

NATURE OF NEW ORDER RIGHTS TO MINERALS: A RUBIKIAN EXERCISE SINCE PASSING THE MAYDAY RUBICON WITH A CUBIC ZIRCONIUM?^{*}

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SUMMARY

The Mineral and Petroleum Resources Development Act 28 of 2002 has created new categories of rights to “minerals” that may be granted to applicants by the Minister of Minerals and Energy. In this article the nature of these rights will be examined. The legislature has labelled prospecting rights and mining rights to minerals as limited real rights in the MPRD Act. The remaining rights to minerals are not labelled. Provision is made for registration or recording rights in the revived Mining Titles Registration Act 16 of 1967 (as amended). Registered rights are claimed to constitute a limited real right binding against third parties. Discrepancies and contradictions regarding the nature of rights to minerals are created by the two statutes. It is concluded that only upon clarification of the provisions of the two sister statutes, would the nature of rights to minerals be more evident. The proposed amendment of section 5(1) of the MPRD Act would be in line with property doctrine based upon the common law and is to be welcomed.

1 INTRODUCTION

The Mineral and Petroleum Resources Development Act 28 of 2002 (hereinafter “MPRD Act”) came into operation on 1 May 2004.¹ This Act brings an end to mineral law of the old order in its repealing² of the common law pertaining to minerals and petroleum to the extent that the common law is in conflict with the MPRD Act.³ The Act repeals the Minerals Act 50 of

^{*} I wish to acknowledge my earlier collaboration on this topic with Prof H Mostert during our writing of chapters 13 and 30 of *Mineral and Petroleum Law of South Africa* (2004). Naturally I assume responsibility for the correctness of the views advanced in this article. The law is stated as at 30 September 2005. Paper delivered on 4 November 2005 at the Property Law Conference held at the University of Johannesburg.

¹ Proc R 25 in GG 26264 of 2004-04-23.

² S 110 read with Schedule 1.

³ S 4(2).

1991 and related statutes or provisions of related statutes.⁴ The MPRD Act introduces a new order and makes provision for transitional arrangements to bridge the transition from the old order to the new order.⁵ The Government claims that crossing of the bridge of transition is on track.⁶

Since 1 May 2004 the Mining Titles Registration Act 16 of 1967 (hereinafter "MTR Act"), as amended,⁷ regulates the registration of mineral and petroleum titles and other rights. The MTR Act previously made provision for the registration of mining titles granted in terms of the Mining Rights Act 20 of 1967 and the Precious Stones Act 73 of 1964. The continuation and/or registration of these titles were made possible by the transitional measure in chapter VII of the Minerals Act 50 of 1991. The appropriateness of the revival of the Mining Titles Registration Act by mere amendment and poor drafting has already been questioned.⁸

The repeal of provisions of the Deeds Registries Act 37 of 1947 by the MPRD Act and the MTR Act was less successful, contradictory⁹ and required amendment.¹⁰ The Minister has adopted regulations in terms of the MPRD Act¹¹ and the MTR Act.¹²

In this article the nature and content of the so called "new order rights to minerals"¹³ created in terms of the MPRD Act will be discussed. In the context of the nature of these rights, their transferability, capability to be mortgaged and termination will also be discussed. The content of any right can in the final analysis only be determined with reference to the limitations

⁴ See further Schedule II to the MPRD Act; Badenhorst "Transitional Arrangements in terms of the Mineral and Petroleum Resources Development Act 28 of 2002: Crossing a Narrow Bridge?" 2002 *Obiter* 250; and Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* (2004) ch 1.4-1.5.

⁵ See in general Badenhorst and Mostert ch 25 and 26.

⁶ The Minister of Minerals and Energy, Lindiwe Hendricks, said on 29 August 2005 in a written reply to a parliamentary question that three companies had received new order rights and that no applications had so far been refused. She added that three applications were rejected for being incomplete and 173 conversions were still under consideration. Jacinto Rocha, a deputy director-general in the department, said: "The process is going fine. It's moving quickly and I don't think there is any rush from anybody." <http://www.busrep.co.za/index.php?fSectionId=567&fArticleId=2855283> (2005/09/08). According to an article in the *Business Day* of 07-09-05 the Minister of Minerals and Energy told Parliament that her department had received more than 3 000 notices of intention to sue Government under the Institution of Legal Proceedings Action against Central Organs of State Act 40 of 2002 during October 2004. Additional notices could be lodged after the October cut-off date if the applicants could show they had good reason for delay. It is stated by lawyers that the total number of claims against Government could run into billions of rands. Extensive amendments to the MPRD Act are in the pipeline with the proposed Mineral and Petroleum Resources Development Amendment Act. The bill is contained in GN 27087 in GG of 2005-08-31.

⁷ Mining Titles Registration Amendment Act 24 of 2003. The title of the Act should also have been amended to the Mineral and Petroleum Titles Registration Act.

⁸ See in general Badenhorst and Mostert 27-5.

⁹ For a detailed discussion, see Badenhorst and Mostert "A Bridge too Ghostly to Contemplate?" July 2004 *De Rebus* 24; and Badenhorst and Mostert ch 1.5 and 25.6.

¹⁰ Rectification took place by the Minerals and Energy Law Amendment Act 11 of 2005 (GG 27897 of 2005-08-15), which rectifications were made applicable with retrospective effect.

¹¹ S 107(1); and GN R 527 in GG 26275 of 2004-04-23.

¹² S 10; GG 26352 of 14-05-2004; and Badenhorst and Mostert 27-6.

¹³ The term "rights to minerals" will further be used in this article but should not be confused with mineral rights that existed in terms of the common law and that were registered in the Deeds Office until the commencement of the MPRD Act on 1 May 2004.

placed upon the exercise of the right. The statutory duties imposed on the holders of the various rights to be discussed will, due to the vast extent thereof, only be cited with reference to sections of the MPRD Act in the footnotes. The registration of these rights in terms of the MTR Act will be discussed briefly. The discussion of similar rights to petroleum will, however, not be dealt with in this article. At the outset, references will be made to “petroleum” as well.

2 NEW ORDER

2.1 Interpretation

The MPRD Act changed the principles of mineral law developed from the common law because it prescribes that, in so far as the common law is inconsistent with the Act, the Act will prevail.¹⁴ When interpreting any provision of the Act, a reasonable interpretation, which is consistent with the objectives of the Act,¹⁵ has to be followed.¹⁶ As will be shown, the Act introduces a new order in respect of rights to mineral and petroleum.

2.2 Ownership of minerals and petroleum resources

“Mineral and petroleum resources” are regarded as the common heritage of the people of South Africa.¹⁷ The State is, however, made the custodian thereof for the benefit of all South Africans.¹⁸ In effect, ownership of minerals and petroleum not yet severed from the land is vested in the State. One of the objectives of the MPRD Act is to give effect to the universally accepted right of the State to exercise sovereignty over all mineral and petroleum resources.¹⁹

The term “resources” is not defined, but “minerals”²⁰ and “petroleum”²¹ are separately defined. In terms of the MPRD Act a distinction is made between

¹⁴ S 4(2).

