ABANDONMENT OF RIGHTS TO MINERALS GRANTED IN TERMS OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT*

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SUMMARY

A peculiar feature of the Mineral and Petroleum Resources Development Act (MPRDA) is the mention of the possibility of abandoning rights granted in terms of its provisions. It has been commented by Van der Schyff that the possibility of abandoning these rights is inconsistent with the Act's objectives of the MPRDA. In particular, empowering a right-holder to abandon a right granted in terms of the MPRDA fails to take into account that such a right comes with significant responsibilities and obligations. As such, unilateral abandonment should not be possible in terms of the legal framework created by the MPRDA.

This article seeks to address this peculiarity in the MPRDA. It considers the legislative context in which such an abandonment (if possible) would operate. The analysis of the possibility of abandoning rights granted in terms of the MPRDA is undertaken in light of theoretical observations in respect of the abandonment of property rights, in particular the seminal article on the subject by Peñalver. The article seeks to answer the question as to whether abandonment, as envisaged by the MPRDA, is possible in the legal framework the Act creates, and outlines the potential consequences thereof for the would-be abandoner.

1 INTRODUCTION

Rights to minerals can only be obtained through an application made in terms of the provisions of the Mineral and Petroleum Resources Development Act (MPRDA)[1]. If an applicant meets the requirements for the

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1 28 of 2002.

granting of a right, the Minister must grant it.[2] Prospecting rights and mining rights, once granted and registered in terms of the Mining Titles Registration Act (MTRA),[3] are limited real rights.[4] A peculiar feature of the MPRDA is the mention of the possibility of abandoning rights to minerals granted in terms of its provisions.[5] Section 56(*f*) of the MPRDA states that a right, permit, or permission granted in terms of its provisions lapses in the event it is abandoned. The Act further notes the consequences of abandoning a right – such as obligations to secure a closure certificate for the mine in question,[6] and to remove structures and objects from the site.[7] However, beyond mentioning the possibility of abandoning a right that has been granted in terms of the Act and the consequences thereof, the MPRDA is silent on how to achieve abandonment.

This article seeks to address this peculiarity in the MPRDA. Its goal is to explore the nature of abandonment under the MPRDA, and in particular, how abandonment may be achieved, if such is possible. Doing so will require an analysis of the law of abandonment in South Africa in general, and in the legal framework created by the MPRDA in particular. The article compares "abandonment" as conceived of in terms of the MRPDA with the concept as it exists in private law, in the law of property in particular. The focus of this article is on rights to minerals, not petroleum, and as such, exploration rights and production rights are not discussed.

This article proceeds along the following lines. First, the law of abandonment in South Africa (specifically related to property) is discussed. Academic views on abandonment of real rights are evaluated. The article considers the legislative context in which such an abandonment of rights to minerals (if possible) would operate. Analysis of the possibility of abandoning rights granted in terms of the MPRDA is undertaken in light of theoretical observations in respect of the abandonment of property rights,[8] with particular reference to the seminal article on the subject by Peñalver.[9] The article seeks to answer the question as to whether abandonment, as envisaged by the MPRDA, is possible within the legal framework that the Act creates, and outlines the potential consequences of abandonment for the would-be abandoner. Suggestions for reform, with a view to bringing clarity on the Act, are provided.

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2 See s 17(1) (prospecting rights) and s 23(1) (mining rights) of the MPRDA.

3 16 of 1967.

4 S 5(1) of the MPRDA.

5 See s 56(*f*) of the MPRDA.

6 See s 43(3)(*a*) and (4) of the MPRDA.

7 See s 44 of the MPRDA.

8 See Strahilevitz "The Right to Abandon" 2010 158 *University of Pennsylvania Law Review* 355; Peñalver "The Illusory Right to Abandon" 2010 109 *Michigan Law Review* 191.

9 Peñalver 2010 *Michigan Law Review* 191.

2 ABANDONMENT: A MISUNDERSTOOD CONCEPT

Superficially, abandonment or waiver of rights appears to be a simple concept in law.[10] In respect of a private-law claim (such as a debt), it is open to the creditor in general to abandon the claim – for example, through the forgiveness of the debt.[11] An heir may exercise her right to reject an inheritance.[12] For immaterial property rights in respect of which registration would usually be required (for example, patents), the right may be waived and the registration thereof deleted.[13] There is little to no restriction on the waiver of such incorporeal rights by the holder.

Where real rights in specific things are concerned, if a person no longer wishes to be the owner of the thing or be the holder of a right, he may abandon it. Where movables are concerned, all that is required is the physical relinquishment of the thing coupled with an intention to be no longer the owner thereof.[14] With incorporeal property (such as servitudes), it is open to the holder (such as the owner of a dominant tenement) to abandon the right.[15]

However, on closer inspection, abandonment is not as easy to achieve as one may believe. As Peñalver notes, one needs to distinguish between an informal physical act that one may colloquially refer to as abandonment, on the one hand, and "the formal legal judgment that an owner has successful and *unilaterally* severed ties of ownership", on the other.[16] The latter is heavily restricted with regard to corporeal property, to the point that a "right" to abandon cannot be said to exist.[17] While the observation above by Peñalver is in respect of United States law, it is relevant to South African law.[18]

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10 See the discussion of the concept in property law texts such as Van der Merwe *Sakereg* 2ed (1989) 224–227; Muller, Brits, Boggenpoel and Pienaar *Silberberg and Schoeman's The Law of Property* 6ed (2019) 158–169, 305–306; Van der Merwe and Pope "Part III: Property" in Du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 490–491. On the abandonment of rights in general, see Joubert "Afstanddoening van Regte" 1981 14 *De Jure* 3.

11 Joubert 1981 *De Jure* 4; Hutchison and Du Bois "Chapter 26: Contracts in General" in Du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 836.

12 Joubert 1981 *De Jure* 5; Paleker "Chapter 25: Succession" in Du Bois (ed) *Wille's Principles of South African Law* 9ed (2007) 717.

