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Author
Martin Brassey SC

Contact details
Telephone: (011) 482-7221
e-mail: info@irr.org.za
website: www.sairr.org.za

The property rights grab

Property rights are under threat from a Constitutional Court decision on mining rights in 2013. This threat has since been compounded by the Promotion and Protection of Investment Bill of 2013, which is soon to be sent to the Cabinet for approval. The Bill, backed by the judgment, could unravel the guarantee of property rights in the Constitution, warns Martin Brassey SC.

Brassey has some hard things to say about the judgment and the courage of the judges who signed off on it. Don't believe, he adds, that the Constitutional Court will rush to protect private property when issues of nationalisation are at stake.

A lucky strike

When I was young, a long time ago I'll admit, a child in the comics we devoured was forever discovering oil. He would be digging in the backyard and strike a gusher. At first staggered by the find, he'd then rush off to find the male head of the, yup, dual-parent household. 'Paw, Paw,' he'd cry, 'it's oil, we's rich!' Father, a looming figure dressed in spruce workman's overalls, would look out the window, see the spouting fountain of inky black goo, then reply 'Thank the Lord, our troubles is over.'

Do children still do this in comics? Do comics like this still exist? I suspect the answer is no on both counts. Never mind, the point is still valid — or rather, the three points, for there are three. The first is that mineral-bearing land is frequently acquired by owners who have no idea of the riches beneath their feet; the second is that the find on their land is generally made by luck or an outsider, and so without any effort on their part; and the third is that, as a result of the discovery, they become wealthy beyond their wildest dreams. It's all pennies-from-heaven or, to use a phrase that at least has the

merit of being right side up, a luxurious Lucky Strike.

Since they have done nothing to make the fortune and need it no more than the rest of us, it is easy to tell them that it is not rightfully theirs. The underlying idea is that the nation as a whole should enjoy the benefit of the chance discovery. The public will best know what to do with it; they won't be like one W T Waggoner, a rancher celebrated in Wikipedia, who struck oil in 1902 while drilling for water and complained 'I wanted water, and they got me oil. I tell you I was mad, mad clean through. We needed water for ourselves and for our cattle to drink.'

Minerals are typically made common property and subjected to the disposition of the state. Our common law is also familiar with a species of property that vests in the people in general.

Minerals and the state

So it is not hard to see why minerals are typically made common property and subjected to the disposition of the state. Most states do not recognise property owners as entitled to sub-soil resources; and often divest them of such rights as they might earlier have had by means of their constitutions. The Ghanaian Constitution, for instance, states that 'every mineral in its natural state [and] rivers, streams and water courses … and any area covered by the territorial sea is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for, the people of Ghana.' UN General Assembly Resolution 1803 (XVII) stipulates that 'the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned'. This is very much in the same vein — though some prefer to limit its reach to indigenous groups deprived of land in the course of colonisation.

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Our common law, sourced in Roman law, is familiar with the notion of a species of property that vests in the people in general. Roman law divides such property into things that are held in common, which comprise the air, running water, the sea and the sea shore; and things that are to be treated as public, such as roads, perennial rivers, and harbours. Today, the distinction between the two categories is really significant only as a means by which to vex law students, for they have mostly been supplanted by statutes such as National Water Act of 1998, which makes the Government the 'public trustee of the nation's water resources'. What is important, at least for present purposes, is the precedent supplied by these categories of common property: they give us a useful framework in which to locate our thoughts on the current structure of mineral rights.

Private minerals ownership in South Africa

Until recently, minerals were decidedly not common property in South African law. Ownership of them, unless alienated by agreement, vested in the owner of the surface land, who was entitled to the proceeds of their exploitation. Under measures designed to maximise fiscal revenue, an owner might occasionally become obliged to use it (the mining right) or

lose it, but in every case minerals could be mined only if a permit for the purpose had been granted by the State. As part of his general ownership rights, an owner could by agreement permit another person to mine and keep the minerals. This entitlement, if registered against the title deeds of the property, enjoyed the status of a real right (that is, one that could be asserted against the world) in much the same way as a servitude. In conception, the regime was anything but arcane or abstruse: all that made it complex was the multiplicity of the enactments (at a time each province in South Africa had its own set of statutes) and the labyrinthine nature of the provisions themselves.

The ANC's Freedom Charter, adopted in 1955, states that 'the mineral wealth beneath the soil ... shall be transferred to the ownership of the people as a whole'.

The ANC's Freedom Charter, adopted in 1955 and now enjoying canonical status in the organisation, states that 'the mineral wealth beneath the soil … shall be transferred to the ownership of the people as a whole'. Banks and monopoly industry are branches of commercial activity also targeted by this injunction, but they remain unscathed, a result (I suggest) of the fact that their profits cannot obviously be seen as windfalls. Shortly after the 1994 transition to democracy, the Government began considering the best way to implement the transfer, and by 2002 it had promulgated a statute for the purpose.

