

The legal position of township developers and holders of coal-mining rights
in respect of the same land

by

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submitted in accordance with the requirements
for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: Prof S J SCOTT

DECEMBER 2014

DECLARATION

I declare that **The legal position of township developers and holders of coal-mining rights in respect of the same land** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



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ABSTRACT

Over the past decade, the regulation of mining in South Africa has undergone a fundamental transformation in order to promote equitable access to the nation's mineral and petroleum resources. The Mineral and Petroleum Resources Development Act 28 of 2002, drastically changed the regulation of mining by placing the nation's mineral and petroleum resources under the custodianship of the state. The transformative objectives of resource reform, as envisaged in the Constitution of the Republic of South Africa, 1996, could however not be achieved without a measure of sacrifice -- most notably, that which had to be shouldered by the owners of the land in which the minerals are contained.

Under common law, minerals vested in the owners of land and no one could compel them to extract or consent to the extraction of these minerals.¹ Landowners were able to safeguard their land from mining activities by refusing to consent to mining. The Mineral and Petroleum Resources Development Act, 2002, changed this by providing that landowners could no longer prevent the state from granting qualifying applicants authorisation to mine. The transformative objectives of resource reform, have inevitably made great inroads into a landowner's rights to use and enjoy his property optimally.

The main focus of this study revolves around the limiting impact of South Africa's current mineral-law dispensation on township development,² and conversely, how township development impairs or limits the mining of coal.³

¹ See *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC).

² Our courts have on many occasions expressed the view that the use of the surface of the land should be subordinate to mineral extraction, affording the holder of mining rights a degree of protection. The *locus classicus* is *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) (the *Anglo* case), where it was restated that in cases of irreconcilable conflict, the use of the surface should yield to mineral exploitation. Opencast mining, and even shallow coal mining, could therefore in practice have the effect of restricting township development.

³ The provisions of the Mine Health and Safety Act 29 of 1996, effectively prevent a mining company from conducting high-extraction mining beneath structures on the surface of land. Coupled with a mining company's liability in cases where damage or injury is caused as a result of

For a better understanding of the limitations which the current legislative provisions create in respect of the rights of landowners and holders of mining rights, a brief evaluation of the historical development of the right to mine coal is provided. The entitlements and reciprocal obligations of holders of mining rights and owners of the affected land are considered, and the parties' legal remedies to resist interference in their respective rights are explored.

In the process of considering possible remedies to resolve the conflict which inevitably arises, I explain why English-law principles governing lateral support (support owed by two adjacent properties [neighbour law]), and subjacent support (where the landowner may not be deprived of the vertical support his property derives from the sub-surface minerals) were incorrectly transplanted into our law. In *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*,⁴ the South African Supreme Court of Appeal rejected the previously-held view⁵ that the right to subjacent support -- like the right to lateral support -- is a natural property right incidental to the ownership of the land. It was further held that conflict between holders of rights to minerals and owners of land should be resolved, not in accordance with English-law principles of neighbour law, but in terms of the law developed for rights relating to the use of servitudes. In summary, the court found that where the parties have not specifically contracted against the specific action (such as opencast or planned-subsidence mining), and provided that it was reasonably necessary for the mining right holder to use this invasive method, he may do so, so long as he does so in the manner least injurious to the entitlements of the surface owner. This decision, however, did not take into account the changes brought about by the comprehensive statutory framework of the Mineral and Petroleum Resources Development Act 28 of 2002 which I argue has replaced the earlier servitude construction.

mining activities, a mining company's right to extract reserves under a proclaimed township, is effectively neutralised.

⁴ 2007 (2) SA 363 (SCA), see also the discussion in Van der Walt AJ *The Law of Neighbours* (Juta 2010) 104-114.

⁵ *Witbank Collieries v Malan and Coronation Colliery Co Ltd* 1910 TPD 667; *Coronation Collieries v Malan* 1911 TPD 577; *London and South African Exploration Co v Rouliot* (1890 – 1891) 8 SC 74.

In this dissertation I consider whether possible solutions to resolve the conflict can be found in the principles relating to neighbour law, and whether the principles governing the use of servitudes remain relevant in resolving conflicts between landowners and holders of mining rights. I evaluate possible legal remedies and place special emphasis on the constitutionality of the curtailment of a landowner's use and enjoyment of his property resulting from mining activities on or under his land. I further consider whether the exercise of a mining right, granted by the state, which results in a serious infringement of a landowner's ownership, could in certain circumstances amount to a deprivation or possibly an expropriation in terms of section 25 of the Constitution. I discuss the position where the state's regulatory interference is so severe that it deprives a landowner of the ability to exercise any, or a substantial portion of his ownership entitlements. I evaluate the possibility that such interference may constitute *de facto* expropriation for which compensation may be claimed.

In the penultimate chapter I briefly mention how the relationship between landowners and holders of mining rights is managed and conflict is defused in other jurisdictions such as China, Australia, the United States of America, India, Germany and Swaziland. I conclude this dissertation with suggestions on possible ways in which the conflict may be resolved or at least minimised in future.

Key words:

Mineral Law, legal relationship between mining right holder and landowner, reciprocal obligations of holders of mining rights and owners of affected land, limitation on ownership by coal-mining, impact of township establishment on coal-mining, restriction of surface land-use rights by mining, deprivation, constructive expropriation, resolution of conflict.

OPSOMMING

Die regulering van mynbou in Suid-Afrika het die afgelope dekade 'n fundamentele verandering ondergaan ten einde breër toegang tot die nasie se minerale en petroleum hulpbronne te bevorder. Die Mineral and Petroleum Resources Development Act,⁶ Wet 28 van 2002, het 'n radikale ommekeer in die mynbou industrie meegebring deurdat die regulering van mynbou aktiwiteite onder die toesig en beheer van die nasionale regering geplaas is. Die transformatiewe oogmerk van hulpbron hervorming ingevolge die Grondwet van die Republiek van Suid-Afrika kon egter nie geskied sonder 'n mate van opoffering nie. Die grootste aanslag van die nuwe mineraalreg bedeling word sonder twyfel gevoel deur die eienaars van grond ten opsigte waarvan mynregte deur die regering aan 'n ander party toegeken word.

Ingevolge die gemenereg was die eienaar van grond voorheen ook die eienaar van die minerale wat in die grond voorgekom het. Gevolglik was dit onder die uitsluitlike beheer van die eienaar om te bepaal of enigiemand anders die reg kon verkry om minerale op of in die betrokke grond te ontgin. Na aanvang van die inwerkingtreding van die Mineral and Petroleum Resources Development Act is hierdie posisie egter omvêrgewerp aangesien die regering voortaan die bevoegdheid het om te bepaal wie en op watter voorwaardes iemand die reg verkry om minerale te ontgin. Die toekenning van die reg om minerale te ontgin op 'n ander se eiendom sonder die eienaar se toestemming, maak dus ernstige inbreuk op sy regte. Grondeienaars se bevoegdhede wat uit hul eiendomsreg voortvloei word in talle gevalle ernstig ingeperk ten einde die oogmerke van hulpbron transformasie te bereik.

Die ondersoek wat hierna volg, is daarop toegespits om die beperkende aanslag van die regulering van steenkoolmynbou-aktiwiteite op die ontwikkeling van dorpsgebiede asook dié van die ontwikkeling van dorpsgebiede op steenkoolmynbou beter te verstaan.

⁶ Die Wet is slegs in Engels beskikbaar.

Ten einde hierdie invloed beter te verstaan, word die geskiedkundige ontwikkeling van die reg om minerale in Suid-Afrika te ontgin kortliks oorweeg. Die regte en verpligtinge van die houters van mynregte en die eienaars van die grond wat deur die uitoefening daarvan geraak word, asook die remedies waaroor die onderskye partye beskik ten einde hul regte teen inbreukmaking deur die ander party te beskerm, word daarna oorweeg.

In genoemde ondersoek toon ek aan waarom die Engelsregtelike burereg-beginsels van laterale steun en ondersteun nie toepassing in ons reg behoort te vind nie en waarom die botsing wat ontstaan vanweë die uitoefening van die grondeienaar en die houer van 'n mynreg se regte liefs versoen moet word deur die Suid-Afrikaanse serwituutreg beginsels toe te pas soos aangetoon in die beslissing van *Anglo Operations Ltd v Sandhurst Estates*.⁷ Hiedie beslissing het egter nie die veranderinge wat meegebring is deur die nuwe bedeling van die Mineral and Petroleum Resources Development Act in ag geneem nie en daar word gevolglik aangevoer dat die serwituut beginsels vervang is deur 'n breedvoerige wetgewende stelsel.

Die grondwetlikheid van die beperking op die bevoegdhede van 'n grondeienaar om sy eiendom te gebruik en te geniet, word ondersoek, asook of daar enige gronde vir 'n eis om skadevergoeding mag wees. In besonder word daar oorweeg of die leerstuk van konstruktiewe onteiening moontlik toepassing kan vind in gevalle waar die staat se regulering 'n uitermatige beperkende effek het op die bevoegdhede van 'n grondeienaar om sy eiendomsreg uit te oefen.

In die voorlaaste hoofstuk ontleed ek baie kortliks hoe die verhouding tussen eienaars van grond in mynbougebiede en houters van regte om minerale te ontgin in Sjina, Australië, die Verenigde State van Amerika, Indië, Duitsland en Swaziland gereguleer word. Ter afsluiting word aandag gegee aan moontlike maniere om die belangebotsing tussen die betrokke partye uit die weg te ruim of te beperk.

⁷ 2007 (2) SA 363 (HHA).

Sleutelwoorde:

Mineraalregte, regsverhouding tussen die houer van 'n mynreg om steenkool te ontgin en 'n geaffekteerde grondeienaar, wederkerige verpligtinge van 'n steenkool-mynreghouer en die eienaar van die geaffekteerde eiendom, beperking van grondgebruiks-regte deur steenkool-mynbou, impak van dorpsstigting op steenkool-mynbou, beperkende impak van steenkool-mynbou op grondgebruik, ontneming, konstruktiewe onteiening, dispuut-beslegting.

ACKNOWLEDGMENTS

I want to express my sincere thanks to Professor Susan Scott for her invaluable insights, genuine interest in the topic and exemplary guidance. I am deeply grateful for her support and encouragement.

Thanks are also due to Professor Neville Botha for his assistance with language editing and to Sasol Mining (Pty) Ltd for their financial support.

Without the patience and unfailing support of my wife Chrystal, I doubt whether this work would have seen the light of day. My love and thanks go out to her.

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CHAPTER 1

INTRODUCTION

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1.1 BACKGROUND

Since the dawn of time, control over land and natural resources has been at the root of societal discord.⁸ It is a source of political and economic power, and the desire to increase control over territories and their raw material offerings has even led to world wars. As the human population with its dependency on limited natural resources continues to grow and available land rapidly decreases, the need for multi-party utilisation of land and the prospect of conflict will inevitably increase. The South African mineral-law dispensation which provides for the separation of the right to extract the minerals in the earth from the title to the land, is a good example of where multiple parties have rights in respect of the same land. The growing emphasis on sustainable, integrated development, and the protection of non-mining interests have made land-use questions in mining more complex.⁹

It therefore comes as no surprise that the relationship between landowners and holders of rights to mine minerals in respect of the same land, has always been a turbulent one. The rich coalfields of the South African Highveld are no exception

⁸ Van Wyk J *Planning Law* 2nd ed (Juta 2012) 17 with reference to the White Paper on Spatial Planning, Land Use Management and Land Development, states, "in South Africa land is central, it is a national asset, it is scarce, it is fragile and throughout South Africa's history, land has been a contentious and emotive issue."

⁹ Southalan J *Mining Law and Policy: International Perspectives* (The Federation Press 2012) 65.

as the parties involved often find themselves in a predicament where the existing towns are virtually surrounded by proliferating opencast¹⁰ and relatively shallow underground coal mines. Although mineral extraction is an integral part of and key to the growth in our country's economy, the destruction inherent in coal mining has earned it one of the top slots in the list of modern-day threats to the environment.

It has recently been reported that mining poses an imminent threat to the agricultural sector as more and more high-grade land is acquired by mining companies. These concerns are not misplaced, but one should be mindful that agriculture requires large tracts of land. Up to 40 percent of the world's surface is used for agriculture, with less than one percent falling to mining.¹¹ AGRI-SA recently reported¹² that South Africa has very little prime agricultural land, and that it is estimated that high- and medium-potential agricultural land amounts to only some 11,5 million hectares, merely 9,4 percent of the surface area of the country. The inescapable reality is that many of these areas are located in parts of our country known for mineral riches and on which coal-mining activities, in particular, take place. Until a suitable replacement can be found for fossil fuels, coal remains a primary energy source that is being rapidly depleted. It is unsurprising, then, that there are many instances where mining and agriculture both seek to use the same land, resulting in competition for control over the land. Mining companies will therefore likely experience opposition from the agricultural sector which views mining as a threat to its survival.

It is, however, not only the agricultural sector which experiences challenges as a result of the increase in the number of coal mines. Another activity contributing to

¹⁰ According to the online Oxford English Dictionary (2014) the word "opencast" denotes a method of mining in which coal or ore is extracted at or from a level near the earth's surface, rather than from shafts. See <http://www.oxforddictionaries.com> (date of use 17 October 2013).

¹¹ Southalan *Mining Law and Policy* 70.

¹² Unpublished submission to the Parliamentary Portfolio Committee by Crosby A on behalf of AGRI SA during the public hearings on the Draft Mineral and Petroleum Resources Development Bill, 11 September 2013.

the competition between landowners and mining right holders for control over land, is that of township development. Apart from the destructive nature of mining operations, the limiting effect mining has on property development and property development, in turn, has on mining is currently also the source of considerable conflict. On the one hand, landowners wish to protect the integrity of the surface of their land, while, on the other hand, holders of mining rights seek to extract the wealth of minerals contained in such land. Clearly these respective rights cannot be exercised without at least some conflict arising.

The focus of this study falls on the extraction of coal on the South African Highveld, where coal can be found at relatively shallow depths below the surface of the land, and where towns are rapidly growing because of the economic opportunities that mining and concomitant urbanisation present.

In the early 1890s following the discovery of coal, a group of settlers established a mining town known as Witbank, now eMalahleni, meaning place of coal. While Witbank started out as a small mining community, eMalahleni has since grown into a thriving town and one of the fastest growing economic centres in the country. The town of Secunda was established in 1974 to house the employees of Sasol employed at its petrochemical plants. Although Secunda did not start out as a mining community, the location of the petrochemical plants was strategically chosen based on the plants' reliance on coal as the main source for Sasol's coal-to-liquid technologies used to produce transportation fuel and a range of valuable chemical products.¹³

The establishment of these towns, like many on the South African Highveld, took place at a time when geological information was still limited, with the result that the majority sprang up on or near areas with valuable coal deposits. Coal mining prospects may have led to the formation of these towns, but as economic activity accelerated, other businesses and industries grew and matured.

¹³ Sasol uses coal as the main feedstock for its coal-to-liquids (CTL) gasification processes, see <http://www.sasol.com> (date of use 17 October 2014).