13 Joubert 1981 *De Jure* 5. See s 64(1) of the Patents Act 57 of 1978. Note, however, the surrender of a patent would be subject to objections of interested persons in terms of s 64(2).

14 Van der Merwe *Sakereg* 224; Muller *et al Silberberg and Schoeman's The Law of Property* 158; Van der Merwe and Pope in Du Bois (ed) *Wille's Principles of SA Law* 490; *S M Goldstein & Co (Pty) Ltd v Gerber* 1979 (4) SA 930 (A) 936F–G; *Salvage Association of London v SA Salvage Syndicate Ltd* (1906) 23 SC 169 171.

15 Van der Walt *The Law of Servitudes* (2016) 572–578; Van der Merwe *Sakereg* 537–539.

16 Peñalver 2010 *Michigan Law Review* 196.

17 Peñalver 2010 *Michigan Law Review* 206.

18 See the discussion in Cramer *The Abandonment of Landownership: A Proposed Model for Regulated Exit* (doctoral thesis, University of Cape Town) 2020 ch 2.

Abandonment, in the true sense of the word, is a unilateral act.[19] It involves an owner acting independently to divest herself of a right, whether ownership or otherwise. Should the cooperation of a third party be necessary to extinguish the right, then what occurs is not truly abandonment, as the cooperation of third parties negates the unilateral nature of abandonment.[20]

With regard to movable corporeal property, it is difficult to see how such abandonment can be achieved without violating municipal by-laws on the disposal of refuse or national legislation such as the National Environmental Management: Waste Act.[21] The Act provides a wide definition of "waste", including "any substance, material or object, that is unwanted, rejected, abandoned, discarded or disposed of … whether or not such substance, material or object can be re-used, recycled or recovered".[22] Such a definition is wide enough to include any unwanted thing, whether it be a functional but obsolete laptop or an empty soda bottle. Consequently, to divest oneself of unwanted property, it is necessary to have the cooperation of a third party, whether that be the municipality collecting refuse or a specialised recycler of e-waste. The law, ultimately, heavily restricts the manner in which one may dispose of unwanted corporeal property.

Where immovable property is concerned, the abandonment of real rights is a point of contention among South African property lawyers.[23] Case law, to date, has provided no conclusive answers.[24] Sonnekus argues that the abandonment of landownership is possible in view of South Africa's negative registration system in respect of land.[25] All that is required is physical

19 Peñalver 2010 *Michigan Law Review* 194.

20 Peñalver 2010 *Michigan Law Review* 194–195.

21 59 of 2008.

22 S 1 of 59 of 2008.

23 See Cramer *The Abandonment of Landownership* ch 4; Cramer "The Abandonment of Landownership in South African and Swiss Law" 2017 134 *SALJ* 870; Mostert "No Right to Neglect? Exploratory Observations on How Policy Choices Challenge the Basic Principles of Property" in Scott and Van Wyk (eds) *Property Law Under Scrutiny* (2015) 26–28; Sonnekus "Abandonnering van Eiendomsreg op Grond en Aanspreeklikheid vir Grondbelasting" 2004 (4) *TSAR* 747; Sonnekus "Enkele Opmerkings na Aanleiding van die Aanspraak op Bona Vacantia as Sogenaamde Regale Reg" 1985 (2) *TSAR* 121; Sonnekus "Grondeise en die Klassifikasie van Grond as Res Nullius of as Staatsgrond" 2001 (1) *TSAR* 84.

24 In reported case law in which it was argued landownership had been abandoned, the courts found abandonment had not occurred as the requisite intention had not been established. As such, the courts did not consider how, exactly, abandonment of landownership may be given effect to. See *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A); *Meintjes NO v Coetzer* 2010 (5) SA 186 (SCA); Cramer *The Abandonment of Landownership* 32–36; Cramer 2017 *SALJ* 881–882. A recent unreported case, *M v M* [2020] ZAGPPHC 155, found that, on the facts of the case before it, the necessary intention existed for co-ownership in immovable property to be abandoned (par 44–55), but the court did not delve into the practicalities of a finding of abandonment of immovable property. Leave to appeal the judgment was granted; one of the reasons for granting leave to appeal was that academic opinion differs on the possibility of abandoning landownership, as well as the absence of case authority for the abandonment of landownership. As of writing, it does not seem the appeal has been heard. See *Molema v Matabologa* [2020] ZAGPPHC 396 par 8–9.

25 Sonnekus 2004 *TSAR* 756. See also Muller *et al Silberberg and Schoeman's The Law of Property* 158–159.

relinquishment of the property, coupled with the intention to be no longer the owner, as in the case of movable property.[26] He argues that it is not necessary to comply with the formalities of the Deeds Registries Act[27] for an owner to abandon her land.[28] Furthermore, it is his view that once abandoned, immovable property is *res derelictae* and open to appropriation by the first taker.[29] Mostert, on the other hand, argues that abandonment of landownership in South African law is not possible in light of the principle of publicity.[30] The principle of publicity is not given effect to as there is no specific mechanism in the Deeds Registries Act, for a landowner to strike her name from the title deed and so unilaterally end her relationship with her property.[31] It is submitted that the view of Mostert is correct.[32] Sonnekus is correct that it is possible for the ownership situation in respect of land to change in the context of original acquisition of ownership without registration actions.[33] However, the principle of publicity is given effect to in the context of original acquisition of ownership.[34] For example, for acquisitive prescription, publicity is served through the requirement that land be held openly as if by the owner for an uninterrupted period of 30 years.[35] The abandonment of landownership, in the absence of a mechanism through which ownership may be terminated, simply cannot give effect to the principle of publicity in the same manner.[36] The abandonment of landownership in South African law is thus not possible, given the lack of a mechanism through which such abandonment may be achieved.[37] It should be noted that the standard view in South African property law is that should the abandonment of ownership in land be possible, such land is *bona vacantia* and thus accrues to the State.[38]

Even with incorporeal limited real rights, abandonment may not be as simple as first assumed. Praedial servitudes,[39] as limited real rights in the

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26 Van der Merwe *Sakereg* 224; Muller *et al Silberberg and Schoeman's The Law of Property* 158; Van der Merwe and Pope in Du Bois (ed) *Wille's Principles of SA Law* 490; *S M Goldstein & Co (Pty) Ltd v Gerber supra* 936F–G; *Salvage Association of London v SA Salvage Syndicate Ltd supra* 171.