¹⁵ S 2 of the Act has the following objectives: (a) the recognition of the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic; (b) to give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources; (c) the promotion of equitable access to the nation's mineral and petroleum resources for all the people of South Africa; (d) the substantial and meaningful expansion of opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources; (e) the promotion of economic growth and mineral and petroleum resources development in South Africa; (f) the promotion of employment and advancement of the social and economic welfare of all South Africans; (g) the provision of security of tenure in respect of prospecting, exploration, mining and production operations; (h) the putting into effect of s 24 of the 1996 Constitution which grants an environmental right by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and (i) ensuring that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

¹⁶ S 4(1).

¹⁷ S 3(1).

¹⁸ S 3(1); and see also s 2(b).

¹⁹ S 2(a).

²⁰ A “mineral” is defined in s 1 as follows: “any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or

rights in respect of minerals and rights in respect of petroleum. It should be noted that in terms of property law theory, the object of the right to minerals or petroleum is the land itself.²² The discussion will hereafter be limited to rights to minerals.

2.3 Rights and duties of the State

The State is empowered to grant various rights to minerals against payment of a fee or consideration.

The State, acting through the Minister of the Department of Minerals and Energy, is empowered to "grant, issue, refuse, control, administer and manage"²³ the following rights: (a) reconnaissance permission to minerals; (b) prospecting right to minerals; (c) permission to remove minerals during a prospecting operation; (d) retention permit for minerals; (e) a mining permit for minerals; and (f) mining right for minerals.²⁴

In her capacity as custodian of mineral resources, the Minister may, in consultation with the Minister of Finance, determine the fee and consideration payable for the granting of such rights in terms of an Act.²⁵ A prospector has to pay the prescribed prospecting fees to the State.²⁶ A holder of a retention permit has to pay retention fees.²⁷ The Mineral and Petroleum Royalty Bill, which makes provision for the payment by miners of statutory royalties, has not yet been finalised.

A duty is imposed on the Minister of Minerals and Energy to ensure the sustainable development of South Africa's mineral resources within a framework of national environmental policy, norms and standards, whilst promoting economic and social development.²⁸

subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes: (a) water, other than water taken from land or sea for the extraction of any mineral from such water; (b) petroleum; or (c) peat".

²¹ "Petroleum" is defined in s 1 as "any liquid, solid hydrocarbon or combustible gas existing in a natural condition in the earth's crust and includes any such liquid or solid hydrocarbon or combustible gas, which gas has in any manner been returned to such natural condition, but does not include coal, bituminous shale or other stratified deposits from which oil can be obtained by destructive distillation or gas arising from a marsh or other surface deposit".

²² Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin in die Suid-Afrikaanse Reg* (1992) (LLD thesis) vi-vii and 4; and see also s 5(1).

²³ Ito s 6(1) any administrative decision or process in terms of the MPRD Act has to be taken or conducted within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness. S 6(1) applies subject to the provisions of the Promotion of Administrative Justice Act, 3 of 2000. Ito s 6(2) such decision has to be in writing and accompanied by written reasons for such decision.

²⁴ S 3(2)(a). Ito s 48(1) reconnaissance, prospecting and mining operations of minerals are prohibited on certain land. See s 48(2) for the circumstances under which permission of the Minister may be obtained for such operations on the land.

²⁵ S 3(2)(b).

²⁶ S 19(2)(f). The amount of prospecting fees and matters relating thereto are prescribed by reg 76 of the MPRD Act.

²⁷ S 35(2)(a). The amount of the retention fees and matters relating thereto are prescribed by reg 77 of the MPRD Act.

²⁸ S 3(3). As to the environmental provisions of the MPRD Act, see further Badenhorst and Mostert ch 17; and Glazewski *Environmental Law in South Africa* (2005) 453-483.

2 4 Rights to minerals

As indicated, the State, acting through the Minister of Minerals and Energy, may grant reconnaissance permissions, prospecting rights, permission to remove minerals during prospecting operations, retention permits and mining rights and mining permits to minerals.²⁹

The application for the above-mentioned rights has to be lodged in the prescribed manner³⁰ and notice as prescribed to and consultation with, interested and affected persons has to take place.³¹ In this article the application procedure prescribed for the respective rights³² will, however, not be discussed.³³

No person may conduct any “operations”,³⁴ as entitled by the above mentioned rights without: (a) being the holder of the relevant right; (b) an approved environmental management plan³⁵ or environmental management programme,³⁶ and (c) notifying and consulting with the owner or lawful occupier of land.³⁷

2 4 1 Reconnaissance permission to minerals

A reconnaissance permission to minerals is a statutory right, granted by the Minister to an applicant, which entitles the holder thereof to enter land for the purposes of a “reconnaissance operation”.³⁸

A holder of reconnaissance permission is entitled, on production of the permission and after consultation with the owner or lawful occupier of land, to enter the land for the purposes of reconnaissance operation.³⁹ A “reconnaissance operation” involves any operation carried out for or in connection with the search for a mineral by geological, geophysical, and

²⁹ S 3(2)(a).

³⁰ Ito reg 2(1) an application has to be lodged by submitting an appropriate completed form or sent by registered post to the Regional Manager in whose area the land is situated. The application has to be accompanied by a plan of the land relating to the application (reg 2(2)). As to the requirements of a “plan”, see further reg 2(2) and (3).

³¹ See reg 3.

³² Application for the following rights takes place in terms of the respective provisions: a reconnaissance permit (s 13), a prospecting permit (s 16), a mining right (s 22) and a mining permit (s 27). An application for renewal of a prospecting right or a mining right takes place in terms of ss 18 and 24, respectively. In terms of s 27(8)(a) a mining permit is also renewable even though provision is not made for a procedure to re-apply.

³³ The reader is referred to the relevant parts in Badenhorst and Mostert ch 14-16.

³⁴ The MPRD Act is inconsistent in its reference to operations. Sometimes the singular is used and sometimes the plural. For purposes of this article the plural will be used.

³⁵ In the case of a reconnaissance permission, prospecting right, a permission to remove minerals and mining permit. Approval of an environmental management plan takes place ito s 39(4).

³⁶ In the case of a mining right. Approval of an environmental management programme takes place ito s 39(4).

³⁷ S 5(4). If the owner or lawful occupier cannot be traced, provision is made for a procedure of notification (s 105 of the MPRD Act).

³⁸ S 15(1). Unlike a “reconnaissance permit” to petroleum, the notion of a “reconnaissance permission” to minerals is not defined in s 1 of the Act.

³⁹ S 15(1). Statutory duties are in terms of s 21(1) and (2) imposed upon the holder of a reconnaissance permission.

photo geological surveys and remote sensing techniques.⁴⁰ A "reconnaissance operation" does not include "prospecting"⁴¹ for minerals.⁴² A holder of reconnaissance permission is not entitled to conduct any prospecting or mining operations for a mineral in the land.⁴³ Neither is such holder entitled to an exclusive right to apply for or be granted a prospecting or mining right.⁴⁴

A reconnaissance permission is valid for two years.⁴⁵ A reconnaissance permission is, however, not renewable.⁴⁶ A reconnaissance permission may not be transferred, ceded, let or sublet, alienated, disposed of or encumbered by a mortgage bond.⁴⁷

The MPRD Act does not deal with the nature of a reconnaissance permission. It will be argued that a reconnaissance permission is a personal right, whether it is recorded or registered in the Mineral and Petroleum Titles Registration Office.⁴⁸

2 4 2 *Prospecting right*

A prospecting right is a statutory right, granted by the Minister to an applicant, which entitles the holder thereof (prospector) to: (a) conduct prospecting operations on land; (b) dispose of minerals for purposes of testing, identification and analyses; (c) apply for ministerial permission to remove and dispose of bulk samples of minerals found during prospecting; (d) apply for the renewal of a prospecting right; and (e) apply for a mining right to minerals.