The towns kept on growing with the result that additional land was required to cater for the rapidly increasing developmental needs.

As the number of mining operations increase and viable coal resources gradually start depleting, mining companies continue to take up more land under prospecting and mining rights to ensure the sustainability of their operations. This inevitably leads to conflict between the owners of land who realise the prospects of township establishment, and the holders of mining rights who make every effort to extract as much coal as practicable. The situation is exacerbated where the town is virtually surrounded by land containing high-grade, relatively shallow mineral-bearing seams, leaving little or no room for further township expansion. With the ever-increasing demands for energy in today's society, dependency on fossil fuels as the principal source for electricity generation and the production of transportation fuels will persist for at least the next decade.

As a direct result of the influx of people attracted by the economic prospects and employment opportunities created by mining, many mining towns are in dire need of expanding their boundaries to cater for the fast-growing housing and commercial needs of the local communities. Mineral extraction will continue to play a vital role for so long as the mining industry remains the backbone of the South African economy, and the towns in these areas continue to expand for so long as mining offers lucrative career opportunities. Rapid economic development and the demand for resources inevitably increases competition for land. The problem therefore continues to grow as the battle for control of the land intensifies. There is consequently a pressing need to find a solution to the possible conflict between mining right holders and landowners, for example a municipality that is responsible for the housing needs of a growing community, and farmers on whom the society depends for food production.

In the search for possible solutions, it would consequently be necessary to explore the content and legal nature of these often competing property interests in land by focussing on the Constitution of the Republic of South Africa, 1996; relevant

provisions of the Mineral and Petroleum Resources Development Act 28 of 2002;¹⁴ recent case law; and other relevant legislative provisions.

To determine the extent of the competing interests of mining right holders and landowners, this study aims to establish i) the current regulatory framework where township development is proposed on land subject to mining rights, and where mining is proposed on agricultural land and/or under land with existing structures; ii) the landowner's rights *vis-à-vis* those of the mining right holder; iii) whether mining limits the surface-use rights of a landowner to an unacceptable extent; and iv) whether harmonious co-existence between these two seemingly mutually exclusive rights, is conceivable.

1.2 STRUCTURE OF DISSERTATION

This dissertation is divided into eight chapters. Chapter 1 provides an introduction to the conflict that may arise between coal mining companies and landowners. Two different types of land-use are particularly relevant to this research: township development;¹⁵ and farming. Emphasis will fall on township development as it highlights the challenges created by the conflicting rights. Chapter 2 offers a brief overview of the development of mineral regulation in South Africa, followed by an evaluation of the nature of mining rights, the entitlements and the duties of the holder of coal-mining rights, by focussing on the provisions of the MPRDA, as amended by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008.¹⁶ The potential impact of the proposed changes in the Mineral and Petroleum Resources Development Amendment Bill (B15-2013)¹⁷ on the relationship between coal miners and landowners, is also considered.

¹⁴ The Mineral and Petroleum Resources Development Act 28 of 2002 is hereafter referred to as the MPRDA.

¹⁵ Township development in this context refers to all forms of housing, industrial and commercial development, as well as ancillary services.

¹⁶ Hereafter the MPRDAA.

¹⁷ Hereafter the MPRD Amendment Bill.

Chapter 3 explores the rights related to ownership of land, and potential limitations on the exercise of these rights. The bulk of the dissertation is, however, devoted to understanding the relationship between landowners and holders of coal mining rights. This evaluation is undertaken in Chapter 4 by considering the relevant provisions of the Mine Health and Safety Act 29 of 1996,¹⁸ and the MPRDA of 2002, as amended, as well as recent decisions by South African courts. Chapter 5 explains how our courts previously relied on the principles of neighbour law and the principles regulating the use of servitudes, in resolving conflicts between landowners and holders of mining rights.

In Chapter 6, I consider the remedies availability to the landowner and the holder of coal-mining rights in instances where there is interference in the exercise of their respective rights. A brief comparative overview of the position in terms of the laws of other jurisdictions -- China, Australia, the United States of America, India, Germany and Swaziland -- is undertaken in Chapter 7. In this chapter I consider whether a more suitable framework for optimal utilisation and simultaneous exercise of rights exists internationally. In Chapter 8 I consider ways in which conflicts between applicants for township development and coal mining right holders can possibly be avoided, mitigated or resolved.

¹⁸ Acronyms will be used for frequently quoted long references and the Mine Health and Safety Act 29 of 1996 will hereafter be referred to as the MHSA.

CHAPTER 2

COAL MINING RIGHTS IN MODERN SOUTH AFRICAN CONTEXT

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2.1 INTRODUCTION

Ever since the first discovery of valuable minerals in South Africa, the framework for regulation of the mining of minerals has been constantly evolving. South Africa's mineral-law dispensation has progressively been shaped and moulded to keep track with advances in the methods, extent and impact of mining. The transformative nature of the Constitution of the Republic of South Africa, 1996, ('the Constitution'), plays a significant role in this branch of the law. These changes culminated in the adoption of an entirely new dispensation governing

custodianship over minerals, which results, to a large extent, from the political imperative to transform the minerals industry.¹⁹

A sound understanding of the sources of South African mineral law will greatly aid an understanding of the present dispensation. To this end, a brief overview of the origins of the South African law regulating mining, and the historical development of the right to mine minerals is provided, followed by a concise evaluation of the rights and duties of a mining right holder in terms of the MPRDA.²⁰

2.2 HISTORY AND DEVELOPMENT OF RIGHT TO MINE IN SOUTH AFRICA

2.2.1 COMMON LAW

The South African common law is predominantly based on Roman law as it was understood and practised in the province of Holland around the time when the first European merchants travelled to, and eventually settled in, the Cape of Good Hope.²¹ The Dutch law influences in the Cape Colony, under the early rule of the Dutch East India Company (Vereenigde Oostindische Compagnie, or VOC), and its origins in the province of Holland, were unmistakable. During this early period of colonisation, mining for minerals was not vital to the economy of the trading post established at the Cape of Good Hope, and as a result there was no need for specific mining regulation.²²

¹⁹ See Mostert H *Mineral Law: Principles and Policies in Perspective* (Juta 2012) 74 – 78 where the review of mineral policy during the 1994 political transition is evaluated.

²⁰ The MPRDA came into effect on 1 May 2004.

²¹ Mostert *Mineral Law* 4. From about 1652 South Africa was colonised informally, and until 1795 the territory was governed by a board of directors of the Dutch East India Company (VOC).

²² Mostert *Mineral Law* 4.

The Roman-Dutch law was derived from two main sources, namely Roman law and Germanic customary law.²³ In early Roman times, the right to remove clay (*servitus cretae eximendae*) and to burn lime (*servitus calcis coquendae*), could be granted by means of praedial servitudes.²⁴ Minerals were regarded as fruits of the land which could be separated from the ownership of the land by the owner of such land. Upon separation, the minerals became the object of separate ownership.²⁵ The holder of a usufruct was entitled to mine minerals in respect of the land over which he had the usufruct.²⁶ The concept of mineral rights as limited real rights was, however, unknown in Roman law.²⁷ One of the basic principles of the South African common law originating from Roman law, is that the owner of the land is the *dominus* of the whole of the land including the air space above the surface, and everything below it.²⁸ The origin of this principle can be found in the Roman maxim *cuius est solum eius est usque ad caelum et ad inferos*.²⁹ Based on this principle, the owner of land was said to be the owner not only of the surface of the land, but of everything legally adherent thereto, and also of everything contained in the soil below the surface.³⁰ This maxim allowed the landowner the right to both the surface, and to what lies beneath it to the full extent allowed by the common law.³¹ During this period, ownership of land was regarded as virtually absolute and unencumbered.³²

²³ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman The Law of Property* 5th ed (Lexis Nexis 2006) 6.

²⁴ Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa: Commentary and Statutes* Revision Service 7 (Juta Cape Town 2011) 1-3.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (Butterworths 1982) 4. See also Badenhorst, Pienaar and Mostert *The Law of Property* 672.

²⁹ As a starting point, the Romans used the principle that ownership of land extended up to the heavens and down to the depths. See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-9.

³⁰ Franklin and Kaplan *Mining and Mineral Laws* 5.

³¹ *Trojan Exploration Co (Pty) Ltd v Van Rensburg Platinum Mines Ltd* 1996 (4) 499 (A) 509.

³² Van der Merwe CG *Sakereg* (Butterworths Durban 1979) 171. Reference is also made to the wide unhindered discretion owners previously enjoyed in relation to their land in Van den Berg HM

It was not long, however, before landowners were compelled to accept significant inroads into their property rights,³³ as their right to enjoy land in all its fullness was soon curtailed by statute under British colonial rule. The British occupation of the Cape of Good Hope in 1806 resulted in our law of property being influenced, to a certain extent, by English-law principles.³⁴ Traces of English-law influences can, for example, be found in the adoption of concepts such as attornment and ninety-nine year leaseholds.

The notion of severance provided that the mineral rights in respect of land could be separated from the title to the land and alienated or dealt with separately.³⁵ Severance afforded parties other than the landowner the right to utilise the land, alongside the landowner, for economic gain. The need for this relationship to be governed by law soon became evident. Due to the high cost of prospecting and mining, which precluded many individuals from undertaking mining ventures, it was soon realised that it would make economic sense to separate the ownership of land and the right to extract minerals.³⁶ Although in terms of the common law owners of land owned everything below it, the right to minerals was one of the rights of ownership which could be subtracted from the full *dominium* by severing it from the title to the land.³⁷ Ownership of un-severed minerals still vested in the

“Ownership of minerals under the new legislative framework for mineral resources” 2009 (1) *Stell LR* 141. It is also noted in Mostert *Mineral Law* 7 that the *cuius-est-solum* maxim affords the landowner the right to the surface and what lies beneath it in all the fullness that the common law allows.

³³ Hahlo HR and Kahn E *The South African Legal System and its Background* (Juta 1973) 763. Van den Berg 2009 *Stell LR* 142 states that in theory ownership of minerals still vested in the owner of the land, but in practice the owner was debarred from enjoying full *dominium* as a result of the limitations.

³⁴ Mostert *Mineral Law* 5.

³⁵ *Id* at 7.

³⁶ In classical Roman law minerals were regarded as fruits of the land and also capable of separation by the owner, see Mostert *Mineral Law* 10.

³⁷ Franklin and Kaplan *Mining and Mineral Laws* 113.

owner of the land until those minerals had been removed.³⁸ On public land, the state, as landowner, could similarly grant the right to mine to third persons. The right to mine minerals was regarded as a privilege of the state.³⁹

The holder of mineral rights during this period enjoyed preference over the owner of the land, not only in regard to his underground mining operations, but also in regard to the use of the surface for all purposes necessary to enable him to carry out his prospecting and mining operations effectively, provided that such rights were exercised in a reasonable manner which was least injurious to the property of the landowner.⁴⁰

Mining activities in the province of Holland during these times were limited and did not enjoy much attention.⁴¹ As a result of the lack of mining activity the state had no need further to develop the regulation of mining. Consequently, the Roman-Dutch system perpetuated the treatment of minerals as an aspect of property law and recognised the Roman-law principle of minerals belonging to the owner of the surface of the land.

In summary, the common law position provided that a holder of mineral rights was entitled to access the land for the purpose of mining, and to ancillary rights, which included the right to use the surface of the land.⁴² Mineral right holders could mine for minerals, separate them from the land, remove them, and sell them for their own account.⁴³ Once the minerals had been separated from the land,

³⁸ Franklin and Kaplan *Mining and Mineral Laws* 113.

³⁹ Mostert *Mineral Law* 5.

⁴⁰ Franklin and Kaplan *Mining and Mineral Laws* 7.

⁴¹ Hahlo and Kahn *The South African Legal System and its Background* 762.

⁴² Wessels J in *Neebe v Registrar of Mining Rights* 1902 TS 65 explained as follows: "Now the State does not merely give the claim-holder the use of the claim, but it gives him a great deal more. It gives him the right of destroying the whole nature of the ground he occupies, and of taking away all the precious minerals under the surface."

⁴³ *Le Roux and Others v Loewenthal* 1905 TS 742.

ownership passed from the landowner to the mineral right holder.⁴⁴ The mineral right holder could remove as much of the soil as was reasonably necessary to uncover the minerals, provided this was done in a manner which least impacted on or interfered with the rights of the landowner.⁴⁵ The mineral right holder was allowed to build structures, roads and railway lines, and to convey water and electricity, provided it was required for operating the mine.⁴⁶ A mineral right holder could not be compelled to exercise his rights.⁴⁷ Where intended surface developments by the owner threatened to impede prospecting or mining, the mineral rights enjoyed priority.⁴⁸ Where the rights of the landowner and the mineral right holder clashed and the conflict could not be resolved, the landowner's rights to make use of the surface of the land had to yield to the rights of the mineral right holder.⁴⁹ In terms of the common law, the landowner could be prevented from developing or using the land in ways which could affect the ability of the mineral right holder to extract the minerals.⁵⁰

However, to understand the true nature of the right to mine minerals in South Africa fully, one cannot look only to the common law.⁵¹

⁴⁴ *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP). See further Van der Merwe *Sakereg* 171 and Mostert *Mineral Law* 12.

⁴⁵ *Hudson v Mann and Another* 1950 (4) SA 485 (T).

⁴⁶ See Chapters XI, XII and XV of the Mining Rights Act 20 of 1976.

⁴⁷ From the words of Hartzenberg J in *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP), it is evident that the holder of the mineral rights was under no obligation to exploit the rights. He could keep them for as long as he wished. He could bequeath them to his heirs or sell them. The state could not compel him to start with the exploitation even if it would have been in the public interest to do so.

⁴⁸ *London and SA Exploration Company Limited v Rouliot* 1891 SC 74. Also see *Coronation Collieries v Malan* 577 and *Douglas Colliery Ltd v Bothma* 1947 (3) SA 602 (T).

⁴⁹ *Hudson v Mann and Another* 1950 (4) SA 485 (T).

⁵⁰ Mostert *Mineral Law* 27.

⁵¹ Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-3 confirm that the common law provides only limited guidance with regard to the legal principles governing the nature of mineral rights.

2.2.2 DEVELOPMENT OF SOUTH AFRICAN MINERAL LAW: STATUTORY PROVISIONS

Soon after gold was discovered in South Africa, the need for more efficient regulation of mining activities arose.⁵² The common law no longer provided all the answers and had to be supplemented by specific mining laws. The lack of adequate regulation of the mining of minerals in Roman-Dutch law during the late 1800s, gave rise to the development of a mining regulatory system created by the courts and the legislature.⁵³ Therefore the South African law of property dealing with mineral rights during the colonial period and throughout the Union of South Africa consisted mainly of Roman-Dutch law, complemented by South African legislation and case law.⁵⁴

Early mining laws focused primarily on the regulation of precious metals such as gold, silver, iridium and platinum. The right to mine these precious metals vested in the state, whilst ownership of unsevered minerals vested in the owner of the land.⁵⁵ The right to mine and dispose precious stones such as diamonds, rubies and sapphires similarly vested in the state, whilst private landowners remained the owners of (unsevered) precious stones discovered on their land.⁵⁶ Coal was classified as a base mineral. Because the mining of base minerals did not play a very prominent role in the colonies, the legislature did not pay much attention to its

⁵² Mostert *Mineral Law* 26 notes that in 1836 the government, judiciary, and legislature were confronted with conflicts between diggers, mine-owners, and landowners who demanded a better solution than the common-law principles could offer. Badenhorst, Pienaar and Mostert *The Law of Property* 667 indicate that before 1 January 1992, the exercise of entitlements of ownership of mineral rights by their owner or holder was always subject to the statutory restrictions with regard to prospecting, mining or disposing of minerals.

