CASES / VONNISSE

PAYING THE PIPER (*IN PRAESENTIA*)

Xstrata South Africa (Pty) v SFF Association 2012 (5) SA 60 (SCA)*

"… the long supple hand still holding the pan-pipes
only just fallen away from the parted lips …"

Kenneth Grahame *Wind In The Willows*

1 Introduction

This decision is an appeal from the decision of the South Gauteng High Court in *SFF Association v Xstrata* (2011 JDR 0407 (GSJ)). The court *a quo* decided incorrectly that the holder of an old-order mining right, which was converted into a (new) mining right in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (the "Act"), remains liable upon conversion for the payment of (contractual) royalties in terms of a mineral lease, which was concluded prior to enactment of the Act (see further Badenhorst "Paying the Piper (*in Absentia*) – *SFF Association v Xstrata* 2011 JDR 0407 (GSJ)" 2012 *Obiter* 436). The appeal was upheld by the Supreme Court of Appeal ("SCA") (2012 (5) SA 60 (SCA) par 27). The decision was rendered by Wallis JA with the other judges concurring with his judgment.

Prior to the Act mineral-right holders could grant a mining right to a miner against payment of royalties or other forms of consideration (see further Badenhorst and Mostert *Mineral and Petroleum Law of South Africa 2004* (Revision Service 8) Ch 5). At issue on appeal was whether the obligation to pay royalties in terms of a mineral lease "survives the introduction of the new regime in respect of mining rights brought about by the Act" (par 7). As indicated by the SCA, the Act fundamentally changed the legal basis upon which rights to minerals are acquired and exercised (par 1). Previously mineral rights were vested in the owner of land or the holder of mineral rights, which rights could be exercised upon acquisition of a statutory authorization to exploit the minerals (see par 1). In terms of the new regime, common-law mineral rights were destroyed (par 8; and see also par 10) and "all mineral resources vested in the state as the custodian of such resources on behalf of all South Africans", whereupon the state could confer the right to exploit such resources to applicants (s 2 and 3 of the Act; and par 1). Upon

* I wish to acknowledge the comments and suggestions of one of the referees.

granting a mining right in terms of the Act (statutory) royalties have become payable to the state since 1 March 2010 (s 25(2)(g)) of the Act and the Mineral and Petroleum Resources Royalty Act 28 of 2008).

In order to prevent disruption of the mining industry, provision was made in the Act for the continuation of old-order rights for different transitional periods ranging from one to five years and conversion of such rights during the periods of transition (par 3; and see also par 8). The transitional arrangements in Schedule II of the Act ("transitional arrangements") *inter alia* ensured security of tenure of prospecting rights and mining rights and enabled holders thereof to comply with the Act (see par 8). (For a discussion of the transitional provisions of the Act, see Badenhorst and Mostert *Mineral and Petroleum Law of South Africa 2004* Ch 25; Dale, Bekker, Bashall, Chaskalson, Dixon, Grobler and Loxton *South African Mineral and Petroleum Law* (2005) [SchII-1] *et seq*)). In particular, an old-order mining right remained valid for five years "subject to the terms and conditions under which it was granted" (item 7(1) of the transitional arrangements) and could be converted into a new mining right (item 7(2) of the transitional arrangements) if certain requirements were met. The applicant had to have: (a) met the requirements for lodgement of application for conversion; (b) conducted mining operations in respect of the mining right; (c) indicated that he would continue to conduct such mining operations upon conversion of the mining right; (d) had an approved environmental management programme; and (e) paid the prescribed conversion fee (item 7(3) of the transitional arrangements).

To recap, the *Xstrata* decision dealt with an old-order mining right that had been converted into a (new) mining right and the effect of these statutory changes on rights to royalties which accrued to a former holder of mineral rights by virtue of a mineral lease (par 1).