"Prospecting operations" is defined as "any activity carried on in connection with prospecting".⁴⁹ "Prospecting" in turn, means "intentionally searching for any mineral by means of any method: (a) which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or (b) in or on any residue stockpile,⁵⁰ or residue deposit,⁵¹ in order to establish the existence of any mineral and to determine the extent and economic value thereof; or (c) in the sea or other water on land".⁵²

⁴⁰ S 1, definition of a "reconnaissance operation".

⁴¹ As to the meaning of "prospecting" see par 2 4 2 below.

⁴² S 1, definition of a "reconnaissance operation".

⁴³ S 15(2)(a).

⁴⁴ S 15(2)(b).

⁴⁵ S 14(4).

⁴⁶ S 14(4).

⁴⁷ S 14(5).

⁴⁸ Registration or recording of rights will be discussed in par 3 below.

⁴⁹ S 1, definition of "prospecting operations".

⁵⁰ "Residue stockpile" means any "debris, discard, tailing, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or another product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or product or production right" (s 1).

⁵¹ "Residue deposit" in turn means any "residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit to a mineral".

⁵² S 1, definition of "prospecting". The concepts of "sea" and "land" are also defined in s 1.

The content of a prospecting right is circumscribed by the Act.⁵³ A holder of a prospecting right may (a) enter the land for purposes of prospecting;⁵⁴ (b) prospect for his or her own account for mineral(s);⁵⁵ (c) remove and dispose of the mineral(s) found during prospecting for testing, identification and analyses; (d) use water⁵⁶ or sink a well or borehole for prospecting usage; and (e) carry out any other activity⁵⁷ incidental to prospecting operations.⁵⁸ A holder of a prospecting right is also entitled to other rights that may be granted to, acquired by or conferred under the Act or any other law.⁵⁹

A prospecting right is exercised subject to its prescribed terms and conditions.⁶⁰ A holder of a prospecting right may only remove and dispose of for his own account any mineral found in the course of prospecting operations in such quantities as may be required to conduct tests on, identify or analyse the minerals.⁶¹ A prospecting right is valid for a specified period which may not exceed five years.⁶² A holder of a prospecting right acquires the exclusive right to apply for, and be granted on compliance with the provisions of the Act: (a) the Minister's permission to remove and dispose for the holder's own account of bulk samples of minerals found during prospecting;⁶³ (b) a renewal of the prospecting right;⁶⁴ and (c) a mining right.⁶⁵ A prospecting right may be renewed by the Minister once, for a period not exceeding three years.⁶⁶ A prospecting right, subject to an application for renewal that has been lodged, remains in force until such time as such application has been granted or refused.⁶⁷

A prospecting right or an interest in any such right is only "transferable"⁶⁸ with the written consent of the Minister.⁶⁹ The prohibition also applies to the transfer of a controlling interest in the holder of any such right or interest, except in the case of a change of the controlling interest in a listed

⁵³ S 5(3).

⁵⁴ The prospector may be accompanied by employees. The prospector may also bring onto the land any plant, machinery and equipment for prospecting purposes. The prospector may further build, construct and lay down any surface or underground infrastructure which may be required for prospecting purposes.

⁵⁵ Prospecting may only be undertaken for minerals for which the prospecting right has been granted.

⁵⁶ Use of water is, however, subject to the National Water Act 36 of 1998. Such use of water may be from any natural spring, lake, river or stream on the land or any excavation previously made and used for prospecting purposes.

⁵⁷ The activity may, however, not contravene the provisions of the MPRD Act.

⁵⁸ Statutory duties are imposed in terms of ss 19(2) and 21(1) and (2) on the holder of a prospecting right.

⁵⁹ S 5(2).

⁶⁰ S 17(6).

⁶¹ S 20(1).

⁶² S 17(6).

⁶³ S 19(1)(c) read with s 20(2).

⁶⁴ S 19(1)(a).

⁶⁵ S 19(1)(b).

⁶⁶ S 18(4).

⁶⁷ S 18(5).

⁶⁸ The prohibition in s 11(1) refers to "ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of".

⁶⁹ S 11(1).

company.⁷⁰ The consent has to be granted if the transferee is capable of complying with all the obligations and terms and conditions of the prospecting right of the transferor.⁷¹ Transfer has to be registered within 30 days in the Mineral and Petroleum Titles Registration Office.⁷² The consent is not required for encumbrance by mortgage bond, if the mortgagee is a bank or financial institution and undertakes in writing that any sale in execution will be subject to Ministerial consent.⁷³

A prospecting right is labelled in the MPRD Act as a limited real right in respect of the mineral and the land to which the right relates.⁷⁴ The registration of a prospecting right in terms of the MTR Act in the Mineral and Petroleum Titles Registration Office⁷⁵ is stated to create a limited real right binding on third parties.⁷⁶

2 4 3 Permission to remove minerals during a prospecting operation

Permission to remove minerals during a prospecting operation is a statutory right, granted by the Minister to the applicant, which entitles the holder thereof to remove and dispose of bulk samples of prospected minerals for his or her own account.

A prospector is generally entitled to remove and dispose of prospected minerals that are required for testing, identification or analyses.⁷⁷ If a holder of a prospecting right, however, wants to remove and dispose for the holder's own account of bulk samples of minerals found during prospecting operations in terms of a prospecting right, the Minister's written permission has to be obtained.⁷⁸

The MPRD Act does not deal with the nature of a permission to remove minerals during a prospecting operation. It will be argued in this article⁷⁹ that a permission to remove minerals during prospecting operations is a personal right, irrespective of whether it is recorded or registered in the Mineral and Petroleum Titles Registration Office.⁸⁰

2 4 4 Retention permit

A retention permit is a statutory right which entitles its holder to: (a) the suspension of the terms and conditions of his or her prospecting right; (b) apply for renewal of the retention permit; or (c) apply for a mining right. It can

⁷⁰ S 11(1).

⁷¹ S 11(2). Compliance with the requirements of a prospecting right in terms of s 17 must also take place.

⁷² S 11(4).

⁷³ S 11(3).

⁷⁴ S 5(1).

⁷⁵ S 5(1)(d) of the MTR Act.

⁷⁶ S 2(4).

⁷⁷ S 5(3)(c) of the MPRD Act read with 20(1).

⁷⁸ S 20(2).

⁷⁹ See par 4 below.

⁸⁰ Registration or recording of rights will be discussed in par 3 below.

perhaps be viewed as a secure halfway house between prospecting and mining of minerals.