A new mining law

The new Act, the Mineral and Petroleum Resources Development Act (MPRDA), stood the previous regime on its head. No longer would minerals be privately owned: now they would, in the words of the operative section, be 'the common heritage of all the people of South Africa', while the State was to be their 'custodian … for the benefit of all South Africans'. Henceforth the State would also create mineral rights by administrative fiat and hand them out to those who made application for them in proper form. Unsurprisingly, 'historically disadvantaged persons' — read black South Africans — would be entitled to preference in the process of allocating mineral rights.

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The Act, in its formative stage, received a frosty response from established mining houses, but a comfortable compromise was quickly struck with the Government in a series of confidential exchanges. Mining companies were told that the State would create a transitional arrangement in which their existing 'old-order' mining rights would be recognised without demur and automatically exchanged for 'new-order' rights to mine under the new statutory regime. These new rights would be recognised for 25 years (soon upped to 30 years), long enough to work out the underground seams and so optimise their investments. In the acquisition of new rights they would, of course, be competing against blacks at a slight disadvantage and, given the open-ended nature of the State's discretion, they might become victims of patronage and other corrupt practices. Offsetting this, however, was the fact the mining rights could now be acquired without paying the hefty royalties that property owners were often able to exact. Not a perfect solution, perhaps, but

a classic exposition of the principle that settlements become simple if third parties can be made to pay the price.

Clubby this all was, but no one could have been naïve enough to believe that an outsider would not seek to unsettle the deal. The attack, when it came, was not based on the argument that the Act, in stripping land owners of their proprietary mineral rights, was unconstitutional. Instead it was argued that the deprivation of old-order rights was an act of expropriation for which compensation was payable under clause 25 (the property clause) in the Bill of Rights.

In the *Agri SA* case, it was argued that the deprivation of old-order rights was an act of expropriation for which compensation was payable.

The *Agri SA* case

The matter began in 2001, when a company called Sebenza (Pty) Ltd bought an unused old-order coal right for some R1m. When the MPRDA came into effect in 2004, the statute gave Sebenza a year to convert its unused right into a new-order one. However, the company could not afford the R1.5m application fee, which meant its old-order right 'ceased to exist' a year later. This prompted Sebenza to claim compensation from the State for the expropriation it had allegedly suffered under the MPRDA. Agri SA, a lobby group for commercial farmers — many of whom had earlier owned unused old-order rights to the minerals beneath their land — took over Sebenza's claim and brought it before the courts as a test case on the consequences of the Act (see *Agri SA* v *Minister for Minerals & Energy 2013* (4) SA 1 (CC)) .

At the heart of the dispute were two concepts included in the property clause: expropriation and deprivation. The natural meaning of each is pretty obvious: expropriation is a process in which something is coercively taken out of someone's estate and then appropriated by (that is, made the property of) the coercing authority. So, if a homeowner refuses to sell property required for a road, the State will expropriate the property and thereby become its owner by an exercise of official power. By contrast, deprivation entails only the first half of the process: the owner of the property is stripped of it but there is no corresponding acquisition of ownership by the authorities. A deprivation will occur when a building is destroyed because it is illegally constructed or noxious, or to clear a firebreak in a situation of sudden emergency.

Deprivation entails only the first half of the process: the owner of the property is stripped of it but there is no corresponding acquisition of ownership by the authorities.

The distinction may sometimes be hard to apply, but it is not an idle one: if property is transferred, it goes to swell the patrimony of the transferee, who can be expected to pay for the benefit. However, in the case of a simple deprivation, there is no corresponding enrichment for which recompense is due.

Placing minerals in the public domain without compensating their owners created a conundrum for the drafters of the new mining statute. Since the minerals would retain their value throughout the process, there would clearly be no destruction of the right to mine them. That meant a process of transfer was inescapable. But a transfer to whom?

Cleverly, the drafters decided not to make the State the recipient. Had they done so, the legal

effect of the process would have been indistinguishable from the acquisition of land to build a road, clearly giving rise to an expropriation for which compensation would be payable. Instead they worded the Act so as to make the recipient 'the people of South Africa'. To make assurance doubly sure, they also declared that minerals 'are [their] common heritage', as though this was an eternal verity that legal regimes of recent times had improperly flouted. By means of this legerdemain, the drafters were able to summon up the image of common and public property (the seashore etc, discussed above) which vests in the public at large for its general use and enjoyment. In the spirit of the tradition so deftly being invoked, the role of the State was simply to safeguard the public interest by acting as the 'custodian for the benefit of all South Africans'.

