

PAYING THE PIPER (*IN ABSENTIA*)

SFF Association v Xstrata 2011 JDR 0407 (GSJ)*

1 Introduction

This decision focused on the impact of the Mineral and Petroleum Resources Development Act (28 of 2002, hereinafter “MPRDA”) on an old-order mining right (based upon a mineral lease) which had been converted into a mining right in terms of the transitional arrangements of Schedule II of the MPRDA. In particular, the court held that consideration in the form of a (contractual) royalty, as provided for in the mineral lease, remains payable upon conversion of an old-order mining right by its former holder (miner) to the grantor of the common-law mining right. The outcome of the decision, namely, continued liability for contractual royalties, has far-reaching consequences for such former holders of old-order mining rights. Continued liability would result in double payment of royalties by miners. This is because under the new dispensation, statutory royalties can be imposed by the state (s 3(1)(b) of the MPRDA) and were imposed and became payable upon commencement of the Mineral and Petroleum Resources Royalty Act (28 of 2008) on 1 March 2010. From the said date, in terms of this decision, double royalties would be payable by miners. If correct, it can be taken one step further. Owing to continued receipt of contractual royalties, former holders of common-law mineral rights would not have suffered an expropriation of property by virtue of the provisions of the MPRDA for purposes of item 12(1) of Schedule II of the MPRDA. Such expropriation would have taken place if the contractual duties to pay royalties had indeed been terminated upon cessation of old-order mining rights (as to such a possible claim, see further, Badenhorst and Mostert *Mineral and Petroleum Law of South Africa 2004* (Revision service 7) 25–53). These consequences will be explained in more detail in this discussion as well as the correctness or not of the decision.

I have written about the acquisition, nature, content, transfer and loss of old order rights before (see Badenhorst “The Make-up of Transitional Rights to Minerals: Something Old, Something New, Something Borrowed, Something Blue ...? 2011 4 *SALJ* 763–784) to which the reader is referred. This decision sheds new light on this topic.

2 Facts

The facts of the case had an interesting historical background. As explained by the court, Apartheid South Africa felt the need to protect itself from possible international sanctions which affected its ability to purchase crude oil on the

* I wish to acknowledge the comments and suggestions of Ernie van der Vyver. I, however, remain responsible for the correctness of the end product.

international market by purchasing excess fuel and storing it (1). During this time, the Strategic Fund Association (hereinafter "SFF") was incorporated to *inter alia* create storage depots, procure and store necessary crude oil (1). SFF was wholly owned by the state and constituted an organ of state in terms of the Constitution of the RSA, 1996 (2). SFF held the coal rights in the so-called Kippoortjie South Coalfield which included disused coal mines. SFF stored crude oil in underground containers in the disused coal mines (2).

On an adjacent farm, Blesbokfontein, Tavistock held coal rights. Tavistock could not mine its coal due to objections by SFF about the serious risk of damage to its containers and the possibility of an environmental disaster should mining take place (2–3). Tavistock claimed R300 million from SFF in compensation for the sterilization of its coal reserves (3).

On 4 April 2001 the parties reached a settlement (Exchange Agreement) in terms of which SFF had to grant Tavistock the right to mine for coal (by virtue of a mineral lease) on the Number 4 and Number 5 seams on a portion of Klippoortjie in exchange for a cession by Tavistock to SFF of coal rights to portions of Blesbokfontein (3) and an undertaking given by Tavistock not to mine on certain portions of Blesbokfontein (4). The execution of the mineral lease had to take place simultaneously with the execution of the cession of the mineral rights (5). In compliance with the Exchange Agreement, a mineral lease was executed between the parties on 12 June 2001 in terms of which mining rights to coal were granted by SFF to Tavistock, namely, to mine the No. 4 and No. 5 seams on a portion of Klippoortjie (see 6–7; it is assumed that the cession also took place simultaneously). No mining within a radius of 200 metres from the oil containers was allowed (8). Tavistock had to commence with mining within 3 months of execution of the Mineral Lease (8) and paid consideration in the form of royalties, as agreed upon in clauses 8.2 and 8.3 of the Mineral Lease (see 8–9). The complex settlement between the parties is summarized as follows by Vally AJ:

"In essence, the parties agreed to settle the dispute by SFF exchanging other mining rights it had for the mining rights of Tavistock in certain portions of the Blesbokfontein farm, in particular for those portions that were allegedly sterilised by the presence of oil containers in Klippoortjie. However, the quantity of coal available to be mined in the No. 4 and No. 5 seams ... far exceeded the amount of sterilised coal ... To equalise the exchange, Tavistock agreed to pay a consideration for the excess coal in the No. 4 and No. 5 seams" (10–11).

Upon enactment of the MPRDA on 1 May 2004, the legal landscape between the parties was transformed, as follows (see 11):

- (a) Tavistock became the holder of an old-order mining right with regard to the coal reserves in Number 4 and Number 5 seams (18; and Tavistock was, as required by the definition of an "old-order mining right" in item 1 of Schedule II of the MPRDA, conducting mining operations by virtue of a mineral lease and held a mining authorization in terms of section 9 of the Minerals Act 50 of 1991).
- (b) Tavistock converted its old-order mining right in terms of the transitional arrangements of Schedule II of the MPRDA into a (new) mining right (18).

-
- (c) Tavistock became liable for payment of royalties to the state for coal extracted at the Number 4 and Number 5 coal seams (18; and see 1 above).
- (d) Compensation may be claimed by someone who can prove that expropriation of his property has taken place by virtue of the provisions of the MPRDA (item 12 of Schedule II). For instance, loss of contractual royalties by a former holder of common-law mineral rights due to termination of the miner's duty to pay such royalties upon cessation of an old-order mining right may constitute an expropriation of property by virtue of the provisions of the MPRDA. In the absence of such loss, such expropriation for purposes of item 12 does not take place.

Tavistock intended to continue mining the coal in the Number 4 and Number 5 coal seams but refused to make further payments of royalties in terms of clauses 8.2 and 8.3 of the Mineral Lease. Tavistock claimed that upon enactment of the MPRDA it was absolved from its obligation to pay to SFF such consideration (19).

In proceedings before the South Gauteng High Court, SFF claimed that Tavistock remained liable, despite the commencement of the MPRDA and conversion of the old-order mining right to pay (contractual) royalties (19). Alternatively, it claimed that due to the impossibility of performance of the Exchange Agreement and Mineral Lease it was entitled to terminate the said agreements (19). Alternatively, SFF sought a declaration that it was entitled to claim compensation for expropriation in terms of item 12 of Schedule II of the MPRDA (19).

Tavistock in turn claimed that upon commencement of the MPRDA, SFF was deprived of its common-law mineral rights in regard to the Number 4 and Number 5 seams and its common-law rights to royalties (by virtue of expropriation) (see 20). In short, it was argued that because SFF no longer granted the right to mine coal, "it cannot receive any consideration from Tavistock should Tavistock mine this coal" (20). Tavistock's right to mine coal was said to have been acquired by conversion in terms of the MPRDA (20).

3 Decision

The court held that the enactment of the MPRDA had no impact on the respective rights and duties of the parties *vis-à-vis* each other (22 and 27). The terms and conditions of the Exchange Agreement and Mineral Lease, including the duty to pay consideration for coal mined from the Number 4 and Number 5 seams, continued to subsist after enactment of the MPRDA (27). As will be shown below, this decision is correct in so far as to the liability for royalties during the period of transition but not after the cessation of the old order right. The reasoning of the court will now be further examined.

3.1 *Effect of MPRDA in general*

After stating various material provisions of the MPRDA (11–16), the cumulative effects of these provisions are clearly summarized by the court, to which the reader is referred to in paragraph 18 (see 16–17).