⁵³ *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) 24, 93. See also Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-2.

⁵⁴ Van der Walt AJ and Pienaar GJ *Introduction to the Law of Property* 6th ed (Juta Cape Town 2009) 3.

⁵⁵ Mostert *Mineral Law* 27.

⁵⁶ Mostert *Mineral Law* 23.

regulation. In terms of the common law, rights to base minerals remained vested in the owner of land.⁵⁷

From the beginning of the twentieth century each of the South African colonies adopted its own mineral legislation.⁵⁸ Transvaal had the Precious and Base Metals Act⁵⁹ (the Gold Law), and later adopted the Mineral Law Amendment Act.⁶⁰ The Orange Free State adopted the Orange Free State Metals Mining Act.⁶¹ Natal had the Mines and Collieries Act,⁶² while the Cape adopted the Precious Minerals Act,⁶³ and the Mineral Law Amendment Act.⁶⁴ The legislation adopted by the colonies remained in force in the provinces after the Union of South Africa was formed, and when the Union became the Republic of South Africa, all laws in force at the time remained in force, unless repealed or amended.⁶⁵ The most prominent mining laws under the latter category, were the Precious Stones Act,⁶⁶ the Mining Titles Registration Act,⁶⁷ the Atomic Energy Act⁶⁸ and the Mining Rights Act.⁶⁹

⁵⁷ According to Mostert *Mineral Law* 29 the fact that mining for this type of mineral went largely unregulated in the various colonies confirms the view that the common-law position remained in place as regards base minerals.

⁵⁸ Van den Berg HM *Mineral Rights under Development: A Comparative Study of the Evolving Nature of Mineral Rights in South Africa and Namibia* submitted to the University of Cape Town in fulfilment of the requirements for the degree LL.M by dissertation (2009) 24.

⁵⁹ Act 35 of 1908 (T). For a more detailed discussion see also Van den Berg *Mineral Rights under Development* 24; Mostert *Mineral Law* 23 and Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-21.

⁶⁰ Act 36 of 1934 (T); Van den Berg *Mineral Rights under Development* 24.

⁶¹ Act 13 of 1936 (OFS); Van den Berg *Mineral Rights under Development* 24.

⁶² Act 43 of 1899 (N); Van den Berg *Mineral Rights under Development* 24.

⁶³ Act 31 of 1898 (C); Van den Berg *Mineral Rights under Development* 24.

⁶⁴ Act 16 of 1907 (C); Van den Berg *Mineral Rights under Development* 24.

⁶⁵ Van den Berg 2009 *STELL LR* 142.

⁶⁶ Act 73 of 1964.

⁶⁷ Act 16 of 1967.

⁶⁸ Act 90 of 1967.

⁶⁹ Act 20 of 1967.

In terms of the Precious and Base Metals Act 35 of 1908, the state could acquire the right to mine and dispose of precious metals, but was obliged to compensate landowners for losses they suffered as a result of the mining.⁷⁰

The state also controlled the land surface after proclamation.⁷¹ The landowner, to a certain extent, also benefited from mining activities. Where a *mijnpacht* was granted, the landowner retained his rights in respect of a portion of the land, and was entitled to half of the claim-licence fee.⁷² Interestingly, the consent of the landowner was a prerequisite for prospecting on land, and compensation was payable for any interference with the landowner's rights during prospecting operations.⁷³

The rapid pace at which the mining industry developed, coupled with the need to make access to the country's wealth of minerals more accessible, highlighted the importance of allowing the separation of the right to mine minerals from ownership of the land. This manifested in a regulatory structure allowing for the registration of mineral rights separately from the title to the land.⁷⁴ This separation of land ownership from the right to extract the minerals, is referred to as "severance". Once minerals had been separated from the land they became movable and ownership in them vested in the holder of the mineral rights.⁷⁵ Acknowledgement of mineral rights as a separate class of right, opened up the possibility of two parties having different rights in respect of the same land.

⁷⁰ Mostert *Mineral Law* 27.

⁷¹ Mostert *Mineral Law* 27. According to Mostert *Mineral Law* 41 "proclamation of land occurred in terms of statute, and empowered the Minister to declare the land open for pegging; to grant mining leases; or to establish a state mine on the land."

⁷² The *Mijnpacht* preserved the landowner's rights to a part of the surface and entitled him to half of the claim licence monies; Mostert *Mineral Law* 27.

⁷³ Mostert *Mineral Law* 27.

⁷⁴ According to Mostert *Mineral Law* 10 the notion that mineral rights can exist independently from ownership of the land in which they are found, was accepted in South African law from as early as 1881. See also *Agri South Africa v The Minister of Minerals and Energy* [2011] 3 All SA 296 (GNP) para 24.

⁷⁵ Badenhorst, Pienaar and Mostert *The Law of Property* 693 - 694.

The statutory approach to mineral laws in South Africa, according to Mostert,⁷⁶ can be divided into the following distinct phases:

2.2.2.1 Conferral: 1964 to 1991

During this post-colonial period, the separate regulatory systems used in the different provinces needed to be consolidated and were repealed. The system of conferral presupposed that the state, as the owner of state land and rights holder in respect of alienated state land, was vested the exclusive right to prospect and mine, and was entrusted with the capacity to bestow such rights on others.⁷⁷ Of specific relevance here is the Mining Rights Act⁷⁸ which determined that the right to mine and dispose of precious metals and oil, vested in the state while the right to mine and dispose of base minerals vested in the holder of the mineral rights.⁷⁹ In terms of section 2(1)(a) of the Mining Rights Act 20 of 1976 and section 2 of the Precious Stones Act 73 of 1964, the state in the case of state or private land had the right of prospecting and mining for and disposing of natural oil and had the right to mine and dispose of precious metals and precious stones. The relevant mineral right holder retained the right to prospect for precious metals and precious stones and the right to prospect, mine and dispose of base minerals. The right to prospect precious metals or base minerals and precious stones on alienated state land were reserved in favour of the owner of the land who could prospect on the land and acquire a mining right in respect of base minerals and precious metals⁸⁰ or take transfer of an owner's certificate in case of precious stones⁸¹ or could nominate someone. The state could confer mining rights in respect of precious stones, precious metals and natural oil, whilst the right to mine base minerals could be granted by the holder of mineral rights by virtue of a mineral lease. Gold, silver, platinum, and iridium were regarded as precious metals, whereas

⁷⁶ Mostert *Mineral Law* 39.

⁷⁷ Mostert *Mineral Law* 40.

⁷⁸ Act 20 of 1967.

⁷⁹ Section 2(1)(a) and 2(1)(b) of the Mining Rights Act 20 of 1967.

⁸⁰ See section 12(1) of the Mining Rights Act.

⁸¹ See section 5(1) of the Precious Stones Act 73 of 1964.

diamonds, rubies and sapphires were regarded as precious stones. Coal was regarded as a base mineral, which was defined as any solid, liquid, or gaseous substance that occurred naturally in or on the earth and which was formed by or subjected to geological processes.⁸² The right to mine a base mineral was conferred by the holder of a base mineral by means of a mineral lease.⁸³ In the Transvaal and Orange Free State, the common-law position still applied to the mining of base minerals, and this was also the position in respect of minerals not yet separated from the land, as these were regarded as the property of the landowner.⁸⁴ The Mining Rights Act and Precious Stones Act provided for the vesting of prospecting and mining rights in the state in respect of precious metals, natural oil and precious stones, which could confer them on the common-law mineral right holders. Mineral right holders could either exercise the right to mine themselves or transfer the common-law rights to others who would be capable of exercising these rights if the right to mine had been conferred on them by the state.⁸⁵ Stated differently, mineral rights were freely transferable, but could only be exercised with the necessary accompanying licence from the state.⁸⁶

2.2.2.2 Authorisations: 1992 to 2004

In 1992 the Minerals Act⁸⁷ was introduced as part of government's new policy of privatisation and deregulation of mineral resources.⁸⁸ The majority of the existing

⁸² See the definition of coal in the Mining Rights Act 20 of 1967 and the discussion thereof in Franklin and Kaplan *Mining and Mineral Laws* 337.

⁸³ Section 25 of the Mining Rights Act 20 of 1967.

⁸⁴ See section 5(a) of Coal Resources Act 60 of 1985 for the limitations placed on the mining of coal.

⁸⁵ Mostert *Mineral Law* 53.

⁸⁶ *Id* 54.

⁸⁷ Act 50 of 1991.

⁸⁸ Badenhorst, Pienaar and Mostert *The Law of Property* 667. Mostert *Mineral Law* 57 defines "Privatisation" as the systematic transfer of state functions, actions, or property to the private sector, where services, production and consumption could be regulated by market and price mechanisms. "Deregulation" she defines as the process by which the restrictive effect of state

mining laws were abolished.⁸⁹ During this period the common-law position relating to ownership was revived.⁹⁰ The owner could, however, not exercise his rights unless a mining authorisation had been acquired from the state.⁹¹ No person could mine for minerals without having been granted the necessary authorisation in accordance with the Minerals Act.⁹² If the operational life of the mine was planned for more than two years, the person or company intending to mine required a mining licence.⁹³ Section 5 of the Minerals Act granted the holder of a mineral right the right to enter upon the land, to mine the mineral which it had a right to extract, and to dispose of the mineral mined. The Minerals Act, however, also allowed the state to issue mining authorisations, but only to the holder of the right to the mineral in question, or the person who had acquired the written consent of the holder.⁹⁴

2.2.2.3 Custodianship: 2004 to date

As indicated above, the current mineral law dispensation has been influenced by advances made in mining technology and practices, as well as by the transformative nature of the Constitution of the Republic of South Africa, 1996, together with subsequent legislation in this area.⁹⁵ After the African National Congress (ANC) became the ruling party in 1994, a comprehensive review was conducted of all mineral laws. This policy review set out to promote equitable and orderly access to the country's mineral resources in ways that would support equal

regulation on private enterprise, competition and the creation of employment opportunities was reduced.

⁸⁹ *Agri South Africa v Minister of Minerals and Energy* [2011] 3 All SA 296 (GNP).

⁹⁰ Badenhorst, Pienaar and Mostert *The Law of Property* 668.

⁹¹ Mostert *Mineral Law* 62.

⁹² Section 5(2) of the Minerals Act 50 of 1991.

⁹³ Section 9(3) of the Minerals Act 50 of 1991.

⁹⁴ Section 9 of the Minerals Act 50 of 1981.

⁹⁵ Calls for change to the mineral policy surfaced long before the 1994 political transition. On 26 June 1955 in Kliptown, when the African National Congress signed the Freedom Charter, the goal of one day having the mineral wealth of South Africa vested in the people, was adopted.

opportunities and non-discrimination.⁹⁶ The promulgation of the MPRDA⁹⁷ ushered in a new order in mining law.⁹⁸ It repealed the system of privately-held mineral rights under the common law,⁹⁹ opting instead for a system of state-controlled rights.¹⁰⁰ Under this new regime the state, acting as custodian, exercises sovereignty over all mineral and petroleum resources and regulates the country's mineral wealth for the benefit of the nation.¹⁰¹ The previous dispensation of privately-owned mineral rights has been abolished.¹⁰² No person is permitted to mine and dispose of minerals without having been granted the appropriate right or permit by the state.¹⁰³ Property rights, including mining rights, are protected by the Constitution.

2.3 LEGAL NATURE OF MINING RIGHTS

I now turn to an evaluation of the nature and extent of a mining right holder's rights. This will be of particular relevance when I consider (in Chapter 6) whether

⁹⁶ Mostert *Mineral Law* 75.

⁹⁷ 28 of 2002, which came into operation on 1 May 2004.

⁹⁸ Van den Berg 2009 *Stell LR* 144.

⁹⁹ Section 4(2) of Act 28 of 2002 provides that in so far as the common law is inconsistent with this Act, this Act prevails.

¹⁰⁰ Mineral and petroleum resources are, in terms of section 3(1) of the MPRDA, the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans. This is one of the most contentious provisions in our current mineral law system.

¹⁰¹ For a more detailed discussion of the concept of custodianship and the declaration on permanent sovereignty over natural resources, see Dale MO *et al South African Mineral and Petroleum Law* Revision Service 9 LexisNexis (2011) 108.

¹⁰² *Agri South Africa v The Minister of Minerals and Energy* [2011] 3 All SA 296 (GNP) para 24. According to Dale *et al South African Mineral and Petroleum Law* 116 the state in exercising its sovereignty, and in order to become the custodian of the mineral resources, the state had to destroy private-law mineral rights by way of the Act.

¹⁰³ Section 5(4) of the MPRDA determines that "[n]o person may prospect for or remove, mine, conduct technical co-operations, reconnaissance operations, explore for and produce any mineral or petroleum."

it is possible for the mining right holder to resist interference in his rights by a third party, and the remedies available when such interference occurs.

In property law two classes of real right are distinguished: namely a right in respect of one's own thing (*jus in re propria*) which provides the most comprehensive right of full enjoyment;¹⁰⁴ and a limited real right in respect of the thing belonging to another (*jus in re aliena*).¹⁰⁵ Ownership or *dominium* is the only right conferring full rights of enjoyment in respect of one's own property, while there is no *numerus clausus* in respect of the rights over another person's things.¹⁰⁶

Section 5 of the MPRDA and section 4(2) of the Mining Titles Registration Amendment Act (MTRAA),¹⁰⁷ classify mining rights as limited real rights, in other words, real rights which one has in respect of a thing belonging to another.¹⁰⁸ This classification was also previously followed by our courts.¹⁰⁹ In determining the nature of mineral rights, our courts relied on the established property-law principles relating to servitudes. In terms of this classification, as a limited real right, a servitude entitles its holder to specific entitlements of use and enjoyment over another person's property. In some cases the holder of a servitude is also entitled to insist that the landowner refrain from exercising certain entitlements flowing from ownership in a way which would negatively impact on the rights of the

¹⁰⁴ See Mostert H and Pope A (eds) *The Principles of the Law of Property in South Africa* (Oxford University Press (2010) 116: "Conventionally, it (referring to ownership) is understood as providing the most extensive entitlements that a person can have over property and as conferring the most complete and comprehensive control over a thing."

¹⁰⁵ Dale *et al* *South African Mineral and Petroleum Law* 134.

¹⁰⁶ Badenhorst, Pienaar and Mostert *The Law of Property* 47,321.

¹⁰⁷ Section 4(2) of 24 Act of 2003

¹⁰⁸ Badenhorst, Pienaar and Mostert *The Law of Property* 47, 686.