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The high court judgment

Juggling with words in this way is, of course, what gives lawyers a bad name. When the case first came to court, the judge was too seasoned a practitioner to be blinded by the language. In a carefully crafted judgment, Judge Barend du Plessis, sitting in the Gauteng North High Court, said compensation was indeed payable and, with the concurrence of the litigants, awarded the claimant the sum of R750 000.

In framing his argument, the judge identified the issues as threefold and cascading: did the statute deprive Sebenza of its mineral rights? If so, was Sebenza expropriated of those rights? If so, is Sebenza entitled to compensation? To each of these questions, his answer was an unequivocal yes.

Summing up his stance on the first point, the judge said (at para 50): 'Under the MPRDA the holder of mineral rights no longer has an asset that can be sold, otherwise alienated, used as security or kept as an investment. The mineral right holder's contingent ownership in the minerals, once [extracted], has similarly disappeared. The right to grant... others [the right] to prospect for and mine has disappeared. In sum, the holders of mineral rights have, since the enactment of the MPRDA, not one of the competencies that the law [earlier] conferred on them.... All that the MPRDA conferred on those holders is the right to apply, in competition with any other person, to be granted a prospecting right or a mining right.'

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In short, the original right had been 'legislated out of existence' under the MPRDA, which meant there was plainly a deprivation. Turning to the issue of expropriation, the judge noted that Sebenza had lost all the competencies of ownership it had previously enjoyed, while the statute had given the mining minister substantially similar rights. The State had thus acquired 'the substance of the property rights of the erstwhile holder' — and it made no difference that the State's competencies were termed 'custodianship' rather than 'ownership'. What mattered was that the interests now vesting in the State were comparable with those previously vesting in the private landowner — and this meant that expropriation had indeed taken place.

On the third issue, the State's argument was that compensation should be nil in the instant case because the purposes of the Act were benign and the totality of the amount that might be due to all erstwhile holders of 'old-order' rights would be crippling. In the judge's view, neither of these factors was relevant to the case before him. If the State had 'wished to expropriate mineral rights without the attendant obligation to pay compensation', it should have used different wording in the MPRDA and expressly relied on relevant limitation clauses allowing derogations from guaranteed property rights in specified circumstances. However, in drafting the MPRDA, 'this advisedly was not done' (see para 94).

The State had acquired 'the substance of the property rights of the erstwhile holder' – and it made no difference that the State's competencies were termed 'custodianship' rather than 'ownership'.

The DMR appealed against this ruling to the Supreme Court of Appeal (SCA), which upheld its appeal. But the SCA judgments were tortured and unconvincing, prompting Agri SA to appeal against them to the Constitutional Court, which dismissed its appeal in April 2013.

The chief justice's ruling

Handing down the majority judgment in the ConCourt, Chief Justice Mogoeng Mogoeng correctly accepted that the effect of the MPRDA had been to deprive property owners of their 'old-order' mining rights. However, on the issue of expropriation, to which he then turned, his reasoning was anything but convincing.

According to the Chief Justice, there can be 'no expropriation in circumstances where deprivation does not result in property being acquired by the State' (at para 50). Recognising that so bold a conclusion would drive a carriage-and-four through the constitutional protection, he then went on to caution against 'a one-size-fits-all' determination of the issue. Such an approach is 'inappropriate, particularly when an alleged acquisition of incorporeal rights, like mineral rights, is considered. A case-by-case determination of whether acquisition has in fact taken place presents itself as the more appropriate way of dealing with these matters.' (At para 64)

But this cautionary homily soon deserted him. Having identified the critical question as being whether the State had acquired ownership of the minerals, Mogoeng went on to say:

'[T]he State, as the custodian of these resources, is not seeking or supposed to be a contender with people or business entities for the right to prospect for or mine these minerals. It is a facilitator or a conduit through which broader and equitable access to mineral … resources can be realised.' (At para 68)

According to the Chief Justice, there can be 'no expropriation in circumstances where deprivation does not result in property being acquired by the State'.

The minority view

Judge Johan Froneman, in a minority judgment, saw the pitfalls of this reasoning. 'If private ownership of minerals can be abolished without just and equitable compensation — by the construction that when the State allocates the substance of old rights to others it does not do so as the holder of those rights — what prevents the abolition of private ownership of any, or all, property in

the same way? [Judge Mogoeng's] construction in effect immunises, by definition, any legislative transfer of property from existing property holders to others if it is done by the State as custodian of the country's resources, from being recognised as expropriation.' (At para 105)

In Froneman's view, the right approach was to accept that an expropriation had occurred. The owner had lost a benefit and the State had acquired one: 'Under the MPRDA the right to compensation has been lost [and] the money that the owner would have received under the [previous Act] is now kept by the State. To me that looks like the acquisition of the benefit by the State' (at para 106). Frankly, it looks like that to me as well and, I suspect, to everyone who possesses an ounce of good sense and sound judgment.