3.2 *Effect of MPRDA on Exchange Agreement and Mineral Lease*

According to the court the Exchange Agreement and the Mineral Lease constituted a single, indivisible transaction (11, 21). (It is presumed that would also include the cession of coal rights.) As to its nature, the transaction was regarded as a “transaction of barter combined with some monetary payments, which only accrued if Tavistock took advantage of the right to mine the excess coal at the No. 4 and No. 5 seams” (11). The court took the view that the Exchange Agreement and the Mineral Lease could only be understood in the sense that the “entire transaction was a *quid pro quo* involving the exchange of each of their respective rights to mine the coal in the various reserves” (21).

The court found that in terms of clause 5 of the Exchange Agreement all risks to the rights in coal (including the risk of legislative intervention) passed to Tavistock on 4 April 2001 (*ie*, the date of execution of the Exchange Agreement) (22). The court held that upon such interpretation the MPRDA had no impact on the respective rights and duties of the parties to the Exchange Agreement *vis-à-vis* each other (22). Such interpretation was held to be reasonable and consistent with the objectives of the MPRDA (22), as is required by section 4(1) of the MPRDA.

The court accepted the proposition that “as soon as Tavistock converted the old-order mining right into the new right in terms of the MPRDA, the old-order right ceased to exist” (22). Vally AJ explained earlier in the judgment that this “makes sense, as they have been converted” (17). The same applied to unconverted rights as the holders were afforded an opportunity to convert them (17). According to the court, the only relevance to be attached to an old-order right was that it is an element of the transitional provisions of the MPRDA (17).

The court, however, rejected the contention that “as Tavistock was now mining in terms of the new right acquired in terms of the MPRDA, and as the old common-law right has been ‘*destroyed*’, Tavistock’s obligation to pay SFF the consideration has been extinguished” (22). At issue before the court was whether the “destruction” of the old-order mining right meant that benefits derived therefrom were also destroyed. This was answered by interpretation and reliance upon the decision of the SCA in *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd* ([2010] ZASCA 109).

Vally AJ held that “in its totality the judgement in *Holcim* did not conclude that as the common-law rights were destroyed so were all benefits derived therefrom” (23). Vally AJ reasoned that those rights were “*destroyed*” but they were also “*replaced by similar rights*” (23). The replacement by similar rights ensured that the benefits of those rights were retained (23). According to the court, those benefits included the “benefits derived from the mining licences obtained in terms of the common-law rights” (23–24). All that the court in *Holcim* said, according to Vally AJ, was that the common-law right is not preserved under the new statutory dispensation (24). Vally AJ concluded:

“Hence, the Supreme Court of Appeal did not hold that the old common law right was so destroyed by the enactment of the MPRDA that it had absolutely

no role to play in the acquisition of the 'new' right from the Minister of Mineral Resources, and that its destruction meant that holders of that right lost whatever benefits they had managed to secure prior to the coming into effect of the MPRDA, which benefits were secured by virtue of exercising that right. One of the benefits those holders would have been able to secure, by virtue of them being holders, was to acquire a mining licence or authorisation and to commence mining operations in terms thereof" (25).

The problem with the quotes from the *Holcim* decision cited by the court is that *prima facie*, on the one hand, the SCA refers to the "destruction of common law rights" upon enactment of the MPRDA (par 24), non-preservation of common-law rights by the new system (par 37), the replacement of common-law rights by similar rights upon enactment of the MPRDA (par 20) and, on the other hand, the survival of common-law rights "only as a right underlying a mining authorisation" upon enactment of the MPRDA (37). It will be shown in my discussion below that it depends on whether the statements were made in respect of the common-law notion of mineral rights (or mining rights) against the background of the new order, or common-law mineral rights (or mining rights) as a component of old-order mining rights during the interim period of transition.

The court found that SFF's right to mine the Number 4 and Number 5 seams was "sold" to Tavistock and it formed the basis of the old-order right vested in Tavistock which was converted into a new right (25). Earlier in the judgment, the court accepted that common-law mineral rights together with the mining authorization are encapsulated in the new right, which is acquired in terms of the MPRDA (18). In terms of the Exchange Agreement and Mineral Lease, such right to mine was exchanged for payment of consideration, which is now payable (25). The court further found that "the destruction of the old common-law right does not result in the destruction of the obligation of Tavistock to pay SFF the consideration in terms of the Mineral Lease" (26).

