(2) of the MPRDA.

[1445] Section 3(3) of the MPRDA.

[1446] Van der Schyff op cit note 1373 at 237; MC Blumm 'Public property and the democratization of western water law: A modern view of the public trust doctrine' 1989 19 *Environmental Law* 573-604 at 580.

[1447] Van der Schyff op cit note 1373 at 237; Blumm op cit note 1446 at 580.

[1448] Ibid.

[1449] Van der Schyff op cit note 1373 at 233 and the reference to *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* supra note 1386 para 102.

[1450] Van der Schyff op cit note 1373 at 233 and the reference to the 'coining' of the phrase by M King & T Lessidrenska *Transient caretakers: Making life on earth sustainable* (2009) Pan Macmillan.

the earth on behalf of future generations.[1451] Section 24 of the Constitution serves as the "conduit" through which the ethical norm of stewardship is accepted into South African law.[1452] The statutory incorporation of the ethics of stewardship regarding minerals and mineral resources has led to the redefining of property rights to the disadvantage of property owners.[1453] The redefinition of the rights of property owners was necessary to rectify the failure of the previous private property-based system[1454] where the rights to minerals were awarded to landowners from a particular race group only.[1455] This change to the private property-based allocation system was required by the change in the public value[1456] system that accompanied the adoption of the Constitution.[1457]

The sovereign rights of states over environmental resources are fiduciary and not proprietary.[1458] Within the context of the public trust doctrine, it has been argued that the terms "trust," "trustee," "beneficiary," and "fiduciary responsibility" indicate a connection between public trusteeship and trust law.[1459] Despite arguments that the principles of trust law relating to private property law are applicable, public trust regarding natural resources is a public concept.[1460] In light of the above, the word "trust" therefore instead refers to the state's fiduciary responsibility by incorporating the concept of public trusteeship.[1461]

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[1451] Van der Schyff op cit note 1373 at 233 and the reference to M Fitzmaurice *Contemporary issues in international environmental law* (2009) Edward Elgar Publishing Ltd 135.

[1452] Van der Schyff op cit note 1373 at 233.

[1453] Ibid at 234.

[1454] J Sax 'Some thoughts on the decline of property' 1983 58 *Walsch LR* 481-496 at 484 where it is stated that the allocation of land to individuals and enterprises was on the understanding that the private ownership system would allocate the property resources to socially desirable uses.

[1455] Van der Schyff op cit note 1373 at 234.

[1456] Ibid.

[1457] The Constitution came into effect on 10 May 1996.

[1458] P Sand 'Sovereignty bounded: Public Trusteeship for common pool resources' 2004 4 *Global environmental politics* 47-71 at 48.

[1459] JS Stevens 'The public trust: A sovereign's ancient prerogative becomes the people's environmental right' 1980 14 *UC Davis LR* 195 – 232 at 197; Sand op cit note 1458 at 55.

[1460] P Sand 'The concept of public trusteeship in the transboundary governance of biodiversity' in LJ Kotze & T Marauhn *Transboundary governance of biodiversity* (2014) 34 – 64.

[1461] Van der Schyff op cit note 1373 at 237; Blumm op cit note 1446 at 580.

### 7.5.2 The State's Fiduciary Duty of Loyalty

The appointment of the state as custodian of the nation's mineral resources[1462] affirms the importance of mineral resources for future generations. It confirms the fiduciary responsibility of the state to protect and manage mineral resources in accordance with the interests of the nation.[1463] As custodian of the mineral resources, the state is responsible for protecting and managing the mineral resources.

The notion of state custodianship was introduced by statute into mineral law.[1464] Therefore, the fiduciary responsibilities are statutorily imposed on the state as custodian and are represented by the minister responsible for mineral and petroleum resources.[1465] The MPRDA assists in guiding the state's interest in mineral and petroleum resources.[1466] This guidance is found in the MPRDA where it provides that the state is responsible for the sustainable development of mineral and petroleum resources.[1467] The state is responsible for doing so within national environmental policy, norms, and standards while promoting social and economic development.[1468]

In exercising these responsibilities, regarded as the state's fiduciary responsibilities, the state may grant, issue, refuse control and manage various permissions, rights, permits, and determine levies, fees, and considerations payable in terms of an Act of Parliament.[1469] As the state's fiduciary responsibility emanates from section 24 of the Constitution, section 38 of the Constitution provides appropriate relief when the state breaches its duties.[1470] Failure to fulfill its fiduciary duties as state custodian should lead to the courts protecting and safeguarding the nation's interest in minerals and petroleum resources.[1471] Administrative law remedies should

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[1462] Section 3(2) of the MPRDA.

[1463] Van der Schyff op cit note 1373 at 230; Section 2 of the MPRDA.

[1464] Section 2(3) of the MPRDA.

[1465] Sections 2 and 3 of the MPRDA.

[1466] Section 5 of the MPRDA.

[1467] Section 3(2) of the MPRDA.

[1468] Section 3(3) of the MPRDA.

[1469] Section 3(3) of the MPRDA.

[1470] Section 38 determines that anyone has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

[1471] Van der Schyff op cit note 1373 at 247; *Meepo v Kotze* 2008 (1) SA 104 (NC) and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources* 2011 (4) SA 113 CC.

also be applied to ensure that the state as custodian fulfills its fiduciary duties and responsibilities.[1472]

Section 24 of the Constitution confers on the state stewardship in which the present generation is regarded as the custodian or trustee of the environment for future generations.[1473] Because no South African legal instrument comparable to state custodianship has been identified, it has been argued that comparing the Anglo-American public trust doctrine may guide interpreting state custodianship's content.[1474] The doctrine of state custodianship is then regarded as an analogous legal instrument that emphasises the state's fiduciary obligations in protecting and upholding the nation's interest in mineral resources.[1475] However, it has been acknowledged that this doctrine is an accepted but contested doctrine in American law[1476] and does not form part of South African law.[1477]

A difference exists between protecting public uses and ensuring that resources are used in the public interest. In contrast, property subject to the public trust may not be used for all public purposes.[1478] Property subject to the public trust must be made available to the public for use. Still, such property must be protected for certain uses, including traditional uses associated or linked with the natural uses related to that resource.[1479] Therefore, the concept of state custodianship is a legal mechanism to ensure that the nation's rights are protected by vesting the rights in the state as trustee. As trustee and acting through its administrative agencies, the state must protect, manage, administer, and conserve natural resources.[1480]

Incorporating the notion of state custodianship as a creature of statute[1481] is also said to have altered the property rights regime to the extent that an institutional change has been

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[1472] Van der Schyff op cit note 1373 at 247.

[1473] *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* supra note 1382 para 19; E van der Schyff 'Stewardship doctrines of Public Trust: Has the Eagle Landed on South African Soil?' 2013 *The South African Law Journal* 369 at 372.

[1474] Van der Schyff op cit note 1373 at 231.

[1475] Ibid.

[1476] Sand op cit note 1458 at 50.

[1477] Van der Schyff op cit note 1373 at 231.

[1478] E van der Schyff 'Unpacking the Public Trust Doctrine: A Journey into Foreign Territory' *PER* 2010 Volume 13 No 5 122 at 149.

[1479] Ibid.

[1480] Van der Schyff op cit note 1373 at 237.

[1481] Section 3(1) of the MPRDA.

intended.[1482] The change in the property rights regime is brought about by the statutory introduction of the notion of state custodianship.[1483] The introduction of the concept of state custodianship by the MPRDA has caused a change in the private ownership of mineral resources.[1484] The concept of beneficial governmental administration of these resources has replaced private ownership of mineral and petroleum resources.[1485] The notion of custodianship introduces this beneficial governmental administration of mineral resources.[1486] The extent to which the property rights regime is changed is discussed in Chapter Four.

### 7.5.3 The State's Fiduciary Duty of Fairness

Government is empowered to adopt policies, plans, programmes, and strategies to fulfill its fiduciary role by using constitutional and statutory laws.[1487] The Constitution affords everyone the right to enforce the government's protection of the environment in the interests of future generations.[1488] While the Constitution in section 24 is not explicit on the government's fiduciary duties, its duties are nevertheless contained in the Constitution as the country's supreme law; hence, any law or conduct that is inconsistent with it is rendered invalid.[1489] The MPRDA determines that the mineral and petroleum resources are the common heritage of all the people of South Africa.[1490] At the same time, it is also referred to as the nation's minerals and petroleum resources.[1491] As a nation, it therefore has shared interests in the country's mineral and petroleum resources. Although individual permits, permissions, and a range of other authorisations[1492] are issued, the MPRDA does not promote individual interests.[1493] A

[1482] *Agri South Africa (*CC) supra 1442 paras 80 – 91.

[1483] E van der Schyff 'Who 'owns" the country's mineral resources? An inquiry into the possible incorporation of the public trust doctrine through section 3(1) of the Mineral and Petroleum Resources Development Act 28 of 2002' 2008 *JSAL* at 757.

[1484] H Mostert Mineral Law Principles and Policies in Perspective (2012) Juta at 114.

[1485] Ibid.

[1486] Ibid.

[1487] Du Plessis op cit note 1357 at 286.

[1488] J Tremmel & M Viehöver 'Standpoint: Can Inter-Generational Justice be Achieved Without Improving Our Democracy? The Dilemma of Short-term Politics' 2002 3 *Generational Justice* 1.

[1489] Du Plessis op cit note 1357 at 287.

[1490] Section 3(1) of the MPRDA.

[1491] Section 3(2) of the MPRDA.

[1492] The MPRDA provides for a reconnaissance permit, prospecting right, mining right, mining permit and a retention permit.

[1493] Van der Schyff op cit note 1373 at 248.

claim for benefits in terms of the MPRDA can therefore not be instituted by a single person except if it is instituted on behalf of the public interest. Therefore, public interest serves as the basis on which a right, permission, or any other authority is considered in terms of the MPRDA.[1494]

Public interest is to be framed, within the current context of South African resources, with reference to the values and fundamental rights embodied in the Constitution and the broad framework of the objects stated in the MPRDA.[1495] The public's interest is to bring about equitable access to South Africa's mineral and petroleum resources within the framework of an environment that is not harmful to health or well-being and the nation's commitment to reform.[1496] The protection of intergenerational interests by advancing ecologically sustainable development and promoting economic and social development set the parameters within which the objectives set out in the MPRDA are to be considered.[1497]

It has been argued that, as the notion of state custodianship is statutorily incorporated, the state custodian's fiduciary obligation is therefore also statutorily defined.[1498] By implication, this would necessitate the amending of legislation to change the nature of the fiduciary duties and responsibilities. The MPRDA requires that the public interest is advanced with every action taken in terms thereof.[1499] Therefore, the individual interest is necessary to sway the public interests as it forms part of the public interest to ensure that the interests of future generations are protected.[1500] Therefore, the interests of the beneficiary, being the people of South Africa, are to be protected rather than the individual's.[1501]

### 7.5.4 The Fiduciary duties of State Custodianship and Stewardship

Although the courts have referred to stewardship being conferred upon the present generation as the custodian or trustee of the environment for future generations, the meaning of

[1494] Ibid at 248.

[1495] Ibid at 248.

[1496] Sections 24(a) and 25(4) of the Constitution.

[1497] Section 2 of the MPRDA.

[1498] Van der Schyff op cit note 1373 at 249.

[1499] Ibid.

[1500] Ibid at 250.

[1501] Ibid.

stewardship is not defined.[1502] In defining stewardship, reference is made to literature describing it as a long-term approach to understanding and respecting the delicate balance of the earth's ecosystem.[1503] Stewardship is therefore regarded as an ethical and religious norm rather than a legal norm.[1504]

Stewardship consists of several unique characteristics.[1505] These characteristics include the duty to the environment, conserve resources,[1506] protect and preserve resources, and a duty towards the present and future generations[1507] concerning natural resources. Stewardship vests a stake for both the immediate holder as well as the community.[1508] In conferring a fiduciary responsibility on the holder, owner, or manager of the resource, stewardship requires that all stakeholders respect the fiduciary relationship between the resources and current and future generations.[1509]

Although the notions of stewardship and public trusteeship are regarded as synonyms, these notions are the basis for establishing a fiduciary duty to the environment and the community.[1510] This fiduciary duty supports the ethical principle that humankind is the guardian of the earth and not the owner of the earth.[1511] The ethical principle of stewardship is therefore said to underlie public trusteeship.[1512] Due to the notion that state custodianship incorporated the concepts of trust or trustee, the following section discusses the nature of the interrelationship between the concept of state custodianship and the principle of public trust.

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[1502] Ibid at 231 and the reference to *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* supra note 1382 para 19.

[1503] Ibid at 232 and the reference to R Bratspies *Finessing king Neptune: Fisheries management and the limits of international* law 2001 25 Harvard Environmental LR 213 – 258 at 214 which defines stewardship as an "approach towards problem solving that includes a long-term perspective, a focus on sustainability, and a deliberate attempt to understand and respect the delicate balance of the earth's ecosystem."

[1504] Van der Schyff op cit note 1473 at 370; Van der Schyff op cit note 1373 at 232; E van de Schyff *Staatsinmenging in privaat-eiendom – verantwoordbaarheid vanuit Christelike Perspektief?* 2003 68 Koers 1-18 at 3.

[1505] Van der Schyff op cit note 1373 at 233.

[1506] Ibid and the reference to EB Weiss 'In fairness to future generations and sustainable development' 1992 8 *American University Journal of International Law & Policy* 19-2.

[1507] Van der Schyff op cit note 1373 at 233.

[1508] R Barnes *Property Rights and natural resources* (2009) Portland Hart Publishing at 248; Van der Schyff op cit note 1373 at 371.

[1509] Van der Schyff op cit note 1373 at 233; Van der Schyff op cit note 1473 at 372.

[1510] Ibid.

[1511] Ibid.

[1512] Ibid.

The concepts of trust and trustee regarding the notion of public trusteeship will be discussed to determine whether public trusteeship can guide in determining the legal meaning of the concept of state custodianship.

### 7.5.5 The Fiduciary Duties of State Custodianship and Public Trusteeship

The question arises whether the MPRDA has introduced the doctrine or principles of public trust through the notion of state custodianship.[1513] In determining whether the MPRDA has done so, it has to be established whether the MPRDA relates to a natural resource used by a particular community, destined to be protected for future or intergenerational access, and is placed under the custodial or fiduciary control of state authority.[1514]

While the courts have been reluctant to pronounce whether the MPRDA has introduced the notion of public trust,[1515] it has been argued that because a stewardship ethic has been introduced in mineral and petroleum law, such introduction will impact the interpretation of the MPRDA. [1516] This is so as the MPRDA has to be interpreted against the statutory background, which is relevant to the interpretation of statutes.[1517] When measured against the criteria as to whether the MPRDA has introduced the doctrine of public trust or principles, it has been argued that a custodial authority is identified endowed with fiduciary responsibility with an identified beneficiary and subject matter.[1518]

Public trusteeship has also been regarded as a mechanism for the protection by the government of natural resources for purposes of public welfare and survival.[1519] In accordance therewith, a legal construct is said to exist that incorporates the idea that the environment is held in a kind

[1513] Van der Schyff op cit note 1373 at 246.

[1514] Ibid; Sand op cit note 1460.

[1515] Minister of Minerals and Energy v Agri South Africa 2015 (5) 1 SCA para 86.

[1516] Van der Schyff op cit note 1373 at 246.

[1517] Ibid.

[1518] Ibid.

[1519] J Boersma 'How to Prepare for the Unknown? On the significance of Future Generations and future Studies in Environmental Policy' 2001 10 *Environmental Values* 35; H Jonas *The Imperative of Responsibility; In search of an Ethics for the Technological Age* (1984) the University of Chicago Press.

of fiduciary trust.[1520] This legal construct imposes a responsibility on the state to manage existing generations' collective duty and act as a guardian to the benefit of future nations.[1521]

The public trust encompasses all three arms of government being the legislature, the executive, and the judiciary. Still, it manifests itself differently regarding the constitutional role each of the three branches of government fulfills.[1522] Therefore, the legislature is said to be the trustee of the assets as the *regulating branch* and the judiciary the ultimate guardian of the trust.[1523] The role entrusted to the executive branch of government is governance in carrying out the trust obligations.[1524]

Therefore, it is expected that different arms of government would have different responsibilities in fulfilling the fiduciary duty of the state.[1525] As stated before, governments are legally responsible for fulfilling their fiduciary duty towards current and future generations to ensure the long-term protection of natural resources to avoid inter- or intergenerational unfairness.[1526] The failure by the government during apartheid and colonial years to use its regulatory powers to the benefit of all South Africans and the failure to protect the environment has led to the adoption of the legal construct of public trusteeship.[1527] As a result, the government's power to regulate the use and enjoyment of mineral resources has been limited by imposing obligations and responsibilities on authorities.[1528] According to this view, the government's powers are de-emphasised while its responsibilities are in turn emphasised.[1529]

Public trusteeship enforces responsibilities that are divided into three categories. [1530] The first responsibility relates to public trusteeship as a principle of interpretation. This responsibility determines that the laws that provide for public trusteeship, are interpreted to promote its aims

[1520] Du Plessis op cit note 1357 at 280.

[1521] Weiss op cit note 1506 at 280.

[1522] MC Wood 'Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part 1): Ecological Realism and the Need for a Paradigm Shift' 2009 39 Environmental LR 43 at 47.

[1523] Du Plessis op cit note 1357 at 280.

[1524] Ibid.

[1525] Ibid.

[1526] Du Plessis op cit note 1357 at 281.

[1527] W Freedman op cit note 1355; Du Plessis op cit note 1357 at 284.

[1528] Ibid.

[1529] Ibid.

[1530] Ibid.

and objects.[1531] The second responsibility relates to the wide scope of government obligations as public trustees in specific legislation. In contrast, the third relates to additional obligations and responsibilities placed on authorities not explicitly stated in the various legislation.[1532] Considering the notion of public trust, it must be noted that public trust and public interest are distinct concepts.[1533] Public interest is a wide concept that includes every act of public value or generates economic gain.[1534] However, the concept of public trust refers to matters of common property held in trust by the state for the uses and benefit of present and future generations of citizens.[1535] This chapter does not intend to determine whether the MPRDA has introduced the doctrine of public trusteeship or principles thereof.[1536] However, it is important to establish the content of the fiduciary responsibility with specific reference to the custodial authority referred to as state custodianship in the MPRDA.[1537]

It is beyond the scope of this thesis to discuss whether the doctrine of public trusteeship has been incorporated into the mineral and petroleum legal dispensation by the adoption of the MPRDA. It has been argued that identifying the nation's minerals and petroleum resources as the subject matter fulfils one of the required elements to determine whether the doctrine of public trusteeship has been incorporated into South African law. Furthermore, it has been argued that the doctrine of public trusteeship has been adopted into South African mineral law.[1538] In accordance with this argument, the public trust doctrine is not to be equated with the Anglo-American doctrine of public trust, as it is only a particular form of recognizing a sovereign's fiduciary and stewardship duties.[1539] The incidence of a particular form of public trust doctrine is said to be dependent on the use of different legal concepts in different foreign jurisdictions.[1540]

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[1531] Ibid at 281.

[1532] Ibid at 285.

[1533] Van der Schyff op cit note 1373 at 148.

[1534] Ibid at 148.

[1535] Ibid at 149.

[1536] Van der Schyff op cit note 1373 at 246; National Environmental Management Act 107 of 1998; National Water Act 36 of 1998; National Environmental Management: Biodiversity Act 10 of 2004; National Environmental Management: Integrated Coastal Management Act 24 of 2008.

[1537] Section 2(3) of the MPRDA; Van der Schyff op cit note 1373 at 246.

[1538] Ibid at 250.

[1539] Blumm MC and Guthrie RD "Internationalizing the public trust doctrine: Natural law and constitutional and statutory approaches to fulfilling the Saxion vision" (2012) 45 *UC Davis LR* at 741; Van der Schyff op cit note 1373 at 251.

[1540] Van der Schyff op cit note 1373 at 251.

## 7.6 Conclusion

The main objectives of the MPRDA are to promote equitable access to the mineral and petroleum resources of the nation to all the people of South Africa and expand opportunities for historically disadvantaged people.[1541] However, the overarching goal of the MPRDA is to protect the public's interest regarding access and use of the mineral and petroleum resources of the country.[1542] By requiring that the public interests of the nation be protected, the MPRDA places a duty on the state to, in administering the mineral resources, act as custodian to the benefit of the nation.

The use of the word *trust* does not refer to the trust as a legal entity found in private law but rather to the state's fiduciary duty as custodian.[1543] It has been argued that the state, acting by virtue of the public trust doctrine and its duty, does so by protecting the public's interest.[1544] Notably, the public has a right to claim that the state fulfills its duties towards the public interest not because of its sovereignty but despite it.[1545] The vesting of fiduciary responsibility in the state ensures that the intergenerational interest in a resource is protected.[1546] It is argued that the existence of fiduciary duty may conclude that a natural resource is regarded as public property or that fiduciary responsibility only results in the regulation of a private source for intergenerational benefit.[1547] The nature and degree of public use and access to natural resources, as well as the limits placed on the rights of the owner of a resource, are determined by the public interest in the application of the fiduciary trust.[1548] The incorporation of a stewardship ethic in terms of the Constitution[1549] and the adoption of subsequent legislation represent the growing realisation of a need to reform the extractive industry for the benefit of future generations.[1550]

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[1541] Section 2 of the MPRDA.

[1542] Van der Schyff op cit 1483 at 757.

[1543] Van der Schyff op cit note 1373 at 130.

[1544] Ibid.

[1545] Ibid.

[1546] Van der Schyff op cit note 1473 at 379.

[1547] Ibid at 379.

[1548] Ibid.

[1549] Section 24 of the Constitution; Van der Schyff op cit note 1373 at 234.

[1550] C Sbert 'Re-imagining mining: The earth charter as a guide for ecological mining reform' 2015 6 *IUCNAEL E Journal* 66-95 as cited in E Van der Schyff op cit note 1373 at 234.