A retention permit suspends the terms and conditions of a prospecting right in respect of land.⁸¹ If the prospecting period for purposes of the prospecting right has not expired, the duration of the prospecting right runs concurrently with that of the retention permit.⁸² Despite the suspension of the terms of a prospecting right and the concurrent running of the periods of a prospecting right and a retention permit, the approved environmental management plan remains in force as if the prospecting right has not lapsed.⁸³ A retention permit is valid for the specified period, which period may not exceed three years.⁸⁴

A holder of a retention permit may renew a retention permit.⁸⁵ A retention permit may only be renewed once for a period not exceeding two years.⁸⁶ The holder of a retention permit has an exclusive right to be granted a mining right in respect of the retention area.⁸⁷ The retention permit is not transferable.⁸⁸ A retention permit may not be encumbered by a mortgage bond.⁸⁹

The MPRD Act does not deal with the nature of a retention permit. It will be argued in this article⁹⁰ that a retention permit is a personal right, whether it is recorded or registered in the Mineral and Petroleum Titles Registration Office.⁹¹

2 4 5 Mining permit

In the case of so-called small-scale mining, provision is made for the application of a mining permit. This would be if the mineral can be mined optimally within two years and the mining area does not exceed 1,5 hectares in extent.⁹²

A mining permit is a statutory right which entitles its holder to: (a) conduct mining operations⁹³ on a small scale; and (b) apply for renewal of such permit in limited instances.

The content of a mining permit is circumscribed by the Act.⁹⁴ A holder of a mining permit may: (a) enter the land for purposes of mining;⁹⁵ (b) mine for

⁸¹ S 32(2). Statutory duties are imposed by s 35(2) of the holder of a retention permit.

⁸² S 32(2).

⁸³ S 32(3).

⁸⁴ S 32(4).

⁸⁵ S 34(1)-(2).

⁸⁶ S 34(3).

⁸⁷ S 35(1).

⁸⁸ S 36.

⁸⁹ S 36.

⁹⁰ See par 4 below.

⁹¹ Registration or recording of rights will be discussed in par 3 below.

⁹² S 27(1).

⁹³ As to the meaning of mining operations and "mine", see par 2 4 6 below.

⁹⁴ S 27(7)(a)(b) and (d).

⁹⁵ The permit holder may be accompanied by employees. The miner may bring onto the land any plant, machinery or equipment for mining purposes. The miner may further build,

his or her own account on or under that mining area for the mineral; and (c) use water⁹⁶ or sink a well or borehole required for prospecting or mining usage.⁹⁷

A mining permit is valid for only two years.⁹⁸ It is renewable for only three periods, each of which may not exceed one year.⁹⁹ A mining permit is not transferable.¹⁰⁰ A mining permit may, however, be mortgaged only for the purposes of funding or financing of the mining project with ministerial consent.¹⁰¹ A mining permit being non-transferable, the real security right of a mortgagee seems to be non-sensical for purposes of a sale in execution.

The MPRD Act does not deal with the nature of a mining permit. It will be argued in this article¹⁰² that a mining permit is a personal right, whether it is recorded or registered in the Mineral and Petroleum Titles Registration Office.¹⁰³

2 4 6 *Mining right*

A mining right is a statutory right, granted by the Minister to the applicant, which entitles the holder thereof to: (a) conduct prospecting operations;¹⁰⁴ (b) conduct mining operations for minerals; and (c) apply for a renewal of the mining right.

“Mining operation” means “any operation relating to the act of mining and matters directly incidental thereto”.¹⁰⁵ To “mine”, in this context, means “any operation or activity for the purposes of winning any mineral on, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto”.¹⁰⁶

The content of a mining right is circumscribed by the Act.¹⁰⁷ A holder of a mining right may (a) enter the land for purposes of mining;¹⁰⁸ (b) mine for his or her own account for mineral(s);¹⁰⁹ (c) remove and dispose of mineral(s)

construct and lay down any surface or underground infrastructure which may be required for the purposes of mining.

⁹⁶ Use of water is subject to the provisions of National Water Act 36 of 1998. Such use of water may be from any natural spring, lake, river or stream, situated on, or flowing through, the land or any excavation previously made and used for prospecting or mining purposes.

⁹⁷ Statutory duties are imposed on the holder of a mining permit in terms of ss 27(7)(c), 28(1) and (2) and 25(2)(h) read with s (d) and (f).

⁹⁸ S 27(8)(a).

⁹⁹ S 27(8)(a).

¹⁰⁰ S 27(8)(b).

¹⁰¹ S 27(8)(b).

¹⁰² See par 4 below.

¹⁰³ Registration or recording of rights will be discussed in par 3 below.

¹⁰⁴ As to the meaning of “prospecting operations”, see par 2 4 2 above.

¹⁰⁵ Definition of “mining operation” in s 1.

¹⁰⁶ Definition of “mine” as a verb. Unlike the definition of “mine” in the Minerals Act 50 of 1991, a definition of mine as a noun is absent.

¹⁰⁷ S 5(3).

¹⁰⁸ The miner may be accompanied by employees. The miner may also bring onto the land any plant, machinery and equipment for mining purposes. The miner may further build, construct and lay down any surface or underground infrastructure which may be required for mining purposes.

¹⁰⁹ Mining may only be conducted for minerals for which the mining right has been granted.

found during prospecting or mining; (d) use water¹¹⁰ or sink a well or borehole required for prospecting or mining usage; and (e) carry out any other activity¹¹¹ incidental to mining operations.¹¹² In terms of the common law, a mining right also includes the entitlement to prospect.¹¹³ A holder of a mining right is also entitled to other rights that may be granted to, acquired by or conferred under the Act or any other law.¹¹⁴

A mining right is exercised subject to its prescribed terms and conditions.¹¹⁵ A mining right is valid for the specified period, which may not exceed 30 years.¹¹⁶ A holder of a mining right has the exclusive right to apply for and be granted, on compliance with the requirements of the Act, a renewal of the mining right in respect of the mineral and mining area in question.¹¹⁷ A mining right may be renewed by the Minister for further periods, each of which may not exceed 30 years at a time.¹¹⁸ A mining right, subject to a renewal application that has been lodged, remains in force until such time as the application has been granted or refused.¹¹⁹

A mining right or an interest in any such right is only transferable¹²⁰ with the written consent of the Minister.¹²¹ The prohibition also applies to the transfer of a controlling interest of a company or close corporation holding any such right or interest except in the case of a change of the controlling interest in a listed company.¹²² The consent has to be granted if the transferee is capable of complying with all the obligations and terms and conditions of the mining right of the transferor.¹²³ Transfer has to be registered within 30 days in the Mineral and Petroleum Titles Registration Office.¹²⁴ The consent is not required for encumbrance by mortgage bond if the mortgagee is a bank or financial institution and undertakes in writing that any sale in execution will be subject to Ministerial consent.¹²⁵

A mining right is labelled in the MPRD Act as a “limited real right” in respect of the mineral and the land to which such right relates.¹²⁶ The

¹¹⁰ Use of water is, however, subject to the National Water Act 36 of 1998. Such use of water may be from any natural spring, lake, river or stream on the land or any excavation previously made and used for prospecting or mining purposes.

¹¹¹ The activity may, however, not contravene the provisions of the MPRD Act.

¹¹² Statutory duties are imposed on the holder of a mining right by virtue of ss 25(2) and 28(1) and (2).