2 Facts

I have summarized the facts as set out in the decision of the court *a quo* with further references to the facts as stated in the SCA decision: During the era of possible international oil sanctions against the *apartheid* government, a wholly-owned company, Strategic Fuel Fund Association ("SFF"), was incorporated by the government to create storage depots for, procure and store crude oil. SFF constituted an organ of state and remains one in terms of the Constitution of the Republic of South Africa, 1996. SFF to this day continues to procure and store strategic oil on behalf of the state (endnote 2). SFF held coal rights in the farm Klippoortjie which included disused coal mines in which crude oil was stored in underground containers. Tavistock Collieries (Pty) Ltd ("Tavistock") held coal rights on Blesbokfontein, an adjacent farm, but could not mine for coal due to the serious risk of damage to the containers of SFF on Klippoortjie and the possibility of an environmental disaster happening. Tavistock is a wholly-owned subsidiary of Duiker Mining (Pty) Ltd, which is in turn a wholly-owned subsidiary of Xstrata, a major international mining group (endnote 3). Tavistock claimed R300 million from SFF in compensation for the sterilization of its coal reserves. In terms of a settlement between the parties (exchange agreement) SFF had to grant Tavistock the right to mine for coal (by virtue of

a mineral lease) on a portion of Klippoortjie in exchange for a cession by Tavistock to SFF of coal rights to portions of Blesbokfontein, and an undertaking by Tavistock not to mine on certain portions of Blesbokfontein (see further par 2 and 4–5). During 2001 a mineral lease was notarially executed between the parties in terms of which mining rights to coal to Klippoortjie were granted to Tavistock against payment of royalties to SFF (see further par 3 and 6). After enactment of the Act, Tavistock converted its old-order mining right in terms of the transitional arrangements into a (new) mining right.

SFF contended that the obligation of Tavistock to pay royalties remained in force despite "the changes wrought by the Act to the system of mineral rights in South Africa" (par 3). Tavistock conceded that it remained obliged to pay royalties during the period of transition but denied that its obligation continued after conversion into a new mining right (see par 3). At issue was thus whether royalties were payable by Tavistock since enactment of the Act and especially upon conversion of the old-order mining right.

3 Decision

According to the court the terms "royalty" had a well understood and relatively universal meaning in this context (par 18). The court referred to the following definition of a "royalty" in the English Oxford Dictionary:

> "A payment made to the landowner by the lessee of a mine in return for the privilege of working it. Also, a payment made, or a portion of the production given, by a producer of minerals, oil or natural gas to the owner of the site or the mineral rights over it" (par 18).

An Australian and American definition of a "royalty" was also referred to (par 18).

In line with the arguments made on behalf of SFF, the court focused on the mineral lease, as well as the exchange agreement of which the mineral lease formed a component.

3 1 In its focus on the impact of the Act on the old-order rights by virtue of the mineral lease as such, the court dealt with (a) the five-year period of transition (or the lesser period as might elapse until conversion), and (b) the period after conversion of the old-order right into a (new) mining right.

(a) The court decided that during the period of transition the provisions of the Act created "a new right, statutory in origin, embodying the rights previously enjoyed under the relevant old-order right, together with an entitlement to convert that right into a mining right under the Act" (par 10; as to the features of old-order rights, see further Badenhorst "The Make-up of Transitional Rights to Minerals: Something Old, Something New, Something Borrowed, Something Blue …?" 2011 4 *SALJ* 763). According to the court, an "old-order mining right" was acquired "on the same terms and conditions as it had hitherto enjoyed" (par 21). The court found that it was common cause between the parties that Tavistock as holder of an old-order mining right enjoyed the rights that it had under

the mineral lease and the old-order mining right was subject to the conditions contained in the mineral lease (par 10). These conditions included the conditions regarding the right to mine coal and the obligations to pay (contractual) royalties (see par 11).