27 Act 47 of 1937.

28 Sonnekus 2004 *TSAR* 751–752.

29 Sonnekus 2004 *TSAR* 751ff.

30 Mostert in Scott and Van Wyk (eds) *Property Law under Scrutiny* 26–27.

31 *Ibid*.

32 See detailed discussion in Cramer *The Abandonment of Landownership* ch 4; Cramer 2017 *SALJ* 870.

33 Cramer *The Abandonment of Landownership* 63; Cramer 2017 *SALJ* 882.

34 Cramer *The Abandonment of Landownership* 63–70; Cramer 2017 *SALJ* 882–886.

35 Cramer *The Abandonment of Landownership* 63–64; Cramer 2017 *SALJ* 882–883.

36 Cramer *The Abandonment of Landownership* 65; Cramer 2017 *SALJ* 883–884.

37 Cramer *The Abandonment of Landownership* 63–70; Cramer 2017 *SALJ* 882–886.

38 Van der Merwe and Pope in Du Bois (ed) *Wille's Principles of SA Law* 492; Van der Merwe *Sakereg* 227; Van der Merwe "Minister van Landbou v Sonnendecker 1979 2 SA 944 (A)" 1980 (2) *TSAR* 183; Miller *The Acquisition and Protection of Ownership* (1986) 8–9.

39 In South African law, a praedial servitude is a limited real right, in which a burden is "imposed on one piece of land (servient tenement) in favour of another piece of land (dominant tenement)" – for example, a right of way. See Muller *et al Silberberg and Schoeman's The Law of Property* 373. Praedial servitudes differ from personal servitudes, which are "established in favour of particular persons over things and may confer a variety of benefits on their holders" – for example, a usufruct that entitles the holder to live on and

property of another,[40] serve as just such an example. It may be assumed that such a right may be freely abandoned by the owner of a dominant tenement, at will, and entirely unilaterally. However, Van der Walt explains that rather than being a unilateral act on the holder's part, the termination of servitudes through abandonment has a more bilateral nature.[41] The termination of a servitude through abandonment will usually occur through an agreement between the parties – the owner of the dominant tenement and the owner of the servient tenement.[42] Even in the absence of express agreement, tacit abandonment of a servitude has a bilateral nature, as the parties are cooperating, even if implicitly.[43] For example, in respect of a positive servitude, the owner of the dominant tenement may acquiesce to conduct that effectively precludes the exercise of her right.[44] In respect of negative servitudes, the owner of the dominant tenement may acquiesce to conduct that runs contrary to the provisions of the servitude.[45] While both parties may be silent, they are cooperating.[46] However, abandonment of a limited real right such as a servitude only takes effect in respect of third parties once expunged from the Deeds Registry.[47]

The position above is reflected in case law. In *Edmeades v Scheepers*,[48] the court found that the holder of a servitude had lost his right by virtue of permitting the owner of the servient tenement to act in a manner that frustrated the terms of the servitude for eighteen years.[49] In *Nowers NO v Burmeister*,[50] the applicants had built a wall in excess of the height permitted by a servitude, in addition to permitting foliage to grow in excess of the height permitted by the servitude. The court in this case found that the applicants' conduct had amounted to an abandonment of the provisions of the servitude.[51] The most recent case concerning the abandonment of a servitude is *Pickard v Stein*.[52] The court in *Pickard* stated that the abandonment of servitudes may be express or tacit – that is it may be inferred through the conduct of the owners of the dominant and servient tenements.[53] The case concerned a servitude of light. The owner of the dominant tenement had given the respondents permission to construct a

use a particular piece of land. See Muller *et al Silberberg and Schoeman's The Law of Property* 382–383.

40 Muller *et al Silberberg and Schoeman's The Law of Property* 53.

41 Van der Walt *The Law of Servitudes* 557–558. In *Pickard v Stein* 2015 (1) SA 439 (GJ), the court stated that the "requirement that waiver operates bilaterally excludes the notion of a unilateral abandonment or waiver of a servitude, as contended for on behalf of Pickard. However, abandonment or waiver satisfying that requirement may still be inferred as having tacitly come about through the conduct of the parties" (par 57).

42 Van der Walt *The Law of Servitudes* 573.

43 Van der Walt *The Law of Servitudes* 577–578.

44 *Ibid*.

45 *Ibid*.

46 *Ibid*.

47 Van der Walt *The Law of Servitudes* 573–574.

48 (1880–1882) 1 SC 334.

49 *Edmeades v Scheepers supra* 339–340.

50 [2011] ZAECELLC 8.

51 *Nowers NO v Burmeister supra* par 40–42.

52 2015 (1) SA 439 (GJ).

53 *Pickard v Stein supra* par 47.

wall that effectively obstructed the servitude of light "in all its components".[54] By giving permission, the court found that the owner of the dominant tenement had abandoned the servitude.[55] As Van der Walt notes, the *Pickard* case demonstrates the bilateral nature of the abandonment of a negative servitude, given the manner in which the owner of the dominant tenement tolerates or even permits conduct that negates her rights in terms of the servitude.[56]

Prior to the commencement of the MPRDA, rights to minerals may have been capable of abandonment in a manner similar to servitudes.[57] However, unlike normal servitudes, the lapsing of mineral rights did not necessarily mean these rights would unite with the servient piece of land.[58] According to Van der Merwe, abandonment could be achieved through a waiver of the right and cancellation of the registration of the right.[59] If the holder of a right to minerals ceased to exist (for example, if a company were liquidated), then the right would most likely be *bona vacantia* and fall to the State.[60] Authority for the position set out by Van der Merwe is found in the case of *Ex Parte Marchini*.[61] The applicant, as owner of the land, claimed the mineral rights related to his land, as the right holder had since been liquidated. The mineral rights had not been disposed of by the liquidators, which the applicant contended meant the rights were considered "worthless" and thus abandoned. The court, however, stated the position that, as quasi-servitudes, mineral rights did not simply revert to the landowner when the holder ceased to exist (or if the right were abandoned).[62] Furthermore, authority supported the position that mineral rights that were abandoned, or where the holder ceased to exist without proper disposal thereof, become *bona vacantia*.[63]