3.3 *Impossibility of performance caused by the MPRDA*

With reference to the alternative claim by SFF of impossibility of performance of the Exchange Agreement and Mineral Lease, Vally AJ confirmed his conclusion that "the enactment of the MPRDA had no impact on the respective rights and obligations of the parties *vis-à-vis* each other" (27).

In reaching the above conclusion, Vally AJ dealt with Tavistock's contention that it does not make sense to invoke impossibility of performance because the Exchange Agreement and Mineral Lease had long been given effect to and a new right had been acquired upon conversion, which right could not be taken away (26). Accepting this as correct, the court rejected Tavistock's next contention that as the common-law right had been destroyed the obligation to pay consideration had also fallen away (26). The court reasoned that if SFF's common-law right had been destroyed then it could not have been given to Tavistock and Tavistock would not have had an "old-order right" to convert into the new right in terms of the MPRDA (26–27). Vally AJ opined that his above-mentioned conclusion was also supported by Item 7(4) of Schedule II

of the MPRDA which provides that “(n)o terms and conditions applicable to the old order mining right remain in force if they are contrary to any provision of the Constitution or this Act” (the court’s italics) (27). The court found that the provisions of the Exchange Agreement and the Mineral Lease are not in conflict with the provisions of the Constitution or the MPRDA (27) and continue to “subsist after the enactment of the MPRDA” (27). One of these provisions is that Tavistock will pay a consideration for certain of the coal it mines from Number 4 and Number 5 seams (27). The court found that the enactment of the MPRDA did not extinguish this duty of Tavistock to pay consideration for coal mined (28). It will be argued below in my discussion that enactment of the MPRDA did not destroy the duty to pay consideration for the coal during the interim period, but that the subsequent cessation of the old-order mining right did indeed destroy such duty and that the decision of the court is accordingly incorrect.

3 4 Compensation for expropriation

SFF’s alternative claim for compensation in terms of item 12 of Schedule II of the MPRDA was probably not dealt with in so far as it was held that Tavistock remained liable to pay contractual royalties to SFF. In other words, SFF’s “property” was not expropriated by the MPRDA by terminating the duty to pay contractual royalties upon conversion of the old-order mining right.

4 Comment

It is submitted that even though the different agreements can be perceived as one transaction, one must be mindful of the consequences of the different agreements. The Exchange Agreement was a barter agreement. This was accepted by the court (see 11) even though it later treated it as a “sale” of the right to mine (see 25). It is submitted that SFF exchanged **mining rights** to coal on Klippoortjie (by virtue of the grant of a *mineral lease*) for Tavistock’s (alleged sterilized) **coal rights** (mineral rights) on Blesbokfontein (by virtue of a *cession* of coal rights) and Tavistock’s undertaking not to mine on parts of Blesbokfontein. The parties agreed in clause 2.4 of the Exchange Agreement that the exchange was of equal value (5). Performance in terms of the barter agreement was rendered upon execution of the notarial mineral lease of mining rights and the simultaneous notarial cession of coal rights. Upon execution and registration of the mineral lease, Tavistock acquired a mining right (which is real in nature). (Similarly, upon registration of the cession of coal rights, SFF acquired mineral rights to coal.) Tavistock, however, acquired the mining right subject to the duty to pay consideration in the form of royalties upon mining of the Number 4 and Number 5 seams of coal.