(b) Regarding the position upon conversion an of old-order mining right (by virtue of a prior mineral lease) into a (new) mining right, the court dealt with the arguments made on behalf of SFF. SFF contended that under item 7(4) of the transitional arrangements the conditions, attaching to Tavistock's right to mine, as set out in the mineral lease, would remain in force after conversion unless these conditions were contrary to the provisions of the Constitution or the Act (see par 11). The court indicated some of the problems with the interpretation of item 7(4) (see par 13) and refrained from expressing a proper meaning of interpretation (par 14). The court proceeded on the assumption in favour of SFF that its approach was correct (par 14). The court, however, subsequently rejected SFF's further argument that continued payment of royalties was not expressly prohibited by the Act and would accordingly remain in force on conversion (par 11) and dealt with the qualification contained in item 7(4) of the transitional arrangements. According to Wallis JA, the qualification in item 7(4) required a different enquiry:

> "It requires each term or condition embodied in the old order mining right to be considered and assessed in the light of and against the provisions of the Constitution and the Act to determine whether it is contrary to either of them. Whether a term or condition is contrary to a provision or the provisions of the Act requires that the term or condition be considered, both as to its content and as to its effect, and weighed in the light of the entirely new system of mineral rights embodied in the Act. If it is inconsistent with that system then it is contrary to the provisions of the Act. The search is not for an express or implied prohibition of the provision in question. It is an assessment of its compatibility with the Act's provisions. If it is incompatible then it cannot form part of the terms and conditions attaching to a mining right obtained by way of conversion of an old order mining right" (par 16).

The court decided that:

> "after conversion of an old order mining right into a mining right, the preservation of a right to claim royalties under a contract, such as this mineral lease, concluded prior to the Act coming into force and maintained during the transitional period in the form of a condition attaching to an old order mining right, does not serve the purposes and would be contrary to the provisions of the Act" (par 26).

The court decided that upon such conversion the following happened:

(a) Tavistock's rights in terms of the mineral lease were terminated by the Act;

(b) in particular, Tavistock's right to mine the coal no longer had its origin in the mineral lease;

(c) Tavistock's right to mine the coal was derived solely from the (new) mining right;

(d) this right to mine had its source in the custodianship of the state that was exercised over minerals;

(e) the right to mine stemed from the state and no longer from SFF;

(f) continued payment of royalties to the SFF (the original mineral right holder) made little sense (see par 21).

The court provided the following reasoning for its decision:

(a) in exercising its custodianship of minerals the state secured an entitlement for itself to be paid (statutory) royalties upon the grant of mining rights (par 22);

(b) it would be inconsistent to and unfair for the Act to permit and compel payment of (contractual) royalties under previous mineral leases and to extract payment of (statutory) royalties from holders of mining rights in terms of the Act (par 22);

(c) double payment of royalties could imperil the financial viability of marginal mines and would be contrary to the obligation of the Minister of Mineral Resources in terms of section 3(3) of the Act to promote sustainable development of South Africa's mineral resources (par 22);

(d) Item 11 of the transitional arrangements of the Act expressly provided for the continued payment of royalties to certain bodies or persons, namely, indigenous communities or natural persons in very limited instances as an exception (see item 11(3))(see pars 23-24). In other words, non-payment of (contractual) royalties to former mineral-rights holders was the rule rather than the exception; and

(e) item 12 of the transitional arrangements of the MPRDA which provided that a person who could prove that his property had been expropriated in terms of the provisions of the Act could seek compensation from the state (par 25; see, however, the court's subsequent rejection of item 12 as a factor (par 25)). In other words, provision was made by the legislature to compensate former holders of mineral rights for the anticipated loss of royalties.

3 2 The court also disposed of the broader argument which was advanced on behalf of SFF namely, that the exchange agreement constituted an indivisible whole of which the mineral lease and Tavistock's obligation to pay royalties merely formed an integral part of the exchange agreement (see par 11). It was argued that the royalty provisions were an erroneous categorization. The mineral lease was rather perceived as a *quid pro quo* for the performance of Tavistock's obligations under the exchange agreement, and that the royalty component of the mineral lease was construed more akin to a purchase price for all the rights conferred upon Tavistock (par 19; it is preferable not to refer to payment of a purchase price in the case of an exchange agreement but, rather, payment of money because the first was an essential element of a contract of sale, whilst the second might be part of performance to be rendered in terms of an exchange agreement). The court decided that this amounted to a "strained and unnatural meaning to be given to the mineral lease" (par 19). The court found that the parties chose to embody the rights and duties in a notarial mineral lease in the conventional form and made use of conventional terminology (par 19).The court held that the parties should be taken at their word, namely, they "chose to say

royalties that would be payable and that was what the words they have used should be taken to mean" (par 20).