¹⁰⁹ *Rocher v Registrar of Deeds* 1911 TPD 311 316; *Van Vuren v Registrar of Deeds* 1907 TS 289 294; *Coronation Collieries v Malan* 1911 TPD 577; *Webb v Beaver Investments (Pty) Ltd* 1954 (1) SA 13 (T); and *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 1989 (1) SA 35 (T).

servitude holder.¹¹⁰ The law relating to servitudes is of particular interest for this study in light of the fact that in South African law, mineral rights have been held to be in the nature of quasi-servitudes.¹¹¹ The latter term was adopted mainly because these rights do not conform exactly to the definition of a servitude.¹¹² Mining rights appear to be similar to personal servitudes¹¹³ in that they vest in a specific person or entity. However, unlike personal servitudes, they do not terminate upon death or dissolution of the right holder. Furthermore, unlike personal servitudes, mining rights are transferable subject to Ministerial consent. They can also not be classified as praedial servitudes¹¹⁴ because they are granted in favour of a specific person and are not created in favour of a dominant tenement. They therefore emerge as a hybrid form which differs from both these types of servitude. In *Van Vuren and Others v Registrar of Deeds*,¹¹⁵ Innes CJ classified mineral rights as quasi-servitudes, a classification which has since often been used by our courts. Many academic writers, however, prefer the

¹¹⁰ Badenhorst, Pienaar and Mostert *The Law of Property* 321.

¹¹¹ *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 509. It was stated in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 364, that it is a settled principle of our law that a right to minerals in the property of another is in the nature of a quasi-servitude over that property. The concept of a quasi-servitude is also discussed by Badenhorst PJ “Trojan trilogy: III mineral rights and mineral law – *Trojan Exploration Co (Pty) Ltd* 1996 (4) SA 499 (A)” 1999 (10) *Stell LR* 99-101.

¹¹² See in this regard the following decisions: *Rocher v Registrar of Deeds* 1911 TPD 316; *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295, 305; *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 (2) SA 467 (A) 490.

¹¹³ Badenhorst, Pienaar and Mostert *The Law of Property* 338 explain that a personal servitude is always granted in favour of a particular individual on whom it confers the right to use and enjoy another's property. A personal servitude confers a variety of entitlements on its holder, but cannot be transferred and will cease to exist upon the death of the holder.

¹¹⁴ According to Badenhorst, Pienaar and Mostert *The Law of Property* 322 a praedial servitude is exercised by the owner of the dominant tenement in his capacity as owner, and likewise enforced against the owner of the servient tenement in his capacity of owner. Neither the entitlement nor the burden can be detached from the piece of land on which it is conferred, and imposed respectively. Both are passed from one owner to the next when the land is transferred, and in this sense, the benefit and the burden of a praedial servitude are said to “run with the land”.

¹¹⁵ 1907 TS 289.

classification of mineral rights as *sui generis* real rights.¹¹⁶ The main reason for this classification appears to be that the law relating to the use of mineral (mining) rights differs fundamentally from traditional use associated with servitudes. Even so, recent pronouncements¹¹⁷ have accepted the principle of relying on the law relating to servitudes when considering how conflicts between landowners and mining right holders should be resolved. I pursue this issue in Chapter 5.

The MTRAA¹¹⁸ provides for the registration of mining rights in the Mineral and Petroleum Titles Registration Office making such rights binding on third parties.¹¹⁹ It has been held that since this Act was enacted after the MPRDA, and in accordance with the maxim *lex posterior derogat priori*, the status of a limited real right will only be established upon its registration.¹²⁰

In Chapter 6 I consider the value of this for the mining right holder, as well as the legal remedy that the mining right holder has for interference by third parties.

2.4 ENTITLEMENTS OF HOLDERS OF MINING RIGHTS

Section 5 of the MPRDA has replaced the common-law entitlements of a mining right holder. It affords the holder and his employees or contractors access to the land to which the right relates, and the right to construct infrastructure or operational facilities without which he would not be able to perform his mining activities.¹²¹ The mining right holder is further entitled to mine on the land for the

¹¹⁶ See *Ex parte Pierce* 1950 (3) SA 628 (O) 634; *Erasmus v Afrikander Proprietary Mines Ltd* 1976 (1) SA 950 (W) 956; *Apex Mines v Administrator Transvaal* 1986 (4) SA 518 (T) 590. The fact that many prefer the classification of mineral rights as *sui generis* real rights is confirmed in para 26 of *Agri South Africa v Minister of Minerals and Energy* [2011] 3 All SA 296 (GNP).

¹¹⁷ *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A); *Hudson v Mann* 1950 (4) SA 485 (T).

¹¹⁸ Section 2(4) of the MTRAA 24 of 2003.

¹¹⁹ *Ibid.*

¹²⁰ Dale *et al* *South African Mineral and Petroleum Law* 135.

¹²¹ Section 5(3)(a) of the MPRDA provides that any holder of a mining right “may enter the land to which such right relates together with his or her employees, and may bring onto that land any

mineral for which such right has been granted for his own account,¹²² and to remove and dispose of any such mineral found during his mining operations.¹²³ Provided that the mining right holder adheres to the provisions of the National Water Act,¹²⁴ he may use water from any natural spring, lake, river or stream situated on, or flowing through such land, or from any excavation previously made for mining purposes.¹²⁵ He is also entitled to sink a well or borehole to obtain water, provided that it is for mining-related uses.¹²⁶ In general, the holder of a mining right may carry out any activity incidental to mining, provided the activity does not contravene the provisions of the MPRDA or any other law.

In addition to the entitlements provided in section 5 of the MPRDA, the mining right holder enjoys the exclusive right to apply for an extension of the mining right for further periods of 30 years each.¹²⁷ A mining right will remain valid until mining in respect of the relevant area has been completed; until the right is allowed to lapse;¹²⁸ or if the right is relinquished. The mining right holder's responsibilities and liability in respect of the mining area terminate only once a closure certificate has been issued by the Department of Mineral Resources,¹²⁹ or if such responsibilities are transferred to another party.¹³⁰ From this discussion it is clear that the mining right holder's entitlements are statutorily defined.

plant, machinery or equipment, and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of mining."

¹²² Section 5(3)(b).

¹²³ Section 5(3)(c).

¹²⁴ Act 36 of 1998.

¹²⁵ Section 5(3)(d).

¹²⁶ Ibid.

¹²⁷ Section 24 read with s 35.

¹²⁸ Section 56.

¹²⁹ Section 43. The proposed changes in the Mineral and Petroleum Resources Development Amendment Bill of 2013 (B15B -2013) should also be noted.

¹³⁰ Section 43(2).

2.5 OBLIGATIONS OF HOLDERS OF MINING RIGHTS

The main statutory duties relevant to this study are the following: the mining right holder must commence with mining operations within one year from the date on which the right becomes effective;¹³¹ it must actively conduct mining in accordance with the mining work programme;¹³² and it must comply with the provisions of the MPRDA or any other relevant law and the terms and conditions under which the mining right has been granted.¹³³

Every mining right holder must take care of the environment and remains responsible for any environmental damage or ecological degradation until a mine closure certificate has been issued by the Department of Mineral Resources.¹³⁴ Mining operations must be conducted in accordance with generally accepted principles of sustainable development by integrating social, economic, and environmental factors into the planning and implementation of mining projects to ensure that the exploitation of mineral resources serves present and future generations.¹³⁵ These principles are promoted by obliging the mining right holder to prepare an environmental management programme, and to have it approved by the Department of Mineral Resources.¹³⁶ In this programme the mining right holder undertakes to conduct mining in a responsible manner and when mining has been completed, to ensure the land is restored, as far as practicable, to its pre-mining condition.¹³⁷ The mining right holder must also comply with the

¹³¹ Section 25(2)(b) of the MPRDA. In terms of this provision the holder of a mining right may not delay commencement of mining activities for unreasonably long periods for the mere sake of retaining the right to mine the land in question. This has been referred to as the so-called “use it or lose it” principle.

¹³² Section 25(2)(c).

¹³³ Section 25(2)(d).

¹³⁴ Section 38(1)(d).

¹³⁵ Section 37(2).

¹³⁶ Section 25(2)(e). It should be noted that s 22(4) and s 25(2)(e) have been amended by ss 18 and 21 of the MPRDAA.

¹³⁷ Section 38(1)(d) of the MPRDA determines that the mining right holder must as far as is reasonably practicable, rehabilitate the environment affected by the mining operations to its natural

provisions of section 24 of the National Environmental Management Act (NEMA).¹³⁸

Failure to comply with any of these provisions constitutes an offence¹³⁹ and may lead to the cancellation or suspension of the relevant mining right.¹⁴⁰

Of further importance to this study, is the mining right holder's responsibility to protect the health and safety of mine employees and other persons at mines, and to take reasonable steps continuously to prevent injuries, ill-health, loss of life, or damage of any kind from occurring as a result of the mining, even in areas where mining has ceased.¹⁴¹ This aspect is of particular importance to this study, as it contributes towards the limiting effect which underground coal mining has on the development of townships. In Chapter 4 I discuss how the current mining laws limit township establishment, and how coal mining is affected by the provisions regulating mine safety and the development of townships.

or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development.

¹³⁸ Act 107 of 1998.

¹³⁹ Section 98(a) of the MPRDA.

¹⁴⁰ Section 47 of the MPRDA.

¹⁴¹ The objects of the MHSA 29 of 1996, read with s 2(2) of the MHSA.

CHAPTER 3

EFFECT OF GRANTING OF MINING RIGHTS ON OWNERSHIP

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3.1 INTRODUCTION

In Roman law the right to minerals and the right to exploit them vested in the owner of land who owned everything above and everything below the land, including the minerals contained in the land.¹⁴² Ownership during this period was regarded as virtually absolute and unencumbered.¹⁴³

¹⁴² According to Wallis JA in *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) 28 the rights of the owner of immovable property in Roman times extended up to the heavens and down to the centre of the earth in accordance with the maxim *cuius est solum, eius est usque ad caelum et ad inferos*. The landowner in accordance with this principle owned the land, the sky above it and everything contained in the soil below the surface. See also Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-3 and Dale *et al South African Mineral and Petroleum Law* 4 for a discussion of this principle which formed part of Roman-Dutch law.

¹⁴³ Van der Merwe CG *Sakereg* 171. Van den Berg 2009 *Stell LR* 141 also refers to the wide unhindered discretion owners used to have in relation to their land. Mostert *Mineral Law* 7 notes that the *cuius-est-solum* maxim affords the landowner the right to the surface and what lies beneath it in all the fullness that the common law allows.

Under the current South African legal system, an owner of land no longer enjoys absolute and unlimited rights which can be exercised in absolute freedom and at his own discretion.¹⁴⁴ The entitlements of landowners must be exercised within the boundaries of the law.¹⁴⁵ Legislation, for example, regulates how the airspace above a person's property should be used,¹⁴⁶ it prescribes the standard of buildings one may develop on such land,¹⁴⁷ and determines how mining of the country's mineral resources should be managed.¹⁴⁸ Ownership of all things is, therefore, not without restriction and is subject to inherent limitations. These ownership-eroding elements can be introduced either by legislation, or in terms of the common law.¹⁴⁹ For instance, in certain cases the common law regulates the

¹⁴⁴ Spoelstra AJ in *Gien v Gien* 1979 (2) SA 1113 (T) 1120 defines ownership as "the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property as he pleases." Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* 1-7 are sceptical of the notion that ownership has at any stage since its development in Roman times been regarded as absolute.

¹⁴⁵ Spoelstra AJ in *Gien v Gien* 8 adds: "This apparently unfettered freedom is, however a half truth. The absolute power of an owner is limited by the restrictions imposed thereupon by the law." Van der Walt and Pienaar *Introduction to the Law of Property* 43 explain that the term ownership is sometimes wrongly characterised as absolute and individualistic: "The absoluteness of ownership is ostensibly found in the owner's entitlement to do with the thing as he pleases within the bounds of the law, that is to say to have absolute and unlimited control of the thing by using it as he sees fit." The individuality of ownership is ostensibly found in the fact that the owner's right is "enforceable against the whole world", which indicates exclusive entitlements of disposition and enjoyment. The conclusion is then that ownership provides the holder of the right with unlimited and exclusive control over the thing. In the authors' opinion the abovementioned point of view is wrong, as ownership must be exercised subject to the requirements of the law and the rights of third parties. According to the authors it was already clear in Roman times that ownership was, to an extent, already limited based on the maxim *sic utere tuo ut alienum non laedas* which means that an owner must use his property in such a way that another person is not burdened or prejudiced.

¹⁴⁶ Aviation Act 74 of 1962.

¹⁴⁷ National Building Standards and Building Regulations Act 103 of 1997.

¹⁴⁸ Mineral extraction is currently mainly regulated by the MPRDA referred to in ch 2 above.

¹⁴⁹ Ownership is the most comprehensive real right a person can have in relation to a thing. This right is limited by the law and the rights of others. Limitation in terms of the law includes statutory limitation and neighbour law. Limitations imposed by the rights of others include servitudes and

legal relationship between neighbours and defines the extent of the right of lateral support owed to an adjacent landowner¹⁵⁰ and in certain circumstances places specific obligations on parties who hold rights in respect of the same land.¹⁵¹ Even constitutional rights are not absolute, as the Constitution itself provides for the limitation of rights, including property rights, provided that the requirements of section 36 of the Constitution have been satisfied.

Under the current mineral-law dispensation, the right to extract the minerals contained in the land is separated from ownership of that land. Unlike the position in Roman times, where the owner owned everything above and below his land, the soil covering the minerals can now belong to one person, while the right to extract minerals can be held by another. Where a person has a right over the land of another, for example a servitude, or, of specific interest to this study, a mining right, these rights often compete with one another. This is because both parties have specific entitlements¹⁵² in, or derive some sort of economic benefit from the same land. These entitlements would, at least to some extent, be limited as soon as one of the parties exercises his right. When one of the parties involved is the owner of land who has an interest in maintaining the integrity of the surface of the land, and the other is a mining company whose rights depend on the excavation of the top layers of soil to uncover the mineral-bearing seams, a conflict between the two rights appears unavoidable.

real security rights. See also Van der Walt and Pienaar *Introduction to the Law of Property* 81 – 97 and Badenhorst, Pienaar and Mostert *The Law of Property* 91-110.

¹⁵⁰ In considering the origin and development of the concept of lateral support, Van der Walt *The Law of Neighbours* 89 notes that the duty to uphold lateral support for neighbouring land imposes a limitation on an owner's entitlement to excavate the soil of his land. The law pertaining to lateral and subjacent support is discussed more fully in Boyd K *Lateral and Subjacent Support* LLM dissertation University of Stellenbosch (2009) 10.

¹⁵¹ Van der Walt *The Law of Neighbours* 108 notes that any servitude inevitably derogates from the rights of the owner of the servient land.

¹⁵² For example, the entitlement to use the thing (*ius utendi*) and the entitlement to consume and destroy the thing (*ius abutendi*). For a more comprehensive explanation of the various entitlements of ownership see Badenhorst, Pienaar and Mostert *The Law of Property* 92.