Even the abandonment of incorporeal property rights such as servitudes is not unrestricted. In circumstances where the abandonment of a servitude would result in serious harm to the servient tenement, the owner of the dominant tenement may not unilaterally abandon her right.[64] This rule would apply in circumstances where certain works need to be maintained, and the possibility of restoring the land to its natural state is unlikely[65] – for example, a servitude requiring the servitude holder to bear the costs of maintaining structures needed to divert a river running over the servient tenement.[66]

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54 *Pickard v Stein supra* par 65.
55 *Pickard v Stein supra* par 72.
56 Van der Walt *The Law of Servitudes* 577.
57 Van der Merwe *Sakereg* 558–559; Hart *The Abandonment of Rights Under the Mineral and Petroleum Resources Development Act* (LLB paper, University of Cape Town) 2013 15–17.
58 Van der Merwe *Sakereg* 558.
59 Van der Merwe *Sakereg* 558; Hart *The Abandonment of Rights* 15.
60 Van der Merwe *Sakereg* 558; Hart *The Abandonment of Rigths* 15–17.
61 1964 (1) SA 147 (T).
62 *Ex Parte Marchini supra* 150F–G.
63 *Ex Parte Marchini supra* 150H.
64 Muller *et al Silberberg and Schoeman's The Law of Property* 401; Van der Walt *The Law of Servitudes* 572–573; Hall and Kellaway *Servitudes* 3ed (1973) 144.
65 Hall and Kellaway *Servitudes* 144.
66 *Ibid*.

The case authority for the prohibition against abandoning servitudes, where doing so may result in injury to the servient tenement, is *Du Plessis v Philipstown Municipality*.[67] The municipality in this case had diverted a river flowing across land owned by the plaintiff, in accordance with an agreement between the parties. Diverting the river required the construction of a weir and a wall, effectively to dam the water above the wall. The municipality sought to abandon the servitude, and the wall, so diverting the river back to its original course. Owing to the manner in which the diversion of the river had altered the land, there was no guarantee that the land could be returned to its natural state. Diversion of the river back to its original course thus posed a significant threat of injury to the plaintiff's land.[68] Given the possibility of harm to the servient tenement, the court stated that the municipality was not entitled to abandon the servitude and remove the wall (thus diverting the river back to its original course).[69] The municipality's request to abandon the servitude while leaving the existing wall in place was also rejected, as it could not simply be permitted to divest itself of its duties to maintain the wall.[70]

What is clear is that the circumstances in which true, unilateral abandonment may occur in South African law are highly circumscribed. Even for incorporeal property rights, it is not uncommon for the cooperation of third parties to be necessary to facilitate abandonment. Abandonment thus operates as a very circumscribed and contextual entitlement of ownership, reflecting the "constant interplay between autonomy and obligation".[71]

3 NATURE OF RIGHTS UNDER THE MPRDA

The MPRDA classifies prospecting rights and mining rights as limited real rights,[72] which can be registered in terms of the MTRA. Badenhorst suggests that the use of the label "limited real right" be viewed as a means by which investors are provided with greater security of tenure.[73] In South African law, a limited real right is a right in property owned by another person.[74] South African law does not have a *numerus clausus* of real rights, and thus the development of novel forms of real rights remains possible (beyond those created by the legislature through statute).[75] Unlike limited real rights at common law, these statutory rights are granted by the State in the land of an individual owner, who cannot prevent the grant or exercise of the right.[76]

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67 1937 CPD 335.

68 *Du Plessis v Phillipstown supra* 340–342.

69 *Du Plessis v Phillipstown supra* 339–343.

70 *Du Plessis v Phillipstown supra* 343.

71 Peñalver 2010 *Michigan Law Review* 193.

72 S 5(1) of the MPRDA.

73 Badenhorst "The Nature of New Order Prospecting Rights and Mining Rights: A Can of Worms?" 2017 134(2) *SALJ* 361 362; Badenhorst "Security of Mineral Tenure in South Africa: Carrot or Stick?" 2014 32(1) *JENRL* 5 17.

74 Muller *et al Silberberg and Schoeman's The Law of Property* 54.

75 Muller *et al Silberberg and Schoeman's The Law of Property* 54–55.

76 Badenhorst 2017 *SALJ* 369.

Since the legislature classifies the most important rights created in terms of the MPRDA as limited real rights, there is no need to expand on this point further.

The nature of the rights to minerals granted in terms of the MPRDA, and especially the continued relevance and application of property law to them, has been subject to academic scrutiny.[77] Original modes of acquisition (such as *occupatio* or prescription) are not possible in respect of rights granted in terms of the MPRDA.[78] *Occupatio* (or appropriation) is not possible because the acquisition of rights to minerals under the MPRDA cannot be done through a unilateral act on the part of the acquirer.[79] Such rights also cannot be acquired (or lost) through prescription; this can happen only in terms of the procedures set out in the Act itself.[80] The manner in which rights are granted in terms of the MPRDA and then registered in terms of the MTRA is comparable to derivative acquisition.[81] It is true that the granting of a right in terms of the MPRDA is a unilateral administrative act.[82] The grant of the right, however, is followed by the conclusion of a notarial agreement between the grantee and the State.[83] Following the execution of this agreement, the grantee has a claim to the registration of the right in the Mineral and Petroleum Titles Registration Office, following which a limited real right comes into existence.[84] These three legal processes are distinct from one another.[85]

The MPRDA contains its own remedies for holders of rights,[86] as well as setting out the consequences of the granting and registration of those rights.[87] Administrative law will be the relevant avenue for redress if a right holder is aggrieved by government action that impacts upon her right – for example, the granting to another party of an overlapping right, or the suspension or cancellation of a right.[88] The MPRDA has its own appeal

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77 See Van Niekerk "Mineral Tenure Security, Registration, and Enforceability of Rights: Debunking the Property-law Paradigm" 2018 135(1) *SALJ* 159; Badenhorst 2017 *SALJ* 361; Mostert "The 'Thing' Called 'Mineral Right': Re-examining the Nature, Content and Scope of a Rather Confounding Concept in South African Law" 2014 17(1) *Recht in Afrika* 28; Van der Schyff *Property in Minerals and Petroleum* (2016) ch 8.