4 Commentary

One should be cautious of relying upon definitions from other mineral-law systems which differ in important and fundamental aspects from the South African system of the past and present. For instance, the royal prerogative to gold and silver and ownership of a mine is found in English law and vests the right to mine in the Crown (see Badenhorst "Ownership of Minerals in Situ in South Africa: Australian Darning to the Rescue" 2010 *SALJ* 646 662–664) definition. The royal prerogative only featured in South Africa if it had been introduced by legislation. For instance, in the Cape Colony section 4 of Sir John Cradock's Proclamation on Conversion of Loan Place to Quitrent Tenure, dated 6 August 1813, preserved the English law concept of the Crown prerogative by reserving "no other right but those on mines of Precious Stones, Gold or Silver" (Dale *An Historical and Comparative Study of the Concept of Acquisition of Mineral Rights* LLD thesis Pretoria University of South Africa (1979) 217; *Benade v Mininster van Mineraal- en Energiesake* 2002 JDR 0769 (NC) 8; and Sir John Cradock's Proclamation was, however, repealed by Act 44 of 1968). The Act defines "contractual royalties" and "statutory royalties" in section 1 and such definitions could have been used by the court.

The decision brought an end to the uncertainty about whether the duty of a holder of an old-order mining right to pay (contractual) royalties continued (a) during the five-year (or shorter) transitional period; and (b) upon conversion of an old-order mining right into a (new) mining right. The decision was authority for the proposition that the duty to pay royalties continued during the period of transition. The fact that this principle was accepted as common cause by the parties was left intact by the court. This in line with the view that transitional arrangements had as its object a seamless continuation of existing mining operations (See *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* [2011] 1 All SA 364 par 26). The court decided that the duty to pay such royalties was, however, terminated upon conversion of the old-order right into a (new) mining right. According to the court "preservation" of the right to claim royalties under a contract did not take place upon conversion of the old-order mining right into a (new) mining right. The word "extinguished" or "terminated' was not used by the court and it is submitted that termination of rights rather than non-preservation took place. It is further submitted that the duty to pay royalties was terminated upon termination of the old-order mining right which was the source of the duty to pay royalties. Termination of the old-order mining right was not restricted to the successful conversion of the old-order mining right (and registration of the new mining right in the mineral and petroleum titles-registration office (item 7(7) of the transitional arrangements; s 5(1)(d) of the Mining Titles Registration Act 16 of 1967), but also included failure to apply for such conversion (item 7(8)) or refusal of an application by the Minister. Mostert (*Mineral Law Principles and Policies in Perspective* (2012) 104) indicates that the last instance was not expressly provided for in the transitional arrangements and concludes that there is no statutory authority

for a conversion to be refused upon non-compliance with the requirements for conversion. However, in *Sishen Iron Ore Company (Pty) Ltd v Minister of Mineral Resources* (unreported decision) Case no 28980/10 (GNP) Zondo J recognized the last instance as a possible way of termination of an old-order mining right. The court first found that the Minister was bound to convert the old-order mining right into a (new) mining right if the holder thereof had met all the requirements for conversion that were prescribed by item 7(3) (see 1 above) (par 89). The court found that if one of these requirements for conversion was not met, the Minister could refuse to convert an old-order mining right into a (new) mining right (par 89). In accordance with my original view (Badenhorst "Transitional Arrangements in terms of the Mineral and Petroleum Resources Development Act 28 of 2002: Crossing a Narrow Bridge?" 2002 *Obiter* 250 275) it seems as if the third instance is possible despite not being expressly provided for in the transitional arrangements. In conclusion, conversion of an old-order mining right (and registration) is one of three possible ways of termination of an old-order mining right.