Lewis AJ in *Odendaal v Eastern Metropolitan Local Council*,¹⁵³ although in a different context, described the challenge as follows:

The rapid urbanisation of countries world-wide and the inevitable need for regulation that has accompanied it has had the effect of restricting full *dominium* even further than the common law ever did.

Generally, a landowner may, subject to the limitations imposed by the law and the rights of others, such as servitudes, use and enjoy his land in any way he pleases.¹⁵⁴ A landowner may alter the character of his land, and may even destroy it, so long as such use is not prejudicial or injurious to the rights of others.¹⁵⁵ The entitlements of an owner in respect of his land are progressively being limited as statutory regulations become more extensive and land becomes increasingly scarce. This is especially true in respect of land where mining rights have been granted to someone other than the landowner. Where ownership and mining rights vest in different persons, the act of mining is bound to have an impact on the owner's rights. Similarly, where township development is planned in respect of land where mining is intended or has previously taken place, such mining operations could very well have an impact on the landowner's proposed land use.

¹⁵³ 1999 CLR 77 (W) 84.

¹⁵⁴ See Badenhorst, Pienaar and Mostert *The Law of Property* 92 and *Gien v Gien* 1120. See also Boyd K *Lateral and Subjacent Support* 19. Van Wyk *Planning Law* 206 is of the view that a landowner's use and enjoyment in respect of his land has been eroded to such an extent by statutory and other limitations that he now has something less than ownership in the true sense of the term as a landowner does not have the right to do with his land as he pleases. Ownership has however been limited by legislation from the earliest days, and landowners could only do with their land as they please within the boundaries which the law allows. Van der Walt and Pienaar *Introduction to the Law of Property* 43 also state that ownership is sometimes wrongly characterised as absolute and individualistic – ownership does not provide unlimited and exclusive control over a thing.

¹⁵⁵ Van der Walt and Pienaar *Introduction to the Law of Property* 40. See further Badenhorst, Pienaar and Mostert *The Law of Property* 91.

3.2 CONSTITUTIONAL RIGHT TO PROPERTY

The advent of the new constitutional order resulted in an expansion and rearrangement of the traditional sources of the law of property.¹⁵⁶ The Constitution of the Republic of South Africa, 1996, is the supreme law of the Republic of South Africa and any law, conduct, or common-law principle in conflict with it, is invalid.¹⁵⁷ According to the Constitution, the right to property is a fundamental human right.¹⁵⁸ Section 25(1) of the Bill of Rights determines that no person shall be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. It places a positive duty on the state to take legislative measures to protect its citizens against violations of their rights, which in the context of land would require of the state to intervene where the conduct of other persons threatens to undermine the protected rights.¹⁵⁹

Even rights afforded by the Constitution, including those in section 25, are subject to limitation under certain circumstances.¹⁶⁰ Section 36 of the Constitution determines that “rights in the Bill of Rights may be limited only in terms of law of general application and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. These factors include the nature of the right, the importance of the purpose of the limitation, the nature and the extent of the limitation, the relation between the limitation and its purpose, and less restrictive means available to achieve the purpose.” The application of section 25 of the Constitution, 1996, and the question of whether the limitations on ownership brought about by the MPRDA could in some cases amount to an expropriation are considered in greater detail in Chapter 6.

¹⁵⁶ Badenhorst, Pienaar and Mostert *The Law of Property* 7.

¹⁵⁷ Section 2 of the Constitution affords it supremacy in law and determines that law conflicting with the Constitution is invalid and the obligations imposed by the Constitution must be fulfilled. See further Van Wyk *Planning Law* 75.

¹⁵⁸ See Van Wyk *Planning Law* 209.

¹⁵⁹ See Van Wyk *Planning Law* 79.

¹⁶⁰ Van Wyk *Planning Law* 211 states that s 25 property rights are not absolute or exclusive since they can be limited by the common-law or legislation.

3.3 CONCLUSION

Although ownership is the most comprehensive right one can have with regard to property, which in principle, entitles the owner to deal with his property as he pleases, it has always been subject to limitations. These limitations include limitations resulting from the rights of others, such as limited real rights. Mining rights fall within this latter category. The MPRDA introduced a completely new mineral-rights dispensation in South African law, which appears to deprive a landowner of the rights to the minerals in his land. The granting of mining rights with its concomitant entitlements in terms of the MPRDA clearly creates opportunities for possible serious conflict between landowners and mining right holders.

In the following chapter I evaluate the factual position underlying the premise that the respective interests of mining right holders and landowners have a limiting effect on one another's rights. The nature and extent of these limitations, as well as their effect on the parties' respective rights are also considered. I now turn to an evaluation of the legal principles applicable to the relationship between the mining right holder and the owner of land with specific reference to the mining of coal.

CHAPTER 4

RELATIONSHIP BETWEEN LANDOWNERS AND HOLDERS OF COAL MINING RIGHTS

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4.1 INTRODUCTION

This chapter evaluates relevant statutory provisions regulating the relationship between the holders of mining rights to land and the owners of that land who wish to embark on township establishment. I explain why mining restricts township development, and why this form of land-use restricts mining. The impact of planning law and mine health and safety provisions are also considered.

4.2 IMPACT OF COAL MINING ON TOWNSHIP DEVELOPMENT AND VICE VERSA

By its very nature, mining necessitates some type of invasive drilling or excavation to uncover and extract the minerals contained beneath the surface of the land. As a result, many mining companies seek to acquire ownership of the surface of the land where they intend to conduct mining because such acquisition allows the greatest freedom in relation to their mining activities. This is typical of opencast mining, which causes a significant disturbance of the surface of the land.¹⁶¹ Where there is no impact on the surface of the land, there is no need to acquire the surface rights. Where the land is not owned by the mining company and the method of mining to be used or activity which is planned impacts on land utilisation, the act of mining impairs the landowner's ability to use his land free from hindrance or constraint.

Such use therefore limits his ownership in his land. Opencast mining, for example, involves removal of the top layers of soil or strata to expose the mineral-bearing seam. Where this type of destructive mining has taken place, it would not be possible to develop a township until the land has been properly rehabilitated. Even if the land can ultimately be returned to the owner, in the majority of cases its character and usefulness are likely to have been materially altered.¹⁶²

¹⁶¹ See Figure 1, Figure 2 and Figure 3 of the Appendix.

¹⁶² Franklin and Kaplan *Mining and Minerals Laws* 138.

Mining therefore deprives landowners of at least some of the entitlements of ownership, and so limits and subtracts from their full rights of ownership.

It is widely known that high-extraction coal mining at relatively shallow depths below the surface, as is commonly practised in South Africa, often results in deformation of the land surface.¹⁶³ This without question impacts on any landowner who intends to use his land, and in particular where he intends to build infrastructure on the land. Infrastructure development will likely be affected by the risk of further ground movement which could potentially result in subsidence¹⁶⁴ of the surface of the land. Mining-induced subsidence, or the sinking of a specific point on the surface of the land as a result of mining, can potentially cause damage to crops or buildings or, in some cases, may even lead to the injury or death of those residing on the land should there be a sudden structural collapse of fixed structures. Less severe consequences of coal mining are the following: increased noise levels; lower or complete loss of borehole yields; increased seismic activity that could lead to the formation of cracks in the strata covering the mineral body extending from the underground cavities to the surface of the land

¹⁶³ Van der Merwe JN *Subsidence Caused by High Extraction Coal Mining in the Sasolburg and Secunda Areas: Prediction thereof and the Mitigation of its Effects* D Phil (Engineering) University of Witwatersrand (1991). High-extraction in this context refers to methods used to extract higher yields of coal. An illustration of a typical underground coal-mining operation is shown in Figure 4 of the Appendix. Figures 5 and 6 illustrate the bord-and-pillar mining method and Figures 7 to 10 a longwall mining section. See also the compact disc accompanying this dissertation for an animation explaining the workings of a typical bord-and-pillar, high-extraction and longwall mining operation. The animation was prepared by and provided with the compliments of Sasol Mining (Pty) Ltd.

¹⁶⁴ Subsidence is commonly used to describe the overall ground movement as a result of underground mining. Stated differently, it is the deformation of land resulting from removing subsurface support. The activity of mining characteristically involves extracting mineral-bearing seams below the surface of land creating open compartments or voids. When the weight of the overburden and the downward force it creates become too great for the remaining rock fragments to withstand the force, it may cause the roof above the void to collapse. This may result in the surface of the land to sinking or subsiding. This effect of the lowering of a specific point on the surface of land caused by mining is referred to as subsidence. See Figures 11 to 34 and Figure 36 of the Appendix for illustrations and examples of the impacts of coal-mine subsidence.

causing the uncontrolled release of methane and other harmful gasses; uncontrolled underground fires and the formation of sinkholes or pans changing the general topography of an area which may alter hydrological characteristics and lead to erosion. Mining subsidence, in addition to the impacts stated above, due to the element of uncertainty that it creates, can also have a range of indirect consequences such as a decrease in property value, increased insurance premiums and perhaps even the inability to obtain financing from banks.

Having considered some of the adverse impacts of coal mining on the utilisation of land, the legal positions of the mining right holder and the landowner need to be evaluated to gain a better understanding of how mining limits township development and township development, in turn, restricts mining. This will be done by evaluating the legal position of each of the aforementioned parties in the following circumstances:

- where an application to mine coal is submitted in respect of land earmarked for township development;
- where township development is undertaken in respect of land where mining rights have already been granted to a party other than the owner of the land;
- where mining is undertaken in respect of land with existing surface infrastructure; and
- where township development is undertaken in respect of land where relatively shallow underground mining has been completed.

4.2.1 APPLICATION TO MINE COAL IN RESPECT OF LAND EARMARKED FOR TOWNSHIP DEVELOPMENT

In this section I consider the following scenario. A landowner of prime vacant land on the outer boundary of a town intends to develop an exclusive residential- and golf estate. Alternatively, the local municipality intends to develop its land for low-cost housing. These owners receive notification from a mining company that it has submitted an application for a mining right in respect of this land and intends to mine for coal. What now? Coal mining will in all probability jeopardise their plans for the development of their land. What remedy, if any, do the landowners have to stop the mining company from obtaining a mining right, which may possibly destroy their entitlements to use and enjoy their property?

This scenario will form the basis of an evaluation of the legal position of both the landowners and the applicant for the mining right.

4.2.1.1 Landowners' right to be consulted

In terms of the MPRDA, the landowner's consent is no longer a requirement for mining in, on, or under his land. The most notable protection afforded by the MPRDA to a landowner against the severe disruptions caused by mining, is the right to be consulted regarding the mining right application. Section 10 of the MPRDA determines that within fourteen days after accepting¹⁶⁵ an application for

¹⁶⁵ The difference between the acceptance and the granting of an application should be noted. Section 22(2) of the MPRDA provides that the Regional Manager must accept an application for a mining right if: (a) the requirements in subsection (1) have been met; and (b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral in respect of the same land. Acceptance, in this context, means that the Regional Manager is satisfied that an application which has been lodged with the department complies with the requirements of s 22(1). If this is the case, s 22(4) provides that "if the Regional Manager accepts the application he must, within 14 days from the date of acceptance, notify the applicant in writing: (a) to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of s 39; and (b) to notify and consult with interested and affected parties within 180 days from the date of the notice." The date on which this notice is issued by the Regional

a prospecting right in terms of section 16 of the MPRDA, or a mining right in terms of section 22, the Regional Manager must issue a notice to the effect that such an application has been received in respect of the land in question.¹⁶⁶ He must call upon interested and affected persons to submit their comments regarding the application within 30 days from the date of the notice.¹⁶⁷

Section 10(2) of the MPRDA affords the landowner the opportunity to object to the granting of the application. When an objection is lodged by the landowner, the Department of Mineral Resources is, in accordance with section 10(2), obliged to refer the objection to the Regional Mining Development and Environmental Committee (RMDEC) to consider the objections and advise the Minister of Mineral Resources. This does not mean that the right may not be granted by the Department of Mineral Resources where the parties, despite the various levels of consultation, fail to reach an agreement. The provisions of section 10 are primarily aimed at allowing the landowner sufficient opportunity to gain knowledge of the application and sufficient detail of what the prospecting or mining operation will entail on the land, and to have his concerns considered by the RMDEC. The RMDEC will allow written and oral submissions by both the landowner and the applicant after which a recommendation will be made to the Minister of Mineral Resources for final decision.

Manager is regarded as the date of acceptance of the application. The merits of the application however still need to be considered based on the criteria provided in s 23. If the application meets these requirements and does not contravene any other provision of the MPRDA or any other applicable legislation, the Minister will be obliged to grant a mining right to the applicant. Section 22 of the MPRDA has been amended by the MPRDAA, *inter alia*, by providing that the Regional Manager has to accept an application “within 14 days of receipt of the application.” The MPRD Amendment Bill 15B of 2013 seeks to remove the reference to 14 days by replacing these words with “the prescribed period.”

¹⁶⁶ The MPRD Amendment Bill seeks to amend s 10(1) by providing that notification of the acceptance of a prospecting right or mining right has to be given by the Regional Manager, as well as the applicant.

¹⁶⁷ The references to a specific period in s 10 of the MPRDA, such as the reference to acceptance of applications “within 14 days” has been replaced in the MPRD Amendment Bill B15B-2013 with the words “within the prescribed period” denoting that the timeframes will only be clarified in the expected amendment to the regulations of 2002.

A new provision has been added by the MPRD Amendment Bill allowing the RMDEC to refer such objections to the applicant and to direct the applicant to consult with the person objecting and submit the result of the consultation to the Department of Mineral Resources.¹⁶⁸ The Amendment Bill further seeks to introduce a sub-paragraph 3 providing that if the aforementioned consultation results in an agreement, the agreement must be reduced to writing and forwarded to the Regional Manager of the Department of Mineral Resources for noting and onward transmission to the RMDEC. The proposed amendment appears to be another attempt by the Department of Mineral Resources to compel the parties to endeavour to reach an amicable agreement in respect of the proposed activities before the right is granted.

Section 16(4)(b) of the MPRDA specifically provides that when the Regional Manager accepts a prospecting right application, he must inform the applicant in writing to notify (also in writing) and consult with the landowner or lawful occupier of the land. The results of this consultation must be submitted to the Regional Manager within 30 days from the date of such notice.

Section 22(4)(b) is similar in that applicants for mining rights are also directed to notify and consult with interested and affected parties within 180 days from the date of the notice.¹⁶⁹

Regulation 3 of the regulations published in terms of the MPRDA specifies how the Department of Mineral Resources should notify interested and affected parties

¹⁶⁸ See s 10(2)(b) of the MPRD Amendment Bill 15B of 2013.