# CHAPTER EIGHT: LAW AND POLICY IN PURSUIT OF GOOD GOVERNANCE IN THE MINING SECTOR

## 8.1 Introduction

Before the advent of the new democratic era in 1994,[1551] South Africa was a divided nation. Social and economic inequalities caused by racial, economic, and social divisions ran deep.[1552] The democratic dispensation heralded the beginning of fundamental changes in the system of governance in South Africa following the adoption of its interim[1553] and final Constitutions in 1993 and 1996 respectively.[1554]

The democratic government provided mechanisms to redress the legacy of apartheid and the integration of South Africa into the rapidly changing international environment.[1555] These mechanisms were provided in accordance with South Africa's newly adopted constitutional principles.[1556] An important mechanism in implementing this change is section 195(1) of the Constitution, which contains the basic values and principles governing public

[1551] South Africa held its first democratic elections on 27 April 1994.

[1552] B Maluka, AJ Diale & KB Moeti 'Transforming Public Service Delivery within the Department of Public Service and Administration: The Quest for Good Governance' *Journal of Public Administration* Volume 49 Number 4-December 2014 1019.

[1553] Interim Constitution of South Africa Act 200 of 1993.

[1554] Constitution of South Africa, 1996.

[1555] S Tshandu & S Kariuki 'Public Administration and service delivery reforms: a post-1994 South African case' *South African Journal of International Affairs* 17:2 189-208 DOI: 10.1080/10220461.2010.492935 at 190.

[1556] Tshandu and Kariuki op cit note 1555 at 190; Maluka, Diale and Moeti op cit note 1552 at 1021.

administration.[1557] These principles aim to ensure a new system of governance that is non-racial, non-sexist, and democratic, with an emphasis on human rights as its hallmark.[1558]

Chapter Seven concluded that the vesting of fiduciary responsibility in the state ensures that the intergenerational interest in the mineral resources are protected.[1559] The existence of fiduciary duties requires that a fiduciary responsibility results in the regulation of a private source for intergenerational benefit.[1560] The incorporation of a stewardship ethic in terms of the Constitution[1561] and the adoption of legislation represent the growing realisation of a need to reform the extractive industry for future generations to benefit from mineral and petroleum resources.[1562]

The principles of good governance required of the state to fulfil its duties and responsibilities towards the nation are discussed. This chapter furthermore contextualises the discussion of good governance by the South African mining sector in fulfilling its duties as state custodian of the mineral resources. The standard to which the state must implement its policies on behalf of the nation as the owner of the mineral resources are also discussed.

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[1557] See section 195 of Chapter 10 of the Constitution which deals with the public administration and reads as follows:

"195 (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development-orientated.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

[1558] B Maluka, Diale and Moeti op cit note 1552.

[1559] See Chapter Seven at 164-165.

[1560] E Van der Schyff *Property in Minerals and Petroleum* 2016 Juta at 234

[1561] Section 24 of the Constitution; Van der Schyff op cit note 1560 at 234.

[1562] C Sbert 'Re-imagining mining: The earth charter as a guide for ecological mining reform' 2015 6 *IUCNAEL E Journal* 66-95 as cited in Van der Schyff op cit note 1560 at 234.

## 8.2 Good Governance

One of the main aims of the democratic government is development, which remains the subject of continuous debate.[1563] An implied agreement between the government and its citizens exists to ensure that mechanisms are in place to eradicate poverty.[1564] Good governance is the method to ensure that mechanisms are in place to provide resources for societal development.[1565] Good governance systems in resource-rich countries are required to dispel allegations of political and economic incompetence.[1566]

### 8.2.1 Origins and Evolution of the Concept of "Good Governance" in South Africa

"Governance" and "Good Governance" are concepts used in connection with the administrative capacity of governments.[1567] Governance is defined as "the maintenance of law and order, the defence of society against external enemies, and the advancement of what is thought to be the welfare of the group, community, society or state itself."[1568] Accordingly, governance means mandating the government to make laws, establish institutions that will implement these laws, and providing the services and products the laws require. Then, the qualifier in "good governance" distinguishes 'what is'[1569] from 'what ought to be'.[1570] Governance is based on fact; good governance on value judgments.

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[1563] H Twinomurinzi, J Phahlamohlaka and E Byrne *Diffusing the Ubuntu Philosophy into E-Government: A South African Perspective* available at https://www.researchgate.net/publication/225974898_Diffusing_the_Ubuntu_Philosophy_into_E-Government_A_South_African_Perspective accessed on 11 October at 97.

[1564] Twinomurinzi, Phahlamohlaka and Byrne op cit note 1563 at 97

[1565] T Prior, PA Wäger and A Stamp 'A Sustainable governance of scarce minerals; the case of lithium' *The Science of The Total Environment* Volumes 461-462 (2013) at 785.

[1566] Ibid at 995.

[1567] M Crous 'Service Delivery in the South African Public Service: Implementation of the Batho Pele Principles by Statistics South Africa' *Journal of Public Administration* Volume 39 no 41 November 2004 574 at 575.

[1568] Ibid at 575.

[1569] T Bowell & TG kemp *Critical Thinking A Concise guide* 4[t] ed (2015) London*:* MH Maserumule 'Epistemic Relativism of Good Governance' *Journal of Public Administration* Vol 49 Number 4 – December 2014 963 at 963.

[1570] Ibid.

### 8.2.2 Contested Meanings and Agendas for Good Governance

There is no internationally agreed definition of good governance.[1571] Agreement on the main characteristics for good governance does, however, exist. These characteristics include technical and managerial competence; organisational capacity; reliability, predictability and the rule of law; accountability; transparency and open information systems; and participation.[1572] In this context, good governance requires adherence to minimal conditions to promote sustainable economic and political development while also considering societal requirements.[1573] Developing countries need to recognise the need to undertake capacity-building while considering their economic, social, and environmental circumstances.[1574]

Although the meaning of the concept of good governance is contentious, the aim is to determine the purpose of good governance by the state. [1575] The formation of the state is based on the question of a just and good society which includes good governance.[1576]

The concepts of good and common good reflect certain normative dispositions which are subject to particular factual contexts. The result is that the meaning of the two concepts may vary depending on the specific circumstances, including what good governance may mean.[1577] While the Western philosophy of good and common good is based on achieving a just society based on individualism, the African philosophy is primarily based on collectivism.[1578]

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[1571] M Bourell, A Swadding V Atalifo & A Tawake "Building in-country and expertise to ensure good governance of the deep-sea minerals industry within the Pacific region" (2017) *Marine Policy* http://dx.doi.org/10.1016/j.marpol.2017.03.022 1.

[1572] Bourell, Swadding, Atalifo & Tawake op cit note 1571 at 1.

[1573] M Grindle 'Good enough governance: poverty reduction and reform in developing countries' *Gov,:Int. J Policy Adm Inst* 17 (2004) 525 at 526.

[1574] World Summit on Sustainable Development, Development Plan, Johannesburg 2002, https://www.un.org.summit para 91 and 136

[1575] MH Maserumule 'Epistemic Relativism of Good Governance' *Journal of Public Administration* Vol 49 Number 4 – December 2014 963 at 969.

[1576] Ibid; J Philippoussis 'The question of Plato's notion of 'leadership' in the Republic' *Department of Philosophy Dawson College* (1999) 109.

[1577] Maserumule op cit note 1575 at 969.

[1578] Ibid at 970.

### 8.2.3 African Imperatives for Good Governance

The African philosophy on achieving a just and good society is based on the philosophy of humanism[1579]This philosophy consists of values and beliefs that emphasise sound human relations and the co-existence of African societies.[1580] The African philosophy of humanism regarding governance is different from the concept of the good and common good in that collectivism as opposed to individual decision making is the determining factor.[1581] The philosophy of humanism is based on humanity in a collective sense, which emphasises the "supreme value of society, the primary importance of social or communal interests, obligations and duties over and above the rights of individuals." [1582]

The African philosophy of humanism emphasises the notion of collectivism in contrast to individualism.[1583] The two philosophies are, however, not to be regarded as opposites. The African concept is that "people are first and foremost social beings, embodied agents in-world and engaged in realising a certain form of life" and that people should be allowed "to experience their lives as bound up with the good in their communities."[1584]

Africa bears witness to political and economic problems, including war and violent conflicts, poverty, human abuse, and inequality, and that good governance is required to address these problems.[1585] Accordingly, the concept of good governance is value-laden; the objective of attaining good governance should not be biased towards the culture and politics of powerful

[1579] DW Nabudere 'The social sciences, humanities physical and natural sciences and transdisciplinarity' *International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity* (2007) 6.

[1580] Maserumule op cit note 1575 at 970.

[1581] GM Nkondo 'Ubuntu as public policy in South Africa; A conceptual framework' *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 2(1) 88 at 90.

[1582] Ibid.

[1583] Maserumule op cit note 1575 at 971.

[1584] Nkondo op cit 1581 at 91; Maserumule op cit note 1575 at 972.

[1585] Ibid at 997.

countries.[1586] What is required is the need for good governance to be based on principles that are founded on specific African contexts.[1587]

Africa has been subjected to demands by funders of development to adhere to the principles of good governance without consideration of the pre-conditions, such as training, required to ensure good governance. Consequently, many African countries have progressed towards good governance by adopting democratic constitutions based on Western values to comply with the imperatives imposed by international funding agencies.[1588]

The African Charter on Values and Principles of Public Service and Administration (2011 Charter)[1589] provides principles in which good governance is attained. These principles include promoting professionalism, ethics, the institutionalisation of a culture of accountability and integrity, transparency,[1590] and the adaptability of public services to users' needs.[1591] If implemented, these principles contribute to good governance in African countries in an ethical and accountable manner.[1592]

The debate on the content of good governance by resource-rich countries has largely been influenced by international institutions, particularly international financial institutions. The chapter proceeds to discuss the development of such influence.

### 8.2.4 Good Governance and International Institutions

The concepts of governance and good governance have been developed by international financial institutions such as the World Bank, the International Monetary Fund, and multilateral

[1586] D Booth 'Governance for development in Africa: Building on what works' *Policy Brief 01 UK Department for International Development Aid (2011*) at 2; Maserumele op cit note 25 at 194; also see MP Sebola Administrative Policies for Good Governance in Africa: Makers, Implementers, Liars and No Integrity' *Journal of Public Administration* Volume 49 Number 4 – December (2014) 995 at 997.

[1587] Ibid.

[1588] Sebola op cit note 1586 at 998.

[1589] African Charter on Values and Principles of Public Service and Administration accessed online at https://au.int/.../african-charter-values-and-principles-public-service-and-administration on 21 May 2018

[1590] MDJ Matshabaphala 'Finding our way: The need for accountable leadership and good governance in South Africa's public services' *Journal of Public Administration* Vol 49 Number 4 – December 2014 1008 at 1009.

[1591] African Union Charter on the Values of Public Service and Administration adopted at the sixteenth ordinary session of the Assembly in Addis Ababa on 31 January 2011.

[1592] Sebola op cit note 1586 at 999; Matshabaphala op cit 1590 at 1010.

political institutions such as the United Nations and the European Union.[1593] The World Bank, in particular, defines the concepts concerning how a country's social and economic resources are managed.[1594] With the development by the World Bank of the concepts relating to how a country's social and economic resources are to be managed, other institutions use a different definition of how a country is to manage these resources.[1595] Institutions such as the United Nations use a definition that references managing a country's political and social aspects.[1596] The European Commission's White Paper on European Governance of 2001[1597] states that good administration is part of good governance. The European Union's governance concerns are arguably not confined to Africa but applied to all nations, including European nations.[1598]

The concept of good governance therefore refers to concepts relating to how a country's resources are to be managed.[1599] Depending on the definition used by the different institutions, these resources refer to social, economic and, in certain instances, to political resources to be managed. The definition of good governance therefore refers to a state of affairs where the responsibility to govern is conducted effectively, transparent, and accountable.[1600] As such, the concept of good governance is a value-laden concept to the extent that it may have different meanings, even among different African countries.[1601]

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[1593] Sebola op cit note 1586 at 996.

[1594] AB Adeosan 'Nigeria @50. The role of good governance and effective public administration towards achieving economic growth and stability in a fledgling democracy' *International Journal of Politics and Good Governance* Vol 3 No 3.3 Quarter III (2012); also see Sebola op cit note 1586 at 996.

[1595] Adeosan op cit note 1594; also see Sebola op cit note 1586 at 996.

[1596] Ibid.

[1597] European Commission *European Governance – White Paper* accessed online at https://ec.europa.eu/europeaid/sites/devco/files/communication-white-paper-governance-com2001428-20010725_en.pdf on 20 May 2018 at 10.

[1598] Ibid at 10; also see R Roos & S De la Harpe 'Good Governance in public procurement: A South African perspective' 2008 *PER/PELJ* Vol 11(2) 125.

[1599] Adeosan op cit note 1594; also see Sebola op cit note 1586 at 996; European Commission *European Governance – White Paper* accessed online at https://ec.europa.eu/europeaid/sites/devco/files/communication-white-paper-governance-com2001428-20010725_en.pdf on 20 May 2018 at 10; [1599] KR Hope 'Toward good governance and sustainable development: The African peer review mechanism*' Governance: An International Journal of Policy, Administration and Institutions (*2005) Vol 18 (2) 283; Sebola op cit note 1586 at 996.

[1600] KR Hope 'Toward good governance and sustainable development: The African peer review mechanism*' Governance: An International Journal of Policy, Administration and Institutions (*2005) Vol 18 (2) 283; Sebola op cit note 1586 at 996.

[1601] Ibid.

Administrative policies need to ensure that good governance is achieved.[1602] The development of administrative policies is not governed by elected institutions in Africa but by public authorities that provide the framework within which public officers fulfill their duties.[1603] Provided administrative policies are not contradictory to legislation, it has been argued that it is acceptable for professional bureaucracies to be entrusted with formulating administrative policies.[1604]

An essential requirement of good governance is ensuring that the right appointments are made transparent and accountable.[1605] Another requirement for good governance is the imperative for a good process, which requires the audit structures and offices to ensure accountability when discharging responsibilities.[1606] Bad governance, characterised by corruption, lack of accountability, and responsiveness, is the opposite of good governance based on values such as participation, the rule of law, transparency, responsiveness, equity, inclusiveness, and efficiency and accountability[1607]

The present-day term for good governance originated from the World Bank report of 1989.[1608] The World Bank used the term for the first time to describe the paradigm for a just and good society.[1609] The introduction of the concept of good governance to modern-day discourse is based on a liberal democratic polity that governs the thinking of Western official aid policy.[1610] Western theory has played a significant role in developing policies and programmes, one of which is the Structural Adjustment Programmes discussed hereafter.

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[1602] L Baxter 'Rule-making and policy formulation in South African Administrative law reform' 1993 *Acta Juridica* 176 at 178; Sebola op cit note 1586 at 998.

[1603] Baxter op cit note 1602 at 178; Sebola op cit note 1586 at 998.

[1604] M Johnston 'Good Governance: Rule of law, transparency and accountability' *Department of Political Science* Colgate University (1993) at 6.

[1605] Ibid.

[1606] Ibid.

[1607] MP Sebola, JP Tsheola & M Molopa 'Conventional media and social networks in a democratic South Africa: Watchdogs for good governance and service delivery?' *Bangladesh E-journal of Sociology* Vol 11(2) 105; Sebola op cit note 1586 at 999.

[1608] World Bank Sub-Saharan Africa: Form crisis to sustainable development – a long term perspectives study 1989 Washington DC.

[1609] R Abrahamsen *Disciplining democracy, development discourse and good governance in Africa* (2000) London; Maserumule op cit note 1575 at 972.

[1610] A Leftwich 'Governance, democracy and development in the Third World' *Third World Quarterly* 14(3) 605 at 607.

### 8.2.5 Structural Adjustment Programmes

Two parallel and overlapping meanings currently exist for the concept of good governance. The first meaning associated with the World Bank emphasises the administrative and managerial dimensions of the concept. In contrast, the second meaning of good governance is associated with the Western thinking donor community who emphasizes democratic practices.[1611]

The evolution of good governance in the present-day discourse can be found in Western theory and public policies of the 1970s, which led to the Structural Adjustment Programmes (SAPs).[1612] The SAPs were applied in the 1980s and regarded as how the recipients of donor funding could develop a just and good society.[1613] The SAP's were based on classical liberalism in terms of which it was believed that should the economics of a country be in order, all other problems such as political stability would be resolved.[1614] Development within the context of the SAPs is therefore seen as the market's function rather than the common good, requiring a minimalist state.[1615]

In fulfilling the objectives of a developmental state, democracy is not a prerequisite but is seen as an important imperative to facilitate a developmental state.[1616] Some scholars argue that substantial intervention by the government is required to ensure the distribution of public revenues to the poor.[1617] The substantial intervention requires a developmental state whose officials genuinely define, pursue and implement developmental goals with the public's participation.[1618]

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[1611] Ibid.

[1612] The Structural Adjustment Programmes (SAP's) were a combination of measures which the IMF, the WB and the donors from the western world applied separately but also in concert as a pressure group to persuade countries to adopt SAP's during the 1980's in return for loans; see Leftwich op cit note 1610 at 607 and also Maserumule op cit note 1575 at 973.

[1613] Leftwich op cit note 1610 at 607; Maserumule op cit note 1575 at 973.

[1614] FN Ikome 'From the Lagos plan of Action to the New Partnership for Africa's Development The political economy of African regional initiatives' *Institute for Global Dialogue* 2007 Midrand; Maserumule op cit note 1575 at 973.

[1615] Maserumule op cit note 1575 at 974.

[1616] Ibid.

[1617] Leftwich op cit note 1610 at 620.

[1618] Maserumule op cit note 1575 at 974.

African scholarship rejected the notion of development based mainly on economic factors as it fails to reflect the people on whose behalf the benefits of development are intended.[1619] In response to the SAPs, the United Commission for Africa developed the Alternative African Framework to Structural Adjustment Programmes (AAF-SAPs). The AAF-SAP's are based on the African developed philosophy of human-centered development, which emerged as a counter to the SAPs.[1620]

The AAF-SAPs rely on a human-centered approach that democratizes all aspects of economic and social activities from the decision-making to the implementation stage.[1621] The main focus of AAF-SAPs is placed on social development by developing democratic institutions, including developing tolerance in societies. AAF-SAPs focus on the human and social aspects of development, reflecting the African philosophy of humanism.[1622] A further policy to bridge the difference between the Western and African approaches was undertaken by the World Bank in Sub-Saharan Africa: From Crisis to Sustainable Development - Long-Term Perspective Study discussed in the next section.

### 8.2.6 The Long-Term Perspective Study by the World Bank

As a further alternative approach to the AAF-SAPs, the Sub-Saharan Africa: From Crisis to Sustainable Development – a Long-Term Perspective Study was developed by the World Bank and released in 1989.[1623] This new approach dominated Western aid policy and African development thinking and was criticised as resembling a doctrine of mutually exclusive choices.[1624] The basis of the Long-Term Prospective Study was good governance and democracy, which were essential for development and not merely desirable. This reasoning led to good governance in the present-day context being viewed as a neo-liberal concept where

[1619] MH Maserumule & SBO Gutto 'A critical understanding of good governance and leadership written in the context of the New Partnership for Africa's Development (NEPAD) and the challenges of contextual discourse on Africa's development paradigms' *International Journal of African Renaissance Studies-Multi-Inter-and-Transdisciplinarity* (2008) Vol 3 Issue 2 63 at 66; Maserumule op cit note 1575 at 976.

[1620] Maserumule & Gutto op cit 1619 at 69.

[1621] A Adedji 'Keynote address on From the Lagos Plan of Action to the New Partnership for African Development and from the Final Acts of Lagos to the Constitutive Act: wither Africa? African Forum for Envisioning Africa' 26 – 29 April 2002 Nairobi Kenya at 8. Available at https://doi.org/10.1080/18186870902840358 as accessed on 3 May 2018.

[1622] Maserumule op cit note 1575 at 976.

[1623] Ibid at 977.

[1624] Leftwich op cit note 1610 at 605.

political factors are as important as economic factors as a requisite for sustainable development.[1625] The protagonists of good governance in the neo-liberal framework are of the view that the democratic capitalist systems promote a prosperous and free world and therefore do not go to war with each other.[1626]

The Long-Term Perspective Study emphasised that development should be consistent with a country's culture, be based on societies' concerns, and reflect the national characteristics. It furthermore emphasised the importance of democratising the development process[1627] by indicating that political legitimacy is integral to sustainable development.[1628] The inclusion by the Long-Term Perspective Study of the importance of the political and social requirements for development is explained because the Western governments started taking an interest in the political imperatives of development.[1629]

The World Bank's approach to good governance has been explained that the World Bank is not allowed to involve itself in the political affairs of countries.[1630] According to this view, the World Bank places reliance on the economic aspects of governance, such as transparency, resource management effectiveness, regulatory environment stability, and non-corrupt, efficient, effective, and accountable government.[1631]

The International Monetary Fund (IMF) describes good governance as those aspects related to the surveillance of macro-economies of countries. These aspects relate to transparency, the effectiveness of public resource management, transparency and stability of the regulatory frameworks for private sector purposes,[1632] the fight against corruption, accountability, and efficiency in the administration of the state.[1633] The following section discusses the African response to the demands and standards set by the international institutions discussed above.

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[1625] Ibid at 615; Maserumule op cit note 1575 at 977.

[1626] Leftwich op cit note 1610 at 605; Maserumule op cit note 1575 at 977.

[1627] World Bank op cit 1608 at 193.

[1628] Ibid at 60.

[1629] Leftwich op cit note 1610 at 606; Maserumule op cit note 1575 at 978.

[1630] Leftwich op cit note 1610 at 608.

[1631] Maserumule op cit note 1575 at 606.

[1632] International Monetary Fund *Good Governance* 1997 article IV available on http://www.imf.org/external/selecteddecisions/description.aspx?decision=ebs/97/125 accessed on 4 May 2018.