¹¹³ *Edwards (Waaikraal) Gold Mining Co Ltd v Mamogale NO and Bakwena Mines Ltd* 1927 TPD 288 298; *Hudson v Mann* 1950 4 SA 485 (T) 488; and Franklin and Kaplan *The Mining and Mineral Laws of South Africa* (1982) 7.

¹¹⁴ S 5(2)).

¹¹⁵ S 23(6).

¹¹⁶ S 23(6).

¹¹⁷ S 25(1).

¹¹⁸ S 24(4).

¹¹⁹ S 24(5).

¹²⁰ The prohibition in s 11(1) refers to “ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of”.

¹²¹ S 11(1).

¹²² S 11(1).

¹²³ S 11(2). Compliance with the requirements of a mining right in terms of s 23 must also take place.

¹²⁴ S 11(4).

¹²⁵ S 11(3).

¹²⁶ S 5(1).

registration of a mining right in terms of the MTR Act in the Mineral and Petroleum Titles Registration Office¹²⁷ is said to constitute a limited real right binding on third parties.¹²⁸

2 5 Suspension and cancellation of rights to minerals

The Minister is empowered to suspend or cancel a reconnaissance permission, prospecting right, retention permit to minerals, mining right or mining permit¹²⁹ under prescribed circumstances.¹³⁰ Suspension or cancellation can only take place if the prescribed procedures are followed.¹³¹ On recommendation of the Minerals and Mining Development Board, the Minister may also suspend or cancel a mining right to minerals if the holder fails to take corrective measures to ensure that optimal mining of mineral resources does take place.¹³²

It is submitted that the ability of the Minister to suspend or cancel rights to minerals does not support or detract from the notion that a personal right can under circumstances be suspended by the other party to the agreement. Such termination or suspension by the grantor of a real right seems, however, odd but not irreconcilable with a real right.

2 6 Lapsing of rights to minerals

Any right to minerals lapses, whenever: (a) the right expires; (b) the holder is deceased and there is no successor in title; (c) a company or close corporation is deregistered and no application for consent has been made to the Minister for the transfer or encumbrance of a right; (d) the holder of the right is liquidated or sequestered; (e) the right is cancelled;¹³³ or (f) the right is abandoned.¹³⁴

It is submitted that the lapsing of rights to minerals does not support or detract from the notion that a personal right or real right may lapse in certain instances.

¹²⁷ S 5(1)(d) of the MTR Act.

¹²⁸ S 2(4) of the MTR Act.

¹²⁹ S 47(1). Ss 21 and 28 require information and data in respect of reconnaissance and prospecting operations and processing and mining of minerals, respectively. Ito s 29 the Minister may also request prescribed information.

¹³⁰ These requirements are the following, namely, if the holder: (a) is conducting any reconnaissance, prospecting or mining operation in contravention of the Act; (b) breaches any material term or condition of such right or permit; (c) is contravening the approved environmental management programme; and (d) has submitted inaccurate, incorrect or misleading information in connection with any matter required to be submitted under the Act (s 47(1)). The possibility of contravening an environmental management plan has been omitted by the legislature in s 47(1)(c) and should be corrected, unless it was not deemed a ground for suspension or cancellation. It is doubted that in the cradle-to-the-grave type of legislation, like the MPRD Act, that this would have been the case.

¹³¹ See ss 47(2)-(5).

¹³² See s 51.

¹³³ See par 2 5 above.

¹³⁴ S 56.

27 Summary of rights to minerals

The following diagram may serve as a summary of the rights to minerals:

Right	Activity	Ancillary rights	Term	Renewable	Transferable	Mortgage bond	Nature
Reconnaissance permission to minerals	"Reconnaissance operations"	None	Two years	No	No	No	Personal right
Prospecting right	"Prospecting operations": entry prospecting removal of minerals use water incidental activities	Apply for: (a) bulk removal of minerals; (b) renewal of a prospecting right; or (c) a mining right	Five years max	Once, three years max	Ministerial consent	Bank or Financial institution and an undertaking is given	Real right
Permission to remove minerals during prospecting	Remove and dispose of bulk samples of prospected minerals						Personal right
Retention permit	Suspension of prospecting right	Apply for: (a) renewal of a retention permit; (b) mining Right	Three years max	Once for two years	No	No	Personal right
Mining Permit	"Mining operations": entry mining use water	Apply for renewal of a permit in limited instances	Two years	Renewable for three periods each not exceeding one year	No	Ministerial permission only for financing mining.	Personal right
Mining Right	"Prospecting operations" "Mining operations": enter prospect mine remove and dispose of minerals use water; and ancillary activities	Apply for renewal of mining right	Thirty years max	Thirty years at a time	Ministerial consent	Bank or Financial institution and an undertaking is given	Real right
Under prescribed circumstances, the Minister may suspend or cancel all the abovementioned rights to minerals.							

3 MINING TITLES REGISTRATION ACT

Section 5(1) of the MPRD Act explicitly states that a prospecting right or mining right granted in terms of the provisions of the MPRD Act is said to be a limited real right in respect of the mineral and the land.¹³⁵ Apart from the Minister granting foregoing "real rights", however, the holder thereof is obliged to lodge these rights for registration in the Mineral and Petroleum Titles Registration Office.¹³⁶ In terms of section 5(1)(d) of the MTR Act¹³⁷ the said prospecting rights and mining rights may be registered accordingly.

¹³⁵ See Badenhorst and Mostert 13-12.

¹³⁶ See ss 19(2)(a) and 25(2)(a).

¹³⁷ 16 of 1967.

Section 2(4) of the MTR Act provides that these rights become a limited real right upon registration thereof, in which event they become binding on third parties.¹³⁸

Nothing is stated in the MPRD Act as to the nature of reconnaissance permissions, permissions to remove minerals during prospecting operations, retention permits and mining permits (hereinafter "remaining rights to minerals"). By implication, the remaining rights to minerals are not limited real rights.¹³⁹ Section 5(1)(v) of the MTR Act provides for recording of the remaining rights to minerals, whilst section 5(1)(c) generally provides for registration of "all rights granted in terms of the MPRD Act".¹⁴⁰ Even though the legislature refers to permits and permissions one should not overlook the underlying "rights" created by permits and permissions. It is, therefore, unclear whether section 2(4) of the MTR Act also applies to the remaining rights to minerals, whether registered or merely recorded. If section 2(4) is indeed applicable to the underlying rights of the permits and permissions, the remaining rights to minerals will also become binding on third parties.

Therefore, as a preliminary finding, at least upon registration of the rights labeled "limited real rights" in the MPRD Act in the Mineral and Petroleum Titles Office, a real right, which is binding on third parties, is said to be created in terms of section 2(4) of the MTR Act.¹⁴¹ It is unclear whether prospecting rights or mining rights could be real in nature before registration, namely upon granting thereof by the Minister. Upon granting by the Minister of the remaining rights to minerals (in terms of the MPRD Act) and/or recording or registration of the remaining rights to minerals (in terms of the MTR Act), the nature of these rights seems unclear.