¹⁶⁹ Section 16(4)(b) of the MPRD Amendment Bill B 15B-2013 seeks to amend the MPRDA and the MPRDAA by providing that when the Regional Manager accepts an application for a prospecting right, the Regional Manager must within a prescribed period from the date of acceptance inform the applicant in writing to consult in the prescribed manner with the landowner, lawful occupier and an affected party and include the result of the consultation in the relevant environmental reports. The proposed amendment of s 22 is very similar to s 16 save that it requires consultation not only with affected parties, but also interested parties.

of the acceptance of an application.¹⁷⁰ It provides that the Minister must make it known that an application has been accepted in respect of the land by placing a notice on a notice board that is accessible to the public, at the office of the Regional Manager. In addition to this notice, interested and affected parties must be informed of the acceptance of the application in at least one of the following ways: “a) publication in the applicable *Provincial Gazette*; (b) a notice in the magistrate’s court of the magisterial district applicable to the land in question; or (c) an advertisement in a local or national newspaper circulated in the area where the land affected by the application is situated.”¹⁷¹ Those who are typically affected by mining activities, such as communities and private landowners are generally not involved in mining, and would in all probability not be aware of any notices appearing either on a notice board at the regional office of the Department of Mineral Resources, or at the local Magistrate’s Court. These parties will certainly not monitor every edition of the *Provincial Gazette* and available newspaper to see whether a mining right may have been accepted in respect of their land.

To make matters worse, the Department of Mineral Resources often fails to satisfy the requirements set out in the MPRDA regulations. As a result, the parties who are directly affected by the proposed mining right application rarely become aware of the application. On the off-chance that the notice does come to their attention, they have only 30 days in which to submit their comments and are expected to provide substantive comments without having even seen the application. The notices that appear on the Department of Mineral Resources’ notice board usually contain no more information than the name of the applicant, the mineral applied for, a description of the affected properties, and an indication of the date on which comments are due.

¹⁷⁰ Sections 16 and 22 of the MPRD Amendment Bill B 15-2013 require applicants to consult in the manner prescribed. At the time of the writing of this dissertation the proposed amendments to the regulations of 2002 have not been compiled and as a result it was not possible to consider whether government intends to afford better protection to landowners through improved regulations.

¹⁷¹ See reg 3 of the MPRDA regulations.

The requirement of consultation in terms of the provisions of section 10, read with the provisions of regulation 3, is therefore grossly inadequate as far as reasonable and proper notification and consultation are concerned, and it could be argued that they fall foul of the requirements of administrative justice.¹⁷² Better protection can be afforded to landowners by amending section 10 to oblige applicants to place a notice or notices in one or more local newspaper circulated in the area of the application. This notice should be translated into at least two (but preferably more) of the official languages commonly used in the area of the application. Applicants should in addition to the newspaper notice be obliged to identify all registered owners of the affected land, as well as adjacent parcels of land, and to ensure all affected parties receive notification of the application. In a country where the postal service does not always function properly, sending a letter by registered postage to the registered address indicated on the title deed of the property will probably not always ensure the landowners receive notification timeously. It might provide a more suitable solution to oblige applicants to notify affected landowners by means of personal visits or personal service of a notice on the affected landowners by the Sheriff of the Court.¹⁷³ The notice should contain the following: a description of the nature of the application; a clear and detailed description of the property affected; an indication of the duration for which the relevant right is applied; an indication of the mineral involved; and a description of the possible impact of the mining activities on the current and future use of the surface of the land. The period within which comments can be submitted is also inadequate and should be extended to at least 60 days.

The efficacy of consultation can be further improved by obliging the applicant to provide a copy of the application, mine work programme and environmental

¹⁷² See s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), s 6(1) of the MPRDA and s 33 of the Constitution of the Republic of South Africa, 1996.

¹⁷³ Compare the provisions of reg 3 of the MPRDA with s 129 of the National Credit Act 35 of 2005 which provides that the credit provider may not commence with any legal action without first providing notice to the consumer. Section 130 further provides the credit provider may not approach the court for an order to enforce the credit agreement without providing proof of the notice. As to the meaning of this “notice”, see *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (EC) para 55.

management programme¹⁷⁴ to parties directly affected without them having to request it, or apply for it in terms of the Promotion of Administrative Justice Act.¹⁷⁵ It would be an unreasonable burden on affected landowners to compel them first to apply for more comprehensive information in order to comment meaningfully on the possible impact, especially considering the administrative delays experienced with regard to applications for access to records, and the short period afforded for comments.

The adequacy of the MPRDA's provisions relating to consultation was considered in *Bengwenyama Minerals v Genorah Resources*.¹⁷⁶ Although the judgment dealt predominantly with the preference of applications submitted by communities wanting to prospect on communal land as provided for in section 104 of the MPRDA and whether an internal appeal process as envisaged in section 96 of the MPRDA was available to the applicant in the circumstances, the judgment also provided some helpful guidance with regard to how consultation should take place. Froneman J held that the applicant, who in this case applied for a prospecting right, is obliged to notify the landowner not only when he applies for the right, but must thereafter also inform the landowner when the right has been granted by the Department of Mineral Resources. The purpose of the first consultation is to inform the landowner or lawful occupier of the acceptance of an application, and to allow him an opportunity to request sufficient information from the applicant to enable him to make a well-informed decision regarding the potential impact of the proposed activities on the utilisation of his land. It also allows the landowner an opportunity to submit comments and raise concerns which in his view the Department of Mineral Resources should take into account before awarding the applicant the relevant right.¹⁷⁷

¹⁷⁴ In view of the amendments to environmental provisions contained in the MPRDAA which will only come into force on 7 December 2014, a copy of the application for environmental authorisation should also be provided.

¹⁷⁵ Act 3 of 2000.

¹⁷⁶ *Bengwenyama Minerals Pty Ltd v Genorah Resources* 2011 (4) SA 113 (CC).

¹⁷⁷ According to Froneman J, the applicant must "(a) inform the landowner in writing that his application has been accepted by the Department of Mineral Resources for consideration;

The purpose of the latter consultation is to allow the landowner and the applicant an opportunity to attempt to reach agreement with regard to the interference with and impact of the proposed activities on the landowner's use of his property. Secondly, it provides landowners and lawful occupiers with sufficient information to allow them to make an informed decision with regard to possible representations, internal appeals, or review applications.¹⁷⁸ In other words, once the right has been granted, the applicant must again consult the landowner with the aim of reaching an agreement on how the activities can be conducted with the least possible inconvenience to the landowner and his property interests. This further consultation is aimed at determining whether some type of accommodation is possible insofar as the interference with the rights of the landowner is concerned. It is furthermore aimed at allowing the landowner the opportunity to evaluate whether the consultation process was adequate and whether the Regional Manager's decision to grant the application was procedurally fair.

Section 5A has been introduced in the MPRDAA and provides that "no person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, retain, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without... (c) giving the landowner or lawful occupier of the land in question at least 21 days prior written notice." In terms of this amendment the landowner is provided more time to consider whether the process followed by the Department of Mineral Resources pursuant to the granting of the right was fair and what is to be done in terms of mining and how it should be accommodated, prior to any activities commencing on his land. Importantly, the 21-day prior written notice provides more time for the parties to negotiate with the *bona fide* intention of reaching an agreement regarding issues such as which access roads may be used to gain access to the site, who will be authorised to enter the land, whether mining will

(b) inform the landowner in sufficient detail of what the operation on the land will entail in order for the landowner to assess the impact on his land and his ability to use the land; (c) consult with the landowner with the view of reaching agreement to the satisfaction of both parties; and (d) submit the results of consultation to the Department of Mineral Resources."

¹⁷⁸ See Badenhorst PJ, Olivier NJJ and Williams C "The final judgment" 2012 (1) TSAR 106.

have any impact on water sources and how compensation for damage to the land will be determined and paid.

In the event of the landowner gaining knowledge that a prospecting or mining right has been granted without the applicant having properly consulted with him, the landowner can lodge an appeal in accordance with section 96 of the MPRDA. An evaluation of the grounds for and requirements of an internal appeal in terms of the MPRDA falls beyond the scope of this dissertation.

4.2.1.2 Effect of land use rights and zoning on applications for mining rights

Owners of land, as I explain in Chapter 3 above, are bound to exercise their rights within the limitations of the law and the rights of others. Limitations in terms of the law include restrictions on the use of property by the provisions of a town planning or zoning scheme and restrictive conditions contained in title deeds.¹⁷⁹ The rights of landowners are also limited by the rights others hold in respect of the land. In this section I consider the impact of township establishment on applications for mining rights. The position will be evaluated from the viewpoint of a mining company applying for a mining right in respect of an area close or adjacent to an existing town.

In particular, the question of what impact township establishment could have on mining right applications becomes relevant where the land in respect of which the application is submitted, is subject to existing or pending applications for township establishment. Certain restrictions apply in respect of land which has been proclaimed as a township. First, one needs to determine the status of the application which has been submitted to the municipality. Here one must consider whether the land earmarked for the development has been formally incorporated as part of the municipality's Spatial Development Framework and/or approved Land Use Scheme, and whether it has been proclaimed as a township. These will be explained below.

¹⁷⁹ Van Wyk *Planning Law* 202.

Determination of the use for which the land is destined is relevant, in the first place, because the MPRDA expressly prohibits the granting of mining rights in respect of certain areas, including land comprising a residential area, land used for public or government purposes or land reserved in terms of any other law.¹⁸⁰ Secondly, the proposed land use becomes relevant to an evaluation of whether or not the owner of land requires the consent of the Minister of Mineral Resources in terms of section 53 of the MPRDA and whether the consent as contemplated in section 53 is a prerequisite for approval of the township in terms of the applicable Townships Ordinance.

In the scenario sketched above,¹⁸¹ the land is earmarked for the development of either a residential golf estate, or for low cost housing development. The applicability of section 48 of the MPRDA will be considered first. Section 48 provides that no mining rights may be granted in respect of certain areas, including “land comprising a residential area;¹⁸² any public road, railway or cemetery;¹⁸³ any land being used for public or government purposes; land reserved in terms of any other law;¹⁸⁴ or areas identified by the Minister by notice in the *Government Gazette* in terms of section 49 of the MPRDA.”¹⁸⁵

The term “residential area” is however not defined in the MPRDA whereas the MPRDA’s predecessor, the now repealed Minerals Act 50 of 1991, made reference to and defined the terms “township”¹⁸⁶ and “urban” area.

¹⁸⁰ See s 48 of the MPRDA.

¹⁸¹ See ch 4 para 4.2.1.

¹⁸² See s 48(1)(a) of the MPRDA.

¹⁸³ See section 48(1)(b) of the MPRDA.

¹⁸⁴ See s 48(1)(c) of the MPRDA.

¹⁸⁵ See s 48(1)(d) of the MPRDA.

¹⁸⁶ The Deeds Registries Act 47 of 1937 defines the term “township” to include “(a) a group of pieces of land or sub-divisions of a piece of land, which are combined with public places and are used mainly for residential, industrial or similar purposes, or are intended to be so used; (b) any combination of such groups which is suitable for registration in one register; (c) any area of land registered or recognised at the commencement of this Act in a deeds registry as a township if a

The MPRD Amendment Bill of 2012 which was published in *Government Gazette* 36037 of 27 December 2012 and which was introduced in the National Assembly on 31 May 2013, extends the prohibition to land comprising a residential area and any land which is within an approved town-planning scheme. Section 48(1)(a) of the MPRD Amendment Bill was later further amended by the National Assembly¹⁸⁷ during March 2014 and now reads that “no prospecting or mining right may be granted in respect of land comprising a residential area, and any land which is within an approved town planning scheme and zoned for residential purposes.” Neither of the term “residential area” nor the term “town planning scheme” is, however, defined in the MPRDA. The term “residential area” can possibly be interpreted to mean land registered for residential purposes in terms of legislation such as the Townships Ordinances or the Development Facilitation Act 67 of 1995 (DFA).¹⁸⁸ In the context of land-use management, residential purpose may mean purposes associated with the use of land primarily for human habitation, including dwelling houses, group housing, hotels, flats, boarding houses, residential clubs, hostels, residential hotels or rooms to let.¹⁸⁹ The term “town planning scheme” is often used in the context of planning law to describe the purpose for which each piece of land within a township may be used and is guided by provincial planning legislation such as the Ordinance.¹⁹⁰ According to Van Wyk,¹⁹¹ the term “town planning scheme” was often used in previous provincial legislation, but has been replaced in more current provincial legislation by “zoning schemes” or “land use schemes”. The whole of South Africa will, in accordance with the Constitution,

general plan thereof is filed in that deeds registry or in the office of the surveyor-general concerned; or (d) any township established, approved, proclaimed or otherwise recognised as such under any law.” The Town-planning and Township Ordinance defines a township as “any land laid out or divided into or developed as sites for residential, business or industrial purposes or similar purposes where such sites are arranged in such a manner as to be intersected or connected by or abut on any street, and a site or street which has not been surveyed or which is only notional in character.”

¹⁸⁷ See B 15B of 2013.

¹⁸⁸ Dale *et al* *South African Mineral and Petroleum Law* 406.

¹⁸⁹ Van Wyk *Planning Law* 256.

¹⁹⁰ *Id* 278.

¹⁹¹ *Ibid* 278.

1996, and section 24 of the Spatial Planning and Land Use Management Act 16 of 2013, fall within town planning schemes.¹⁹² Government created so-called “back-to-back-municipalities” which include rural areas which were previously not part of a land-use scheme. Based on the proposed amendments to section 48(1) of the MPRDA, it appears that for the provision to apply, the area under consideration has not only to fall within a town planning scheme, but the land must also have been rezoned for residential purposes.

From these definitions it would seem that the use of land as a residential golf estate or low-cost housing development would fall within an area listed in section 48 as the classification of residential land is sufficiently broad to include these types of development which will be used by the general public and in which people will reside permanently. An interesting question which falls to be considered is whether there is any merit in a municipality arguing that land incorporated in a Spatial Development Framework or Land Use Scheme, and earmarked for residential development, constitutes land which is reserved in terms of other legislation – for example, the Spatial and Land Use Management Act 16 of 2013, or the Ordinance.

According to Dale,¹⁹³ the question of whether or not land has been reserved in terms of any other law, will emerge from the wording of such other law. If the Spatial Planning and Land Use Management Act prohibits mining in, on, or under land in respect of which a Spatial Development Framework or Land Use Scheme has been approved, it might be so, but if not, then the answer would be no.

¹⁹² See the preamble to the Act, in particular where it states: “And whereas certain parts of our urban and rural areas currently do not have any applicable spatial planning and land use management legislation and are therefore excluded from the benefits of spatial development planning and land use management systems”. See also s 7(a)(iv) which provides, “land use management systems must include all areas of a municipality and specifically include provisions which are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas.”

¹⁹³ Dale *et al* *South African Mineral and Petroleum Law* 407.

If the area under consideration has indeed been proclaimed as a township and the land has been zoned as residential land as provided in section 48, the Minister of Mineral Resources would be prohibited from granting any mining rights in respect of such land. It should be noted that section 48 does not prohibit the activity itself, but only the issuing of new rights in respect of such an area.¹⁹⁴

A landowner who purchased land for residential development, will point out during the public consultation phase of the mining right application, that the mining right should not be granted as the section 48 prohibitions apply. Until the land has been formally proclaimed as a township and rezoned for residential use, section 48 will offer no relief. Until the land has been formally incorporated in a town planning scheme, and is proclaimed a township and zoned for residential use, section 48 will not apply and the landowner will be entitled only to submit objections as an interested party in light of the potential material impact on his ownership.