[1633] V Randall & R Theobald *Political change and underdevelopment: a critical introduction to the Third World politics* 2 ed (1998) Macmillan Press at 40.

### 8.2.7 African Approach

Critiques of the neo-liberal approach argue that neo-liberal scholars fail to answer the importance of economic growth, fiscal stability, efficiency, effectiveness, and compliance with the imperatives of the procedural aspects of democracy.[1634] African scholarship proposes that the answer to the above proposition is that good governance must be approached within a human-centered development paradigm. Participation by the people in reform and development programmes by the state ensures participatory democracy, decentralisation of decision-making powers on both the economic and political dimensions.[1635] As such, people are at the centre of development as direct beneficiaries of the benefits of economic growth, socio-economic development, and the enhancement of the welfare of society.[1636]

The importance of the African approach to development is that the full effect is placed not only on the economic dimensions as an end to itself but that focus is placed on the predominant effect of all aspects of economic and social activities.[1637] Therefore, the notion of civil society is placed in a predominant position where it plays an important role in the collaborative manner in which a government is tasked to fulfill the interests of society. The human-centered approach uses the substantive aspects of democracy to utilise economic and social activities' value to improve citizens' lives in determining the meaning of good governance. Using the substantive aspects of democracy, the African approach can be associated with the developmental state where government plays an interventionist role in improving citizens' developmental needs and welfare.[1638]

Therefore, the wide contrast in meanings of good governance is between the liberal economic approach espoused by international financial organisations and the human development paradigm conceptualised by mainly African scholars.[1639] The development approach underpinned by human development as the centre of good governance is supported by

[1634] Maserumule op cit note 1575 at 985.

[1635] K Amuwo 'Globalisation, NEPAD and the governance question in Africa' *African Studies Quarterly* accessed at https://asq.africa.ufl.edu/amuwo_fall02/ on 4 May 2018.

[1636] Ibid; Maserumule op cit note 1575 at 986.

[1637] Ibid.

[1638] Leftwich op cit note 1610 at 987.

[1639] Maserumule op cit note 1575.

initiatives such as the Arusha Charter for Popular Participation and Transformation.[1640] This charter was adopted by the Organisation of the African Union and is consistent with the AAF-SAP approach. The approach adopted by the LPTS within this developmental framework is therefore rejected.[1641]

Renewed interest in the sustainable development of Africa during the late 1990s led to the adoption of the New Partnership for Africa's Development (NEPAD) in 2002.[1642] The NEPAD document regards good governance as a principle and an essential requirement but not as a concept.[1643] The term good governance has therefore become a "trans-contextual, value-laden and multidimensional concept with multi-vocal meanings and, because of epistemic relativism, can mean different things to different people depending on the context in which it is used."[1644] Notwithstanding the differences between the various system approaches, the requirements of transparency and accountability remain.

## 8.3 Towards a Contextualised Understanding of Good Governance

As indicated above, the wide contrast in meanings of good governance is, therefore, between the liberal economic approach espoused by international financial organisations and the human development paradigm conceptualised by mainly African scholars.[1645] Therefore, there is a need to contextualise the requirement of good governance for South Africa, particularly concerning the South African extractive minerals industry.

[1640] African Charter for Popular Participation and Transformation accessed online at: https:/oldsites.issafrica.org/uploads/POPULARPARTCHARTER.PDF on 20 May 2018.

[1641] Maserumule op cit note 1575 at 987.

[1642] New Partnership for Africa's Development available at www.dirco.gov.za/au.nepad/nepad.pdf accessed on 21 May 2018.

[1643] Maserumule op cit note 1575 at 987.

[1644] Ibid at 988.

[1645] Ibid.

### 8.3.1 A Principled Approach to Reforming Public Service

The democratic government provided mechanisms to redress the legacy of apartheid and the integration of South Africa into the rapidly changing international environment.[1646] These mechanisms were provided in accordance with South Africa's newly adopted constitutional principles.[1647] An important mechanism in implementing this change is section 195(1) of the Constitution, which contains the basic values and principles governing public administration.[1648] These principles aim to ensure a new system of governance that is non-racial, non-sexist, and democratic, with an emphasis on human rights as its hallmark.[1649]

Reform of the public service concentrates on legislative and administrative reform to eradicate the existing economic and social inequities.[1650] Administrative reforms were meant to substitute the strict application of rules and control reminiscent of the apartheid government with a public-orientated service approach.[1651] The promulgation of the White Paper on the Transformation of Public Service (WPTPS)[1652] in 1995 heralded the formal start of the

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[1646] S Tshandu & S Kariuki 'Public Administration and service delivery reforms: a post-1994 South African case' *South African Journal of International Affairs* 17:2 189-208 DOI: 10.1080/10220461.2010.492935 at 190.

[1647] Tshandu and Kariuki op cit 1646 at 190; Maluka, Diale and Moeti op cit note 1552 at 1021.

[1648] See section 195 of Chapter 10 of the Constitution which deals with the public administration and reads as follows:

"195 (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(j) A high standard of professional ethics must be promoted and maintained.

(k) Efficient, economic and effective use of resources must be promoted.

(l) Public administration must be development-orientated.

(m) Services must be provided impartially, fairly, equitably and without bias.

(n) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(o) Public administration must be accountable.

(p) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(q) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(r) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

[1649] B Maluka, Diale and Moeti op cit note 1552.

[1650] Tshandu and Kariuki op cit note 1555 at 190.

[1651] Ibid.

[1652] Republic of South Africa: White Paper on the Transformation of Public Service 1995. The White Paper was published by the Ministry for Public Service and Administration on 15 November 1995 to establish a policy framework to guide the introduction and implementation of new policies and legislation aimed at transforming the South African public service.

transformation process in the public service.[1653] The WPTPS provided the structure for adopting new policies and implementing new mandates in terms of the Constitution.[1654] The subsequent White Paper on Transforming Public Service Delivery (also referred to as the Batho Pele White Paper), published in 1997, created a participative governance model.[1655] Batho Pele, which means "People First," became the outlook of government to develop a more harmonious way of life known as *Ubuntu*.[1656] The Batho Pele principles require that every citizen have equal access to services to which they are entitled.[1657] The next section discusses the notion of Batho Pele and its accompanying principles.

### 8.3.2 Batho Pele

The Sotho term Batho Pele means "People First."[1658] To improve the service delivery of public services, the imbalances of the past need to be addressed. This need necessitates a shift from bureaucratic systems, processes, and attitudes in search of a new system that puts the public's needs first and is responsive to citizens.[1659] The Batho Pele principles are to be applied within the legislative framework provided by the Constitution.[1660] The following section discusses the required legislative and policy framework insofar as good governance is concerned.

#### *8.3.2.1 Legislative and Policy Framework*

Chapter 10 of the Constitution deals with public service delivery.[1661] The Constitution provides in Chapter 2 that everyone has a right to inherent dignity and the right to have that dignity

[1653] Twinomurinzi, Phahlamohlaka and Byrne op cit note 1563 at 95; Maluka, Diale and Moeti op cit note 1552 at 1020.

[1654] Twinomurinzi, Phahlamohlaka and Byrne op cit note 1563 at 95.

[1655] Ibid at 95; B Maluka, Diale and Moeti op cit note 1552 at 1020.

[1656] Twinomurinzi, Phahlamohlaka and Byrne op cit note 1563 at 95.

[1657] White Paper on Transforming Public Service Delivery, Department of Public Service and Administration Government Gazette Vol 388 Notice 1459 of 1997 at 15; DS Sing 'Building and Capacitating a United Public Personnel Management System for Integrated Service Delivery' *South Africa Public Personnel Management* Volume 41 no 3 Fall (2012) 459 at 551.

[1658] Republic of South Africa Presidential Review Commission (PRC) *Developing a Culture of Good Governance: Report of the Presidential Review Commission on the Reform and Transformation of the Public Service in South Africa* presented to the President of South Africa, Mr NR Mandela on 27 February 1998 accessed on 4 May 2018 at pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2007/070126prc.htm.

[1659] H Kroukamp 'Batho Pele: putting the citizen first in transforming public service delivery in a changing South Africa' *International Review of Administrative Sciences* Volume 65 (3) 327 at 329.

[1660] Chapter 10 of the Constitution deals with the Public Administration.

[1661] Chapter 10 of the Constitution.

respected and protected. The democratic values and principles governing public administration are listed in section 195 of the Constitution.[1662]

Section 195 of the Constitution sets the minimum standards for services rendered by public servants. These standards include professional ethics, the provision of impartial, fair, equitable, and unbiased service, the efficient utilization of resources, and meeting the needs of the public.[1663] The White Paper on the Transformation of the Public Service (WPTPS)[1664] intends to give effect to the Constitutional imperative of implementing service delivery strategies at national and provincial departments to ensure improvement in service delivery quality, quantity, and equity.[1665]

Notably, the WPTPS provides impetus to the transformation process by means of rationalising and restructuring to ensure a unified, integrated, and reduced public service.[1666] One of the objectives of the new government culture is the decentralisation of power from the central government to the provincial and local spheres of government.[1667]

A number of legislative frameworks relating to service delivery were adopted to support the Constitution's provisions.[1668] One such framework was the Reconstruction and Development Program (RDP White Paper), emphasizing an integrated and coherent socio-economic progress informed by strategies and policies on transformation.[1669] The Promotion of Access to Information Act (PAIA)[1670] is further aimed at giving effect to the right of access by a citizen to any information held by the state as provided for in the Constitution.[1671] PAIA was necessary

[1662] Section 195 of the Constitution.

[1663] Section 195 of the Constitution.

[1664] White Paper on the Transformation of the Public Service Government Gazette Vol 365 No 16838 Pretoria Government Printers 1995.

[1665] Tshandu and Kariuki op cit note 1646 at 195; TI Nzimakwe & Z Mpehle *Key Factors in the successful implementation of Batho Pele principles* Volume 47 Number 1.1\ March 2012 at 280.

[1666] Tshandu and Kariuki op cit note 1646 at 195.

[1667] Ibid.

[1668] Nzimakwe and Mpehle op cit note 1665 at 281.

[1669] White Paper on *Reconstruction and Development* General Notice 1954 Government Gazette Vol 353, 23 November 1994.

[1670] Promotion of Access to Information Act 2 of 2000.

[1671] Nzimakwe and Mpehle op cit note 1665 at 281.

to correct the secretive and unresponsive approach by the previous government system, which led to the abuse of power and violations of basic human rights.[1672]

The White Paper on Transforming the Public Service Delivery (Batho Pele White Paper)[1673] aims to provide a framework and implementation strategy for transforming public service delivery. The Batho Pele White Paper was directed to public servants to implore them to be service-oriented, strive for excellence, and commit to continuous service delivery improvement.

#### 8.3.2.2 The Batho Pele Principles and Good governance in the Minerals Sector

The over-centralized operating and hierarchical rule-bound systems inherited from the previous government, makes it difficult to hold public servants accountable according to the Batho Pele principles.[1674] Batho Pele is not a business plan or a policy but rather an attitude or set of values that provide direction to the public service.[1675] The Batho Pele principles warrant a customer-orientated approach that intends to improve organizations' capacity to meet customers' needs by continuously adjusting organisational structure, behaviour, and culture.[1676] It should not be seen as a public relations exercise but rather a strategy to instil a culture of accountability and service-orientated public servants who strive for excellence in service delivery.[1677]

The White Paper on the Transformation of the Public Service[1678] determines eight important principles to be observed by the public service.

The first principle of consultation[1679] acknowledges the right of citizens to be consulted about the services they receive and, where feasible, a choice of such services. Consultation should also cover those instances where citizens do not receive services. A more participative and

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[1672] Ibid.

[1673] *White Paper on Transforming the Public Service Delivery* General Notice 1459, Government Gazette No 18340, Vol 388, 1 October 1997 at 16 – 22; Nzimakwe and Mpehle op cit note 1665 at 281.

[1674] Tshandu and Kariuki op cit note 1555 at 195; Nzimakwe and Mpehle op cit note 1665 at 281.

[1675] Ibid at 282.

[1676] Nzimakwe and Mphele op cit note 1665 at 288.

[1677] Ibid.

[1678] White Paper on the Transformation of the Public Service General Notice 1227, Government Gazette No 16838, Vol 365 15 November 1995; White Paper on Transforming the Public Service Delivery General Notice 1954 Government Gazette No 18340 Vol 388, 1 October 1997 at 16 – 22.

[1679] Section 195(1)(e) of the Constitution of South Africa states that "People's needs must be responded to, and the public must be encouraged to participate in policy making.

cooperative relationship is to be developed between the service provider and service users.[1680] The setting of service standards[1681] as a principle reinforces the need to determine benchmarks to measure the extent of satisfaction of citizens who have received services.

The requirement to consult as determined by the MPRDA is reflected in the Guidelines for Consultation with Communities and Interested and Affected Parties[1682] when applications for mining, prospecting and other applications for mineral rights are submitted to the Department of Minerals and Energy. The Department of Minerals and Energy have also recently issued the Mine Community Resettlement Guidelines 2022[1683] in accordance with the requirement to consult. These guidelines require extensive consultation when the rights and interests of landowners, lawful occupiers, holders of informal and communal land rights and other interested and affected parties are to be affected due to resettlement as a result of a proposed mining development.[1684]

The principle of increasing access[1685] to public services is to provide a framework for delivering public services to more South Africans. Physical barriers and cultural values that could prevent services from being rendered should be removed.[1686] Service delivery should be provided to citizens in remote areas, which can be made accessible by mobile units and redeploying facilities and resources to those most in need. To ensure that services are competitive, an annual review is required with a comparison to international standards.[1687]

The fourth principle is to ensure that citizens are treated with courtesy and respect.[1688] Acceptable behaviour of a high standard must be displayed by public officials and be monitored regularly. Public servants should uphold the constitutional principle of human dignity by

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[1680] Kroukamp op cit 1659 at 330.

[1681] Section 195(1)(b) of the Constitution of the Republic of South Africa states that "A high standard of professional ethics must be promoted and maintained."

[1682] Guidelines issued by the Department of Minerals and Energy in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum and Resources Development Act 28 of 2002.

[1683] Guidelines issued by the Department of Mineral Resources and Energy in Government Gazette No 46125 on 30 March 2022.

[1684] See the introduction to the Guidelines issued by the Department of Mineral Resources and Energy in Government Gazette No 46125 on 30 March 2022.

[1685] Section 195(1)(d) of the Constitution of South Africa states "Services must be provided impartially, fairly, equitably and without bias."

[1686] Crous op cit note 1567 at 579.

[1687] Nzimakwe and Mpehle op cit note 1665 at 281.

[1688] Section 195(1)(a) of the Constitution of South Africa requires that a high standard of professional ethics be promoted and maintained.

avoiding conflict of interests and applying self-restraint. Monitoring employers' performance who deal with customers has to be consistently undertaken while enforcing good customer care.[1689]

The Guidelines for Consultation with Communities and Interested and Affected Parties[1690] as well as the Mine Community Resettlement Guidelines 2022[1691] were issued for the purpose that interested and affected communities as well as mine communities subjected to possible resettlement, be treated with courtesy and the necessary respect. In accordance with the Guidelines for Consultation with Communities and Interested and Affected Parties, public officials are required to monitor consultations and receive reports on the possible means of avoiding or minimising the impact of mineral right applications on communities and interested and affected parties.[1692] Mine Community Resettlement Guidelines 2022 provide for reporting, monitoring and evaluating by a Resettlement Monitoring and Evaluation Committee on the implementation of prescribed reports to be submitted by an applicant for mineral rights.[1693] In the instance of an intended resettlement of communities, these reports include a Resettlement Plan[1694], Resettlement Action Plan[1695] and Resettlement Agreement.[1696]

The principle of providing information[1697] requires that citizens be given complete and accurate information about the public services they receive. Up to date and easily understandable information concerning services to citizens in different languages should be provided as much

[1689] Crous op cit note 1567 at 580.

[1690] Guidelines issued by the Department of Minerals and Energy in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum and Resources Development Act 28 of 2002.

[1691] Guidelines issued by the Department of Mineral Resources and Energy in Government Gazette No 46125 on 30 March 2022.

[1692] Guidelines issued by the Department of Minerals and Energy in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum and Resources Development Act 28 of 2002.

[1693] Section 14 of the Guidelines issued by the Department of Mineral Resources and Energy in Government Gazette No 46125 on 30 March 2022.

[1694] Section 10 of the Mine Community Resettlement guidelines issued by the Department of Mineral Resources and Energy in Government Gazette No 46125 on 30 March 2022.

[1695] Section 11 of the Mine Community Resettlement guidelines issued by the Department of Mineral Resources and Energy in Government Gazette No 46125 on 30 March 2022.

[1696] Section 12 of the Mine Community Resettlement guidelines issued by the Department of Mineral Resources and Energy in Government Gazette No 46125 on 30 March 2022.

[1697] Section 195(1)(f) of the Constitution of South Africa the public administration to be accountable. Section 195(1)(g) states "Transparency must be fostered by providing the public with timely, accessible and accurate information."

as providing services to the disabled.[1698] Information suited to the customers' needs and made available at regular intervals must be provided.[1699]

In terms of the principle of openness and transparency,[1700] citizens should be informed about how departments are run, the cost thereof, and who is in charge of service delivery. This ensures that customers know that the government achieves the promised service delivery standards and that non-delivery is being addressed. Regular progress reports informing customers of information that they are entitled to receive are imperative.[1701] Part of the process of openness and transparency is accountability.[1702] Transparency also ensures that the public service is effective, free from nepotism and corruption.[1703]

The principle of redress, in turn, refers to the need to improve service delivery if it falls below the required standard. This principle is also known as recovery, which implies that when an institution makes a mistake, it apologises, rectifies it, and does more than required. A customer is also more likely to accept that an institution cares if the mistakes are remedied as soon as possible.[1704]

Within the framework of the mineral sector, the Mine Community Resettlement guidelines provide for the calculation of compensation in instances where resettlement takes place.[1705] These compensation values are to be determined on current full replacement values to compensate members of the mine community to be resettled by a mineral right application granted by the state.[1706] The Mineral and Petroleum Resources Development Act also provides that an owner or lawful occupier who has suffered or is likely to suffer loss or damage as a

[1698] Nzimakwe and Mpehle op cit note 1665 at 281.

[1699] Crous op cit note 1567 at 581.

[1700] Section 195(1)(g) of the Constitution of South Africa states "Transparency must be fostered by providing the public with timely, accessible and accurate information."

[1701]Crous op cit note 1567 at 582.

[1702] Section 195(1)(f) of the Constitution of South Africa.

[1703] Crous op cit note 1567 at 582.

[1704] Ibid at 583.

[1705] Section 9.4 of the Mine Community Resettlement guidelines issued by the Department of Mineral Resources and Energy in Government Gazette No 46125 on 30 March 2022.

[1706] Section 12 of the Mine Community Resettlement guidelines issued by the Department of Mineral Resources and Energy in Government Gazette No 46125 on 30 March 2022.

result of a mineral right application, such owner or lawful occupier has the right to the payment of compensation for such loss or damage.[1707]

The last principle refers to the need to ensure that the services rendered create value for money.[1708]In this regard, public services must be provided efficiently and economically to provide the best possible services considering the budget available.[1709] The principle of the best value for money espoused in the Batho Pele White Paper requires budgeting by matching the programmes with the budget.

Service Delivery Improvement Plans are required to allow the White Paper's implementation strategy to be improved.[1710] However, Batho Pele was treated as an addition to the programmes of government rather than the stimulus to ensure that government principles are implemented within the changing service delivery environment.[1711]

The mineral sector attempts to address the Batho Pele principles through legislation, in particular the Mineral and Petroleum Resources Development Act.[1712] The guidelines issued in support of the changing service delivery regulated primarily by the MPRDA,[1713] intends to further fulfil the responsibilities of the state towards all stakeholders, including interested and affected parties required by the Batho Pele principles. The next section discusses good governance applied to the mineral resources sector.

### 8.3.3 Good Governance and the Mineral Resources Sector

No clear description exists of the role of the state to ensure sustainable development in the mineral resources sector.[1714] The state has been described as displaying many different forms

[1707] Section 54 of the Mineral and Petroleum Resources Development Act 28 of 2002.

[1708] Section 195(1)(b) of the Constitution of South Africa requires that resources must be used in an efficient, economic and effective manner.

[1709] White Paper on the Transformation of the Public Service General Notice 1227 Government Gazette No 16838 Vol 365 Pretoria Government Printers 1995.

[1710] D Gasper 'Fashion, learning and values in public management: Reflection on South African and international experience' *African Development* Volume 27 no 2 2002 accessed on 4 May 2018 at https://www.ajol.info/index.php/ad/article/view/22163.

[1711] Maluka, Diale and Moeti op cit note 1552 at 1032.

[1712] Mineral and Petroleum Resources Development Act 28 of 2002.

[1713] Mine Community Resettlement guidelines issued by the Department of Mineral Resources and Energy in Government Gazette No 46125 on 30 March 2022 and the Guidelines for Consultation with Communities and Interested and Affected Parties published in Government Gazette No 46125 on 30 March 2022.

[1714] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 42.

or features which changes shape and appearance, depending on the context and circumstances in which it acts.[1715] The expected role of the state with regards to its sustainability role differs in the different discourses that exist with regards to the mining industry.[1716] This section focusses on the pro-mining discourse which establishes a positive link between progress, development, economic growth and the promotion of the minerals industry. Pro-mining discourses determine the state's development role with reference to the sustainable mineral development consensus[1717] and the state's responsibilities regarding responsible mining.[1718] The discourse of pro-mining also includes the role of the state regarding neoextractivism[1719] and the approach of the state in the discourse relating to its approach to critical and strategic minerals.[1720]

The sustainable mineral development consensus requires the state to promote neoliberalism by taking measures which include establishing a private sector-led mining industry, attracting investment capital, implementing taxation measures that create a fair taxation regime and clear policies on mineral tenure, the revocation of licenses and compensation payable.[1721] The state

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[1715] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.exproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 42 with reference to Bob Jessop 'Bringing the state back in (yet again): reviews, revisions, rejections and redirections' (2001) 11(2) *International Review of Sociology* 149, 161.