As indicated by the court, upon enactment of the MPRDA, it did not have an impact on the Exchange Agreement in so far as performance was already rendered by the parties thereto. If performance (that is execution and/or registration of the mineral lease or cession of coal rights) had not yet taken place, impossibility of performance due to the enactment of the MPRDA would have been relevant for purposes of the Exchange Agreement. For instance, the provisions dealing with notarial execution of a mineral lease (s 3(1)

General Law Amendment Act 50 of 1956) and registrability of a mineral lease or a cession of mineral rights in the Deeds Office (s 3(1)(m) of the Deeds Registries Act 47 of 1937) had been repealed by section 110 of the MPRDA and such notarial execution and registrations were no longer possible. This can be illustrated by the facts of *Southern Era Resources Ltd v Farndell* (2010 (4) SA 200 (SCA)), a decision of the Supreme Court of Appeal which the court could and should have considered. The decision involved a sale of mineral rights, of which the cession was not registered in the Deeds Office before enactment of the MPRDA. The court confirmed that due to the repeal of section 3(1)(m) of the Deeds Registries Act by the MPRDA, registration of cessions of mineral rights could no longer be effected in the Deeds Office (par 4). The parties did not dispute that the repeal of section 3(1)(m) made performance by the seller impossible (par 8). The court accepted as a general proposition, that a party to a contract is discharged from his obligation if impossibility of performance supervenes on account of a change in the law of the land (par 8). Cession of mineral rights was, therefore, no longer possible. The court found on the facts that the sale of mineral rights was *perfecta* when registration of the cession of the mineral rights into the purchaser's name became impossible. It found that the benefit and risk attaching to the mineral rights sold passed to the purchaser, upon the sale becoming *perfecta*, in which case the seller was entitled to payment of the purchase price (par 8 and 18; and see Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 3–22). Perhaps the decision in SFF Association can be explained upon the above basis. As found by the court, in accordance with the agreement, all risks to the rights in coal and the risk of legislative intervention passed to Tavistock on 4 April 2001 (22). Tavistock was still entitled to the consideration in terms of the barter agreement, that is, the payment of royalties despite the fact that it was no longer possible for SFF to grant the right to mine. As it will be argued that the decision of the court is incorrect, it is submitted that the impact of the decision can be limited by arguing that it should be restricted in its application because it dealt with consideration in an exchange transaction which was perceived as a single transaction. This would, however, totally ignore the personal rights and real rights that were created in this “single transaction” and the impact of the MPRDA on those rights.

Upon enactment of the MPRDA, its provisions had an impact on the respective common-law mineral rights and mining rights (as old-order rights). In the present case it is submitted that, for purposes of the MPRDA, a clear distinction should be drawn between its impact on: (a) the common-law notion (or vehicle) of a mineral right or mining right; and (b) prior existing common-law mineral rights or mining rights during the interim period of transition.

Upon enactment of the MPRDA, the notion of a common-law mineral right or mining right disappeared altogether as a legal concept against the background of the new order (Badenhorst “Mineral Rights: ‘Year Zero’ cometh?” 2001 *Obiter* 119; “Exodus of ‘Mineral Rights’ from South African Mineral Law” 2004 22 *Journal of Energy and Natural Resources Law* 218; and see further Badenhorst “Mineral Rights are Dead! Long Live Mineral Rights! *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA)” 2008 *Journal of South African Law* 158). These notions only survived as components of old-order rights for purposes of the transitional arrangements.

The above-mentioned statements of the Supreme Court of Appeal in *Holcim* (par 3 2 above) as to destruction, non-preservation and replacement of rights refer to the notion of common-law rights against the background of the new order. As to its impact on pre-existing common-law rights, the Supreme Court of Appeal held that the transitional arrangements prevented disruption and stultification of the mining industry by “continuing the existing rights with respect to such operations in the form of transitional rights called ‘old-order rights’ ...” (par 26). The court reasoned that, if it had not been for the transitional arrangements, the MPRDA would have extinguished all pre-existing mineral rights and rendered existing mining operations unlawful (par 25). The Supreme Court of Appeal therefore, accepted that upon enactment of the MPRDA the pre-existing rights continued to exist (or survived) in the form of old-order rights (see further Badenhorst 2011 4 SALJ 772).