78 Van Niekerk 2018 *SALJ* 175–180.

79 Van Niekerk 2018 *SALJ* 175.

80 *Ibid*.

81 Van Niekerk 2018 *SALJ* 176. Van Niekerk explains that, in terms of s 5(1)(*d*) of the MPRDA, the status of limited real rights is accorded to prospecting rights and mining rights granted in terms of the Act, so long as they are registered in terms of the MTRA. Section 2(4) states that the "registration of a right in terms of this Act in the Mineral and Petroleum Titles Registration Office shall constitute a limited real right binding on third parties".

82 Van Niekerk 2018 *SALJ* 177; Badenhorst 2017 *SALJ* 366, 380. See *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA) par 24–26.

83 Badenhorst 2017 *SALJ* 366, 380.

84 Badenhorst 2017 *SALJ* 363, 380.

85 *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd supra* par 19.

86 See s 96 of the MPRDA, which provides for an internal appeal procedure and for when parties may approach the courts. See also Van Niekerk 2018 *SALJ* 180–185.

87 See, for example, ss 5, 17 and 23 of the MPRDA. See also Van Niekerk 2018 *SALJ* 180–185.

88 Van Niekerk 2018 *SALJ* 180. See s 1 of the Promotion of Administrative Justice Act 3 of 2000, which defines administrative action as "any decision taken, or any failure to take a

procedure that must be followed by aggrieved parties prior to seeking to take a decision on judicial review.[89]

Enforcement of these rights against third parties (such as landowners or lawful occupiers) is also regulated by the MPRDA, as well as by some private-law remedies.[90] Some common-law principles and remedies do remain relevant, so long as they are consistent with the MPRDA.[91] Prospecting and mining rights still need to be exercised in line with the common-law principle of *civiliter modo*.[92] That is to say, they must be exercised in a reasonable manner causing as little inconvenience as possible to the landowner or lawful occupier.[93] Van Niekerk points out that the entitlements of prospecting rights and mining rights flow from section 5(3) of the MPRDA, which empowers a right holder to enter upon land and to engage in prospecting or mining, as well as incidental activities.[94] Section 5A(c) requires that any landowner or lawful occupier be given a minimum of 21 days' notice prior to the right holder entering the land to exercise her rights.[95] Where conflict arises between a right holder and landowners or lawful occupiers before mining commences, it is not private-law remedies that immediately apply, but a specific conflict-resolution provision in the MPRDA.[96] According to the Constitutional Court in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd*,[97] only once the right holder has exhausted the procedure set out in the MPRDA may she approach a court for relief (such as an eviction or interdict) against an intransigent landowner or lawful occupier.[98] The only exception to this situation is where the landowner or lawful occupier refuses to comply with the procedure set

decision by- (*a*) an organ of state, when- … (ii) exercising a public power or performing a public function in terms of any legislation".

89 Van Niekerk 2018 *SALJ* 180. See s 96 of the MPRDA.

90 Van Niekerk 2018 *SALJ* 180–185.

91 S 4(2) of the MPRDA. See Badenhorst and Van Heerden "Conflict Resolution Between Holders of Prospecting or Mining Rights and Owners (or Occupiers) of Land or Traditional Communities: What Is Not Good for the Goose is Good for the Gander" 2019 136 *SALJ* 303 315–318; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) 363 (SCA) par 21–22.

92 Van der Schyff *Property in Minerals and Petroleum* 602; *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC) par 58; *Anglo Operations Ltd v Sandhurst Estates (Pty)* Ltd *supra* par 21–22.

93 *Ibid*.

94 Van Niekerk 2018 *SALJ* 182.

95 Van Niekerk 2018 *SALJ* 182–183.

96 See s 54 of the MPRDA. See *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd supra* par 85–97. However, the right holder is not precluded from approaching the court where the landowner or lawful occupier is not cooperating – for example, where the landowner is denying access while seeking expropriation of the land in question. See *Joubert v Maranda Mining Co (Pty) Ltd* 2010 (1) SA 198 (SCA) par 15–16.

97 *Supra*.

98 *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd supra* par 85–97. See the discussion of this part of the *Maledu* judgment in Badenhorst and Van Heerden 2019 *SALJ* 321–322. They submit that the SCA in *Maranda* "did not require the remedies in terms of s 54 first to be exhausted but … accepted that the jurisdiction of the courts is not excluded by s 54". Thus, the remedies contained in the MPRDA, in the SCA's view, do not need to be exhausted before a party may approach the courts.

out in the MPRDA.[99] Effectively, private-law remedies operate to fill the gaps left by the MPRDA in respect of the enforcement of limited real rights created by the Act, whether against government or private persons.[100]

4 OBLIGATIONS ATTACHING TO RIGHTS UNDER THE MPRDA

The rights granted in terms of the MPRDA do not endow the holder only with entitlements, but also with significant responsibilities and obligations.[101] The application phase for a right includes consultation with relevant stakeholders (such as landowners and lawful occupiers),[102] as well as affected communities.[103] Furthermore, environmental reports must be submitted in terms of Chapter 5 of the National Environmental Management Act.[104] Financial provision for rehabilitation of the land, including "ongoing post decommissioning management of negative environmental impacts", is required before mining or prospecting operations can begin.[105] Financial provision is not a once-off obligation, but an integral obligation to the continuation of the right. It entails annual assessments of environmental liability, followed by a submission of an audit report outlining the adequacy of the existing financial provision.[106] Failure to satisfy the Minister with a report may lead to the right holder incurring the costs of an assessment conducted by an independent assessor appointed by the Minister.[107] The Minister may also instruct the right holder to increase the financial provision on an annual basis on the basis of this assessment.[108] Financial provision can be withheld from the right holder, in whole or in part, upon termination of the right should the right holder fail to "rehabilitate the environment or to manage any impact on the environment".[109]