[1716] Various discourses exist on the state's development and sustainability role in the mining industry. These discourses are based on either pro-mining discourses or those based on the dissent of the mining industry. This chapter limits the discussion of the role of the state to the pro-mining discourse. See Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at in chapters 2 and 3.

[1717] The sustainable mineral development consensus determines that the state must comprehensively regulate the mining industry, which must include (at least) environmental regulation; see Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 42.

[1718] The discourse relating to responsible mining adopts the requirement that the state must regulate comprehensively, but assumes that the state is incapable and thus provides for the different stakeholders in mining to accept a larger degree of responsibility for social and environmental impacts; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 43.

[1719] According to this discourse, the state promotes mining through renegotiating contracts, the formation of state-owned mining entities partaking in mining activities and state equity participation in mining activities; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 43.

[1720] The discourse of critical and strategic minerals reflects on the neoliberal reforms in support of security of supply of the world's economic centres where developed nations use the state's protective role over society and the environment to criticise mining investment and trading partners who do not comply with similar rigorous standards to which they adhere, to ensure the benefit of security of supply; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 42.

[1721] These principles were adopted at the Whitehorse Leadership Accord held in 1994; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-

is also expected to provide services to ensure the development of a prosperous mining industry.[1722]

The expectations on the state to facilitate a sustainable mineral development consensus has increased by requiring the state to establish an attractive destination for competitive private investment as well as establishing the state as a role player in changing mining practices and making use of the potential socioeconomic benefits derived from the activities of the mining industry.[1723] In establishing the conditions for good governance, the role of the state as regulator is balanced by the state's role as facilitator of obtaining investment.[1724] The state's central role in establishing good governance in the mining industry requires of it to establish the rule of law, provide effective state institutions, public participation in decision making, the promotion of human rights, controlling corruption and ensuring accountability in the industry.[1725] Good governance in the mining industry requires national government, as opposed to subnational (local or provincial governments), to take the major role in fulfilling the above requirements.[1726]

org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 50 and the reference to the Whitehorse Leadership Council *Whitehorse Mining Initiative: Leadership Council Accord (Final Report)* adopted in October 1994.which also refers to measures such as ensuring a more certain climate for mineral exploration on land subject to first nation claims.

[1722] These services include geological surveys, the management of date regarding exploration, ensuring a mineral law framework that attracts investment, applying rules that ensure a consistent application of mineral tenure and mine reclamation and other measures to ensure standards that comply with the needs of a sustainable society; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 53. Also see World Summit on Sustainable Development *Plan of Implementation of the World Summit on Sustainable Development* para 46(a).

[1723] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 65; International Institute for Environment and Development and World Business Council for Sustainable Development *Breaking New Ground: Mining Minerals and Sustainable Development* (2002) xiv 337.

[1724] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 65 and the reference to International Institute for Environment and Development and World Business Council for Sustainable Development *Breaking New Ground: Mining Minerals and Sustainable Development* (2002) xiv 337.

[1725] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 65.

[1726] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 65; International Institute for Environment and Development and World Business Council for Sustainable Development *Breaking New Ground: Mining Minerals and Sustainable Development* (2002) xiv 161.

The requirement for good governance in the mining industry requires the establishment of competent state institutions that is developed over time.[1727] Good governance is regarded as a technical, capacity building matter which can be implemented by governments.[1728] Good governance requires legal and regulatory frameworks, policies and practices that promote social and economic benefits.[1729]

These frameworks are to be supported by policies and practices that reduce social and environmental impacts, protect biodiversity and ecosystems.[1730] The sustainable mineral development consensus approach recognises the state as important to facilitate a private-led mining sector to regulate impacts from mining and to ensure that the mineral extractive industry is in accordance with national planning processes.[1731]

A "whole of government" approach is required by the state to establish the requirements of good government.[1732] The national government is to establish policy and the legislative framework to manage the mining industry and enforce these regulations by putting in place competent institutions and to invest in basic services.[1733] In addition, the state is to ensure that the different levels of government, institutions and agencies co-operate according to harmonised and coherent mining policies which are in accordance with the internationally

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[1727] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 56 and the reference to Anthony Bebbington et al "Contention and ambiguity: Mining and the possibilities of development' (2008) 39(6) *Development and Change* 965, 974.

[1728] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 56 and the reference to Anthony Bebbington et al "Contention and ambiguity: Mining and the possibilities of development' (2008) 39(6) *Development and Change* 965, 974.

[1729] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 58.

[1730] Policies and rules regulating postmining closure is also required to ensure good governance; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 58.

[1731] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 69.

[1732] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 66 with reference to the Columbia Centre on Sustainable Investment, Sustainable Development Solutions Network, United Nations Development Plan & World Economic Forum *White Paper -Mapping Mining to the Sustainable Development Goals: An Atlas* (July 2016) 12.

[1733] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 66 with reference to the Columbia Centre on Sustainable Investment, Sustainable Development Solutions Network, United Nations Development Plan & World Economic Forum *White Paper -Mapping Mining to the Sustainable Development Goals: An Atlas* (July 2016) 12.

accepted principles set out in the Sustainable Development Goals.[1734] National development plans are therefore to be aligned with mining policies together with better co-ordination with local government to ensure that investment in mining are optimally used for sustainable development.[1735]

A second discourse on mining, development and sustainability is the responsible mining discourse which is different from the sustainable mineral development consensus discussed above.[1736] This term is associated with initiatives by the mining industry that exceeds the basic standards determined in state regulation.[1737] These initiatives reduce the dominance of the state in regulating the mining industry and view it as one of many stakeholders in the mining industry.[1738]

The responsible mining discourse implies that the state is not sufficiently capacitated to undertake dialogue with other stakeholders.[1739] The state's role in this discourse is to establish basic conditions of regulatory compliance with additional layers of accountability and verification by stakeholders in the mining industry without requiring the state to enforce such

[1734] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 66 with reference to the Columbia Centre on Sustainable Investment, Sustainable Development Solutions Network, United Nations Development Plan & World Economic Forum *White Paper -Mapping Mining to the Sustainable Development Goals: An Atlas* (July 2016) 12.

[1735] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 66 with reference to the Columbia Centre on Sustainable Investment, Sustainable Development Solutions Network, United Nations Development Plan & World Economic Forum *White Paper -Mapping Mining to the Sustainable Development Goals: An Atlas* (July 2016) 2.

[1736] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 70.

[1737] Initiatives undertaken include the Extractive Industries Transparency Initiative (EITA), the Kimberly Process (KP), the International Cyanide Management Code and the Initiative for Responsible Mining Assurance and the Alliance for Responsible Mining; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 70.

[1738] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 70.

[1739] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 70.

levels of added accountability and verification.[1740] Accordingly, the state is regarded as nothing more than part of a broader "community of interest".[1741]

A third discourse that provides for the demands of nations in resource-rich countries to derive more benefit from their natural resources and the willingness of governments to exercise more control over the natural resources, is known as neoextractivism.[1742] According to this discourse, the state is prepared to consider owning and controlling mining factors for the production of minerals to fulfil its social and economic policies.[1743] States are required to undertake experiments in free market fundamentalism[1744] or neoliberal reforms in transforming the minerals industry.[1745] This discourse also provides for socialist governments to undertake state-led extractivism of mineral resources.[1746]

Within the African context, the launch of the African Union affirmed the need for a developmental state to develop the mineral resources to address poverty and underdevelopment.[1747] The Africa Mining Vision (AMV) determines that the mining of mineral resources is important to the development and need to industrialise African

[1740] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 71.

[1741] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 72.

[1742] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 73.

[1743] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 73

[1744] This happened in Chile during the 1970s and 1980s; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 73.

[1745] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 73.

[1746] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 73

[1747] The African Union was launched in 2002 which requires a developmental state that is pro-active to ensure fair and equitable benefit to rich mineral endowed nations; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 76.

economies.[1748] This discourse places the state as protector and custodian of mineral resources whilst simultaneously requiring it to promote the mining industry.[1749]

Neoextractivism and the impact on the role of the state can take on various forms.[1750] State-led neoextractivism may lead to resource nationalism which manifests itself through nationalism or indigenisation of mineral resources and factors of production.[1751] It may also manifest itself in other forms of activities by developmental state participation.[1752] A form of resource nationalism may lead to the state nationalising the mining industry and other factors of production.[1753] Another form of resource nationalism is indigenisation, where the state requires private owned companies to sell their equity to the citizens of that country.[1754] In addition, the state may also, in terms of this discourse, establish one or more state-owned mining companies over certain minerals and adopt measures for the compulsory beneficiation of minerals within the particular country.[1755] The state, instead of facilitating the private sector to develop the minerals sector, plays a dominant role in neoextractivism and resource nationalism in promoting the minerals sector to facilitate sustainable development.[1756]

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[1748] The African Mining Vision was adopted under the leadership of the United Nations Economic Commission for Africa; see African Union Africa Mining Vision (February 2009) 1; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 76.

[1749] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 78.

[1750] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 79.

[1751] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 80.

[1752] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 80.

[1753] In the instance of resource nationalisation, the state requires privately owned foreign firms to either transfer or sell all their equity to the state or alternatively to provide that the state is provided with free carried interest to the benefit of the state with no accompanying obligation to subscribe or contribute to equity capital for the shares; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 80.

[1754] South Africa requires private mining companies in terms of the Mining Charter, to sell a fixed percentage of its shares to certain of its citizens in reaching a certain level of compulsory local equity ownership; Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 80.

[1755] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 80

[1756] Tracy-Lynn Field *State governance of Mining, Development and Sustainability* available at https://doi-org.ezproxy.uct.ac.za/10.4337/9781784712648.00007, accessed on 28 September 2022 at 70

## 8.4 Conclusion

South Africa remains engulfed in the heritage of apartheid. Despite policy reform and service delivery initiatives, South Africa is regarded as one of the world's most unequal societies, with significant disparities between rich and poor.[1757] Although a new approach to service delivery has been undertaken, what remains required is an approach that "puts pressures on systems, procedures, attitudes, and behaviour within the Public Service and reorients them in the customer's favour, an approach that puts the people first."[1758] This is in accordance with the principles espoused by Batho Pele.

The requirement of good governance as reflected in the Batho Pele principles, determines the attitude or set of values that provide direction to the public service responsible for the regulation of mineral resources; in this instance the Department of Minerals and Energy. The Batho Pele principles warrant a customer-orientated approach that intends to address the needs of all stakeholders in the mineral resources sector. As indicated above, the organisational structure, behaviour, and culture required in the mining sector is determined by the MPRDA[1759] and the various guidelines issued in support thereof.[1760] The aforementioned legislation and guidelines require adherence to a culture of accountability and service-orientated public servants who strive for excellence in service delivery in the mineral sector.

Transparency about the wealth generated by the mining sector and how it is distributed is required.[1761] The understanding of stakeholders to a social license extends not only to a particular community as it is usually understood but also to mine management, mine employees, neighbouring landowners, mining regulators, local authorities, business and service providers, community groups, and other non-governmental organisations, financial institutions, and the media who can all influence decisions.[1762] The capacity to monitor

[1757] Government Information Quarterly (2011) Volume 28 Issue 2 April 211 at 219.

[1758] Ibid at 221.

[1759] Mineral and Petroleum Resources Development Act 28 0f 2002.

[1760] Mine Community Resettlement guidelines issued by the Department of Mineral Resources and Energy in Government Gazette No 46125 on 30 March 2022 and the Guidelines for Consultation with Communities and Interested and Affected Parties published in Government Gazette No 46125 on 30 March 2022; Nzimakwe and Mphele op cit note 110 at 288.

[1761] International Institute for Environment and Development and the World Council for Sustainable Development working paper 'Breaking New Ground: Mining Minerals and Sustainable Development Mining for the future – Appendix C: Abandoned mines' London 2002.

[1762] E Swart 'The South African Legislative Framework for Mine Closure' *Journal of the South African Institute of Mining and Metallurgy* 2003 Volume 103(8) 489 at 490.

transparency and accountability initiatives over resource developments and the distribution of the benefits of the wealth generated by the extractive sector needs to be developed.[1763] The state, as custodian, bears the responsibility to ensure that measures are put in place to provide a transparent and accountable extractive sector.

"Best practice" principles regarding transparency are increasingly crucial to strengthen a mining company's social license to operate. A mining company's social license to operate may be as important as its regulatory license.[1764]The mine management and its employees, communities, neighbouring landowners, mining regulators, local authorities, business and service providers, community groups and other non-governmental organisations, financial institutions, and the media are all parties who can impact on the decisions that have an impact on the social license of the mining industry.[1765] The state has an important role to ensure a viable mineral resources sector. The state's role may vary in promoting the minerals sector to facilitate sustainable development. As a stakeholder in the mineral resources sector, it continues to play a dominant role.

As custodian of the nation's mineral resources, the state must ensure consistent and reliable financial, environmental, economic, and social attributes. Compliance by the state and mining companies with transparency initiatives is imperative in ensuring good governance in the mining sector. In fulfilling its duties as state custodian of the mineral resources, the nature of its duties is to be established. Therefore, the next chapter discusses whether and to what extent the duties of the state can be determined with relevance to the interests of the respective stakeholders in the mineral and petroleum resources sector.

[1763] MP McHenry, A Morrison-Saunders, P Goreyd et al 'Puzzled: Navigating Extractive Policy Information Jigsaws for Best Practice and Transparency' *The Extractive Industries and Society* 2 (2015) 401-405 at 402.

[1764] Ibid at 402.

[1765] Swart op cit note 1762 at 490.

# CHAPTER NINE: STATE CUSTODIANSHIP AND STAKEHOLDERS

## 9.1 Introduction

The MPRDA was enacted to provide the required positive redress in accordance with the constitutional imperative to promote equitable access to mineral and petroleum resources due to historical injustices.[1766] One of its objects is to give effect to the state's custodianship of the nation's natural resources.[1767] The state as custodian needs to take positive redress on behalf of communities directly affected by mining activities. The mechanisms introduced to address historical imbalances as well as an interpretation of the approach taken by the courts to ensure that the interests held by different stakeholders are discussed in this Chapter. The public's interest in the nation's mineral and petroleum is one consideration when weighing the interests required by the MPRDA.[1768]

## 9.2 Stakeholder Groups

The MPRDA has created a regulatory environment aimed at rectifying the injustices of the past by ensuring equal access to mineral and petroleum resources.[1769] The new regulatory environment requires that the legal interests of various stakeholders be balanced by the state in exercising its role as custodian.[1770] The interests of landowners to deal with their property and the interests of holders of permissions, permits and rights to minerals must be balanced by the state as custodian.[1771] The state as custodian of the nation's mineral and petroleum resources, is obliged to ensure that the nation's interests are promoted and protected.[1772] This section

[1766] See Preamble to the MPRDA.

[1767] Section 2(b) of the MPRDA.

[1768] Van der Schyff op cit note 319 at 515.

[1769] Sections 2-5 of the MPRDA; Van der Schyff op cit note 319 at 515.

[1770] Ibid.

[1771] Sections 2-5 of the MPRDA; Van der Schyff op cit note 319 at 515.

[1772] Ibid.

discusses the interests of the different stakeholders brought about by the adoption of the principle of state custodianship by the MPRDA.

### 9.2.1 The Public Interest in the Nation's Mineral and Petroleum Resources

The MPRDA aims to redress communities affected by mining activities in South Africa as a country in transition[1773] from a system of racial inequality to a system of substantive equality.[1774] Implementing positive action to the contrary is the only way to overcome systemic racial discrimination.[1775] Legislation is required to ensure equal access to resources and to remove competitive access based on the ownership of land; which access had its roots in different forms of discrimination prior to democracy.[1776] Through eradicating past inequities, the sustainable use of the nation's mineral and petroleum resources is promoted.[1777]

The MPRDA deprives landowners of the right to control access to the land by holders of rights to minerals.[1778] The rights of holders to minerals are also limited in that the MPRDA determines the rights and obligations of these right holders.[1779] Conflict is created between the nation's collective interest and individual interests by the holders of rights to minerals when exercising their rights to minerals.[1780]

As the MPRDA forms part of the overall framework of law, including the Constitution, the public interest is determined by the constitutional values of human dignity,[1781] equality[1782] and freedom.[1783] The public interest has been described as an "open ended, broad concept that is

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[1773] H van Niekerk Towards a New Understanding of Mineral Tenure Security: The demise of the property-law paradigm (unpublished PhD research paper, University of Cape Town, 2016) at 45.

[1774] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 5.

[1775] Ibid.

[1776] Ibid.

[1777] Sections 2-5 of the MPRDA; Van der Schyff op cit note 319 at 515.

[1778] Ibid at 520.

[1779] ibid at 521.

[1780] Ibid at 522.

[1781] Section 10 of the Constitution; Van der Schyff op cit note 319 at 522.

[1782] Section 9 of the Constitution; Van der Schyff op cit note 319 at 522.

[1783] Section 12 of the Constitution; Van der Schyff op cit note 319 at 522.

difficult to define."[1784] The legislature has the responsibility to determine the meaning of public interest when adopting legislation.[1785] The public interest regarding the nation's mineral and petroleum resources is confirmed in the MPRDA.[1786]

The MPRDA determines that the nation's interest in its mineral and petroleum resources consists of the transformational objects of the MPRDA, the national economic benefit and the protection of the environment.[1787] The MPRDA endorses the objective of transformation by promoting equitable access to the nation's resources for all the people of South Africa and developing opportunities for the historically disadvantaged people.[1788] The objective of the national economic growth is promoted to grow the economy and develop the nation's mineral and petroleum resources by stimulating growth in employment and advance the social and economic welfare of all South Africans.[1789]

Last mentioned objective include promoting employment, advancing the social and economic welfare of all South Africans,[1790] providing security of tenure in respect of extraction operations[1791] and ensuring that holders of mining rights contribute towards the socio-economic development of the areas where they operate.[1792] The objects that promote the national economic interest and those requiring the socio-economic development of all South Africans, are therefore interrelated.[1793] Additional measures to ensure that the national economic interest is promoted, include the obligation of the state as custodian to ensure that the national benefit to be obtained from the extractive industry is not at the expense of maintaining health and safety measures.[1794]

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[1784] Ibid; H Mostert *The constitutional protection and regulation of property and its influence on the reform of private law and landownership in South Africa and Germany* (2002) Heidelberg: Springer Verlag at 22; *Mabaso and Others v Nel's Melkery (Pty) Ltd* 1979 (4) SA 358 (W).

[1785] M Chaskalson & C Lewis 'Property' in M Chaskalson et al (eds) *Constitutional Property Law of South Africa* 2 ed (1998) Juta at 31-22; Van der Schyff op cit note 319 at 522.

[1786] Section 2 of the MPRDA; Van der Schyff op cit note 319 at 522;

[1787] Section 2 of the MPRDA; Van der Schyff op cit note 319 *at* 523.

[1788] Section 2 of the MPRDA; Van der Schyff op cit note 319 at 523.

[1789] Section 2 of the MPRDA; Van der Schyff op cit note 319 at 523. Promoting the national economic growth benefit also includes providing security of tenure to the extractive industry in return to contribute to the socio-economic development of the areas in which they conduct their operations.

[1790] Section 2(f) of the MPRDA; Van der Schyff op cit note 319 at 533.

[1791] Section 2(g) of the MPRDA; Van der Schyff op cit note 319 at 533.

[1792] Section 2(i) of the MPRDA; Van der Schyff op cit note 319 at 533.

[1793] Ibid; *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Others 2014* (6) SA 403 (GP) para 62.

[1794] Mine Health and Safety Act 29 of 1996; Van der Schyff op cit note 319 at 534.

The MPRDA grants the Minister the power to expropriate property; in particular land or any right therein, if necessary, for the achievement of the objects referred to in the MPRDA.[1795] The rights to minerals may be expropriated by the Minister in accordance with the MPRDA where section 2(h) of the MPRDA which require that section 24 of the Constitution be given effect to by ensuring that the mineral and petroleum resources of the MPRDA are developed in an orderly and ecologically sustainable manner while promoting social and economic development will not be attained if an extractive operation was allowed to continue.[1796]

A number of legislative measures have been adopted that may be regarded as relevant law for protecting the interests of the nation.[1797] Legislation that deal with land use planning[1798] and royalties and taxes[1799] are linked to the country's economic development and environmental protection.[1800] Environmental legislation that provide for the principle of sustainable development of economic and social rights must also be balanced with the development of the nation's mineral and petroleum resources.[1801]

The courts have indicated that one of the objects of the MPRDA is to give effect to the environmental rights in the Constitution by ensuring that the nation's mineral rights are developed in an ecologically sustainable manner.[1802] Various legislative measure have a significant impact on the development of mineral and petroleum resources in an ecologically sustainable manner.[1803] These legislative measures include the National Environmental

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[1795] Sections 2(d), (e), (f), (g) and (h) of the MPRDA promote the meaningful expansion of opportunities for historically disadvantaged persons to participate in the mineral and petroleum industries, to promote the economic growth of and mineral resource development, to promote employment and advance the social and economic benefit of all South Africans, to provide security of tenure and to ensure the orderly development of the nation's mineral and petroleum resources in an ecologically sustainable manner while promoting social and economic development; Van der Schyff op cit note 319at 541.

[1796] Section 55 of the MPRDA; Van der Schyff op cit note 319 *at* 541.

[1797] Ibid at 543.

[1798] Ibid at 543; J van Wyk *Planning Law* 2 ed (2012) Juta at 10.

[1799] Van der Schyff op cit note 319 at 543; the Income Tax Act 58 of 1962 which contains the majority of tax provisions for the mining industry. *Xstrata South Africa (Pty) Ltd and Others v SFF Association* 2012 (5) SA (60) SCA para 22 where it was held that there was no obligation to pay contractual royalties to the common-law mineral right holder due to the enactment of the MPRDA.

[1800] Van der Schyff op cit note 319 at 543.