Despite the prohibition in section 48(1), there are exceptions. Section 48(2) grants the Minister a discretion, notwithstanding the fact that the land is land as envisaged in section 48, to continue to grant the right “if he is satisfied that, having regard to the sustainable development of the mineral resources involved and the national interest, it is desirable to issue it;¹⁹⁵ that the mining will take place within the framework of national environmental management policies, norms and standards;¹⁹⁶ and, further, that the granting of such right will not detrimentally affect the interests of any holder of a prospecting or mining right.”¹⁹⁷ Given that coal has been classified as a strategic mineral, and considering further the socio-economic benefits mining creates, it may well be argued that the extraction of coal as a non-renewable strategic mineral resource justifies the interference in the landowner’s use and enjoyment of his land.

¹⁹⁴ Dale *et al* *South African Mineral and Petroleum Law* 406.

¹⁹⁵ See s 48(2)(a).

¹⁹⁶ See s 48(2)(b).

¹⁹⁷ See s 48(2)(c).

Section 23 of the MPRDA provides that the Minister is obliged to grant a mining right provided that certain minimum requirements have been met. These requirements include that: “the mineral can be mined optimally in accordance with the mining work programme;¹⁹⁸ the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;¹⁹⁹ the financing plan is compatible with the intended mining operation for their duration;²⁰⁰ mining will not result in unacceptable pollution, ecological degradation, or damage to the environment;²⁰¹ the applicant has provided financially and otherwise for the prescribed social and labour plan;²⁰² the applicant has the ability to comply with the relevant provisions of the MSHA 29 of 1996;²⁰³ the applicant is not in contravention of any provision of the MPRDA;²⁰⁴ and the granting of such right will further the objects referred to in section 2(d) and (f) ²⁰⁵ of the MPRDA.”

Unless the landowner succeeds in persuading the Minister that the granting of the application will lead to unacceptable pollution,²⁰⁶ ecological degradation or damage to the environment or that the socio-economic benefits of the township development outweigh those of mining, it is unlikely that the mining right application will be refused. The fact that mining activities will interfere with or limit the landowner’s future development plans will not constitute a valid ground for refusal of the mining right application. The Minister is entitled, as part of the environmental management process, to ask the applicant for the mining right to explain how it intends to deal with future township development activities. The applicant can point out that it is the holder of a valid prospecting right with the exclusive right to obtain a mining right in respect of the area and that coal mining

¹⁹⁸ Section 23(1)(a) of the MPRDA.

¹⁹⁹ Section 23(1)(b) of the MPRDA.

²⁰⁰ Section 23(1)(c) of the MPRDA.

²⁰¹ Section 23(1)(d) of the MPRDA.

²⁰² Section 23(1)(e) of the MPRDA.

²⁰³ Section 23(1)(f) of the MPRDA.

²⁰⁴ Section 23(1)(g) of the MPRDA.

²⁰⁵ Section 23(1)(h) of the MPRDA.

²⁰⁶ See section 23(1)(d) of the MPRDA.

is of national importance. If the land in question is not an area listed in sections 48 and 49 of the MPRDA, the Minister will have to weigh-up the socio-economic benefits of the owner's proposed surface development against those of mining. It can however be argued by the mining right holder that the MPRDA allows the Minister no discretion to weigh-up the importance of these rights. Once the applicant has complied with the requirements for a mining right and the land in question is not land as envisaged in sections 48 and 49, the Minister will be obliged to grant the mining right.

Another important aspect is the requirement of having land appropriately zoned. This is not only important for the owner of the land attempting a residential development, but it can also be the Achilles-heel of mining companies. In three recent decisions²⁰⁷ the court had to deal with whether mining right holders in addition to their rights granted in terms of the MPRDA, also require permission for the appropriate land zoning in terms of local town planning legislation.²⁰⁸ Whereas mining is governed by the MPRDA, the land on which mining takes place is regulated by various Ordinances, which in the case of *Maccsand* and *Swartland* was the Land Use Planning Ordinance 15 of 1985. The court held that the holder of a mining right will not be permitted to exercise that right unless the land has been zoned for mining purposes in terms of the relevant ordinance. The court confirmed that there is no conflict between the Ordinance and the MPRDA, and that each is concerned with different subject matter. If land is intended to be used for a purpose not permitted in terms of the zoning scheme or regulations, an application must be lodged with the municipality for rezoning or a use departure. The fact that the mining right holder's ability to use the surface of the land for

²⁰⁷ *Maccsand (Pty) Ltd v City of Cape Town* 2011 (6) SA 633 (SCA) confirmed by the Constitutional Court in *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) and *H Louw NO v Swartland Municipality* 2012 (7) BCLR 712 (CC).

²⁰⁸ On the aspects of planning law, see Van Wyk *Planning Law*. Jafta J in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para 18 considered the meaning of the term "planning" and added that in the context of municipal functions the Constitution uses the word "planning" to refer to the regulation and control of land use. See also Van Wyk J "Fracking in the Karoo: Approvals required?" 2014 (1) *Stell LR* 34 - 55 for a discussion of *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC).

mining purposes is now subject to the approval of the municipality, could have far reaching consequences such as causing delays in the implementation of new mining projects.²⁰⁹ If such authorisation is refused, it would prevent, or at least delay the exercise of the right to mine, which may place the holder in breach of its obligations in terms of the mining right, ie to commence mining operations within one year after the granting thereof, and to mine in accordance with the mining work programme.

In the recent as yet unreported judgment of *Coal of Africa Limited v Akkerland Boerdery (Pty) Ltd*,²¹⁰ the respondent argued that Coal of Africa (Pty) Ltd should not be allowed to proceed with coal prospecting activities on the land as it had not complied with the Makhado Land Use Scheme of 2009.²¹¹ The land in question was primarily zoned for agricultural use, and it was argued by the respondent that no consent-use²¹² or secondary-land-use rights have been granted in respect of such land. The land in question was however not part of a proclaimed township. Consequently, the applicant contended that rather than prohibiting prospecting activities outright, such activities should rather be seen as being generally permitted by the Scheme. Although prospecting operations were not expressly mentioned in the Scheme, they were also not expressly excluded. Kgomo J ruled that while the definition of “agricultural use” did not expressly include prospecting as a permitted land use, it could not by any means be interpreted as not being

²⁰⁹ In *City of Johannesburg Metropolitan Municipality* 2010 (2) SA 544 (SCA) para 1 Nugent JA acknowledged the headache of dealing with land-use-planning matters involving multiple regulating bodies. He declared: “The existence of parallel authority in the hands of two different bodies, with its potential for the two bodies to speak with different voices on the same subject matter, cannot but be disruptive to orderly planning and development within a municipal area.” For a discussion of this judgment and its implications see Van Wyk J “Parallel planning mechanisms as a recipe for disaster” 2010 (13) *PER* 1.

²¹⁰ 2014 ZAGPPHC 510, unreported case number: 38528/2012 (date of judgment: 5 March 2014).

²¹¹ The Makhado Land Use Scheme was issued in terms of the Town Planning and Township Ordinance 15 of 1986.

²¹² A “consent use” is a permission given by the municipality to use land in a specific zone for a specific purpose, but the use granted is not permanent as in the case of rezoning. See Van Wyk *Planning Law* 289

permitted. The appropriate land did not fall within a proclaimed township. There could thus not be an outright prohibition on prospecting or mining taking place. The use of such wide, open and unqualified language in the Scheme indicated to the judge, that no restriction or qualification was intended.

With reference to section 21 of the Ordinance, Kgomo J expressed the view that despite the fact that the concept of “proclaimed land” as it is used in the Mining Rights Act of 1967 has been replaced in its entirety, the preparation of town planning schemes should alleviate possible or future interference with mining. He further held that the “consent” contained in clause 25.1 of the Scheme²¹³ is in the nature of a permanent exemption which would allow prospecting and mining related activities. Coal of Africa was consequently permitted to continue with its prospecting activities.

The *Maccsand*, *Swartland Municipality* and *Coal of Africa* rulings unfortunately leave various questions unanswered. For instance, where the land is owned by a farmer, how will the mining right holder compel the farmer to rezone his land for mining purposes if this could imply additional costs arising from the rezoning process and possibly even higher rates and taxes? If the owner of the land is the only person competent to apply for rezoning, will the local or provincial authority assist a mining company should the landowner refuse to initiate the process? It is common cause that the municipality deals primarily with how the surface of land is used, and not with the subsurface. It then begs the question of whether the requirement of rezoning will apply in instances where only underground mining is set to take place, or where only underground infrastructure such as pipelines are being installed? Where the surface of land will be disturbed for example by opencast mining, or where surface infrastructure such as incline or ventilation shafts and conveyor belt systems need to be developed, the mine will probably

²¹³ Section 25 is headed “Consent for specific purposes” and provides that: “without prejudice to any powers of the local municipality derived from any law, or the remainder of this Scheme, nothing in the foregoing provisions of this Scheme shall be construed as prohibiting or restricting the following: (section 25.1) the exploitation of minerals on any land not included in a proclaimed township.”

need to purchase the land or negotiate servitudes to accommodate the required infrastructure. Where there is any use of the surface land which potentially depends on the municipality supplying services -- such as water and electricity -- or use of land for mining purposes which, where it used for some other purpose, would attract rates and taxes for the municipality, it is likely that the zoning requirements will apply. Underground activities which would not impact on municipal services or the potential of land for future township use are unlikely to attract the municipality's attention.

In the event that the application for township proclamation is approved before the granting of the mining right application, the landowner will be entitled to object to the granting of the mining right on the basis that the land under application is an area mentioned in section 48 in respect of which mining should not be allowed. The landowner can further argue that the use and enjoyment of his land will be materially impacted upon if mining is conducted on his land and that mining and township development are incompatible.

If the mining right application is approved by the Minister of Mineral Resources prior to approval of the township, the holder of the mining right will undoubtedly oppose proclamation of a township on the basis of the adverse impact it may have on mining. The position of a mining right holder where the landowner undertakes township development on the same land, will be considered in 4.2.2.

The discussion above has evaluated the position where the holder of an existing prospecting right applies for a new mining right under sections 22 and 23 of the MPRDA. Another provision which could also be relevant to the relationship between holders of mining rights and landowners, is section 102 of the MPRDA. Where a mining company is also the holder of an existing mining right which is located directly adjacent to a prospecting right area, the MPRDA provides in section 102 for an applicant to apply for the extension of an existing mining area by requesting the Minister to incorporate the prospecting right area into the existing mining right area. This can be done by applying to amend the existing mining right by merging it with the adjacent prospecting right area.

If approved, the holder of the mining right will have a single, integrated, larger mining area which will include the area where it previously had only a prospecting right.

As a result of the apparent misuse of this provision section 102(2) has been amended by the MPRDAA and no longer provides for the extension of areas by means of applications for amendment of rights. The operation of the amendment to section 102(2) has, however, been delayed in a subsequent notice in the *Government Gazette*.²¹⁴ The proposed changes to section 102(2) will only come into effect on a date to be promulgated. If section 102(2) in its current form comes into force, an unintended consequence will be that holders of mining rights will no longer be able to use section 102 to expand mine boundaries and consolidate existing prospecting or mining right areas.²¹⁵

Section 102 has often been used to incorporate or combine small reserve areas on which it would otherwise not have been economically viable to develop a new mine. These areas would only be economically viable, and indeed contribute towards optimal exploitation of available coal resources, if they were to be combined with other existing rights. If the partial cession of rights, as provided in the MPRD Amendment Bill were allowed, applicants could take cession of portions of adjoining rights and subsequently incorporate these into their existing mining right areas by applying for an amendment of the existing mining right. This will no longer be possible when the amendment comes into effect and a mining company will have to apply for new mining rights in respect of such areas. This will mean that the mining company will hold multiple mining rights in respect of a single mining operation. Being the holder of several mining rights in respect of one mining operation complicates the administration of and reporting on compliance in

²¹⁴ See GG 36541 of 6 June 2013.

²¹⁵ Section 102 of Act 49 of 2008 provides that a mining right or mining work programme may not be amended or varied (including by extension of the area it covers) without the written consent of the Minister. Section 102(2) determines that the amendments or variations referred to in subsection 1, shall not be made if the effect of such amendment or variation is to extend an area or portion of an area, unless the omission of such area was as a result of an administrative error.

respect of each individual right. The 2008 amendment appears to be contrary to the objective of the partitioning of rights envisaged in section 11 of the Mineral and Petroleum Resources Development Amendment Bill of 2013.

The MPRD Bill, if approved in its current form, will again allow the extension of mining areas through the amendment of existing rights, provided that the area to be incorporated into the existing right does not exceed the extent of the initial right. The proposed amendment further appears to recognise the value of using section 102 as a measure to attain optimal utilisation of available resources as it allows the extension of areas by, for example, incorporating small, uneconomical or otherwise stranded resources, if the purpose of the extension is to consolidate existing adjacent rights.²¹⁶

The concern of landowners over these amendments of mining areas in terms of section 102 of the MPRDA relates to consultation, or rather the lack thereof. It often happens that holders of existing mining rights, when they initially applied for such rights, may have conducted environmental studies and obtained an approved environmental management programme over an area larger than the area in respect of which the mining right was eventually granted by the Department of Mineral Resources. During the process of applying for approval of its environmental management programme the applicant will have conducted extensive public participation processes and consulted with interested and affected parties on the impact of mining on their land. If the holder of such an existing mining right later becomes the holder of an adjacent prospecting right, the holder can apply to have the prospecting right area incorporated into the mining right area in terms of section 102 of the MPRDA. Normally an applicant would be obliged to conduct an environmental impact assessment and prepare and submit an environmental management programme for approval. In this instance, the applicant already has an approved environmental management programme in respect of the application area. The Department of Mineral Resources, in view of

²¹⁶ In terms of the revised s 102(2) of Bill 15B of 2013 an amendment or variation of an existing right will not be allowed if the extent of the area to be incorporated exceeds the extent of the original right, unless the amendment is aimed at consolidating existing adjacent rights.

the fact that the applicant already holds an approved environmental management programme, will not require the holder to conduct new environmental studies and again consult interested and affected parties on the potential environmental impact of mining, as this will already have taken place.

If an applicant intends to amalgamate a prospecting right area with its existing adjoining mining right area by means of applying for an amendment in terms of section 102 of the MPRDA, the requirements of consultation provided in section 22 will not apply, leaving the landowner in a vulnerable position. Although section 102 does not specifically require prior consultation, as is the case with section 22, depriving landowners of the opportunity to be consulted on the potential impact of mining activities on their land, to comment or to object, is likely to contravene the principles of procedural fairness.²¹⁷ This is currently a *lacuna* which the legislature intends to rectify by obliging applicants who wish to extend their mineral areas by means of applications to amend existing rights, to submit simultaneous applications in terms of section 102 and, sections 22 and 23 of the MPRDA.²¹⁸

4.2.2 TOWNSHIP ESTABLISHMENT ON LAND WITH PRE-EXISTING MINING RIGHTS HELD BY PARTY OTHER THAN LANDOWNER

An established mining company holds a mining right to extract coal on a portion of land which has recently been earmarked for township establishment by the municipality in terms of its Spatial Development Framework and an application for township establishment is submitted by a landowner for a housing development. Prospecting results from a previous drilling campaign revealed that the best quality and quantity minerals are to be found directly beneath the area on which a landowner intends to build multiple-storey residential apartments. Will mineral extraction be allowed on or beneath this area, or will the mining company forfeit its right to mine? If the latter position prevails, it would lead to considerable losses in revenue for the mining company. Will the landowner be obliged to obtain the mining right holder's consent before being able to proceed with his development?