The MPRD Act requires lodging of transfers, cessions, letting, subletting, alienations and encumbrance by mortgage of prospecting rights and mining rights, at the Mineral and Petroleum Titles Registration Office within a prescribed time.¹⁴² The necessary ministerial permission for cession, leasing or sub-leasing of a prospecting right or mining right or encumbrance by mortgage bonds in certain circumstances must, however, be obtained.¹⁴³ On the strength of these provisions, it may be assumed that registered prospecting rights and mining rights may be: (a) alienated or disposed of by contract and transferred by registration of a cession in the Mineral and Petroleum Titles Registration Office;¹⁴⁴ (b) let or sublet by agreement and registration thereof in the Mineral and Petroleum Titles Registration Office;¹⁴⁵ and/or (c) encumbered by registration of a mortgage bond in the Mineral and Petroleum Titles Registration Office.¹⁴⁶

¹³⁸ See Badenhorst and Mostert 13-12 to 13-13.

¹³⁹ See Badenhorst and Mostert 13-13 and 30-2.

¹⁴⁰ See Badenhorst and Mostert 13-13.

¹⁴¹ *Ibid.*

¹⁴² S 11(4) of the MPRD Act. Badenhorst and Mostert 13-20 and 31-2; and see further the discussion of Badenhorst and Mostert in ch 13.6.7 and 30.2.3.

¹⁴³ S 11; see par 2 4 2, 2 4 5 and 2 4 6 above.

¹⁴⁴ S 5(1)(d) of the MTR Act.

¹⁴⁵ S 5(1)(e).

¹⁴⁶ S 5(1)(h). Registration of cession of such mortgage bond may take place in terms of s 5(1)(i); and Badenhorst and Mostert 13-20 and 31-2.

Even though they may be registrable¹⁴⁷ or recordable,¹⁴⁸ a reconnaissance permission,¹⁴⁹ mining permit¹⁵⁰ and retention permit,¹⁵¹ may not be transferred, ceded, let, sublet, alienated, disposed of or encumbered by mortgage.¹⁵² A mining permit which is registrable¹⁵³ or recordable¹⁵⁴ may, however, under prescribed circumstances, be encumbered by a mortgage bond.¹⁵⁵

4 INTERPRETATION

On a literal reading of the provisions of the two Acts, prospecting rights and mining rights are regarded as limited real rights upon granting of the rights by the Minister and/or upon registration of the rights in the Mineral and Petroleum Titles Registration Office. Upon registration of limited real rights, these rights become binding on third parties. The remaining rights to minerals are not limited real rights when granted by the Minister, but upon registration (or mere recording) limited real rights may or may not be created.

The literal reading of the provisions of the two Acts is absurd, to put it mildly. The provisions of the two Acts are also in conflict with the general principles applicable to the acquisition of real rights to land and the dichotomy between contract and delivery of real rights.¹⁵⁶

If section 5(1) of the MPRD Act and section 5(1) of the MTR Act are read together, different interpretations are possible: First, section 5(1) of the MPRD Act may be interpreted as an *ex lege* creation of real rights¹⁵⁷ upon granting by the Minister.¹⁵⁸ Secondly, it can be argued that the granting of a right in terms of the MPRD Act by the Minister to a holder has to be seen as a consensual agreement.¹⁵⁹ In *Ondombo Beleggings v Minister of Mineral & Energy Affairs*¹⁶⁰ the court held that a prospecting lease in terms of section 4 of the Precious Stones Act 73 of 1964 is a consensual agreement. Eksteen JA explained as follows:¹⁶¹

¹⁴⁷ S 5(1)(c) of the MTR Act.

¹⁴⁸ S 5(1)(v) of the MTR Act.

¹⁴⁹ S 14(5) of the MPRD Act.

¹⁵⁰ S 27(8)(b).

¹⁵¹ S 36.

¹⁵² Badenhorst and Mostert 13-20.

¹⁵³ S 5(1)(c) of the MTR Act.

¹⁵⁴ S 5(1)(v) of the MTR Act.

¹⁵⁵ S 27(8)(b) of the Act.

¹⁵⁶ See in general Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* (2002) ch 5.

¹⁵⁷ It could be argued that other real rights are created by operation of law, such as a tacit hypothecs, judicial mortgage, statutory security rights and liens.

¹⁵⁸ Badenhorst and Mostert 13-13 to 13-14 and 30-3 to 30-4.

¹⁵⁹ Badenhorst and Mostert 13-14 and 30-4.

¹⁶⁰ 1991 4 SA 718 (A). For a discussion of the case, see further Badenhorst and Van Heerden "A Comparison between the Nature of Prospecting Leases in terms of the Precious Stones Act 73 of 1964 and Prospecting Permits in terms of the Minerals Act 50 of 1991 – *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* 1989 4 SA 309 (T); 1991 4 SA 718 (A)" 1993 TSAR 159.

¹⁶¹ *Ondombo Beleggings v Minister of Mineral & Energy Affairs* 1991 4 SA 718 (A) 724H.

“The fact that the Act expressly requires certain matters to be dealt with in the lease, and in some instances gives the Minister an overriding say in determining certain terms, does not, in my view, detract from the contractual nature of the lease. After all, much the same circumstances pertain to numerous commercial agreements, more particularly when an individual contracts with a large corporation and is presented with a printed form of agreement. The mere fact that the individual may not readily be able to procure the alteration of any of the terms does not detract from the fact that his acceptance of those terms would lead to a binding contract being concluded.”

Upon the granting of the respective rights only personal rights are created.¹⁶²

The dogmatically correct view would be that the granting of a prospecting right or mining right by the Minister only creates personal rights by agreement between the holder and the Minister. The granting of such rights does not constitute the transfer of a real right. Amongst others, a real agreement (“saaklike ooreenkoms”) and registration in the case of rights to land is required for the transfer of a limited real right.¹⁶³ Upon such granting, personal rights are created by agreement between the holder and the Minister. Upon registration, such personal rights are terminated and a prospecting right or mining right, which is real in nature, is created. Such registered rights would be binding on third parties. The addition in section 2(4) of the MTR Act by the legislature of real rights being “binding on third parties” seems to be superfluous insofar as real rights by nature are binding on third parties.¹⁶⁴ It is also arguable that a right capable of being a real right¹⁶⁵ is envisaged (though not created) at the stage when the Minister grants a prospecting right or mining right.

It is conceded that the nature of a prospecting right by virtue of a prospecting contract and a mining right by virtue of mineral leases in the previous legal dispensation was not always consistent. A mining right by virtue of a registered notarial mineral lease was accepted to be a real right.¹⁶⁶ In *Vansa Vanadium SA Ltd v Registrar of Deeds*¹⁶⁷ it was, however, held that a prospecting contract registered in the deeds office does not create a real right.¹⁶⁸

It has, however, been submitted before¹⁶⁹ that upon conclusion of a prospecting contract, both a personal right (called a prospecting right) and a

¹⁶² Badenhorst and Mostert 13-14 and 30-4.

¹⁶³ See Badenhorst, Pienaar and Mostert 80-81.

¹⁶⁴ Badenhorst and Mostert 13-15.

¹⁶⁵ See *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1992 2 SA 419 (T) 435F; and Badenhorst, Pienaar and Mostert 65.

¹⁶⁶ Badenhorst and Mostert 5-5; and s 3 of the General Law Amendment Act.

¹⁶⁷ 1997 2 SA 784 (T) 794G and 795H-I/J.