[1801] Section 3(3) of the MPRDA provides for the definition of 'sustainable development' as 'the integration of social, economic and environmental factors into planning implementation and decision making so as to ensure that mineral and petroleum resources development serves present and future generations'.

[1802] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 paras 34 and 75.

[1803] Van der Schyff op cit note 319 at 543.

Management: Protected Areas Act that provides for protected areas that include marine protected area, nature reserves and national parks.[1804] Other legislative measures also impact on the sustainable development of the nation's mineral and petroleum resources.[1805] The state, appointed as custodian in terms of the MPRDA, has a duty to ensure that the nation's interest in the country's mineral and petroleum resources are protected and developed in the interest of the present and future generation in accordance with relevant legislation.

### 9.2.2 Holders of Rights to Minerals and 'Interested and Affected Persons'

The granting of a right to minerals, entitles the right holder to enter the land to which such mineral relates and to bring the onto the land any necessary plant, machinery or equipment.[1806] The right holder is also allowed to remove and dispose of mineral or petroleum found during the prospecting, mining, exploration or production of minerals or petroleum.[1807] Landowners, together with 'a natural or juristic person or association of persons with a direct interest in the proposed or existing operation and who may be affected by the proposed operation' are regarded as an interested and affected persons.[1808] Whilst the definition seems to limit 'interested and affected' persons to those with a direct interest, the Mineral and Petroleum Resources Development Act Regulations allows members of the public to submit written comments on applications submitted for rights to minerals or petroleum.[1809]

[1804] National Environmental Management: Protected Areas Act 57 of 2003.

[1805] The National Environmental Management: Biodiversity Act 10 of 2004; The National Environmental Management: Integrated Coastal Management Act 24 of 2008; National Radioactive Waste Disposal Institute Act 53 of 2008; the Astronomy Geographic Advantage Act 21 of 2007 and the Hazardous Substances Act 15 of 1973.

[1806] Section 5 of the MPRDA.

[1807] Section 5 of the MPRDA; Van der Schyff op cit note 319 at 580. The right holder is also allowed a number of other rights, such as the right to use water from any natural spring, lake, river or stream situated or flowing through such land in terms of the National Water Act 36 of 1998. Right holders may also conduct any other activity incidental to prospecting, mining, exploration or production operations which do not contravene the provisions of the National Water Act of 1998.

[1808] See the definition of 'interested and affected persons' in the Mineral and Petroleum Resources Development Regulations (MPRDAR) published in GN R527 in GG 26275 of 23 April 2004 as amended.

[1809] Regulation 3(4) of the MPRDAR; Van der Schyff op cit note 319 at 582.

As 'the nation' is the owner of the country's mineral and petroleum resources, every South African is considered to have a direct interest in the development thereof.[1810] Interested and affected persons would therefore include landowners, holders of rights to minerals or petroleum, neighbouring landowners and right holders and communities directly and indirectly affected by the extractive operations.[1811]

### 9.2.3 Mining Companies as Right Holders *vis-a-vis* Landowners or Lawful Occupiers

The rights and obligations of mining companies as right holders are regulated by the MPRDA.[1812] Extractive operations result in encroachments upon land ownership and the rights of lawful occupiers.[1813] The MPRDA provides mechanisms for the balancing of the interests of right holders and landowners or lawful occupiers.[1814]

The Mineral and Petroleum Resources Act Regulations (MPRDAR) provides for the need to notify and consult with interested and affected persons who may be affected by extractive operations.[1815] A statutory right to access and entry to the land is created for the benefit of the right holder.[1816] A right holder who is refused access to the land to which the right relates,[1817] makes unreasonable demands in return for access to the land or who cannot be found in order to gain access must notify the Regional Manager.[1818] The Regional Manager is then compelled to apply the process as provided in the MPRDA.[1819] The right holder is also entitled to approach the High Court for an interdict access and entry to the land is denied.[1820]

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[1810] Ibid at 582.

[1811] Ibid at 582; *Louisvale Irrigation Board v Minister of Minerals and Energy and Others* [2011] ZANHC 40.

[1812] See MPRDA; Van der Schyff op cit note 319 at 594.

[1813] Ibid at 594.

[1814] See Regulation 3 of the MPRDAR; sections 54A and 96 of the MPRDA; Van der Schyff op cit note 319 at 594.

[1815] Regulation 3 of the MPRDAR.

[1816] Section 5(3) of the MPRDA. Any refusal to allow a right holder access to the land will be unlawful.

[1817] Section 5(3) of the MPRDA; *Joubert and others v Maranda Mining Company (Pty) Ltd* 2010 (1) SA 198 (SCA); *Meepo v Kotze and others* 2008 (1) SA 104 (NC).

[1818] Section 54A of the MPRDA.

[1819] Section 54(2) of the MPRDA.

[1820] Van der Schyff op cit note 319 at 590. The right holder will have to satisfy the requirements for the obtainment of an interdict as required in *Setlogelo v Setlogelo* 1914 AD 221. The right by a holder to minerals granted in terms of the MPRDA, constitutes a clear right as required for the obtainment of an interdict. The other

Where the Minister is of the view that continued negotiations with the land owner or land occupier to obtain access or entry to the land may negatively affect the objects of the MPRDA,[1821] the Minister may recommend that the land be expropriated.[1822] The right holder may also be prohibited from commencing or continuing with the activities permissible in accordance with the relevant right until a dispute between the right holder and the land owner or land occupiers has been settled by a court of law or is subject to arbitration.[1823] This decision may only be taken if the Regional Manager is of the view that the failure to reach an agreement is due to the fault of the right holder.[1824] This power of the Regional Manager has been described as a statutory interdict[1825] and also identified as an internal remedy in instances where the right holder does not want to settle a dispute.

Where the landowners and land occupiers are likely to suffer loss or damage in the exercise of the rights by the right holder, they will be entitled to be compensated for loss or damage incurred.[1826] The landowner or land occupier may also initiate the process provided by the MPRDA to be compensated for loss or damage suffered by the exercise of the rights held by the right holder.[1827] The MPRDA therefore seeks to protect the interests of both the right holders and landowners or land occupiers.[1828]

The MRDA does not prescribe the principles that need to be considered in the instance of competing interests between holders to rights to minerals and landowners or land occupiers.[1829] The MPRDA specifically states that the common law principles will apply in so far as they are

requirements for the granting of an interdict include an injury actually committed or reasonably apprehended and the absence of similar or adequate protection by any other remedy.

[1821] These objects are contained in sections 2(c), 2(d), 2(f) or 2(g) of the MPRDA.

[1822] Section 55 of the MPRDA; Van der Schyff op cit note 319 at 591.

[1823] Section 54(6) of the MPRDA.

[1824] Section 54(6) of the MPRDA. MO Dale L Bekker, M Chaskalson, C Dixon, G Grobler, C Loxton, M Ash and A Cox *South African mineral and petroleum law* (18 ed, 2015) MPRDA-475 describes the power of the Regional Manager to prohibit the right holder to commence or continue with the activities as a statutory interdict. Van der Schyff op cit note 319 at 592 and the reference to *Joubert NO and Others v Maranda Mining Company (Pty) Ltd* [2010] 2 All SA (GNP) para 48.

[1825] Van der Schyff op cit note 319 at 592.

[1826] Sections 54(3) and 54(7) of the MPRDA; Van der Schyff op cit note 319 at 591.

[1827] Section 54(7) of the MPRDA.

[1828] Van der Schyff op cit note 319 at 590.

[1829] Ibid at 594.

not inconsistent with its provisions.[1830] Under the previous mineral law regime, two common law principles applicable to the South African property law determined the relationship between the holders of rights to minerals and landowners or land occupiers as well as the relationship between the holders of rights to minerals and landowners of adjacent land.[1831] The first general principle applies to servitudes to the extent that the owner of land has to allow the holder of a right to minerals to do whatever is required to exercise the right to minerals.[1832] The second principle is that the owner of property should use it to the extent that it does not interfere with the rights of others.[1833]

The adoption of the MPRDA and the resultant introduction of the state as custodian, has impacted on the first principle where the owner of the land or land occupiers must allow the holder of a right to minerals to undertake whatever is required in giving effect to this right.[1834] The impact of the introduction of the notion of state custodianship on this common law principle is discussed in Chapter Three of this thesis.

Regarding the second principle, landowners are entitled to use their property for purposes for which it may ordinarily be used; which consequently require neighbours to tolerate each other in the reasonable use of their property.[1835] In considering what is reasonable, the courts have taken note of the special characteristics of the relationship.[1836] In the instance of mineral and petroleum development, the courts consider the nation's interest in the country's mineral and petroleum resources, the public interest in respecting landowner's ownership entitlements, the extent of rights allocated to right holders to minerals and the consequent limitation on ownership.[1837]

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[1830] Ibid at 595; *Andrews v Narodien* 2002 (1) SACR 336 (C) 345; *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA) at 147 where it was confirmed that statutory presumptions do not detract from the common law unless explicitly stated in legislation.

[1831] Van der Schyff op cit note 319 at 596.

[1832] Ibid at 596; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

[1833] Van der Schyff op cit note 319 at 596; AJ van der Walt *The law of neighbours* (2010) Juta.

[1834] Van der Schyff op cit note 319 at 597

[1835] *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A) 518; Van der Schyff op cit note 319 at 59.

[1836] *Malherbe* supra 1835 at 518; Van der Schyff op cit note 319 at 59; *De Charmoy v Day Spar Hatchery (Pty) Ltd* 1967 (4) SA 188 (D) 191.

[1837] Van der Schyff op cit note 319 at 596.

### 9.2.4 The Interests of Local Government in the Balancing of Rights

The MPRDA requires the development of the nation's mineral and petroleum resources in an orderly manner to ensure social and economic development.[1838] The MPRDA therefore requires that holders of rights to minerals comply with the terms and conditions of the relevant mineral rights granted in terms of the MPRDA and 'any other relevant law'.[1839] Within the context of local government, land use planning legislation aims to promote economic growth and environmental protection in fulfilling its aim to promote sustainable development.[1840]

The nature of extractive operations requires a particular link between the land and land use planning legislation.[1841] This is due to the locality of mineral ores in specific areas and the impact of the extractive operations on the immediate area where it is being conducted.[1842] Due to the nature of mining operations, the extractive industry is regarded as a unique land use.[1843]

The Spatial Planning and Land Use Management Act (SPLUMA) provides a framework to guide provincial and local governments to develop spatial planning, land use legislation, principles and policies.[1844] It provides a uniform, effective and comprehensive system of spatial planning and land use management.[1845] Mining and production are particular land uses which require buildings and other structures to be erected to facilitate extractive operations.[1846] SPLUMA therefore applies to mining and production operations.[1847] Whilst the MPRDA

[1838] Section 2(h) of the MPRDA.

[1839] Sections 17(6), 19(2)(d), 23(6), 25(2)(d), 75(5)(b)78(2)(b), 82(2)(c) and 86(2)(c) of the MPRDA.

[1840] Van Wyk op cit note 1798 at 10; Van der Schyff op cit note 319 at 543.

[1841] The link between land and economic development is indicated in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) para 128; Van der Schyff op cit note 319 at 543.

[1842] Ibid at 544; A Morishima 'Challenges of environmental law – Environmental issues and their implications to jurisprudence' in NJ Chalifour, P Khameri-Mbote, LH Lye & JR Nolon (eds) *Land use law for sustainable development* (2007).

[1843] Van der Schyff op cit note 319 at 544; *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC); *Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd and Another* 2013 (4) BCLR 467 (KZD); *Coal of Africa Limited and Another v Akkerland Boerdery (Pty) Ltd* [2014] ZACPPHC 510; *Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd* 2014 JDR 0531 (GNP).

[1844] Spatial Planning and Land Use Management Act 16 of 2003 (SPLUMA) which commenced on 1 July 2015; see CL Van Schalkwyk *A Legal Perspective on the Role of Municipalities in Navigating the Relationship between land Use Planning and Mining* (unpublished PhD research paper, University of Cape Town, 2018).

[1845] Section 2(2) of SPLUMA; Van Schalkwyk op cit note 1844.

[1846] The definition of 'mining purposes' contained in SPLUMA include 'purposes normally or otherwise reasonably associated with the use of land for mining'.

[1847] Van der Schyff op cit note 319 at 545.

regulates the granting of rights to minerals and petroleum, land use planning legislation will determine the area in which mining activities are to be conducted.[1848]

The Minerals Act did not require a holder of a mining authorisation to apply for any land development proposal.[1849] The applicant for a mineral right holder only had to apply for permissions in terms of the Minerals Act and did not require permissions in terms of any other act.[1850] With the adoption of the MPRDA, the Constitutional Court found that compliance with the Land Use Planning Ordinance (LUPO) had to be adhered to.[1851] The MPRDA requires that applicants for rights to minerals comply with 'relevant law'.[1852]

The Constitutional Court decided that a distinction had to be made between mining as an extractive activity regulated by means of the MPRDA and mining as a particular land use that is regulated through other applicable land use planning legislation.[1853] LUPO regulated the use of land in the Western Cape[1854] whilst the MPRDA regulated mining.[1855] The Court found that mining, regulated by an act of Parliament and a national competence, required the rezoning of the land which was a local government competence, to allow mining operations.[1856] LUPO therefore enabled local government to regulate the use of the land.[1857] LUPO did not determine mining rights which was the exclusive function of the MPRDA.[1858]

Before mining can commence, the applicable land use legislation needs to be complied with.[1859] As a result, the legislation of national, provincial and local government as different,

[1848] Van Schalkwyk op cit note 1844; SPLUMA: Van der Schyff op cit note 319 at 545.

[1849] The Minerals Act 50 of 1991; *Mtunzini* supra note 1843 at para 63.

[1850] Ibid para 63.

[1851] *Maccsand* supra note 1843. LUPO, relevant only to the Western Cape Province, was subsequently repealed by the Western Cape Land Use Planning Act,[1851]

[1852] Section 23(6) of the MPRDA.

[1853] *Maccsand* supra note 1843 paras 49-51.

[1854] Land Use Planning Ordinance 15 of 1985 which was replaced by the Western Cape Land Use Planning Act 3 of 2014.

[1855] MPRDA.

[1856] *Maccsand* supra note 1843 para 18.

[1857] Ibid paras 49-51.

[1858] Ibid. Due to the different jurisdictions of the various land use mechanisms in the different provinces and municipalities, different interpretations have been required on the basis of differing regulatory requirements as to whether mining operations was provided for or included mining operations in certain land use legislations.

[1859] Ibid; Van Schalkwyk op cit note 1844 at 50 - 55.

interdependent and interrelated spheres of government, need to be complied with.[1860] The legislative and executive competencies of all three spheres of government need to be interpreted in a manner that gives effect to the spirit and meaning of the Constitution.[1861] The Constitution provides specific functional areas of competence between the three spheres of government.[1862] These functional areas may overlap.[1863] In the instance of mining, an overlap of functional areas occur as extractive operations are conducted on land which is the competence of local government whilst the activity of mining is regulated by national government.[1864] Effect therefore needs to be given to the principles of co-operative governance by all three spheres of government.[1865]

### 9.2.5 Communities

The position regarding communities as stakeholders is multi-layered and therefor complex. This section discusses the legal framework applicable to communities which requires meaningful consultation to allow mining activities to take place.[1866] Meaningful consultation with communities also include consultation to obtain their consent for mining applications, the adoption of Social and Labour Plans as well as consent to be relocated, where required.

#### *9.2.5.1 Multi-layered Legal Framework Applicable to Community Interests*

The Constitution[1867] recognises the public interest in reforms to bring about equitable access to all South Africa's natural resources.[1868] In particular, the Constitution requires the nation's commitment to land reform as well as reforms to bring about equitable access to all South

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[1860] Van Schalkwyk op cit note 1844 at 32; N Steytler, Y Fessha and C Kirby 'Status Quo Report on Intergovernmental Relations regarding Local Government' (2006) available at *http://hdl.handle.net/10566/4739* accessed on 17 October 2022; Section 40 of the Constitution; Van der Schyff op cit note 319 at 550.

[1861] J van Wyk 'Planning in all its (dis)guises: Spheres of government, functional areas and authority' (2012) 15 *PELJ* 288 at 310.

[1862] The Constitution provides in Schedule 4 for the functional areas of concurrent national and provincial legislative competencies whilst Schedule 5 provides for the functional areas of exclusive provincial legislative competence.

[1863] *Maccsand* supra note 1843 at paras 47.

[1864] Van Wyk op cit 1861 at 300; *Maccsand* supra note 1843 at paras 47; Van der Schyff op cit note 319 at 550.

[1865] Chapter 3 of the Constitution; Van der Schyff op cit note 319 at 550.

[1866] See discussion at para 2.5.1 here below.

[1867] Constitution of 1996.

[1868] Section 25(4) of the Constitution of 1996.

Africa's natural resources, be undertaken.[1869] The Constitution therefore enjoins the state to take reasonable legislative and other measures to develop conditions that enable citizens to gain access to land on an equitable basis.[1870] As stated above, the MPRDA was introduced as a consequence of the state's obligation in terms of section 24(b)(iii) of the Constitution.[1871]

The main purpose of the MPRDA is to provide for equitable access to and sustainable development of the nation's mineral and petroleum resources.[1872] In addition to its object to give effect to the state's custodianship of the nation's natural resources,[1873] a further object of the MPRDA is to expand, substantially and meaningfully, opportunities for historically disadvantaged persons.[1874] Mining companies are required to engage meaningfully in public consultation with communities as well as interested and affected parties[1875] when applying for exploration rights, mining rights and determining the environmental impact of mining activities.[1876] The substance of the requirement by the MPRDA that communities be consulted, is discussed in the following subsections. Two further relevant laws deserve mention, however:

First, the Interim[1877] Protection of Land Rights Act[1878] (IPILRA) was adopted to provide for communities with insecure tenure in the former homelands and to be treated as the owners of the land they occupy.[1879] IPILRA states that 'no person may be deprived of any informal right

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[1869] See section 25(4)(a) of the Constitution of 1996.

[1870] Section 25(5) of the Constitution of 1996.

[1871] The MPRDA was enacted in May 2002 in terms of section 24(b)(iii) of the Constitution which determines that everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[1872] Preamble to the MPRDA.

[1873] Section 2(b) of the MPRDA.

[1874] Section 2(d) of the MPRDA.

[1875] Sections 10, 16, 22, 27 and 39 of the MPRDA. Also see the *Guideline for Consultation with Communities and Interested and Affected Parties* as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum Resources Development Act (Act 28 of 2002) available at *https://www.dmr.gov.za/Portals/0/consultation_guideline.pdf* accessed on 12 February 2020.

[1876] See Sections 5A and 10 of the MPRDA. Section 5A(c) determines that no person may prospect, remove, mine, conduct technical co-operation and reconnaissance operations, explore for and produce any mineral or petroleum or commence any work relating thereto without giving the landowner or lawful occupier of the land at least 21 days written notice. Section 10(b) requires the Regional Manager to, within 14 days of accepting an application, call upon interested and affected persons to submit comments regarding the application within 30 days from date of the notice. Also see PJ Badenhorst and NJJ Olivier 'Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002' *De Jure Law Journal (*2011) Vol 44 No 1 126.

[1877] This act serves as an interim measure to protect the rights of communities who, prior to the advent of democracy on 24 April 1994 have insecure tenure due to historical racial discriminatory policies.

[1878] Section 2 of the Interim Protection of Land Rights Act 31 of 1996 (IPILRA).

[1879]Section 2 of IPILRA.

to land without his or her consent.'[1880] In the instance where the land or a right to land is held by a community, the deprivation of such land or right to land is to be in accordance with the custom and usage of that community.[1881] Further, the Constitution requires that the substantive and procedural rights of occupying communities be recognized.[1882] The Restitution of Land Rights Act (RLRA)[1883] requires the restoration of rights in land, including mineral rights to dispossessed communities.[1884]

In addition, the Minerals and Mining Policy for South Africa states that communities directly affected by mining, should at the planning phase participate in environmental impact assessments.[1885] Public participation in decision-making is required through equitable and effective consultation with interested and affected parties.[1886] The requirements of the constitutional imperative to provide equitable access[1887] and its consequences on communities directly affected by mining, are discussed in the next subsections.[1888]

The MPRDA states that it will prevail insofar as the common law is inconsistent therewith.[1889] No similar provision exists concerning customary law.[1890] Customary law is therefore not subjected to the MPRDA to the extent that it may conflict with customary law.[1891] The Constitution requires the courts to apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law.[1892]

Whilst the MPRDA does not regulate customary law, IPILRA specifically deals with customary law insofar as the interim protection of land rights by communities are concerned.[1893] The MPRDA furthermore requires consultation with interested and affected persons whilst IPILRA specifically requires consent to be obtained from holders of informal

[1880] Section 2(1) of IPILRA.

[1881] Section 2(2) of IPILRA.

[1882] Constitution of the Republic of South Africa, 1996.

[1883] Restitution of Land Rights Act 22 of 1994.

[1884] Sections 2 and 3 of the Restitution of Land Rights Act 22 of 1994.

[1885] White Paper on a Minerals and Mining Policy for South Africa, General Notice 2359, Government Gazette 19344, 20 October 1998 available at *https://www.dmr.gov* accessed on 10 February 2020.

[1886] Ibid.

[1887] Section 24(b)(iii) of the Constitution.

[1888] White Paper on a Minerals and Mining Policy for South Africa op cit note 115.

[1889] Section 4(2) of the MPRDA; see *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP*)* para 66.

[1890] Section 4(2) of the MPRDA.

[1891] *Baleni* supra note 1889 para 66.

[1892] See section 211(3) of the Constitution; *Baleni supra* note 1889 para 71.