Upon enactment of the MPRDA the prior existing common-law mineral rights or mining rights continued in force as old-order rights subject to the transitional arrangements of Schedule II of the MPRDA. In the case of an old-order mining right, the composite mining right is made up of what was previously held separately by means of the mining authorization and the common-law mining right (*Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd supra* par 21). In this regard, Vally AJ suggested that the common-law right had not been destroyed because otherwise an old-order right capable of conversion into a new right would have been absent (26–27).

In the present case, a further distinction should be made between the continuance of old-order mining rights during the interim period and the cessation of old-order mining rights. The interim period for an old mining right was a period not exceeding five years or the period for which it was granted, whichever period is the shortest (item 7(1) of Schedule II of the MPRDA; and *Kowie Quarry CC v Ndlambe Municipality* 2008 JDR 1380 (E) par 27 31). With reference to the content of common-law mineral rights, the entitlements to enter land, prospect and mine for minerals continued to exist during the interim period, as well as the entitlements to dispose of the land for purposes of prospecting and mining and to prohibit interference with prospecting or mining by virtue of the old-order mining right (*Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 373H). The entitlements of prospecting and mining could still be exercised because of the existence and continuation of a valid mining authorization as a component of an old-order mining right. Continuance of mining meant that consideration of royalties remained payable by the holder of the old-order mining right. The entitlements of alienation and encumbrance have, however, been terminated upon commencement of the MPRDA in so far as provision is not made for the alienation, transfer or encumbrance of the “old-order mining right” (nor its underlying common-law rights) in the MPRDA. A duty is imposed upon the holder of an “old-order mining right” to apply for conversion to a mining right (item 7(2)) (see further Badenhorst 2011 4 SALJ 777). It should be noted that conversion of an old-order mining right (and registration of a mining right) is one of the three forms of cessation of an old-order mining right.

Cessation of an old-order mining right took place upon conversion and registration of the new mining right (item 7(7) of Schedule II of the MPRDA),

or failure by the holder to lodge such right for conversion (item 7(8) of Schedule II of the MPRDA). (Vally AJ only refers to conversion and not subsequent registration as a requirement for cessation of the old-order mining right.) It is submitted that termination also took place upon refusal of the application by the Minister due to non-compliance with the requirements of item 7(3) of Schedule II of the MPRDA (*Sishen Iron Ore Company (Pty) Ltd v Minister of Mineral Resources* (unreported decision) Case no 28980/10 (NGD) par 89; and see further Badenhorst 2011 4 SALJ 781–782)).

Vally AJ cannot have his cake and eat it. On the one hand, it is accepted that upon conversion the old-order mining right ceased to exist (is destroyed), whilst on the other hand, the benefits derived therefrom are retained (23). If the old-order mining right ceased to exist or is destroyed so are their benefits. Destruction or “destruction” simply does not mean continuation of rights. Cessation of the existence of an old-order mining right does not differ from the destruction thereof unless “destruction” of an old-order mining right means something else. The court seems to accept that “destruction” means the replacement thereof by similar rights and explains the retention of benefits (like royalties) due to the replacement of old-order rights by similar rights (23). Such view about the continued liability to pay contractual royalties reminds one of the old sayings about payment in accordance with the law of the Transvaal. Perhaps the unfairness of the loss of royalties by former common-law holders of mineral rights upon cessation of old-order mining rights played a role in the court’s view of the notion of destruction of old-order rights without the loss of such royalties. If it was taken into account that the state is actually liable for compensation for such loss if it amounted to expropriation by virtue of the provisions of the MPRDA, the outcome of the decision may have been different. As indicated before, former holders of common-law mineral rights who granted mining rights to grantees in return for royalties could recover such losses from the state in terms of item 12 of Schedule II of the MPRDA.