Once a right is terminated, stringent mine closure obligations bind the previous right holder.[110] Until the issuing of a closure certificate, the right holder

> "remains responsible for any environmental liability, pollution, ecological degradation, the pumping and treatment of extraneous water, compliance to

99 *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd supra* par 87.
100 Van Niekerk 2018 *SALJ* 185.
101 Van der Schyff *Property in Minerals and Petroleum* 612.
102 Ss 16(4)(*b*), 22(4)(*b*) and 27(5)(*a*) of the MPRDA.
103 S 10 of the MPRDA.
104 107 of 1998. See ss 16(4)(*a*), 22(4)(*a*) and 27(5)(*b*) of the MPRDA.
105 S 24P(1) of 107 of 1998.
106 S 24P(3) of 107 of 1998.
107 S 24P(4) of 107 of 1998.
108 S 24P(3)(*a*) of 107 of 1998.
109 S 24P(2) of 107 of 1998.
110 See s 43 of the MPRDA concerning the requirements that a right holder must adhere to in order to be issued with a closure certificate following the termination of her right or cessation of mining or prospecting operations.

> the conditions of the environmental authorisation and the management and sustainable closure thereof."[111]

Effectively, the obligations that attach to a prospecting right or a mining right may follow the right holder indefinitely after the termination of the right. The only manner in which a right holder can truly escape these obligations is to cease to exist, which is unfortunately often the case in the South African context.[112]

5 ABANDONMENT UNDER THE MPRDA

The MPRDA uses the term "abandon" in seven places in respect of rights to minerals.[113] Section 56(*f*) is the provision that expressly states that a right to minerals granted in terms of the MPRDA will lapse when "it is abandoned". Section 43(3)(*a*) provides that the lapsing of a right through abandonment triggers an obligation on the former right holder to apply for a closure certificate. Section 43(4) requires an application for a closure certificate in the event of abandonment to be made to the relevant Regional Manager within 180 days of the lapsing of the right. Section 44, concerning the removal of "buildings, structures and other objects", also applies in the event of the lapsing of a right to minerals through abandonment.

The mention of abandonment in the MPRDA has drawn the attention of Van der Schyff, who finds the possibility of a right holder being empowered to abandon a right granted in terms of the MPRDA inconsistent with the Act's objectives.[114] In particular, empowering a right holder to abandon a right granted in terms of the MPRDA fails to take into account that such a right comes with significant responsibilities and obligations.[115] As such, unilateral abandonment should not be possible in terms of the legal framework created by the MPRDA.[116]

While the MPRDA refers to the possibility of the lapsing of a right through abandonment, it does not explicitly clarify how abandonment may be effected.[117] Section 107(1)(*g*) provides that the Minister may make regulations regarding the abandonment of rights to minerals, but the existing

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111 S 43(1) of the MPRDA.

112 Field has highlighted the problem of mining companies selling rights on to smaller concerns who are ill-equipped to rehabilitate the environment and manage the environmental impacts of prospecting or mining operations, a practice she calls "pass-the-parcel". Often, when it is necessary to conduct rehabilitation of mined-upon land, the last holder of the prospecting right or mining right may quickly cease to exist. See Field *State Governance of Mining, Development and Sustainability* (2019) 335–336; Field *Facilitating Dereliction? How the South African Legal Regulatory Framework Enables Mining Companies to Circumvent Closure Duties* Paper Presented at conference titled 9th International Conference on Mine Closure, University of Witwatersrand and Australian Centre for Geomechanics, (October 2014) 7; Humby "The Spectre of Perpetuity Liability for Treating Acid Water on South Africa's Goldfields: Decision in *Harmony II*" 2013 31 *JERL* 453 459–460, 463.

113 See ss 30(1)(*d*), 30(5), 43(3)(*a*), 43(4), 44(1), 56(*f*) and 107(1)(*g*).

114 Van der Schyff *Property in Minerals and Petroleum* 508–509.

115 Van der Schyff *Property in Minerals and Petroleum* 509.

116 *Ibid*.

117 *Ibid*.

MPRDA regulations do not explicitly do so. In this respect, to determine how abandonment may be effected in terms of the MPRDA, it is necessary to consider section 11(1) of the Act.

Section 11 of the MPRDA provides for the "[t]ransferability and encumbrance of prospecting rights and mining rights". Section 11(1) states that ministerial consent is required for the cession, transfer, letting, subletting, assignment, alienation or any disposal of a prospecting or mining right. Abandonment is not mentioned explicitly. However, given the Act's mention of the possibility of abandonment in later sections, it is reasonable to interpret "otherwise disposed of" as including abandonment. Although the section purports, in its title, to be concerned with transferability and encumbrance, the word "disposed" is a possible catch-all for acts other than transfers and encumbrances. The Oxford English Dictionary defines "dispose" as "[t]o put or get [anything] off one's hands … to get rid of".[118] The Oxford English Dictionary also defines "abandon" as "[t]o let go, give up, renounce".[119]

As abandonment (in the context of the law of property) entails relinquishing a thing with the intention of no longer being owner,[120] such an act evidently can be classified as a disposal. Thus, it is submitted that abandonment under the MPRDA is subject to ministerial consent in terms of section 11(1).[121]

Furthermore, in light of the buildings and other structures that usually accompany mining operations, one can potentially even argue that, at common law, these limited real rights cannot simply be abandoned. The MPRDA makes provision for common-law rules not inconsistent with the Act to continue to operate within the new legal framework.[122] Given the obligations that attach to a mining or prospecting right, a common-law rule restricting abandonment where harm would inevitably follow to the servient tenement appears consistent with the Act. Following the authority of *Du Plessis v Philipstown Municipality*,[123] a limited real right (such as that granted in terms of the MPRDA) cannot simply be abandoned where it would result in harm to the servient tenement. Indisputably, failure by a right holder to comply with her obligations and rehabilitate the servient tenement constitutes harm.