[1893] Ibid.

rights to land; which right holders are regarded as landowners in certain instances.[1894] The MPRDA and IPILRA, considering their respective purpose, are not in conflict but are to be "interpreted and read harmoniously."[1895] Broader protection to traditional communities is therefore afforded by obtaining the consent of landowners where customary law is applicable, whilst mere consultation with interested and affected parties are required in terms of the MPRDA.[1896]

Protection of communities by requiring consent, and not mere consultation is found in international law.[1897] Both General Recommendation No XXIII issued in terms of the Convention on the Elimination of All Forms of Racial Discrimination relating to indigenous people[1898] as well as the Covenant on Economic, Social and Cultural Rights[1899] requires free, prior and informed consent from members of the community who have the right to refuse such consent.[1900] Whilst the African Charter does not provide for free, prior and informed consent, the African Commission on Human and Peoples Rights[1901] and the African Court on Human and Peoples Rights[1902]; institutions responsible for the interpretation of the African Charter[1903] require that people must be afforded with the right to free, prior and informed consent when decisions are to be made about their land.[1904]

#### 9.2.5.2 Meaningful Consultation with Communities

The right of an interested and affected party to be consulted does not extend to the sustainability of mining from a community perspective nor its social impacts, but merely on the

[1894] Ibid paras 74-75.

[1895] *Maledu and Others v Itereleng Bakgatla Minerals Resources (Pty) Limited and another* [2018] ZACC at 41; *Baleni* supra note 1889 para 75.

[1896] Ibid para 76.

[1897] Ibid para 78 and the reference to General Assembly Recommendation No XXIII: Indigenous Peoples issued in terms of the Convention on the Elimination of All Forms of Racial Discrimination on 18 August 1997 accessed on 13 February 2020. Regulation 4(d) requires that party states shall "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."

[1898] General Recommendation No XXIII: op cit note 258.

[1899] *Baleni supra* note 1889 para 78 and the reference to the United Nations General Assembly *Covenant on Economic Social and Cultural Rights adopted* on 16 December 1966 and entered into force on 3 January 1976.

[1900] *Baleni* supra note 1889 para 78.

[1901] African Commission on Human and Peoples Rights accessed at *www.achpr.org* on 13 February 2020.

[1902] African Court on Human and Peoples Rights accessed at *https://en.african-court.org* on 13 February 2020.

[1903] *Baleni* supra note 1889 para 81 and the reference to Maledu supra 1895 para 72.

[1904] Ibid.

environmental impacts of the proposed mining. The requirement to consult does not require the granting of consent by interested and affected parties.[1905] Currently, meaningful consultation, and not mere consultation, is to be conducted with interested and affected parties.[1906]

Meaningful consultation requires the applicant for a prospecting or mining right to act in good faith by facilitating participation in a manner that provides reasonable opportunity to a landowner, lawful occupier or interested and affected party to provide comment with respect to the land subjected to the application.[1907] The purpose of meaningful consultation is to allow interested and affected parties to comment on the impact prospecting or mining activities would have on their rights to use the land by availing all relevant information regarding the proposed activities to enable them to make an informed decision regarding the impact of the proposed activities.[1908] The meaningful consultation with lawful occupiers, landowners and interested and affected parties must be conducted in terms of the public participation process prescribed in the Environmental Impact Assessment Regulations promulgated in terms of the National Environmental Management Act, 1998.[1909]

The MPRDAR define an interested and affected party as 'a natural or juristic person or an association of persons with a direct interest in the proposed or existing prospecting or mining operation or who may be affected by the proposed existing operation.'[1910] The meaning of interested and affected persons is to be interpreted with reference to mine communities as defined in the MPRDAR as amended, Landowners Traditional Councils,[1911] land claimants,[1912] lawful land occupier and holders of informal rights to land.[1913] The Departments responsible for Agriculture, Land Reform and Rural Development, for Co-operative Governance and

[1905] Badenhorst and Olivier op cit note 1876 at 126.

[1906] Regulation 3A of GNR. 420 Government Gazette 43172 of 27 March 2020 amends the MPRDA Regulations published under GNR.527 of 23 April 2004 that requires 'meaningful consultation' as opposed to 'consultation' in accordance with lastmentioned regulations.

[1907] Regulation 1(e) of GNR. 420 of Government Gazette 43172 of 27 March 2020.

[1908] Ibid.

[1909] Regulation 1(e) of GNR. 420 of Government Gazette 43172 of 27 March 2020 read with section 24(5) of the National Environmental Management Act, 1998.

[1910] Regulation 1 of GNR. 420 of Government Gazette 43172 of 27 March 2020.

[1911] Landowners Traditional Councils as defined in the Traditional Leadership and Governance Framework Act, 2003 read with Regulation 1(d)(ii) of GNR. 420 of Government Gazette 43172 of 27 March 2020.

[1912] Land claimants whose claims in terms of the Restitution of Land Rights Act, 1994 have not been rejected or settled. See Regulation 1(d)(iii) of GNR. 420 of Government Gazette 43172 of 27 March 2020

[1913] Regulation 1(d)(v) of GNR. 420 of Government Gazette 43172 of 27 March 2020 provides for holders of informal rights to land as defined in terms of section 1 of the Interim Protection of Land Rights Act, 1996 to be acknowledged as interested and affected persons.

Traditional Affairs as well as the Department responsible for Human Settlements, Water and Sanitation are included in the definition of interested and affected persons.[1914]

Regulations issued by the Department regulate the manner in which the notice, advertisement and publication of the relevant application is to be made to enable interested and affected persons to be informed and invited to submit comments.[1915] A Guideline issued by the Department of Minerals and Energy[1916] for consultation with communities as well as interested and affected persons, acknowledges the importance of involving communities from an early stage in the application process for mineral rights.[1917] The guidelines contain definitions of 'consultation',[1918] a 'community'[1919] as well as 'interested and affected parties'.[1920] The rationale for consultation is to provide affected parties with the necessary information about

[1914] Regulations 1(d)(vi) – (viii) of GNR. 420 of Government Gazette 43172 of 27 March 2020. Reference is also made to any other person whose socio-economic rights may be directly affected by the abovementioned operations as well as the local municipality, civil society and the government departments, agencies and institutions responsible for aspects of the environment and infrastructure that may be affected by the intended project. See Regulations 1(d)(ix) – (xii) of GNR. 420 of Government Gazette 43172 of 27 March 2020.

[1915] See section 3 of the MPRDA Regulations published under GNR.527 of 23 April 2004 as amended by GNR. 420 of Government Gazette 43172 of 27 March 2020.

[1916] Guidelines issued by the Department of Minerals and Energy are not binding on applicants for mineral rights but serves as a standard against whether the standards required by the Department have been met when an application is considered.

[1917] See the Preamble to the *Guideline for Consultation with Communities and Interested and Affected Parties* as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum Resources Development Act (Act 28 of 2002) *available at https://www.dmr.gov.za/Portals/0/consultation_guideline.pdf* accessed on 12 February 2020.

[1918] 'Consultation' is defined as "… a two-way communication process between the applicant and the community or interested and affected party wherein the former is seeking, listening to, and considering the latter's response, which allows openness in the decision-making process." See Part D: Definitions of the *Guideline for Consultation with Communities and Interested and Affected Parties* as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum Resources Development Act (Act 28 of 2002) available at *https://www.dmr.gov.za/Portals/0/consultation_guideline.pdf* accessed on 12 February 2020.

[1919] 'Community' means a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of the Act negotiations or consultations with the community are required, the community shall include the members or part of the community, directly affected by prospecting or mining, on land occupied by such members or part of the community. See Part D: Definitions of the *Guideline for Consultation with Communities and Interested and Affected Parties* as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum Resources Development Act (Act 28 of 2002) available at *https://www.dmr.gov.za/Portals/0/consultation_guideline.pdf* accessed on 12 February 2020.

[1920] The definition of 'Interested and Affected Persons' include a reference to host communities, landowners (traditional and title deed owners), traditional authority, land claimants, lawful land occupier as well as "(a)ny other person whose socio-economic conditions may be directly affected by the proposed prospecting and mining operation". The (then) Department of Land Affairs, local municipality and relevant government departments, agencies and institutions responsible for environmental issues and infrastructure, are also included. See Part D: Definitions of the *Guideline for Consultation with Communities and Interested and Affected Parties* as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum Resources Development Act (Act 28 of 2002) available at *https://www.dmr.gov.za/Portals/0/consultation_guideline.pdf* accessed on 12 February 2020.

the proposed prospecting or mining project so that they can make informed decisions.[1921] It also determines whether accommodation is possible insofar as the interference with their rights to use the affected properties is concerned.[1922] This definition also includes a reference to the requirement that consultation in terms of the MPRDA, requires parties to act in good faith when attempting to reach such accommodation referred to above.[1923]

The obligation to conduct meaningful consultation has been reiterated in various court cases in South African law.[1924] The importance of participation and meaningful engagement by interested and affected persons is also recognised by the United Nations as a core element of a rights-based approach to development.[1925] The African Court on Human and Peoples' Rights found that the state has a duty to consult with the affected community to obtain their free, prior and informed consent according to the customs and traditions of the community where the development or investment project would have a major impact.[1926]

Consultation with landowners provides landowners with the necessary information to make informed decisions on the use of internal procedures,[1927] the representations to be made and whether to take the decision by the Department of Mineral Resources and Energy on judicial

[1921] See Part E of the *Guideline for Consultation with Communities and Interested and Affected Parties* as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum Resources Development Act (Act 28 of 2002) avaialbe at *https://www.dmr.gov.za/Portals/0/consultation_guideline.pdf* accessed on 12 February 2020.

[1922] See Part E of the *Guideline for Consultation with Communities and Interested and Affected Parties* as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum Resources Development Act (Act 28 of 2002) available at *https://www.dmr.gov.za/Portals/0/consultation_guideline.pdf* accessed on 12 February 2020.

[1923] See Part E of the *Guideline for Consultation with Communities and Interested and Affected Parties* as required in terms of sections 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the Mineral and Petroleum Resources Development Act (Act 28 of 2002) avaialbe at *https://www.dmr.gov.za/Portals/0/consultation_guideline.pdf* accessed on 12 February 2020.

[1924] *Port Elizabeth Municipality v Various Occupiers* 2005(1) SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) within the context of socio-economic rights. See *Doctors for Life International v Speaker of the National Assembly 2006* (6) SA 416 (CC) for the interpretation of the duty to consult in a meaningful manner in the legislative context.

[1925] See articles 1 and 8.2 of the UN Department of economic and Social Affairs *The United Nations Development Agenda: Development for All* (2007); UN Declaration on the Right to Development (1986) available at *https://www.ohchr.org/en/professionalinterest/pages/righttodevelopment.aspx*_accessed on 12 February 2020; South African Human Rights Commission Report on the *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 13-14 September; 26 and 28 September; 3 November 2016 at 60.*

[1926] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endoris Welfare Council) v Kenya* (2009) 273/03 African Court for Human and Peoples Rights. See South African Human Rights Commission Report op cit note 1946 at 64.

[1927] Section 54 of the MPRDA provides for a process in terms whereof a landowner may claim compensation resulting from loss or damage suffered or is likely to suffer loss or damage as a result of reconnaissance, prospecting or mining operations.

review.[1928] The consultation process and its result is part of the fairness process, as it informs the administrator of the content of the consultation process followed, which ensures that the granting of the application is procedurally fair.[1929] The obligation to consult with interested and affected parties does not rest on the state, but on the applicant.[1930] The state, however, has the obligation to ensure that consultation does indeed take place.[1931]

#### 9.2.5.3 Instances where Consent is Required

In two instances, consent and not mere consultation is required.[1932] The first instance is where an applicant for mining rights has to obtain consent from the local municipality for mining operations to be established in accordance with the Spatial Development and Land Use Management Act (SPLUMA).[1933] The second instance where the express consent of communities must be obtained, is where the protection of informal rights in terms of the IPILRA is concerned.[1934] Where communities hold informal rights to land,[1935], IPILRA

[1928] *Bengwenyama Minerals* supra 1802 para 66.

[1929] Ibid.

[1930] See sections 5 and 10 of the MPRDA.

[1931] See sections 17(4A) which regulates applications for prospecting rights and section 23(2A) of the MPRDA which regulates applications for the granting and duration of a mining right where a community occupies land. Both sections determine that the relevant minister may impose those conditions as may be necessary to promote the rights and interests of the community, which conditions may include requirements regarding participation by the community. Proof of such consultation has to be submitted to the Regional Manager

[1932] South African Human Rights Commission Report op cit note at 64.

[1933] The Spatial Planning and Land Use Development Act 13 of 2015 (SPLUMA) came into operation on 1 July 2015.The aim of SPLUMA is to develop a new framework to govern planning, permissions and approvals and sets a framework for new developments in providing for different lawful land uses.[1933] It furthermore intends to redress the imbalances of the past and to ensure equity in the development of spatial planning and land use management.

[1934] Interim Protection of Informal Rights Act 31 of 1996.

[1935] The *Interim Protection of Informal Rights Act* 31 of 1996 defines informal rights as follows:

"(a) the use of, occupation of, access to land in terms of –

(i) any tribal, customary or indigenous law or practice of a tribe;

(ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in

(aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act no, 18 of 1936);

(bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971); or

(cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;

(b) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of public office;

(c) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or

determines that 'no person may be deprived of any informal right to land without his or her consent.'[1936] Where land is held on a communal basis, the custom and usage of that community must be considered when a person is to be deprived of such rights.[1937]

In the instance of informal rights to land, certain requirements are to be met where a decision to dispose of informal land rights in accordance with the custom and usage of a community, is to be made.[1938] These requirements include the holding of a meeting for the purpose of considering the disposal of such rights and the giving of sufficient notice to community members. It also includes giving the community a reasonable opportunity to participate, a majority of members to be present at the meeting and a decision to be taken by the majority of the holders of such rights.[1939] IPILRA also requires that 'appropriate compensation' must be provided to any persons who are disposed of such informal land rights.[1940] Where an agreement cannot be reached, the MPRDA provides for the expropriation of land where such expropriation is deemed necessary for the achievement of the objects of the MPRDA.[1941]

The Constitutional Court[1942] has found that communities who are landowners or lawful occupiers, are entitled to have their rights and interests considered when assessing whether to grant prospecting rights.[1943] The granting and execution of a prospecting right was regarded by the court as a considerable invasion on the rights of a community to the use and enjoyment of their land.[1944] Recognition of the rights of the community was required, whether the landowner was the owner of the surface and what lies beneath it, or whether ownership did not belong to the landowner but 'somehow resides in the custody of the state.'[1945]

(d) the use or occupation by any person of an erf as if he or she is, in respect to that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act No.112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question."

[1936] Section 2(1) of the Interim Protection of Informal Rights Act 31 of 1996.

[1937] Section 2(3) of the Interim Protection of Informal Rights Act 31 of 1996.

[1938] Section 2 of the Interim Protection of Informal Rights Act 31 of 1996.

[1939] Section 2(4) of the Interim Protection of Informal Rights Act 31 of 1996.

[1940] Section 2(3) of the Interim Protection of Informal Rights Act 31 of 1996.

[1941] See sections 54(5) and 55 of the MPRDA.

[1942] *Bengwenyama Minerals* supra note 37 para 62.

[1943] Ibid para 63.

[1944] Ibid.

[1945] Ibid.

#### 9.2.5.4 Consultation about Relocation of Communities

Communities are often required to relocate due to proposed mining activities on, or in close proximity, to the land they occupy, with accompanying relocation and payment of compensation.[1946] Consultation with communities by applicants for mineral rights in accordance with the prescripts of the MPRDA is therefore imperative.[1947] Various disputes regarding community relocation and compensation agreements indicate the lack of transformed practices in addressing the economic empowerment of communities and their sustainable development.[1948]

The requirement for security of tenure is not limited to private ownership.[1949] Customary law and informal arrangements relating to land also require the security of tenure.[1950] Security of tenure is described as a relationship to the land that enables a person to use one's property in security, peace and dignity.[1951] Security of tenure is therefore intended to prevent forced eviction, harassment and other forms of threats.[1952] These rights include the traditional rights of communities and persons to compensation for the loss of land resources, such as communal grazing land, communal farming land as well as the collection of resources, such as traditional medicine and food.[1953] Land held by the community on a communal basis must therefore also be included in negotiations for the relocation of persons and communities.[1954] Concerns regarding the calculation and payment of compensation for relocation and loss of land rights, including a failure to monitor compliance, exist.[1955]

[1946] South African Human Rights Commission Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 13-14 September; 26 and 28 September; 3 November 2016 at 16.

[1947] See sections 5 and 10 of the MPRDA; South African Human Rights Commission Report op cit note 1946 at 16.

[1948] Ibid.

[1949] Ibid at 17.

[1950] Ibid.

[1951] United Nations Human Rights Council, Resolution A/HRC/25/54 Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context Raquel Rolnik (30 December 2013) at para 5; South African Human Rights Commission Report op cit note 1946 at 17.

[1952] South African Human Rights Commission Report op cit note 1946 at 17.

[1953] Ibid.

[1954] Ibid.

[1955] Ibid.

The Constitution requires that no person may be deprived of property except in terms of a law of general application.[1956] The Constitution states that no person may be arbitrarily deprived of property.[1957] The right to property may only be limited by a law of general application.[1958] No law may permit arbitrary deprivation of property.[1959] The limitation of property must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[1960] To determine whether a limitation is reasonable and justifiable in an open and democratic society based on the above values, the Constitution provides a number of factors that, inter alia, need to be considered being the importance of the purpose of the limitation and the nature and extent of the limitation.[1961] The Constitution also provides that the relation between the limitation and its purpose as well as whether less restrictive means can be applied to achieve the purpose be considered as relevant factors in determining whether the limitation is reasonable.[1962] When mineral rights are awarded in respect of property, which was used or occupied by the land owner or lawful occupier of land to the extent that their rights over the land will be limited in a substantial form, deprivation of property occurs.[1963]

In instances of both voluntary and involuntary resettlement, long-term hardship may be caused and may also lead to impoverishment through the physical and economic displacement of communities.[1964] The established unity of a community is disturbed when a community is resettled.[1965] The community's sense of traditional values, beliefs, culture, family structure and religions are often destroyed through the removal of a community.[1966] The perceived unbalanced power relationship between communities and the mining companies and the continuation thereof during the resettlement process and thereafter, infringes on the dignity of members of a community.[1967]

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[1956] Section 25(1) of the Constitution; South African Human Rights Commission Report op cit note 1946 at 17.

[1957] Section 25(1) of the Constitution.

[1958] Section 25(1) of the Constitution.

[1959] Section 25(1) of the Constitution.

[1960] Section 36(1) of the Constitution.

[1961] Section 36(1) of the Constitution.

[1962] Section 36(1) of the Constitution.

[1963] South African Human Rights Commission Report op cit note 1946 at 17.

[1964] NR Nkadimeng *The Bakgaga Bakopa Community's Experiences of Forced Removal from their Ancestral Settlement at Maleoskop* (unpublished research paper for the Magister Educationis, Rand Afrikaans University, 1999); see South African Human Rights Commission Report op cit note 1946 at 18.

[1965] Nkadimeng op cit note 1964 at 9.

[1966] Ibid at 9-11

[1967] Dawid P Mouton *The power of stories from within: The Dingleton Community of relocation* Stellenbosch Theological Journal (2016) Vol 2, No 1 305-319 at 313.

The sustainable livelihoods of communities may also be affected due to the loss of assets, land and opportunities associated with the loss of land.[1968] Active participation by the community in the planning, implementation and evaluation in any decision making regarding programs intended to benefit them due to their displacement, is required.[1969] Consideration to the cultural identity of the community, the maintenance of a continuous process of informed dialogue and the empowerment of the community in taking decisions affecting their cultural practices, social structures and value systems, is required.[1970] The state, as custodian, bears the responsibility to play a key role in the negotiation process with affected communities with particular reference to compensation payable to communities.[1971]

The process by which land and other natural resources are accumulated by mining companies and their previous users dispossessed, have been referred to as Accumulation by Dispossession (ABD).[1972] The central requirements for ABD consist, first, of the absence of a voluntary market purchase or voluntary consent in land acquisitions by those who own or have access to land.[1973] The second requirement is the state's backing of non-voluntary acquisition of land where the state is convinced by the acquirers of the land to obtain land cheaply and easily where communities do not give voluntary consent or agree to sell their land or where communities are not the registered owners of the land.[1974] The third requirement is where rural leadership of communities and gangs are hired to acquire land[1975] whilst the fourth requirement is the use of coercion or threat of force to obtain land.[1976] The last requirement is the use of fraud and corruption in any large scale land development project.[1977] ABD therefore indicates the process

[1968] South African Human Rights Commission Report op cit note 1946 at 18.

[1969] B Luka *Communication between the mine and the community in a mining resettlement project: A case study on Kumba Iron Ore's Dingletone project* (unpublished Masters in Art in Communication thesis, North-West University, 2019) at 116.

[1970] Ibid.

[1971] South African Human Rights Commission Report op cit note 1946 at 18.

[1972] Phillan Zamchiya 'Mining Capital and Dispossession in Limpopo, South Africa' *Institute for Poverty, Land and Agrarian Studies (PLAAS)* Working Paper 56 at 5 and the reference to D Harvey *The new imperialism* (2003) Oxford University Press. According to M Levien 'The land question: Special economic zones and the political economy of dispossession in India' *Journal of Peasant Studies* 39 (3-4) 933-969 at 941 the definition of ABD is 'the use of extra-economic coercion to expropriate means of production, subsistence or common social wealth for capital accumulation'

[1973] Zamchiya op cit 1972 at 5.

[1974] Ibid.

[1975] Ibid at 6.

[1976] Ibid.