Item 7(2) of Schedule II determines that “(n)o terms and conditions applicable to the old-order mining right remain in force if they are contrary to the provisions of the Constitution” or the MPRDA. If this provision is applied during the interim period it would mean that payment of consideration in the form of royalties is permissible because it is not contrary to the MPRDA (or the Constitution for that matter). As we have seen, the right to mine (as granted by the holder of the pre-existing common-law mineral right) continues during the interim period and thus also the concomitant duty of the grantee to pay consideration in the form of royalties. If this provision is applied (as it should) to the new mining right, it would mean that upon cessation of the old-order mining right, the right to mine by virtue of the common-law mineral lease is terminated as well as the concomitant duty to pay consideration in the form of royalties. In this regard, I differ from the decision of the court. Upon cessation of the old-order mining right, the grant of a mining right by someone other than the state is in conflict with the provisions of the MPRDA (see s 3(2)). The payment of consideration in the form of royalties to someone other than the state (except for the exceptions created in favour of host communities in item 11 of Schedule II of the MPRDA), is also in conflict with the right of the state to claim royalties (see s 3(2)(b) of the MPRDA). Continuance of the common-law position in this respect would be inconsistent

with the provisions of the MPRDA and the provisions of the MPRDA would, therefore, in terms of section 4(2) of the MPRDA, prevail. By virtue of the new mining right, the state is granting the entitlement to mine subject to the duty of the grantee to pay statutory royalties. The new right is similar to the common-law mining right in so far as entitlements to mine and duties to pay consideration, but the grantor and recipient of royalties (and the amount thereof) have changed upon termination of the old-order mining right. It is, accordingly, submitted that the court's decision about continued payment of consideration in the form of royalties by Tavistock upon termination of its old-order mining right is, therefore, incorrect.

The right to mine was granted by holders of common-law mineral rights for royalties as consideration. This situation continued during the interim period subject to restrictions imposed by the transitional arrangements. Under the new order, the right to mine is granted by the state for royalties as consideration. Under the new order the former holders of common-law mineral rights have lost their rights to contractual royalties. For such loss, compensation should be claimed from the state in terms of item 12 of Schedule II of the MPRDA. Under the new order, the former holders of old common-law mineral rights have nothing to grant (due to the empowerment of the state to grant mining rights in the state by s 3(2)(a) of the MPRDA), and receipt of consideration would constitute an undue payment. To grasp another English common-law notion in support of my argument, privity of contract is absent between the former grantor of a common-law mining right and the holder of a mining right granted by the State.

For purposes of transition of rights, the different periods need to be distinguished: the common-law period before the MPRDA, the transitional period under the MPRDA, and the new order under the MPRDA. During the respective periods, the content of the right and extent of duties and identity of holders of rights change, all of which require thorough analysis. The rights figuring during the first movement are based on Roman or common-law as developed by the courts, and were granted by the holder of common law mineral rights to a grantee of a mineral lease. During the second movement, the common-law mining right has been transformed into a composite statutory mining right, and is made up of what was previously held separately by means of the mining authorization and the common-law mining right, with its entitlements restricted by the transitional provisions of the MPRDA. The grantor and grantee remain the same. Performance is still rendered by the parties and impossibility of performance by legislative intervention is not relevant. During the third movement, a new statutory mining right is acquired. This movement, in addition, involves a change in the person of the grantor of the mining right and the receiver of royalties, namely, the state. Just like former common-law based mining rights (or the composite statutory right during the interim transitional period), the rights no longer exist after cessation in the new order, and the common-law based duties to pay royalties no longer exist. Upon cessation of the old-order mining right, it is impossible for the former holder of a common-law mineral right to "grant" the right to mine. At this stage, impossibility of performance by legislative intervention becomes relevant. In this instance, the MPRDA no longer allows payment of contractual

royalties (except to host communities), and it becomes impossible for miners to pay royalties to the erstwhile holder of common-law mineral rights.

The outcome of the decision has far-reaching consequences. It would mean that former old-order mining right holders would continue to be liable for payment of royalty upon conversion and registration of their old-order mining rights into new mining rights. As they are liable for payment of statutory royalties, it would result in double payment as consideration for the right to mine. This could not have been the legislature's intention. The scenario would be even worse if former holders of an old-order mining right failed to apply for conversion of their old-order mining right. Upon cessation thereof, they would remain liable for payment of royalties to a former grantor of the common-law mining right. This would also be the case if the Minister refused to convert the old-order mining right. In short, the outcome of the decision has far-reaching consequences in these instances. It is submitted that upon cessation of the old-order mining right, the entitlement to mine and the duty to pay consideration in the form of contractual royalties, are terminated. If not, why then was it necessary for the legislature to distinguish between different forms of royalties and create the exception of continued payment of royalties to host communities in terms of item 11 of Schedule II of the MPRDA?