Dale argues that a holder may abandon a mining right or prospecting right "as it relates to part of the relevant area, or insofar as it relates to some of the minerals".[124] Referral is made to regulation 76(4) of the MPRDA regulations,[125] which contemplates the relinquishment by the right holder of

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118 "dispose, v." www.oed.com (accessed 2022-02-10).

119 "abandon, v." www.oed.com (accessed 2022-02-10).

120 Van der Merwe *Sakereg* 224 537–539; Muller *et al Silberberg and Schoeman's The Law of Property* 158; Van der Walt *The Law of Servitudes* 572–578.

121 This conclusion was also reached in Hart *The Abandonment of Rights* 22.

122 See s 4(2) of the MPRDA.

123 *Supra*.

124 Dale *SA Mineral and Petroleum Law* (2021) 487.

125 GN R527 in *GG* 26275 of 2004-04-23.

areas that have been prospected.[126] For such relinquishment, written notice with the relevant details must be submitted to the Regional Manager or Designated Agency.[127] The right holder must also not have any outstanding prospecting fees.[128] While section 56(*f*) of the MPRDA does not provide for the manner in which a right may be abandoned, written notice would be sufficient in the view of Dale (such as that foreseen in regulation 76(4)).[129] Registration of such abandonment would then take place in terms of section 5(1)(*d*) of the MTRA.[130] In terms of section 12A(3), the registration of the abandonment would need to be accompanied by a "plan or diagram depicting the area affected".[131]

The argument put forward by Dale does not consider section 11(1) of the MPRDA, which requires ministerial consent for disposal of a right. While a right holder may be entitled to seek to relinquish her right or any part thereof, she is not entitled to do so unilaterally. The right holder may submit written notice in pursuit of such relinquishment, but it is submitted there is no obligation on the Minister to accept. In any case, any such relinquishment of the right automatically triggers the obligation to obtain a closure certificate and to comply with the stringent rehabilitation requirements that flow therefrom.

Effectively, unilateral abandonment is not possible in the legal framework created by the MPRDA. This position is reinforced by applying the common-law rule restricting abandonment of limited real rights where doing so would harm the servient tenement. What is referred to as abandonment in the MPRDA is perhaps better classified as a form of surrender, because another party (being the Minister) has the discretion to accept or reject the conveyance of the right.[132] Surrender would ultimately entail obtaining the Minister's consent in the same manner for the transfer or encumbrance of a right granted in terms of the MPRDA.[133] In any event, once abandonment or surrender is achieved with ministerial consent, the obligations attached thereto remain. Abandonment or surrender only achieves the extinguishment of entitlements.

It is best classified as a form of surrender, as the right holder must secure the Minister's consent to relinquish the right, and this will probably be subject to the Minister's conditions. Furthermore, "surrender" would appear to fit better the consequences of relinquishing the right, since the termination of the right (that is, the entitlements) is not an end to the obligations attached thereto. The right holder will still be obligated to take the necessary steps to

126 Dale *SA Mineral and Petroleum Law* 487.

127 Reg 76(4)(a).

128 Reg 76(4)(b).

129 Dale *SA Mineral and Petroleum Law* 487.

130 See Dale *SA Mineral and Petroleum Law* 488.

131 Dale *SA Mineral and Petroleum Law* 488.

132 The Oxford English Dictionary defines "surrender" as "[t]o give up (something) out of one's own possession or power into that of another who has or asserts claim to it", or "[t]o give up, resign, abandon, relinquish possession of, esp. in favour of or for the sake of another" ("surrender, v." www.oed.com (accessed 2022-02-10)). Unlike the term "abandon", it gives discretion to the other party to accept or reject the conveyance.

133 S 11(1) of the MPRDA.

rehabilitate the land and secure a closure certificate. The term "abandonment" does not, it is submitted, adequately capture the consequences of the termination of a right in this manner.[134]

It is true that at common law the abandonment of a limited real right such as a servitude can also be framed as a bilateral act – a tacit agreement between two parties.[135] Following the authority of *Pickard*,[136] it may be suggested that limited real rights granted in terms of the MPRDA may similarly be abandoned by agreement.[137] However, absent circumstances in which abandonment of a servitude may cause harm to the servient tenement,[138] there is nothing in law to stop the holder of a servitude from taking the step to abandon without the agreement of the owner of the servient tenement, even if most cases demonstrate cooperation between the parties. A limited real right granted in terms of the MPRDA will always require the consent of the Minister for abandonment (or surrender) to be effected and can thus be distinguished from limited real rights at common law in this respect.

The reasons that a party would wish to abandon (or surrender) a valuable right to mine, or prospect, are unclear. To date, case law on the abandonment of rights granted in the MPRDA has involved a claim by a third party that the holder of a right has abandoned the right, not a claim by the right holder to abandon.[139] In *Van den Heever v Minister of Minerals and Energy*,[140] the court concluded that the intention to abandon a right to mine diamonds over a number of portions of land could not be established on the facts.[141] In *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd*,[142] it was found that a prospecting right had expired by effluxion of time, and it was thus not necessary to consider whether the right had been abandoned.[143] Given the liabilities that attach to a right, even upon its lapsing, it would appear unlikely that a right holder would elect to abandon. In any case, any such election would still be subject to ministerial consent. As noted, the only manner in which a right holder may truly escape liability is by ceasing to exist.