It is submitted that the court's decision that payment of royalties after conversion of the old-order mining right would be contrary to the provisions of the Act is correct. The grant of the right to mine by someone other than the state, payment of royalties to someone other than the state (unless expressly provided for) and the continuance of the common-law position would be inconsistent with the provisions of the Act (see further Badenhorst 2012 *Obiter* 444–445). The exceptions of continued payment of royalties to a certain type of persons, namely communities, for which royalties accrued prior to the commencement of the Act and persons who might suffer undue hardship if payment is discontinued or who used such monies for social upliftment, was sanctioned by item 11(1) of the transitional arrangements and is in line with the objectives of the Act (as stated in section 2(c), (d) and (f)) and with the Act's intention to redress past discrimination (see Mostert *Mineral law* 134). The court indicated that item 11(1) expressly dealt with the situation after the mining right had come to an end (par 23). The court reasoned that item 11 excluded contractual royalties (such as in the *Xstrata* decision) on the basis of the type of person and not the type of agreement (mineral lease) (par 23).

It is submitted that implementing the broader argument advanced by SFF of rather working with the exchange agreement rather than the mineral lease would have encountered further problems. Rendering of performance in terms of the exchange agreement (rather than the mineral lease) by paying money (in the form of royalties) after conversion of the old-order mining right would have been impossible due to enactment of the Act. In *Southern Era Resources Ltd v Farndell* (2010 (4) SA 200 (SCA) par 8) it was accepted as a general proposition, that a party to a contract was discharged from its obligation if impossibility of performance supervened on account of a change in the law of the land. It was decided in S*outhern Era* that registration of a cession of mineral rights was impossible because of the repeal by the Act of the registration provisions in the Deeds Registries Act 47 of 1937 (par 4). Rendering of further performance (mining and payment of royalties) in terms of a broader exchange agreement after conversion of the old-order mining right would also have been impossible due to being inconsistent with the

provisions of the Act (see further Badenhorst 2012 Obiter 440–441 and 444). It should be remembered that in the *Xstrata* decision, performance in terms of the exchange agreement (and mineral lease) had taken place prior to the Act except for the continuation of mining and payment of royalties after enactment of the Act.

The outcome of the decision of the SCA is that double royalties are not payable. During the period of transition (contractual) royalties were payable to SFF as original grantor of the mining right and holder of the old-order mining right. Upon conversion of the old-order mining right (statutory) royalties were (according to the court) only payable to the state as custodian of mineral resources. In terms of section 3(1) of the Act the mineral 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". These statements in section 3(1) were more recently held by Wallis JA to encapsulate "in non-technical language the notion that the right to mine vests in the state" (*Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 par 86 ("*Agri SA III*")). Since *the Xstrata* decision by the SCA section 3 was interpreted differently by the Constitutional court in *Agri South Africa v Minister for Minerals and Energy* [2013] (ZACC) 9 ("*Agri SA IV*"). Chief Justice Mogoeng did not favour the view that prior to the Act the right to mine was vested in the state by virtue of a public-law power (see par 35). Mogoeng CJ merely accepted that the state was then, the custodian of the mineral and petroleum resources on behalf of all the people of South Africa, which was their common heritage (par 25). In the minority judgment of Justice Froneman it was accepted that the state then had the power to decide whether to exploit minerals they owned and to whom they could give their exploitation rights by virtue of its custodianship of mineral resources under the MPRDA (par 8l). It seemed as if the minority of the Constitutional court might adhere to the view that ownership of unsevered minerals vested in the state whilst, Chief Justice Mogoeng merely accepted the construction of custodianship of such unsevered minerals.

According to the interpretation of the SCA in *Agri SA III*, the right to mine must have been reserved by the state for itself. *Mostert* (*Mineral Law* 114), however, argues that neither ownership of minerals nor the right to prospect or mine has been reserved by the state (see also Dale *et al South African Mineral and Petroleum Law* MPRDA-10), but rather, the administrative ability to grant such rights to others. Her view is in line with the view that the MPRDA has given powers and functions in the public-law sense and not private-law rights. Whilst, it is not disputed that the state has the administrative ability to grant rights to minerals in terms of the Act, these rights as such must have a source (custodianship/ownership of minerals or the right to mine) and have to be vested in some holder (whether by virtue of private law or public law). A right without a holder ("in the air") simply would not do. In terms of the *Agri SA III* pronouncement, the state is not only the grantor of the new mining right but (prior to such grant) also the holder of the right to mine. In short, since conversion of an old-order mining right royalties are only payable to the state as the true piper who calls the tune. The outcome of the decision of the court *a quo* that royalties were payable to SFF and the state was clearly wrong. What made the said outcome even worse was that in so far as SFF is a state organ, double royalties would in

effect have been payable to the state. The SCA did not expressly deal with or addressed the erroneous judgment of the court *a quo*.