[1977] Ibid.

by which land and other resources are acquired and their previous users dispossessed for the purposes of capital accumulation.[1978]

The consequences of ABD occur even in instances where dispossession of land occurs lawfully and voluntarily as well as where state laws are meant to attract foreign investment, such as in the instance of the MPRDA.[1979] As such, the dispossession consequences remain dire for communities dispossessed of land.[1980] Although communities in some instances stand to benefit from investments made in the mining operations on land from which they are dispossessed, the loss of land, water, and grazing lands as well as the imposition of interest on unfair community loans in shareholding arrangements leads, very often leads to dire consequences outside the context of the strict definition of ABD. The state as custodian of mineral resources, therefore has the duty to ensure that the dire consequences to communities flowing from the dispossession of land, are prevented and minimised within or outside the context of ABD. [1981]

Dispossession and the consequent displacement of communities lead to multifaceted impoverishment.[1982] Impoverishment due to the displacement of communities leads to landlessness which forms the foundation of their productive systems, commercial activities and livelihoods.[1983] Landlessness leads to joblessness to those who sustained themselves from the land dispossessed and homelessness leading in turn to a loss of a community's' cultural space and identity and 'place attachment.'[1984] Marginalisation of the community, increased morbidity due to a decrease in health levels, food insecurity, loss of access to common property and social disarticulation are further consequences of displacement.[1985] These failures are due to a lack of coherent policies by the state which determine the correct approach to the displacement of communities, the lack of finances allocated to displaced communities and their circumstances and the failure to adopt a methodology that does not externalize costs of displacements rather

[1978]Ibid.

[1979] Ibid.

[1980] Ibid.

[1981] Ibid at 20 where it is argued that the same dire consequences apply even in instances where ABD does not apply within its strict definition.

[1982] Michael M Cernea 'Understanding and Preventing Impoverishment from Displacement: Reflections on the State of Knowledge' *Journal of Refugee Studies* (1988) Vol 8 No 3 at 245.

[1983] Ibid at 251.

[1984] Ibid and the reference to S Low and L Altman (eds) *Place Attachment* 1992 New York: Plenum Press.

[1985] Ibid at 252.

than to internalize them within project budgets.[1986] Other failures include a lack of appropriate policies due to poor organisational capacity and professional social engineering skills caused by weak institutions and authoritarianism where the displaced communities and host populations are not allowed to adequately participate in the planning and execution of the relocation of communities.[1987]

It is the duty of the state to ensure that the displacement of communities take place in accordance with considered policies that benefit communities to be displaced and to be executed by effective and efficient government institutions where the costs of such displacements, whether forcefully or voluntary, are not externalized but internalized within the budget process of the project. The duty to ensure that the livelihoods of displaced communities be returned is a matter of acknowledgment of rights and correct resource allocation.[1988] The state's duties extend to ensuring that all stakeholders participate in resolving the difficult problems of resettling displaced communities, which include obtaining the voluntary and informed consent of the community to be displaced.[1989]

Meaningful consultation is required for the resettlement of mine and host communities due to proposed mining activities.[1990] The consultation guidelines must contain measures proposed by the applicant to implement the proposed activities considering the issues raised in the consultation process.[1991] These measures include an agreement on the resettlement plan.[1992]

[1986] Ibid at 253.

[1987] Ibid at 254.

[1988] Ibid at 258.

[1989] Ibid at 259.

[1990] Regulation 7 of the Mine Community Resettlement Guidelines, 2022 published under GN No 46125 of 30 March 2022 requires meaningful consultation, a list of the stakeholders to be consulted and the methods of consultations with stakeholders.

[1991] Mineral and Petroleum Regulations published under GNR.527 of 23 April 2004 as amended by GNR. 420 of Government Gazette 43172 of 27 March 2020.

[1992] Regulation 7 of the Mine Community Resettlement Guidelines, 2022 published under GN No 46125 of 30 March 2022 requires meaningful consultation, a list of the stakeholders to be consulted and the methods of consultations with stakeholders; Mineral and Petroleum Regulations published under GNR.527 of 23 April 2004 as amended by GNR. 420 of Government Gazette 43172 of 27 March 2020.

The Resettlement Guidelines make provision for a Community Resettlement Plan,[1993] Resettlement Action Plan[1994] and a Resettlement Agreement.[1995] Measures to be implemented due to the resettlement of a community, include measures for enhancing and improving their livelihoods such as housing, schools, health facilities and recreational facilities.[1996] A transparent, participatory approach is to be followed to determine compensation payable based on the local context and current full replacement values of those properties from where communities are to be resettled.[1997]

In the instance of successful applications for mining activities, another legal mechanism exists to assist communities directly affected by mining activities in the form of Social and Labour Plans (SLPs).[1998] The next section discusses the circumstances wherein which SLPs are required and their requirements.

#### *9.2.5.5 Communities and Social and Labour Plans*

SLPs are part of the legislative aim to ensure that the state as custodian redresses the legacy of apartheid and reconstructing society on the basis of equality.[1999] The objectives of the SLP system are encapsulated in the Mineral and Petroleum Regulations to the MPRDA.[2000] The MPRDAR intend to promote employment and contribute to the transformation of the mining industry whilst advancing the social and economic welfare of South Africans.[2001] The revised

[1993] Regulation 10 of the Mine Community Resettlement Guidelines, 2022 published under GN No 46125 of 30 March 2022.

[1994] Regulation 11 of the Mine Community Resettlement Guidelines, 2022 published under GN No 46125 of 30 March 2022

[1995] Regulation 12 of the Mine Community Resettlement Guidelines, 2022 published under GN No 46125 of 30 March 2022

[1996] Regulation 9 of the Mine Community Resettlement Guidelines, 2022 published under GN No 46125 of 30 March 2022; see in particular Regulation 9.3 (a) – (m) of the Mine Community Resettlement Guidelines, 2022 published under GN No 46125 of 30 March 2022 that list the factors that should be taken into consideration when resettling communities.

[1997] Regulation 9.4 of the Mine Community Resettlement Guidelines, 2022 published under GN No 46125 of 30 March 2022. The full replacement cost, which includes the market value of the assets plus the transaction costs are to be calculated and paid to affected communities.

[1998] Regulations 40-46 of the Mineral and Petroleum Regulations published under GNR.527 of 23 April 2004 as amended by GNR. 420 of Government Gazette 43172 of 27 March 2020.

[1999] 'The Social and Labour Plan Series Phase 1: System Design Trends Analysis Report' by the *Centre for Applied Legal Studies* March 2016 at 23. See the reference to C Albertyn and B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South Journal on Human Rights* 248.

[2000] Regulation 41 of the Mineral and Petroleum Regulations published under GNR.527 of 23 April 2004 as amended; *The Social and Labour Plan Series Phase 1: System Design Trends Analysis Report* op cit note 1999 at 23.

[2001] Regulation 40 of the MPRDA Regulations determines the application of the provisions, Regulation 41 contains the objectives, Regulation 42 determines the process of submitting the SLP as part of the mining right

Guidelines for Social and Labour Plans of 2010 (2010 SLP Guidelines) were developed to regulate the drafting of SLPs, which intends to promote economic growth, the development of resources in South Africa and to utilise and expand the skills base to empower historically disadvantaged persons.[2002]

The SLPs are a consequence of the mining industry's developmental responsibility to promote the objectives, obligations and mechanisms required in terms of the MPRDA,[2003] the 2010 SLP Guidelines and the MPRDA Regulations.[2004] SLPs offer opportunities to communities and mine workers to benefit from resources in their area, which include human resources development and training and contribute to the implementation of infrastructure and developmental needs of the community in specified areas.[2005] SLPs, which are required to be submitted as part of an application for a mining right, contain commitments that are developed in consultation with affected communities and persons and become binding upon the granting of a mining right.[2006]

The content, objectives and obligations of the SLP are determined primarily by the MPRDAR.[2007] The 2010 SLP Guidelines require indicators to be included for local economic development (LED) whilst it also contains the layout for project plans, including human resources development and LED initiatives.[2008]

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application whilst Regulation 43 states that the SLP needs to be reviewed every 5 years and is valid until the issuing of a closure certificate. Regulation 44 states that SLPs require the consent of the minister in the instance of amendments and variations thereto, Regulation 45 provides for annual reports to be submitted to the relevant regional manager whilst Regulation 46 provides for a description of the contents that SLPs must contain.

[2002] The initial *Guidelines on Social and Labour Plans* were adopted by the Department of Minerals and Energy during 2004 and amended in 2010. In terms of the MPRDA, historically disadvantaged person means:

'(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;

(b) any association, a majority of whose members are persons contemplated in paragraph (a);

(c) a juristic person, other than an association, which-

(i) is managed and controlled by a person contemplated in paragraph (a) and that the persons collectively or as a group own and control a majority of the issued share capital or members' interest, and are able to control the majority of the members' vote; or

(ii) is a subsidiary, as defined in section 1(e) of the Companies Act, 1973, as a juristic person who is a historically disadvantaged person by virtue of the provisions of paragraph (c)(i);'

[2003] Sections 23(1)(e) and 23(1)(h) of the MPRDA

[2004] *The Social and Labour Plan Series Phase 1: System Design Trends Analysis Report* op cit note 1999 at 23.

[2005] Ibid at 14.

[2006] Ibid.

[2007] Regulations 40-46 of the MPRDA Regulations.

[2008] See Revised Social and Labour Plan Guidelines October 2010; *The Social and Labour Plan Series Phase 1: System Design Trends Analysis Report* op cit note 1999 at 23.

The SLP system together with the National Development Plan (NDP),[2009] the New Growth Path (NGP)[2010] as well as the integrated development plans (IDP) of municipalities, are developmental tools. The NDP is South Africa's strategic development agenda that aims to eliminate poverty and reduce inequality by means of economic growth, job creation and investing in education.[2011] The New Growth Path intends to identify measures to strengthen the capacity of the state and to enhance the performance of the private sector to achieve employment and growth goals. The IDP provides strategic guidance to municipalities and to coordinate the different sectoral plans and planning processes.[2012] The SLP system is therefore interlinked with the above legislation in order to fulfil the transformational goals of government as required by the Constitution.[2013]

The public nature of the obligations of right holders gives the government the power and duty to monitor and enforce compliance of SLPs.[2014] As communities are not required to agree or be a formal party to these obligations, they have less influence over the content of SLPs that affect them directly.[2015] This position is indicative of a power imbalance between communities and mining companies to the detriment of communities that the state as custodian was intended to address.[2016]

In acknowledgement of the various concerns regarding the mining industry and other sectors of the economy, a panel of experts (the so-called High-Level Panel) was appointed to make an assessment of the implementation of key legislation and to make recommendations as to necessary interventions.[2017] Insofar as the mining industry is concerned, the panel found that there were two ways in which the state had failed to ensure that the legacies of the past concerning communities in former homeland communities, had been redressed[2018] The first

[2009] National Development Plan 2030: Our future – make it work 15 August 2012 accessed at www.gov.za on 14 February 2020.

[2010] *The New Growth Path* accessed online *https://www.gov.za/about-government/government-programmes/new-growth-path* on 14 February 2020.

[2011] National Development Plan 2030 op cit note 2009.

[2012] The New Growth Path op cit note 2010.

[2013] *The Social and Labour Plan Series Phase 1: System Design Trends Analysis Report* op cit note 1999 at 26.

[2014] Ibid at 31.

[2015] Ibid at 32.

[2016] Ibid.

[2017] *Report of the High Level Panel on the Assessment of key legislation and the Acceleration of Fundamental Change* November 2017 accessed at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf on 12 February 2020 at 30.

[2018] Ibid at 503.

was that mining had led to the dispossession of land and the second was that there were no real benefits created for communities.[2019] In referring to the ownership of minerals as being the common heritage of all South Africans with the state as the custodian thereof, the panel found that the legislative removal of the right of landowners to refuse to mine on their land has caused devastating impacts for members of rural and customary communities.[2020] A lack of reporting by role players in the mining industry to communities on whose behalf and apparent benefit various forms of financial instruments are concluded, financial mismanagement, poor administration of community benefits by provincial governments and a lack of access to information, have caused communities not to receive real benefits from mining activities on their land.[2021]

#### 9.2.5.6 Interpretation of the Rights of Communities Affected by Mining

The rights of communities affected by mining activities have been considered in a number of instances.[2022] The Constitutional Court has found consultation to be a process in terms of which an "accommodation of sorts" can be reached regarding the impact of mining activities.[2023] The Constitution obliges the state to facilitate conditions that enable citizens to gain access to land on an equitable basis.[2024] The Constitution furthermore requires that a community whose tenure to land is insecure as a result of past racially discriminatory laws or practices is either entitled to tenure that is secure or comparable redress.[2025]

The MPRDA provides for a measure of redress by allowing a community to obtain a preferent right on community land for mining activities.[2026] In the instance where the Department of Minerals and Energy has received an application for prospecting activities, the Department has

[2019] Ibid.

[2020] Ibid.

[2021] Ibid at 504.

[2022] *Bengwenyama Minerals* supra note 1802; *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10; *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* [2015] ZASCA 82; *Baleni v Minister of Mineral Resources* supra note 1889; *Daniels v Scribante and Another* 2017 (4) SA 341 (CC); *Maledu and Others v Itereleng Bakgatla Minerals Resources (Pty) Limited* supra note 1895.

[2023] *Bengwenyama Minerals* supra note 1802 para 68.

[2024] Section 25(4) of the Constitution; see *Bengwenyama Minerals* supra note 1802 para 70.

[2025] Mining legislation prior to the MPRDA prevented black people from acquiring access to mineral resources. See *Joubert et al* (ed) *The Law of South Africa* (2ed) vol 18 (LAWSA) at para 16-7; sections 25(6) and 25(7) of the Constitution; *Baleni* supra note 1889 para 49 and *Bengwenyama Minerals* supra note 1802 para 70.

[2026] Section 104 of the MPRDA. In the instance of *Bengwenyama Minerals* supra note 1802 the community applied for a preferent right to prospect on community land.

the obligation to afford the community an opportunity to make representations regarding an application pertaining to their community land.[2027]

The right of a community to make representations to the Department in instances where it has a preferent right to apply for prospecting or mining rights on community land is regarded as a special category of rights in addition to their rights as owners of the land.[2028] Communities who have rights to community land must, therefore, be given an opportunity to apply for a preferent right to prospect or mine, especially in the instance where it is known to the Department that the community has applied for prospecting rights.[2029]

The meaning of the state as custodian of the nation's mineral and petroleum resources must be interpreted with reference to the Bill of Rights as contained in the Constitution.[2030] The process of interpreting the Constitution must recognise the context in which it is located, which requires a transition from an unjust society to a society based on the dignity of all citizens and all-inclusive governance.[2031] Various pieces of legislation have been adopted to address the historical imbalances of the past, which includes the Extension of Security of Tenure Act (ESTA)[i] to protect farm dwellers, the Prevention of Illegal Eviction and Unlawful Occupation of Land Act (PIE) to protect urban dwellers and the Restitution of Land Rights Act[ii] to assist those dispossessed by racial laws. Also the Land Reform (Labour Tenants) Act[2032] to protect labour tenants and IPILRA were adopted to protect those who had insecure tenure due to the failure of the pre-democratic government to recognise customary law.[2033]

Where a mineral right is granted in terms of the MPRDA, a deprivation from the landowners' right to use of the land occurs.[2034] Accordingly, consent and not merely consultation with the

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[2027] *Bengwenyama Minerals* supra note 1802 para 73.

[2028] Ibid.

[2029] In *Bengwenyama Minerals* supra note 1802 the community as well as Genorah applied for prospecting rights on community land. The Department failed to inform the community of the competing claim and subsequent to receiving the community's application and responding to communication on their behalf, awarded a prospecting right to Genorah whilst rejecting a similar application by the community.

[2030] See *Baleni* supra note 1889 para 36 where reference is made to *Bato Star Fishing* supra 1774 wherein reference is made to *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC).

[2031] *Mashavha v President of the Republic of South Africa and Others* 2005 (2) SA 476 (CC) at para 55; *Investigating Directorate: Serious Economic Offences* supra note 2030.

[2032] Land Reform (Labour Tenants) Act 3 of 1996*; Baleni* supra note 1889.

[2033] Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998; *Baleni* supra note 1889.

[2034] *Baleni* supra note 1889 para 59-60.

community is required where the protection of informal rights to land in terms of IPILRA is concerned.[2035] Where a compulsory deprivation occurs due to the granting of a right in accordance with the MPRDA, the state as custodian of the mineral and petroleum rights does not assume ownership thereof, but is merely a '… facilitator or conduit through which the broader and equitable access to mineral and petroleum resources can be realised.'[2036] Due to the public interest and the constitutional imperative, which underlies the MPRDA to transform and facilitate equitable access, the state, as custodian, did not expropriate rights from previous holders of old order rights with the adoption of the MPRDA.[2037]

## 9.3 Conclusion

This chapter indicates the tensions and disparities that exist, not only for the rights and interests of landowners and lawful occupiers, but also other stakeholders.[2038] The nation's interest in its mineral and petroleum resources includes the transformational objects of the MPRDA, the national economic benefit and the protection of the environment. The granting of mineral rights is a considerable invasion on the use and enjoyment of the land on which mining activities are to happen.[2039] National economic growth encompasses stimulating an increase in employment and the advancement of the social and economic welfare of all South Africans while also providing security of tenure for holders of mineral rights.

The interests of local government to ensure that the object of economic growth and environmental protection is fulfilled, provides the link to ensure that mining as a particular land use is regulated through land use planning legislation to the benefit of all stakeholders, including the nation as the owners of the mineral resources, the holders of mineral rights and landowner entitlements on whose land extraction operations are conducted. International instruments exist to emphasise the need to obtain the free, prior and informed consent of communities when decisions regarding their land are to be made.[2040]

Due to the historical imbalance, the state as custodian is responsible for ensuring redress is implemented in favour of communities directly affected by mining activities. As stated, the Constitution and the MPRDA requires the state to implement laws that substantially and

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[2035] *Baleni* supra note 1889 para 61.

[2036] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at para 68.

[2037] Ibid para 68.

[2038] *Bengwenyama Minerals* supra note 1802 para 63; *Baleni supra* note 1889 para 83; *Maledu* supra note 1895 para 78.

[2039] *Maledu* supra note 1895 para 78.

[2040] African Commission on Human and Peoples Rights accessed *at www.achpr.org* on 13 February 2020; African Court on Human and Peoples Rights accessed at *https://en.african-court.org* on 13 February 2020; Covenant on Economic Social and Cultural Rights adopted the United Nations General Assembly on 16 December 1966 and entered into force on 3 January 1976.

meaningfully expand opportunities for historically disadvantaged persons.[2041] The main purpose of the MPRDA is to provide equitable access to and sustainable development of mineral and petroleum resources.[2042] One of its objects is to give effect to the state's custodianship of the nation's resources.[2043]

This thesis focuses on the object of the MPRDA to give effect to the state's custodianship of the nation's mineral and petroleum resources. The substantive principles that define the concept of state custodianship, its legal duties and responsibilities and its legal limitations are discussed. It also reviews the legal content of the fiduciary duties of the state as custodian, to whom the it is accountable and to what standards the state must fulfil its duties and responsibilities as a custodian.

[2041] Section 24(b)(iii) of the Constitution and the Preamble to the MPRDA.

[2042] Section 2(d) of the MPRDA.

[2043] Section 2(b) of the MPRDA.

# CHAPTER TEN: CONCLUDING REMARKS: FORMULATING 'STATE CUSTODIANSHIP' OF MINERAL RESOURCES

## 10.1 An Understanding of State Custodianship

This thesis set out to determine the legal content of state custodianship within the context of the MPRDA. Questions were posed to provide content to the notion of state custodianship. The answers to these questions (summarised in section 2 below) provide an explanation of the notion of state custodianship, and the requirements that determine its content.

## 10.2 Insights Gleaned from the Pursuit of the Research Questions

It was hypothesised[2044] that the new mineral regime, heralded by the MPRDA, has caused mineral law to shift its centre of gravity from private law to public law, and in particular assume an administrative law basis. This thesis has shown that the government's constitutional duty to secure ecologically sustainable development and use of natural resources translates into a fiduciary obligation to protect the environment and natural resources for present and future generations.[2045] The introduction of the MPRDA and the notion of state custodianship[2046] seeks to fulfill this constitutional mandate concerning mineral resources.[2047]

The shift of the centre of gravity of mineral law to public law facilitates the duty of the state-as-custodian to ensure that the public interest is protected.[2048] The public interest regarding the nation's mineral resources is determined by the constitutional values of human dignity,[2049]

[2044] See Chapter 1 (note 2 above).

[2045] Section 24 of the Constitution of the Republic of South Africa, 1996.

[2046] See Chapter Seven (note 1366 above).

[2047] See Chapter Three (note 325 above).

[2048] See Chapter Six (note 1328 above) and Chapter Nine (note 2037).

[2049] See Chapter Nine (note 1781 above).

equality,[2050] and freedom.[2051] The MPRDA reflects the public's interest in the nation's mineral and petroleum resources.[2052]

The state-as-custodian must ensure that the transformational objects of the MPRDA, the national economic benefit, and the protection of the environment are complied with.[2053] Promoting national economic growth by growing the economy and developing the nation's mineral and petroleum resources by stimulating growth in employment and the advancement of the social and economic welfare of all South Africans by the state, are also enabled by the shifting of the centre of gravity of mineral law to public law.[2054]

The various subquestions that guided the inquiry, brought to light the following insights:

### 10.2.1 The State must Promote Equitable Access to the Nation's Mineral Resources

The first question that this thesis sought to address was to determine the principles that define the concept of state custodianship. These principles are determined by the provisions of the MPRDA[2055] and the fiduciary duties of the state as custodian.[2056] Determining the state's obligation to act as custodian relies on interpreting the state's duties and responsibilities in accordance with the Constitution and the MPRDA.[2057]

The MPRDA introduced state custodianship of mineral resources as a concept in mineral law and this Act remains the main instrument in determining the content of resource custodianship in South Africa.[2058] It introduced state custodianship to promote equitable access to the mineral and petroleum resources that belong to the nation.[2059] The MPRDA aims to promote equal access to all South Africa's people and expand opportunities to historically disadvantaged

[2050] See Chapter Nine (note 1782 above).
[2051] See Chapter Nine (note 1783 above).
[2052] See Chapter Six (note 1330 above).
[2053] See Chapter Eight (note 1729 above).
[2054] See Chapter Nine (note 1795 above).
[2055] See Chapter Seven (note 1438) above).
[2056] See Chapter Seven (note 146 above).
[2057] See Chapter Seven (notes 1543 and 1544 above).
[2058] See Chapter Three (note 325 above).
[2059] See Chapter Three (note 323 above).

people.[2060] It also requires the state to protect the nation's public interest by acting as custodian of mineral resources for the benefit of the nation.[2061] The MPRDA requires that in interpreting its provisions, any reasonable interpretation which is consistent with its objects must be preferred over an interpretation inconsistent therewith.[2062]

### 10.2.2 The Custodial Role of the State Begets a Fiduciary Duty Towards the Nation

The MPRDA refers to state custodianship of mineral (and petroleum) resources but is not explicit about the fiduciary nature of the state's duties.[2063] As chapter 7 above demonstrated, however, the custodial role of the state indeed begets a fiduciary duty towards the nation to protect the latter's interest in its mineral resources.[2064] The foundation for the state's fiduciary duty is found in section 24 of the Constitution, which provides that the state must protect the people's environment and natural resources.[2065] Furthermore, the MPRDA determines that the state has an express duty towards previously disadvantaged communities to ensure equal access to mineral resources.[2066]

The fiduciary duty also extends to applicants for rights provided for in the MPRDA and the community affected the applications for rights to minerals. The MPRDA introduces state custodianship to give effect to the state's duty to control the mineral resources.[2067] Broader state control is necessary to ensure equitable access to mineral and petroleum resources, create economic development and protect the environment. These requirements ensure the development of the mineral and petroleum resources industries.[2068]

State custodianship requires the state to fulfill its fiduciary duties towards the nation as the owner of mineral resources.[2069] The requirement that the state regulates mineral and petroleum

[2060] See Chapter Three (note 677 above).