If private ownership of minerals can be abolished without just and equitable compensation, what prevents the abolition of private ownership of any, or all, property in the same way?

Compensation, however, was not to be had for the asking, but was payable only if the claimant could prove a loss that should in equity be recognised. In the present case, according to the judge, the MPRDA had already provided 'just and equitable' compensation for this expropriation by allowing Sebenza to apply for the conversion of its old-order right. That Sebenza had been unable to do so was because of its own financial problems and not because the MPRDA's provision for 'compensation-in-kind' was inadequate (see para 109). In addition, if there was a shortfall, this could not supply a basis of complaint when the individual's entitlements were weighed against the transformative aims of the statute. Froneman thus agreed with Mogoeng that Sebenza was not entitled to compensation, but reached his conclusion on a different basis.

Import of the majority judgment

Judge Froneman's judgment, being the minority one, is not the law. The law is represented by the majority judgment and we must work within its framework. Froneman believed the majority was willing to countenance a deprivation in every case in which the statute placed the property in the hands, not of the State, but of the public at large.

The MPRDA had already provided 'just and equitable' compensation for this expropriation by allowing Sebenza to apply for the conversion of its old-order right.

What we have already seen, however, is that the judgment is rather less absolute than this. Much of its language, to be sure, is in blunt and unequivocal terms, but there is also the passage saying every instance of acquisition must be dealt with on its own merits and in the light of its own circumstances.

This statement provides some basis for arguing that minerals are an exceptional form of property and, as justification for this proposition, stressing that they are typically a windfall that the owner has done nothing to earn or deserve. A statute that, by the stroke of a pen, deprived homeowners of the ownership of their dwellings would, I surmise, never survive scrutiny under the Constitution even were it to place the homes in the public domain. A nuanced approach is arguably what the majority mandates and, through it, justice can at least potentially be done.

An unravelling of property rights?

There is also no denying, however, that the *Agri SA* decision is a set-back for property owners and those who believe property rights should be respected More than this, it is a wake-up call for those who believe that their patrimonial rights will be protected by the Constitutional Court. Such a belief informed the decision of the De Klerk government to jettison minority veto rights in the course of negotiating over the transition to majority rule. But constitutional protections are porous in their content and their enforcement depends on the courage and determination of the judges who enforce them.

There is no denying, however, that the *Agri SA* decision is a set-back for property owners.

There are occasions since 1994 in which the courts have exhibited a willingness to make a stand, but they are principally in areas in which the conflict with the other branches of government is more apparent than real: I think for instance of cases arising out of the death penalty, marriage and customary relationships, and gay rights, where the executive wants a liberal outcome but would rather not be seen to make the decision. But when the conflict is real — notably on matters of socio-economic concern, which are of course at the heart of the policies espoused by the ANC Government — no such toughness is really apparent. This is partly a consequence of the imperative to transform the bench. However, it is also because of the limitations inherent in the judicial process that the courts show a decided lack of backbone in such matters.

Decisions on property rights provide the quintessential illustration of the point. For example, efforts to evict illegal occupiers of buildings and land invaders are met with procrastination and windy judicial rhetoric. When orders are finally made, they serve to 'reward' the occupiers for their acts of illegality by saddling the property owner with the burden of caring for them and giving them a preferential right to the emergency accommodation that municipalities either own or are forced to acquire. The judicial endorsement of the statutory dispossession of minerals is just another instance of this weak-kneed approach, and we are already beginning to witness its consequences.

Efforts to evict illegal occupiers of buildings and land invaders are met with procrastination and windy judicial rhetoric. The *Agri SA* case is just another instance of this weak-kneed approach.

Emboldened, the State is invoking the heritage-plus-custodianship formula to legitimise seizures in other contexts. Learning from the Nationalists, who shamelessly gave nice names to nasty laws, the Government has promulgated, for comment and criticism, a Promotion and Protection of Investment Bill aimed principally at robbing investors of the shield against property deprivation embodied in South Africa's treaties with foreign countries. But at the heart of the Bill is a provision that says it is not 'an act of expropriation' if the State's conduct results in a deprivation which is not accompanied by the State's acquisition of the ownership of the property in question. The scope of the immunity created by the Bill would be bad enough if it were to target foreigners alone. However, it is also unlimited in extent and so can be used against South African nationals as well. The only significant restriction is that the property in question must be used 'for commercial purposes'.

The result, according to leading legal commentator Anthea Jeffery, is that the State will have

broad powers to deprive anyone of commercial property as 'custodian of the poor'. She cautions that a cash-strapped State might not in future shrink from using the Bill to grab land without compensation in pursuit of its land restitution policy. If this occurs, then the protective constitutional cloth so earnestly woven by De Klerk, already fraying most grievously, will begin to unravel completely.

— **Martin Brassey SC**

*** Martin Brassey is senior counsel at the Johannesburg Bar.**