The converse of a duty is a right. It is submitted that upon conversion of the old-order mining right into a (new) mining right (and registration thereof) the right of SFF to claim royalties was extinguished or terminated. Tavistock argued that upon such loss of royalties, SFF would not have been prejudiced because it would be able to recover compensation from the state for its loss in terms of item 12 of the transitional arrangements of the Act (see par 25). Although Wallis JA initially relied on item 12 as part of his reasoning he decided not to attach any weight to item 12 (par 25). Justification for his total disregard of an important provision such as item 12 is sought in his view that "it may be debatable whether the Act does in fact expropriate the rights that were enjoyed under the old minerals regime" (par 24).

The *Xstrata* decision was of course the precursor to Wallis JA's subsequent radical decision in *Agri SA III* that all mineral rights that existed in South Africa prior to the Act were not expropriated under the Act because the right to mine minerals remained, as it always had been, vested in the state (*Agri SA III* par 99 85). Wallis JA found that holders of unused old-order rights were not deprived of their rights because they not only retained a preference to apply for a prospecting right or a mining right for a year, but "would acquire more extensive rights if they sought and obtained a prospecting right or mining right" (par 97). Wallis JA further found, albeit *obiter*, (see par 90) that holders of old-order prospecting rights or old-order mining rights who applied for conversion of their rights were not deprived of the right to prospect or mine because of the continuation of their prospecting or mining activities and the similar content of present rights and previous rights (par 98–90). The court did not exclude the possibility, based on the facts of a particular case, that the Act may have expropriated prior existing rights (par 99).

It is submitted that the *Agri SA III* decision was incorrect in so far as expropriations of mineral rights, prospecting rights and mining rights did take place upon commencement of the Act (see further Badenhorst "Expropriation of 'Unused Old Order Rights' by the MPRDA: You had nothing! *Minister of Minerals and Energy v Agri SA (CALS amicus curiae)*" 2013 *THRHR* 472; "Large-scale Expropriation of Mineral Rights in South Africa: The *Agri South Africa* fiasco" 2012 31 *ARELJ* 205; Van der Vyver "Nationalisation of Mineral Rights in South Africa" 2012 *De Jure* 125 134–138). The SCA should at least have decided that in the case of holders of unused old-order rights who did not (or could not as in the *Agri SA* case) have applied for new prospecting or mining rights during the one-year transitional period, expropriation took place because their allocated right to mine ("in the sense of the right (*sic*) to prospect and mine for minerals" (par 99) (and not the state's public power to control mining) was acquired by the state. It is conceded that holders of old-order prospecting rights and old-order mining rights acquired more or less the same entitlements on conversion. It is submitted that despite the *Agri SA III* decision, it is still arguable that in the case of unsuccessful applications for or conversions to (new) (prospecting rights or) mining rights or failure to apply, expropriation