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134 This state of affairs is similar to that which prevails in the context of immovable property, which cannot be abandoned in South African law (Cramer *The Abandonment of Landownership* ch 4; Cramer 2017 *SALJ* 870; Mostert in Scott and Van Wyk (eds) *Property Law Under Scrutiny* 26–28). In the context of immovable property, some landowners who find themselves saddled with ownership of negative-value property, for which they owe municipal rates, will enter into an "abandonment agreement" with the relevant municipality. In return for transferring the property to the municipality, any arrears owed are forgiven. Owing to the nature of these agreements, it is submitted that "surrender agreements" would be a more appropriate term (Cramer *The Abandonment of Landownership* 57).

135 Van der Walt *The Law of Servitudes* 577–578.

136 *Supra*.

137 *Pickard v Stein supra* par 47.

138 Muller *et al Silberberg and Schoeman's The Law of Property* 401; Van der Walt *The Law of Servitudes* 572–573; Hall and Kellaway *Servitudes* 144. See discussion of *Du Plessis v Philipstown Municipality supra*.

139 See *Van den Heever v Minister of Minerals and Energy* 2015 JDR 0515 (SCA).

140 *Supra.*

141 *Van den Heever v Minister of Minerals and Energy supra* par 23.

142 *Supra*.

143 *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd supra* par 21.

6 SUGGESTIONS FOR REFORM

Based on the interpretation of the legal framework provided above, the unilateral abandonment of rights granted in terms of the MPRDA is not possible. However, it is still desirable that the legislature bring clarity to the situation. As Van der Schyff points out, "the legislature should have created a clearly circumscribed process through which a right holder could surrender his right".[144] Some suggestions for reform, with a view to clarifying the position in the MPRDA, are offered below.

"Abandonment" can only be achieved through the grant of ministerial consent, as argued above, but it would be ideal if section 11(1) of the MPRDA could be amended to include the word "abandon" as an action that would require such consent. Otherwise, reference to the possibility of abandonment in later sections of the Act remains peculiar on first reading. Such a small amendment would easily clarify the position in the MPRDA.

Alternatively, since abandonment in the true legal sense of the word is not possible under the MPRDA, the Act could be amended to replace references to abandonment with surrender. Furthermore, section 11(1) should include the term "surrender", to make it clear that ministerial consent is always required to bring to an end to a right holder's relationship with a right granted in terms of the MPRDA. As submitted above, the use of the word "surrender" would be a more accurate description of what the MPRDA envisions when it uses the term "abandon". Effectively, a right holder would be able to surrender a right granted in terms of the Act, subject to the Minister's consent, and any conditions attached thereto.

Furthermore, unlike the operation of abandonment in the law of property, a surrendered right granted in terms of the MPRDA would not simply become unowned, and open to appropriation. Rather, the right to the minerals in question would fall once again into the custodianship of the State, and the Minister would be empowered to award any part thereof to any future applicant.[145] Thus, the surrender of the right in question is directed to a specific party for potential reallocation, which conflicts with the operation of abandonment in the law of property.

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144 Van der Schyff *Property in Minerals and Petroleum* 509.

145 Any "abandonment" of a right to minerals granted in terms of the MPRDA must be registered with the Mineral and Petroleum Titles Registration Office, in terms of s 5(1) of the MTRA. The lapsing of a right in this manner means it ceases to exist (Van der Schyff *Property in Minerals and Petroleum* 511). The MPRDA makes the State the custodian of the nation's mineral resources (s 3(1)), which acting through the Minister, has the power to grant and issue rights to mineral resources (s 3(2)). As the previous right has ceased to exist, there would seem to be no obstruction to the State, as custodian of mineral resources, in granting a new right in the same minerals on the same land. The consequence of "abandonment" in terms of s 56(*f*) would be consistent with that of deregistration of a company in terms of s 56(*c*). See *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy* 2014 (6) SA 403 (GP) par 65, in which the court stated that, in the event of a right lapsing in terms of s 56(*c*), the "right reverts to the custodianship of the state, which assumes the power to reallocate the right in terms of the MPRDA, and thus to ensure that the objectives of the Act are met". See also Badenhorst "Lapsed Prospecting Rights: 'The Custodian Giveth and the Custodian Taketh Away'? *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy*" 2016 133(1) *SALJ* 37.

The suggested reforms would have no substantive effect on the contents of the MPRDA and would merely serve to make explicit the position that prevails in the existing legal framework. It would also more correctly describe the legal consequences of what is currently referred to as "abandonment" in the MPRDA.

7 CONCLUSION

"Abandonment", as it operates in the context of the MPRDA, reflects a wider trend in the law of property, as first identified by Peñalver.[146] So long as externalities may arise from relinquishing a particular right, whether it be ownership or a limited real right, the law will place restrictions on how one may dispose of such a right. The severity of these restrictions will scale depending on the nature of the thing in question, ranging from regulated disposal to outright prohibition of disposal in the absence of a third party willing and able to take responsibility for the thing in question. These restrictions apply not only to corporeal property, but also to incorporeal property, such as limited real rights.

Rights granted in terms of the MPRDA entail not only entitlements but also onerous obligations. To permit a right holder to abandon without restriction would clearly be inconsistent with the objectives of the MPRDA.[147] However, this is not possible on the suggested interpretation of the Act. First, the Act itself expressly provides for the consequences of abandonment, which triggers obligations to rehabilitate the land in question and to seek a closure certificate.[148] Secondly, a reading of the Act as a whole makes it evident that any form of abandonment of a right granted therein would be subject to ministerial consent in terms of section 11(1). The latter transaction would not, in fact, be abandonment in the true sense of the word, since the right would revert to the authority of the State, and thus could be granted to another applicant for the same right.

While the MPRDA may use the term "abandon", it is submitted that it does not correspond with the meaning of "abandonment" as understood in the law of property. Rather, the MPRDA envisions a form of regulated surrender of rights, subject to ministerial consent and obligations to rehabilitate the mined-upon land.

146 Peñalver 2010 *Michigan Law Review* 191.

147 Van der Schyff *Property in Minerals and Petroleum* 508–509.

148 See s 43(3)(*a*) and (4) of the MPRDA.