[2061] See Chapter Seven (note 1543 above).

[2062] See Chapter Three (note 378 above).

[2063] See Chapter Seven (note 1489 above).

[2064] See Chapter Seven (note 1495 above).

[2065] See Chapter Seven (note 1445 above).

[2066] See Chapter Nine (note 1769 above).

[2067] H Mostert Mineral Law: Principles and Policies in Perspective (2012) Juta at 78.

[2068] Section 2 of the MRPDA; Mostert op cit note 2067 at 78; Chapter 3 (note 420 above).

[2069] See Chapter Seven (note 1440 above).

resources places the nation's interests at the state's discretion.[2070] The state has to exercise its discretion in the best interest of the nation.[2071]

The fiduciary nature of the state's function requires the state to comply with a more stringent duty towards mineral resources than an owner's interest.[2072] As fiduciary, the state must fulfill the role of allocator and referee in allocating rights provided for in the MPRDA.[2073] The state is not allowed to undertake activities in competition with applicants to mineral resources due to the fiduciary duty to regulate, protect and promote the nation's mineral and petroleum resources.[2074]

### 10.2.3 The Custodial Role of the State also makes it a Steward of Transformation

The MPRDA incorporates the notion of stewardship with regard to mineral and petroleum resources.[2075] In fulfilling its stewardship role required by the Constitution,[2076] the state must ensure that the mineral resources are protected for current and future generations.[2077]

By incorporating the notion of stewardship in respect of mineral and petroleum resources, the MPRDA also serves as an example of transforming the rights of property owners regarding previously owned mineral rights to minerals found on or below the surface of their land.[2078] This transformation was necessary to address the racially based [2079] discriminatory laws that existed before the MPRDA came into effect.[2080]

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[2070] See Chapter Two (note 303 above).

[2071] See Chapter Nine (note 1780 above)

[2072] See Chapter Five (note 1037 above).

[2073] See Chapter Five (note 1055 above).

[2074] See Chapter Nine (note 1840 above).

[2075] See Chapter Six (note 1342 above).

[2076] Section 24 of the Constitution of the Republic of South Africa, 1996; Chapter Six (note 1245 above).

[2077] See Chapter Six (note 1265 above).

[2078]See Chapter Six (note 1197 above).

[2079]See Chapter Eight (note 1552 above).

[2080] See Chapter Nine (note 1775 above).

The introduction of the stewardship ethic to be exercised by the state represents the need for the minerals and petroleum industry to be transformed for the benefit of all generations.[2081] The notion of ownership of land and equal access to minerals introduced after democracy, have been influenced by political motivation for change, leading to the introduction of the development of the property concept by the introduction of the MPRDA.[2082]

### 10.2.4 Unsevered Minerals are Res Publicae

The link between private land ownership and the exploitation of mineral and petroleum resources was severed by the MPRDA to enable equitable access to the country's mineral and petroleum resources.[2083] It therefore replaced the previous mineral and petroleum system with a stricter regulatory system.[2084] The MPRDA introduced a new mineral and petroleum legal system to terminate the previous discriminatory, unequal and unjust system by determining that the mineral and petroleum resources belong to the nation.[2085]

The question as to where the ownership of unsevered minerals vests remains undecided by the courts.[2086] The apprehension by the courts to guide where ownership of minerals vests has not assisted in determining this question. This thesis argues that the ownership of unsevered minerals must be regarded as *res publicae.*

The legislative interference into the *cuius est solum* principle by the MPRDA may therefore have led to the abrogation thereof to ensure equitable access to South Africa's mineral and petroleum resources.[2087] The abrogation of the *cuius est solum* principle was arguably confirmed by the Constitutional Court in stating that the ownership of all mineral and petroleum resources is vested in the nation and that the MPRDA vested all minerals in the

[2081] E van der Schyff *Property in Minerals and Petroleum* (2016) Juta at 234 and the reference to C Sbert 'Re-imagining mining: The earth charter as a guide for ecological mining reform' (2015) *6 IUCNAEL E Journal* 66-95; E Gudyanas 'Transitions to post-extractivism: Directions, options, areas of action' in M Lang & D Mokrani *Beyond development: Alternative visions from Latin America* (2013) Transnational Institute, Amseterdam165-188.

[2082] See Chapter Six (note 1202 above).

[2083] See Chapter Four (note 687 above).

[2084] See Chapter Four (note 908 above).

[2085] See Chapter Four (note 909 above).

[2086] See Chapter Four (note 802 above).

[2087] See Chapter Four (note 812 above).

state.[2088] This apparent contradiction where both the state and the nation are vested with ownership of the mineral and petroleum resources is said to contextualise the property-rights regime in terms of which not only the mineral and petroleum resources but also other natural resources are regulated.[2089] The concept of property in an uncodified property law system as in South Africa therefore allows for an amended concept of ownership of unsevered minerals to accommodate the notion of state custodianship.

It is therefore suggested that the common law has developed to the extent that the concept of *res publicae* includes mineral resources.[2090] This development of the common law nature of ownership, rather than being classified as an exception to private law theory,[2091] is in accordance with the development of *res publicae* to include mineral (and petroleum) resources.[2092] The interpretation of section 3 of the MPRDA confirms the notion that a landowner is excluded from owning the minerals under the land.[2093]

### 10.2.5 The Interests protected by the State-as-Custodian

The state-as-custodian has to ensure that the public interest is protected.[2094] Public interest has been described as an "open ended, broad concept that is difficult to define."[2095] As the MPRDA forms part of the overall framework of law, including the Constitution, the public interest is determined by the constitutional values of human dignity,[2096] equality,[2097] and freedom.[2098] The public interest regarding the nation's mineral and petroleum resources is reflected in the MPRDA.[2099]

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[2088] See Chapter Four (note 911 above).

[2089] See Chapter Four (note 912 above).

[2090] HM van den Berg 'Ownership of minerals under the new legislative framework for mineral resources' 2009 *Stell LR* 139 at 155; Chapter Six (note 1212 above).

[2091] See Chapter Four (note 825 above).

[2092] See Chapter Four (note 932 above).

[2093] See Chapter Four (note 934 above).

[2094] See Chpater Six (note 1223 above).

[2095] See Chapter Nine (note 1784 above).

[2096] See Chapter Seven (note 1364 above).

[2097] See Chapter Seven (note 1365 above)

[2098] See Chapter Seven (note 1365 above)

[2099] See Chapter Seven (note 1542 above).

The state as custodian is to ensure that the nation's interest in its mineral and petroleum resources complies with the transformational objects of the MPRDA, the national economic benefit, and the protection of the environment.[2100] The state is to promote national economic growth by growing the economy and developing the nation's mineral and petroleum resources by stimulating growth in employment and the advancement of the social and economic welfare of all South Africans.[2101]

### 10.2.6 No Public Trust Doctrine in South African Law, but …

The view that the public trust doctrine has been accepted into South African law is not accepted.[2102] It has been argued that introducing the public trust doctrine into South African mineral law is unnecessary due to the unclear scope of the doctrine and the unnecessary efforts in attempting to fit the doctrine within the framework of South African law.[2103] Section 24 of the South African Constitution provides a right to the environment, with several environmentally-related laws giving effect to this constitutional right.[2104] The public trust doctrine does, however, assist in determining the scope of the fiduciary duty of the state as state custodian by establishing the requirements for the existence of public trusteeship that aim to fulfill environmental protections.

### 10.2.7 The Administrative Duties of the State-as-Custodian

The second question posed is what the legal duties and responsibilities of the custodial state are. The state's legislated duties and responsibilities as custodian are contained in the MPRDA.[2105] These duties and responsibilities are predominantly administrative in nature as provided for in the MPRDA.[2106]

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[2100] See Chapter Nine (note 1787 above).

[2101] See Chapter Nine (note 1795 above).

[2102] Chapter Six (note 1186 above); Van den Berg op cit note 690 at 149.

[2103] See Chapter Six (note 1300 above).

[2104] Section 24 of the Constitution of the Republic of South Africa, 1996; National Environmental Management Act 108 of 1998; National Water Act 36 of 1998; National Environmental Management: Integrated Coast National Water Act 36 of 1998; National Environmental Management Act 107 of 1998; National Environmental Management: Integrated Coast Management Act 24 of 2008Management Act 24 of 2008

[2105] See Chapter Five (note 953 above).

[2106] See Chapter Five (note 1079 above).

The MPRDA therefore requires that the state, to promote equitable access to the nation's mineral and petroleum resources while expanding opportunities for historically disadvantaged persons, adhere to its administrative duties.[2107] The state is also required to adhere to its administrative duties in promoting the other objectives of the MPRDA, which include promoting economic growth and development of mineral and petroleum resources, providing security of tenure for mining activities, promoting employment, and advancing the social and economic welfare of South Africans.[2108]

### 10.2.8 State Custodianship of Mineral Resources has its Limitations

The third question intends to establish what the legal limitations to state custodianship are. The shifting theoretical basis of mineral law from a combination of property and administrative law to one based primarily on administrative law guides the limitations imposed on state custodianship.[2109] Administrative law principles provide limitations on the state as custodian.[2110] These rules are procedural by nature and determine how the executive authority, acting through the responsible minister, exercises its powers according to the rule of law.[2111]

The custodial state's fiduciary duties towards the beneficiaries of state custodianship require that the state acts in a position of trust. The state's fiduciary duties are therefore limited to the extent required by its position of trust. The state-as-custodian, therefore, has to act according to the duties of care and loyalty and act lawfully and in good faith.

### 10.2.9 Duties of the Fiduciary State as Custodian of the Nation's Resources

The state, as fiduciary, is required to conduct substantive consultation with all stakeholders.[2112] The degree of consultation is determined by the state acting as a fiduciary towards the affected stakeholders.[2113] Consultation with stakeholders is required who are directly and indirectly

[2107] See Chapter Five (note 956 above).

[2108] See Chapter Five (note 1055 above).

[2109] See Chapter Five (note 1079 above) and Chapter Seven (note 1358 above).

[2110] See Chapter Five (note 1149 above) and Chapter Seven (note 1370 above).

[2111] See Chapter Five (note 1075 above).

[2112] See Chapter Eight (note 1684 above).

[2113] See Chapter Nine (note 1907 above).

affected by mining activities. Consultation is also required when mineral policy and legislation are to be formulated.[2114] The state's exercise of the fiduciary duty is limited by substantive consultation because the beneficiaries' interests are to be determined and considered.[2115] The state's discretion as custodian in making decisions in accordance with the MPRDA is therefore limited by the procedural requirement to consult substantively, and the requirement that the concerns raised during the consultation process are to be duly considered.[2116]

Fourthly, this thesis addresses the legal content of the state's fiduciary duties that form part of the concept of state custodianship. The position of trust is based on the requirement that the state as custodian exercises such trust to the benefit of the nation as mineral and petroleum resource owners in accordance with the MPRDA.[2117] The state assumes this role by virtue of its constitutional obligation and the consequent legislated role as state custodian of mineral and petroleum resources.[2118] The state is responsible for executing its fiduciary duties due to the importance placed on mineral and petroleum resources, the historical context to access minerals, and the transformative objectives of the MPRDA.[2119]

The present generation is to benefit from the duty of stewardship conferred upon the state to protect mineral and petroleum resources.[2120] Stewardship is an ethical and religious norm rather than a legal norm. The state assumes responsibility for the duty to protect and preserve resources for the present and future generations.[2121] Stewardship ensures a vested interest for both mineral right holders and the community affected by the activities of mineral right holders.[2122] The Constitution and the MPRDA have imposed on the state as custodian the responsibility to ensure compliance with this norm.[2123]

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[2114] See Chapter Nine (note 1909 above).

[2115] See Chapter Nine (note 1906 above).

[2116] See Chapter Nine (note 1928 above).

[2117] See Chapter Nine (note 1923 above).

[2118] See Chapter Nine (note 1931 above).

[2119] See Chapter Six (note 1197 above).

[2120] See Chapter Six (note 1188 above).

[2121]. See Chapter Six (note 1192 above).

[2122] See Chapter Six (note 1191 above).

[2123] See Chapter Six (note 1194 above).

The MPRDA outlines the specific responsibilities of the Minister as representative of the state as custodian.[2124] In addition to certain administrative responsibilities ascribed to the Minister by the MPRDA,[2125] the Minister is also tasked with developing mineral and petroleum resources on a sustainable basis, considering national policy, norms, and standards, and promoting economic and social development.[2126] The state acting through the Minister and as state custodian has to advance the social values contained in the Constitution, thereby addressing the inequalities of the past through the regulation of mineral and petroleum resources.[2127]

The state-as-custodian is required to adopt policies, plans, programmes, and strategies. It does so by adopting and implementing the Constitution and legislation.[2128] Doing so fulfills the public interest in ensuring equitable access to South Africa's mineral and petroleum resources within the constitutional framework of the nation's commitment to reform the mineral resources environment.[2129] The MPRDA's objectives are to be considered against the requirements that the intergenerational interest of sustainable development is protected and economic and social development be developed.[2130]

As the notion of state custodianship has been incorporated by statute, amendments to its nature must also be amended statutorily. This requirement impacts the state's fiduciary duties that are deducted from the statutory meaning of state custodianship as read with the Constitution.[2131] An amendment to the legislation would be required to change the nature of the fiduciary duties and the state's responsibilities.[2132]

The nation's mineral (and petroleum) resources are identified as the subject matter of the fiduciary nature of the state's custodianship.[2133] The state has a responsibility towards the nation to ensure that legislation is adopted in accordance with the Constitution and legislation

[2124] See Chapter Three (note 551 above).

[2125] See Chapter Three (note 550 above).

[2126] See Chapter Three (notes 570, 675 and 676 above).

[2127] See Chapter Three (note 323 above).

[2128] See Chapter Three (note 469 above).

[2129] See Chapter Four (note 916 above).

[2130] See Chapter Three (note 453 above).

[2131] See Chapter Six (note 1354 above).

[2132]See Chapter Seven (note 1499 above).

[2133] See Chapter Six (notes 130 and 1306 above).

insofar as the nations' interest in mineral and petroleum resources are concerned.[2134] Considering that the constitution and legislation protect the public's interest, the public has a right to claim that the state fulfils its duties towards mineral and petroleum resources, not because of the state's sovereignty to determine the mineral regime in South Africa, but despite it.[2135]

### 10.2.10 The State-as-Custodian is Accountable to the Nation for Exercising its Fiduciary Duties.

The fifth question the thesis sought to address is to whom the state as custodian is responsible for exercising fiduciary duties. The MPRDA requires that every action taken in terms thereof, the public's interest as owner, be advanced.[2136] The individual's interest is required to give way for the public interest. The public interest's dominance over the individual interest is required to protect future generational interests rather than individual interests.[2137] The interests of the individual who are applicants for rights and permissions in accordance with the MPRDA are, therefore, to give way to the collective interest of the public, who, as the nation, is the owner of mineral resources.

The public interest with regard to mineral and petroleum resources refers to the nation's interest as owner. Therefore, the state as custodian is accountable to the nation as a whole and thereby acts in the public interest and not only to the benefit of individual interests.[2138] However, when acting in the broader public's interest, the interests of all affected parties have to be considered, including that of an applicant, the recipient community, landholder, and the nation as owner of the mineral and petroleum resources.[2139]

In exercising its duties towards the nation as the owner of mineral and petroleum resources, the state is mandated to manage these resources on the nation's behalf and to its benefit as beneficiary of the fiduciary relationship.[2140] Holding the state accountable to a fiduciary duty

[2134] See Chapter Five (note 1085 above).
[2135] See Chapter Seven (note 1545 above).
[2136] See Chapter Nine (note 1836 above).
[2137] See Chapter Seven (note 1500 above).
[2138] See Chapter Eight (note 1763 above).
[2139] See Chapter Nine (note 1768 above).
[2140] See Chapter Two (note 314 above).

serves the public interest by protecting the previously disadvantaged and vulnerable groups by advancing their protection.[2141] There can be no objection to holding the state accountable to the stricter requirements required by the fiduciary duty.[2142]

Although the MPRDA does not refer explicitly to the creation of a trust, it can be accepted that the legislature intended to establish a trust relationship within the wide sense.[2143] In this instance, the state is legally bound to act in the interests of the beneficiaries of the mineral and petroleum resources as state custodian.[2144]

### 10.2.11 The State-as-Custodian must Fulfil its Duties and Responsibilities in Accordance with the Requirements Set by the Constitution

The final question asked is what standards the state must fulfill its duties and responsibilities as a custodian. The MPRDA provides that the Minister responsible for mineral resources regulation acts on behalf of the state in fulfilling its duties and responsibilities provided for in the MPRDA.[2145] By virtue of the Minister vested with the responsibility to act as custodian, the state acts on behalf of the nation.[2146]

The duties and responsibilities contained in the MPRDA are to be executed in accordance with the MPRDA and the laws and policies in pursuit of good governance by the state.[2147] Any decision taken by, or failure to take a decision, by a state organ when exercising a power in terms of the Constitution, is subject to the standards required by the Constitution.[2148]

The Constitution protects against the misuse of power, preserves a balance between fairness, and maintains the public interest. When the custodial state performs a public power or a public function in fulfilling its duties and responsibilities, it requires compliance with the

[2141] See Chapter One (note 63 above).

[2142] See Chapter Two (note 308 above).

[2143] See Chapter Seven (note 1419 above).

[2144] See Chapter Seven (note 1426 above).

[2145] See Chapter Seven (note 1443 above).

[2146] See Chapter Seven (note 1445 above).

[2147] See Chapter Eight (note 1725 above).

[2148] Section 195 of the Constitution of the Republic of South Africa, 1996; Chapter Seven (note 1472 above).

Constitution.[2149] The state is also empowered to implement policies or programmes, and its powers are limited by requiring that all administrative action meet the minimum requirement of lawfulness, reasonableness, and fairness.[2150]

Failure by an administrative official to decide within a reasonable time and not in accordance with the principles of lawfulness, reasonableness and procedural fairness may be taken on judicial review by an aggrieved party. Administrative justice is therefore expressly made applicable to all administrative decisions taken in accordance with the MPRDA.[2151] Civil and criminal remedies may also be instituted against the state when the state fails to comply with its duties.

South Africa continues to suffer from the heritage of apartheid. Despite policy reform and service delivery initiatives, South Africa is regarded as one of the world's most unequal societies, with significant disparities between rich and poor.[2152] The state, as custodian, bears the responsibility to ensure that measures are put in place to address the legacy of apartheid.

## 10.3 Conclusion

State custodianship can be described as the state having a fiduciary duty towards the nation in exercising its role as the custodian of mineral and petroleum resources. The state does so for the benefit of the nation as the owner of mineral and petroleum resources. Limitations to the exercise by the state of its legislative and fiduciary duties require that the state, as custodian, act with the required duty of care in protecting and promoting the interest of present and future generations. Although the concept of state custodianship is to be developed by the courts, this thesis concludes that the state as custodian has a fiduciary duty towards its citizens and all stakeholders insofar as mineral resources are concerned. State custodianship, therefore, means that the state must act responsibly and be accountable to its citizens and stakeholders. In exercising its fiduciary duties, the state has to comply with relevant legislative requirements, particularly the objectives determined by the MPRDA, which include the duty to address socio-economic development and redress the wrongs of the past.

[2149]See Chapter Seven (note 1429 above).

[2150] See Chapter Three (note 577 above).

[2151] See Chapter Seven (note 1487 above).

[2152] *Government Information Quarterly* (2011) Volume 28 Issue 2 April 211 at 219; See Chapter Eight (note 1757 above).

The South African demand for natural resources is linked to the sustainable and beneficial use of its mineral and petroleum resources. The South African demand for the advancement of equitable access to natural resources has led to the notion of property law in South Africa being developed.[2153] The MPRDA regulates the mineral and petroleum resources within the context of the changing property law.[2154]

When making decisions in executing law and policy regarding mineral resources, the custodial state is required to act in an independent, fair, reasonable, trustworthy, and timeous manner. The state is required to adopt legislation and make uniform rules and decisions. As a result, the nature of the state custodian's duties and responsibilities requires it to facilitate and not participate in the mining industry. When acting in the public interest, the state's discretion may not be subverted by considerations that are incompatible with the principles that underlie state custodianship. Therefore, the state is obliged to give effect to the principles, legislation, duties, and responsibilities that determine the nature of state custodianship in limiting its powers, provided these considerations are in accordance with the Constitution.

[2153]See Chapter Four (note 898 above).

[2154] See Chapter Four (note 900 above).

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