¹⁶⁸ The court relied on the decision in *Cullinan v Pistorius* 1903 ORC 33 37 and the views of Joubert “Die Prospekterkontrak” 1959 *THRHR* 81 82; Wilmans *Minerale, Mineraalregte en Verbandhoudende Kontrakte* (1977) 133; Viljoen *The Rights and Duties of a Holder of Mineral Rights* (LLD thesis) (1975) 43; and Nel *Prospekterregte in die Suid-Afrikaanse Mineraal-en Mynreg* (LLD thesis) (1994) 494 (*Vansa Vanadium SA Ltd v Registrar of Deeds supra* 794G-795D). Franklin and Kaplan 630 maintain that, insofar as a prospecting right involves a subtraction from the *dominium*, it amounts to a real right. The court rejected their view (*Vansa Vanadium SA Ltd v Registrar of Deeds supra* 795H-I/J).

¹⁶⁹ See Badenhorst and Mostert 4-4.

personal right aimed at the acquisition of a prospecting right (in the nature of a real right) are created.¹⁷⁰ Upon registration of a prospecting contract the said personal rights are terminated and a prospecting right (in the nature of a real right) is created.¹⁷¹ The real right is transferred and accepted in terms of the real agreement. A registered prospecting right is real, because the object of the right is land; the origin of the right is registration. Furthermore, the right amounts to either a subtraction from the *dominium* of complete ownership or a subtraction from a mineral right and the parties usually have the intention to bind successors in title.¹⁷²

It should be borne in mind that, contrary to mineral rights, prospecting contracts and mineral leases registrable in the deeds registry, rights registrable in the Mining Titles Office (before the commencement of the MPRD Act), were regarded as statutory rights, separated from the ownership of the land to which they pertained.¹⁷³ The Mining Titles Registration Act has, as indicated before, been amended to make provision for the registration of mineral titles.¹⁷⁴

The dogmatically correct view, in terms of property theory based upon the common law, however, runs contrary to the principle of interpretation laid down in the MPRD Act, namely provisions of the common law that are inconsistent with the MPRD Act will not apply.¹⁷⁵ In its desire to create a new mineral (and petroleum) order the legislature attempted to rid the mineral (and petroleum) system of its common law features. To the extent that the provisions of the MPRD Act are in conflict with the abovementioned dogmatic view, such view may not be advanced. However, it could be argued that absurd results could not have been intended by the legislature. As indicated,¹⁷⁶ a reasonable interpretation that is consistent with the objectives of the MPRD Act is required. In its attempt to allay fears of investors and mining companies, security of tenure of prospecting and mining operations was resorted to as an objective of the MPRD Act.¹⁷⁷ This objective is relevant for the interpretation of the provisions of the MPRD Act. An interpretation consistent with this objective may result in the creation of a limited real right upon granting thereof by the Minister. Its creation takes place even earlier than in terms of the property theory based upon the common law even though this right does not at that stage operate against third parties.

¹⁷⁰ Badenhorst and Olivier "Die Aard van Regte Ingevolge 'n Prospekteerkontrak – *Vansa Vanadium SA Ltd v Registrar of Deeds*" 1997 TSAR 593-594.

¹⁷¹ In *Lazarus and Jackson v Wessels, Oliver and the Coronation Freehold Estates, Town and Mines, Ltd* 1903 TS 499 510 it was decided that a prospecting contract which granted a right to prospect (and mine) created a real right. Heyl *Grondregistrasie in Suid-Afrika* (1977) 76 regards a prospecting right as a personal servitude. According to Van der Merwe *Sakereg* (1989) 435 and Jones and Nel *Conveyancing in South Africa* (1991) 435 registration of a prospecting contract results in its operation as against third parties. See further Badenhorst and Olivier 1997 TSAR 594.

¹⁷² See Badenhorst and Olivier 1997 TSAR 595.

¹⁷³ Badenhorst and Mostert 27-4.

¹⁷⁴ Badenhorst and Mostert 27-6 point out that the legislature erroneously refers to the registration of "mining titles".

¹⁷⁵ See par 2 1 above.

¹⁷⁶ See par 2 1 above.

¹⁷⁷ S 2(g).

No principles of interpretation are prescribed in the MTR Act. This implies that whilst the MPRD Act has to be interpreted in terms of the objectives of that Act, the MTR Act may still be interpreted in terms of the common law. The legislature has created a lopsided vehicle of interpretation: on the one side it should disregard common law inconsistent with the MPRD Act and interpreted in terms of the objectives of the MPRD Act, whilst on the other side an interpretation in terms of property theory based upon the common law is possible in order to understand the revitalised MTR Act. Whether this result was intended by the legislature is questionable. Perhaps it can be ascribed to bad drafting or absence of co-operation in the drafting of the MPRD Act and the revival of the MTR Act.

If a limited real right is indeed created upon granting of a prospecting or mining right, such construction would advance the objective of the MPRD Act of achieving security of tenure at an early stage. It is of course possible for the legislature to create a new mode of acquisition of a real right to land, namely upon the granting of a prospecting or mining right by the Minister in terms of the MPRD Act. The absurdities arising from a joint reading of section 5(1) of the MPRD Act and section 2(4) MTR Act are, however, evident: a limited real right is created upon granting of the prospecting or mining right by the Minister and again upon registration thereof in the Mineral and Petroleum Titles Registration Office. Only upon registration, however, does the limited real right become binding on third parties. If a real right was indeed created upon granting of a prospecting right or mining right by the Minister, such a right, being real in nature, ought to be binding on third parties. It does not seem to be the case. The absence of this characteristic of a real right may conveniently be explained as being a feature of the (common law unfriendly) creature invented by the legislature.

Even though untenable, it seems as if one could argue as a compromise that, within the new mineral resources system, limited real rights are created in phases, where the nature of the right and its consequences is separated by the act of registration.¹⁷⁸

Despite the foregoing interpretation, it is submitted that the determination of the nature of the new rights still requires comparison with and interpretation against the background of property theory based upon the common law. The mere labelling of a right as a "limited real right" smacks of property theory based upon the common law. So does the retention of the characteristic of real rights as being capable of operating against third parties.

The creation of a real right upon registration of a prospecting or mining right in terms of the MTR Act is consistent with the dogmatic approach in terms of property theory based upon the common law. The creation of a real right at this stage seems dogmatically more sound. It should be noted that publication only takes place upon registration of the rights in the Mineral and Petroleum Titles Registration Office.

It is not the first time that the legislature has bestowed the feature of being "binding on third parties" upon a real right. In terms of section 3 of the

¹⁷⁸ Badenhorst and Mostert 13-13.