took place because the state acquired the allocated "right to mine" from such former holders upon enactment of the Act. It was always argued that the loss of the right to claim royalties by a former holder of mineral rights constituted an expropriation of property for purposes of a claim against the state in terms of item 12 of the transitional arrangements (Badenhorst 2002 *Obiter* 250 276–277; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa 2004* 25-52–25-53). It is further submitted that despite the *Agri SA III* decision, upon successful conversions of old-order mining rights, the loss of royalty payments does constitute an expropriation of property by enactment of the Act because of the extinguishment of the personal right ("vorderingsreg") of former mineral-right holders to claim royalties in terms of prior existing mineral leases (The same applies to the loss of the right to claim prospecting fees in terms of former prospecting contracts). Personal rights are of course capable of being the object of expropriation (Gildenhuys *Onteieningsreg* (2001) 63). At least, it should be argued that this instance is one of the possible expropriations Wallis JA may have had in mind. The majority of the Constitutional Court, however, decided In *Agri SA IV* that the state did not acquire, and, therefore, did not expropriate, the ownership of mineral resources or the mineral rights of holders of unused old-order rights (par 68 and 71). This decision of the Constitutional Court in *Agri SA IV* was rendered after the *Xstrata* decision by the SCA, and its application may be restricted to "unused old-order rights" as *Agri SA IV* did not deal with a conversion of old-order mining rights into new mining rights (which was the case in the *Xstrata* decision of the SCA). The possibility of other expropriations by the MPRDA was also left open by Mogoeng CJ in *Agri SA IV* (par 75).

In *Agri SA v Minister of Minerals and Energy* ([2011] 3 All SA 296 (GNP) par 82 ("*Agri SA II*") the court *a quo* decided that expropriation of unused old-order rights did take place because, the state acquired the substance of the property rights of the erstwhile holder of common-law mineral rights. Du Plessis J reasoned that from a reading of section 3 and 5 Act, the Minister was, upon commencement of the Act, "vested with the power to confer rights, the contents of which were substantially the same as, and in some respects, identical to, the contents of common-law mineral rights" (par 82). The decision of the court *a quo* is preferred as being correct (see further Badenhorst and Olivier "Expropriation of 'Unused Old Order Rights' by the MPRDA: You have Lost it! *Agri SA v Minister of Minerals and Energy*" 2012 *THRHR* 329). By analogy to the reasoning of Du Plessis J in *Agri SA II*, the state acquired the pan-pipes of the former piper. It is submitted that the definitions of royalties provided by the SCA also support the idea that a royalty is payable to someone in exchange for the right or privilege to mine on land. In reality, that someone either holds the mineral rights, right to mine, mining rights or owns the minerals *in situ*. Prior to the MPRDA (contractual) royalties were payable to holders of mineral rights. The state now holds the right to mine, or alternatively, owns the mineral resources or holds the custody thereof on behalf of the people of South Africa. That is the rationale for payment of royalties to the state. It is conceded that royalties can now in terms of the MPRDA, unlike contractual royalties before, be construed as a form of tax. It is further conceded that the definition of royalties cited by the SCA was made within the context of a mineral lease.

5 Conclusion

The SCA resolved the issue whether payment of royalties by virtue of mineral leases executed prior to enactment of the Act should continue to take place upon enactment of the Act. During the transitional period holders of old-order mining rights remained obliged to pay such (contractual) royalties. The source of the duty was the underlying old-order mining right that was recognized by the Act during the period of transition. However, upon conversion of an old-order mining right to a (new) mining right (contractual) royalties are no longer payable to the former holder of common-law mineral rights. Such continued payment would be contrary to the provisions of the Act. Upon conversion (statutory) royalties are payable to the state. The source of such duty is the custodianship of mineral resources or, rather, the right to mine which is vested in the state. The outcome of the decision avoids the payment of double royalties to the former holder of mineral rights and the state, and protects the viability of marginal mines and jobs.

The decision can be explained as follows: Since enactment of the Act, the particular right to mine is retained by the holder of an old-order mining right. Upon conversion of the old-order mining right it is, rather, the right to mine, as acquired by the state upon termination of the old-order mining right, which is granted by the state to an applicant. The duty to pay royalties, or its converse the right to claim royalties was extinguished when the old-order mining right was terminated upon: (a) conversion and registration of the new mining right; (b) failure to apply for such conversion; or (c) refusal by the Minister of an application for conversion. The loss of such right should be recognized as an expropriation of property for purposes of a claim of compensation against the state in terms of item 12 of the transitional arrangements of the Act. In the light of the *Agri SA IV* decision this explanation and recognition seem unacceptable and unlikely. Such a claim should, however, be recognized. After all, the state is Grahame's Piper at the Gates of Dawn who also gets paid for playing a recycled old song. As in the story, the Piper's music causes memories (of negotiated royalties) to fade away softly.

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