The decision may have another unintended consequence. Because grantors of old-order mining rights would, by virtue of the *SFF Association* decision, continue to receive consideration in the form of royalties (arguably contrary to the intention of the legislature), they would not have suffered a (possible) expropriation of property by virtue of the provisions of the MPRDA for purposes of a compensation claim in terms of item 12 of Schedule II of the MPRDA. Although this reduction of possible expropriations by the provisions of the MPRDA is a positive outcome, the state's liability for the loss of contractual royalties to former holders of common law mineral rights should not be shifted to the miner (grantee of the mining right). The state is, in effect, awarded royalties by the MPRDA and, in terms of the *SFF Association* decision, absolved from compensating former holders of common-law mineral rights.

5 Conclusion

For purposes of the MPRDA, a clear distinction should be drawn between its impact on: (a) the common-law notion (or vehicle) of pre-existing rights; (b) pre-existing common-law rights *per se* during the interim period of transition. In (b) a further distinction should be made between: (i) the continuance of pre-existing common-law rights as old-order rights; and (ii) the cessation of old-order rights. In the case of an old-order mining right, the common-law notion of a mineral right or a mining right in (a) does not exist any more. In situation (b) the pre-existing mining right and mining authorization has continued during the period of transition as a composite statutory creature. Cessation of the old-order mining right takes place upon conversion of such right and registration of the converted right, failure to apply for conversion, or refusal of an application for conversion of an old-order mining right.

During the interim period the entitlement to mine is retained by the holder of the old-order mining right (by virtue of the underlying common-law mining right to mine) subject to the duty to pay consideration in the form of royalties to the grantor of the common-law mining right. The exercise of the entitlement to mine is permitted during the period of transition by the continued validity of the mining authorization. Thus, both the retention and exercise of the entitlement to mine and payment of royalties are permitted by the MPRDA.

Upon conversion of an old-order mining right and registration of the new mining right, "acquisition" takes place of a similar mining right upon grant by the Minister in terms of the MPRDA. Although the grantee remains the same, the state is now the grantor of the mining right. Upon cessation of the old-order mining right, continued payment of contractual royalties, as before the MPRDA, would be contrary to the right of the state to grant mining rights and to receive statutory royalties in return. Such common-law position is overridden by the MPRDA as being inconsistent with its provisions. Upon cessation of the old-order mining right the common-law based entitlement to mine and the duty to pay consideration in the form of royalties are terminated. Performance becomes impossible at this stage due to statutory intervention. Upon conversion of the old-order mining right and registration, a similar mining right is acquired from the state, containing an entitlement to mine subject to the duty to pay statutory royalties to the state.

The court's decision in *SFF Association* that payment of contractual royalties has to continue despite cessation of the old-order mining right is incorrect. Continued liability for contractual royalties will result in the payment of double royalties by former holders of old-order mining rights who would be paying the Piper and the state. This surely could not have been intended by the legislature: the erstwhile Piper is simply absent during the third movement and contractual royalties should not be payable. Continued liability for contractual royalties has a further consequence, namely, that expropriation of the right of former holders of common-law mineral rights to royalties does not take place. Although this reduction of possible expropriations by virtue of the provisions of the MPRDA is a positive outcome, the state's liability for the loss of contractual royalties to former holders of common-law mineral rights should not be shifted to the miner. After all, the state is now Syd Barrett's "Piper at the Gates of Dawn" who calls the tune.

PJ Badenhorst
Deakin University, Australia
Visiting Professor of Law
Nelson Mandela Metropolitan University, Port Elizabeth