General Law Amendment Act 50 of 1956 a mineral lease had to be in notarial form to be valid.¹⁷⁹ For a mining right in terms of a mineral lease to be enforceable against third parties section 3, in addition, required registration of the mineral lease in the Deeds Office. As in the past, no definition is given as to who is contemplated as falling within the scope of “third parties”.¹⁸⁰

As to the remaining rights to minerals, it is submitted that these rights are not real rights granted by the Minister in terms of the MPRD Act. By implication, the remaining rights to minerals seem to be personal in nature.¹⁸¹ The granting of the remaining rights may be interpreted as an *ex lege* creation of personal rights upon the granting thereof by the Minister.¹⁸² As indicated before, the preferred view is that the granting of prospecting or mining rights to minerals by the Minister to a holder is a consensual agreement. Upon a combined reading of section 5(1) of the MPRD Act and sections 5(1)(c) and 2(4) of the MTR Act one could assume that the remaining rights to minerals may become real upon registration (if the intention of the legislature was indeed to deviate from the existing principles of property law). Even though the legislation refers to permissions and permits (which may be recorded), the underlying rights to permission and permits (which may theoretically be registered) should not go unobserved. It is, however, submitted that these rights are and remain personal upon recording in terms of section 5(1)(v) of the MTR Act in the Mineral and Petroleum Titles Registration Office.¹⁸³ It can be argued that the MTR Act envisaged registration and/or recording in the Mineral and Petroleum Titles Office of all of rights to minerals.¹⁸⁴ It is arguable that the reference to “rights” in section 5(1)(c) was intended by the legislature to refer only to prospecting rights and mining rights and not to reconnaissance permissions, permissions to remove minerals during prospecting operations, retention permits and mining permits. The remaining rights to minerals can, therefore, only be recorded and do not qualify as limited real rights which are binding on third parties. It is submitted that upon “recording” of the remaining rights to minerals, such rights would remain personal. If the remaining rights are indeed registered, such rights would, in accordance with property theory based upon the common law, still remain personal.¹⁸⁵

As submitted above,¹⁸⁶ the ability of the minister to suspend or terminate rights to minerals or the lapsing thereof neither supports nor detracts from the rights being personal rights. This termination or suspension by the grantor of a real right seems odd but is not irreconcilable with a real right. As

¹⁷⁹ See further Franklin and Kaplan 292ff; and Badenhorst and Mostert ch 5.1.3.

¹⁸⁰ Franklin and Kaplan 300.

¹⁸¹ Badenhorst and Mostert 13-13 and 30-4.

¹⁸² Badenhorst and Mostert 13-14.

¹⁸³ Badenhorst and Mostert 13-15.

¹⁸⁴ Badenhorst and Mostert 13-13.

¹⁸⁵ *British South Africa Company v Bulawayo Municipality* 1919 AD 84 93; *Fine Wool Products of South Africa Ltd v Director of Valuations* 1950 4 SA 490 (E) 499C; *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 1 SA 600 (O) 608C; *Schwedhelm v Hauman* 1947 1 SA 127 (E); *Lorentz v Melle* 1978 3 SA 1044 (T) 1049H-1050; *Ex parte Menzies et Uxor* 1993 3 SA 799 (C) 806F-G; and *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1999 2 SA 419 (T) 435B/C.

¹⁸⁶ See par 2 5 above.

was submitted further,¹⁸⁷ the lapsing of rights to minerals does not support or detract from the notion that a personal right or real right may lapse in certain instances.

The possibility created in the MPRD Act and MTR Act for the registration of transfer of prospecting rights or mining rights¹⁸⁸ supports the construction that these rights are indeed real rights that can only be transferred or "disposed of" by registration in the Mineral and Petroleum Titles Office. Such cession takes place in accordance with property theory based upon the common law. As seen before, a registered prospecting right or mining right may be the object of a registered lease (or sub-lease) or a registered mortgage bond. Such lease or mortgage bond is also a limited real right in accordance with property theory based upon the common law.

Cession or disposal of the remaining rights to minerals is not permitted in the MPRD Act. This may support the view that these rights were intended to be personal in nature. If the view is advanced that a registered mining permit does not constitute a real right upon registration, registration of a mortgage bond over a mining permit (being a personal right) would then be novel. Section 4(1) of the MPRD Act would, however, make such an interpretation (mortgaging of a personal right by registration of a mortgage bond) possible.¹⁸⁹

The discrepancies between section 5(1) of the MPRD Act and section 5(1) of the MTR Act should be clarified. To the property law fundamentalist the crossing of the Rubicon since Mayday 2004 by this statutory cubic zirconium¹⁹⁰ seems unsound. Only when the discrepancies between the provisions of the two important sister acts have been clarified, would the nature of the various rights stop being as variable and complex as a Rubik's cube.

5 RECENT DEVELOPMENTS

It is heartening that the legislature intends to amend and rectify section 5(1) of the MPRD Act.¹⁹¹ Section 5(1) will then state that a prospecting right or mining right granted in terms of the MPRD Act and registered in terms of the MTR Act is a limited real right. A real right will, therefore, only be created upon registration of a prospecting right or mining right. By its nature such a right would be binding upon third parties.

The proposed amendments to the MPRD Act remain silent about the nature of the remaining rights to minerals. What has been said before about

¹⁸⁷ See par 2 6 above

¹⁸⁸ See par 3 above.

¹⁸⁹ Badenhorst and Mostert 13-20 fn 14.

¹⁹⁰ The importance of property theory (and more specifically the doctrine of private law rights) in the development of mineral law led me to the following conclusion during the early 1990s: "Hand aan hand met die ontginning van minerale in die praktyk en die dinamiese ontwikkeling van sakereg in die algemeen, kan die leerstuk van subjektiewe regte steeds in die toekoms dien as poleerder van die inheemse Suid-Afrikaanse juridiese diamant": Badenhorst 1004.

¹⁹¹ S 3 of the proposed MPRD Amendment Act (see fn 6 above).

these rights¹⁹² applies *mutatis mutandis*. At this stage, it seems as if the provisions regarding the interpretation of the MPRD Act¹⁹³ will not be changed.

The MTR Act (as amended) should also receive the attention of the legislature. Section 2(4) of the MTR Act will be superfluous in two respects: Firstly, the amended section 5(1) of the MPRD Act will make it clear that a real right is created upon registration. Secondly, as stated before, a real right is by nature enforceable against third parties. In the optimistic words of Willis J in *AXZS Industries v AF Dreyers (Pty) Ltd*:¹⁹⁴

“A real right, such as ownership, is as every first year law student knows, enforceable against the whole world.”

The distinction between registration or recording of rights in the Mining Titles Office and the consequences thereof should be clarified. Registration of prospecting rights or mining rights creates real rights binding upon third parties in accordance with the publicity principle. The same can not be said for recording of permissions and permits. The question remains whether recording of permissions and permits is intended to serve some publicity function.

6 CONCLUSION

It is submitted that the nature of rights to minerals in terms of the MPRD Act should be interpreted in accordance with property doctrine based upon the common law: Upon granting of prospecting rights and mining rights to minerals by the Minister, personal rights are created. Upon registration in the Mineral and Petroleum Titles Office of prospecting rights and mining rights to minerals, (a) personal rights in terms of the grant are terminated; and (b) prospecting rights and mining rights, which are real in nature, are created. The latter rights are binding on third parties. Upon granting the remainder of rights to minerals by the Minister, personal rights are created. Upon recording (or registration) of the remaining rights to minerals only personal rights are recorded (or registered) and they remain personal in nature despite recording (or registration) thereof. If merely recorded, the remaining rights do not seem to be binding as against third parties.

The suggested property law approach is to a large extent supported by the proposed amendment of the all important section 5(1) of the MPRD Act and is to be welcomed. For the sake of consistency the MTR Act also needs to be revisited by the legislature.

¹⁹² See par 4 above.

¹⁹³ See par 2 1 above

¹⁹⁴ 2004 4 SA 186 (W) 196F/G.