²¹⁷ An aggrieved landowner can consider lodging a judicial review application in terms of the PAJA.

²¹⁸ See s 22 of the MPRD Amendment Bill B15 of 2013.

How does our law regulate the legal relationship between these parties? These questions will be addressed below.

In this section of the dissertation I consider the process and requirements for establishing a township on land subject to mining interests. A brief overview of applicable planning-law principles is provided to highlight the parties' position with regard to town-planning and town-proclamation processes. The question whether permission is required from the mining right holder prior to the landowner obtaining permission for township proclamation will also be discussed.

4.2.2.1 Township development process

An understanding is required of how changes to land use is managed in order to facilitate development. In particular, the need for interaction between owners of land and mining right holders during this process is relevant to this study.²¹⁹ Town planning is a municipal function and any change in the utilisation of land must take place in terms of specific requirements and procedures.²²⁰ For example, an owner of land who intends to change its current use, needs to apply to a competent authority to amend the zoning rights. In cases where the change in land use has the potential to impact detrimentally on the environment, an authorisation to undertake it must also be obtained.

Development in relation to town planning has been defined to mean “any process initiated by a person to change the use, physical nature or appearance of that land, and includes the construction, erection alteration, demolition or removal of a structure or building; any process to rezone, subdivide or consolidate land; any changes to the existing natural topography; and the destruction or the removal of indigenous or protected vegetation.”²²¹ Development has also been defined as

²¹⁹ Land-use management is described by Van Wyk *Planning Law* 245 as the administration and regulation of changes to the use of land.

²²⁰ See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC). See also Van Wyk *Planning Law* 246.

²²¹ Integrated Coastal Management Act 24 of 2008. See also Van Wyk *Planning Law* 359.

“the erection of buildings and structures, the carrying out of construction, engineering, mining or other operations on, under or over land, and a material change to the existing use of any building or land for non-agricultural purposes.”²²² In broad terms, development essentially entails a process of change in the utilisation of land.²²³

To proclaim and zone land as a residential township, a process of township development must be undertaken. Township development is the systematic process aimed at regulating the changes in land use and aims to protect those who will ultimately become residents and users of its amenities.²²⁴ In South Africa, the township development process is governed by provincial ordinances such as the Land Use Planning Ordinance²²⁵ which applies in respect of the Western Cape, the North-West and Eastern Cape Provinces and the Town-Planning and Townships Ordinance²²⁶ which applies in respect of the Province of Gauteng, Limpopo and Mpumalanga. The latter Ordinance applies in respect of the Highveld of Mpumalanga and will hereafter be referred to as the Ordinance. For this study only the latter Ordinance is relevant.

The Ordinance distinguishes between township development undertaken by the owner of land²²⁷ and that undertaken by the municipality.²²⁸ The process of township development commences with the landowner lodging an application with the municipality together with such plans, diagrams, and other documents as may be prescribed by the municipality.²²⁹ After receiving the application, the municipality must give notice of the application to possible interested and affected parties. This will be done by means of the publication of a notice in the local newspaper once a week for two consecutive weeks. The municipality, or the

²²² KwaZulu Natal Planning and Development Act 6 of 2008. See also Van Wyk *Planning Law* 360.

²²³ Van Wyk *Planning Law* 360.

²²⁴ *Municipality of Stellenbosch v Shelf-Line 104 (Pty) Ltd* 2012 (1) SA 599 (SCA).

²²⁵ Ordinance 15 of 1985.

²²⁶ Ordinance 15 of 1986.

²²⁷ See Chapter III of the Ordinance.

²²⁸ See Chapter IV of the Ordinance.

²²⁹ See subsecs (1) and (2) of s 69 and subsecs (1) and (2) of s 96 of the Ordinance.

applicant, with the consent of the municipality, must forward a copy of the application to any other municipality or department that in the municipality's opinion may be interested.²³⁰ Within 28 days of the publication of the notice, representations may be made by interested parties and those who are materially or adversely affected by the application may submit objections.²³¹ All representations and objections must then be forwarded to the applicant who must, within 28 days of receiving the representations and objections, submit his reply to the municipality.²³² The municipality shall then consider the application with due regard to any objections lodged and all representations, comments and replies received.²³³ The municipality may also consider conducting inspections or investigations and hold hearings after notifying the relevant parties.²³⁴ The applicant may also be required to amend its application if the municipality so requires.

The application together with all objections, comments and replies is then submitted to the Director.²³⁵ Where the municipality does not recommend the application, or recommends that it be approved subject to an amendment, it must notify the applicant who must furnish a reply within 60 days from the date of the notification.²³⁶ The application is then submitted to the Townships Board for consideration of the objections and recommendations. The Townships Board may carry out its own investigation or inspection and request further information.²³⁷

The Townships Board must prepare a report in which it either recommends the approval of the application subject to any conditions it may deem appropriate,

²³⁰ Sections 69(6) and 96(3) of the Ordinance.

²³¹ Sections 69(7) and 96(3) of the Ordinance.

²³² Subsections (8) and (9) of s 69 and s 96(3) of the Ordinance.

²³³ Section 69(10) of the Ordinance.

²³⁴ Section 69(10) of the Ordinance.

²³⁵ The officer in the provincial administration of that province designated to perform the functions entrusted by or under the Ordinance.

²³⁶ Section 69(14) of the Ordinance.

²³⁷ Section 69(17) of the Ordinance.

refuses the application or postpones its decision.²³⁸ All relevant parties will be informed of the Board's recommendation. After having informed the relevant parties, the Townships Board will submit a report, together with its recommendations and the reasons therefor, as well as the replies thereto to the Premier of the relevant province, who may approve the application subject to such conditions as he may deem advisable. He may also refuse the application or postpone the decision.²³⁹

If the application is approved, the applicant, the Surveyor-General, the Registrar of Deeds and the municipality will be informed in writing of the decision and the conditions imposed. The applicant must then submit any plan, diagram or other relevant document to the Surveyor-General for approval within 12 months of receiving the notice.²⁴⁰ After all the conditions have been met, the documentation and title deeds will be lodged with the Registrar of Deeds for registration or endorsement.²⁴¹

Once all the requirements have been met, the Premier will declare the township an approved township by means of proclamation in the relevant *Provincial Gazette*.²⁴² The notice in the provincial gazette will set out the conditions of establishment of the township. Only upon proclamation may erven be sold and registration of the relevant transfers be effected in the Deeds Office. Restrictive conditions, if any, must be registered against the title deeds of the properties.²⁴³ The value of using restrictive conditions as a planning tool for land management will be evaluated in greater detail in Chapter 8. The Ordinance itself also places restrictions on how properties may be used and its impact on mining and township development will be considered below.

²³⁸ See s 98 of the Ordinance.

²³⁹ See ss 69(19), 71 and 98(4) of the Ordinance.

²⁴⁰ Van Wyk *Planning Law* 367.

²⁴¹ Sections 72 and 101 of the Ordinance.

²⁴² Section 79 of the Ordinance.

²⁴³ Van Wyk *Planning Law* 376.

4.2.2.2 Restrictions imposed by Ordinance

The Ordinance restricts the development of townships in respect of certain areas. Of particular interest to this study is section 21 of the Ordinance which provides that “a municipality shall not prepare a town-planning scheme in respect of land: (a) which is proclaimed land; and (b) on which prospecting, digging, or mining operations are being carried out.” It is not clear whether this section applies only to opencast or surface prospecting or mining activities and in respect of activities currently taking place. Given the uncertainty a holder of a mining right will have to object if attempts are made to incorporate a portion of land in respect of which it holds a mining right in a town-planning scheme. Such a holder will, however, only be allowed to object if the applicable legislation provides him a right to be heard. Section 69(5) of the Ordinance sets out the procedure for establishing townships and provides that the person applying for township establishment must satisfy the municipality that the holder; or usufructuary; or lessee of the rights to minerals or the holder of rights in terms of a prospecting contract or notarial deed has consented to the establishment of the township. Section 69(5) requires not only consultation with the holder, usufructuary, or lessee of the rights to minerals or the holder of rights of a prospecting contract, but specifically requires an applicant for township establishment to obtain their consent.

Clearly the terminology used in section 69 of the Ordinance, and specifically those parts referring to rights to minerals and a prospecting contract, indicate that this provision was enacted before to the promulgation of the MPRDA in 2004. Consequently, certain authors²⁴⁴ argue that the Ordinance was rendered

²⁴⁴ Grobler GL SC in *Ex parte Ecencico (Pty) Ltd in re Township Establishment Process in Terms of the Planning and Townships Ordinance 15 of 1986* 7 September 2007 (unpublished legal opinion). The difficulty of interpreting s 69(5) of the Ordinance at present is that the practical reason and need for the section remain whilst the underlying common law and legislation has changed to such an extent that, strictly speaking, none of the terms used to describe the circumstances in which, and the person whose consent is required, exist any longer. Because these concepts no longer exist, so it is argued, it is simply no longer possible to obtain the consent of the mineral right holder as envisaged in section 69(5) of the Ordinance. It is argued that the township application process is now separately regulated by s 53 of the MPRDA. Dale *et al South*

inoperative by section 53 of the MPRDA. Therefore the mining right holder's consent is not required. Based mainly on the provisions of section 12 of the Interpretation Act²⁴⁵ and the principle of lawfulness of administrative action, Booysen²⁴⁶ however argues that consent by the mining right holder remains an administrative requirement without which township development cannot proceed. Until the position is clarified by our courts, mining right holders remain in a position to veto township establishment and to limit the landowner's free exercise of his rights.

4.2.2.3 Restrictions on surface land-use rights

The only provision of the MPRDA dealing with the utilisation of the surface of land and which could potentially restrict a landowner's ability to establish a township is

African Mineral and Petroleum Law 439 seem to be of the same opinion: with the abolition of mineral rights and hence the abolition of the legislative requirement of the consent of the mineral right holder to township establishment, the importance of ss 5(3) and 53 of the MPRDA, and of the judicial remedies available to the holders of permissions, permits and rights granted in terms of the MPRDA, will increase. The authors however proceed to mention that in light of an analysis of the legal position, it is clear that an applicant for approval in terms of planning legislation or land development legislation, to a town planning scheme, will, in addition to other legislative requirements, be obliged to apply to the Minister for approval in terms of s 53.

²⁴⁵ Act 33 of 1957. Section 12 provides that: "Where a law repeals and re-enacts without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so enacted."

²⁴⁶ Booysen DHL *Legal Opinion prepared on behalf of Sasol Secunda Shared Services* 3 October 2007. Booysen argues, relying mainly on s 12 of the Interpretation Act that a statute in these circumstances must be interpreted to render it effective rather than inoperative; it must be construed to render it effective, intelligible and valid rather than in a manner that would defeat its purpose; if the words are unclear it should be given a meaning that furthers the purpose of the statute, rather than one which will frustrate it. Booysen further argues that, despite the long list of repeals and amendments effected in terms of s 110 of the MPRDA (set out in schedule I thereto), s 69(5) of the Ordinance has not been amended. Clearly, if it was the legislator's intention that the requirement of s 53(1) of the MPRDA (that the Minister must consent to use of land in a manner which may be contrary to the objects of the MPRDA) should not have been a requirement for the township establishment procedure, s 69(5) of the Ordinance would have been repealed.

section 53 which obliges any person “who intends to use the surface of any land in any way which may be contrary to any object of the MPRDA, or which is likely to impede any such object,” to first apply to the Minister of Mineral Resources for approval.²⁴⁷

Any utilisation of land, or even the intended use of land which may potentially limit or defeat any of the stated objects of the MPRDA, must first be sanctioned by the Minister of Mineral Resources. Consequently, where a landowner intends to use land in a manner which would be contrary to the objects of the MPRDA, including the promotion of equitable access to the nation’s mineral and petroleum resources;²⁴⁸ the promotion of economic development and the advancement of social and economic welfare of South Africans;²⁴⁹ providing security of tenure in respect of prospecting, mining and production operations;²⁵⁰ or giving effect to section 24 of the Constitution by ensuring that the nation’s mineral and petroleum resources are developed in an orderly and ecologically sustainable manner,²⁵¹ the landowner can only do so lawfully with the Minister’s permission.

Section 53 therefore protects holders of mining rights against any possible threat of adverse use of the surface of the land to which the mining right relates. According to Dale *et al*²⁵² holders of mining rights will be able to rely on the administrative remedy provided by section 53, in addition the remedies provided to the holder in terms of section 5 of the MPRDA. The landowner or lawful occupier may accordingly not do anything to impede or restrict the exercise of the holder’s rights to mine and the holder will be entitled to resist any such interference by applying for an interdict against adverse surface use.²⁵³

²⁴⁷ In terms of s 103 the Regional Manager in the area where the rights are located will have the required delegated authority to decide on the applicability of s 53. See also Dale *et al South African Mineral and Petroleum Law* 434.

²⁴⁸ Section 2(c) of the MPRDA.

²⁴⁹ Section 2(e) of the MPRDA.

²⁵⁰ Section 2(g) of the MPRDA.

²⁵¹ Section 2(h) of the MPRDA.

²⁵² Dale *et al South African Mineral and Petroleum Law* 434.

²⁵³ Ibid.

Rezoning and proclaiming a township on land with the aim of developing densely populated areas because of the impact on possible surface or underground mining, may well be a use of the surface of land contrary to the promotion of mineral development which will in turn impact on a mining right holder's security of tenure in respect of the minerals it intends to extract.²⁵⁴

As I explain in 4.2.2.2, one of the section 69 requirements for township development is for the applicant to obtain the permission of any holders of mining rights. In practice, as a result of the requirements of section 53, in the absence of the Department of Mineral Resources first granting approval in terms of section 53, landowners are unlikely to obtain approval from the municipality in terms of section 69 of the Ordinance. *Dale et al*²⁵⁵ appear to support the notion that a landowner or occupier may not do anything on the surface of land to impede or restrict the exercise of a mining right holder's rights to extract the minerals. For them, section 53 provides an opportunity for mining right holders to intervene and halt the process of township establishment by compelling the owner or occupier first to obtain the Minister's permission.

When an application in terms of section 53 is received, the Regional Manager of the Department of Mineral Resources will determine if any prospecting or mining rights have been granted in respect of the land to which the section 53 application relates. Based on the principles of administrative justice, the Regional Manager will be obliged to call on any interested or affected parties to submit any comments they may have in respect of the application. If the Regional Manager finds that mining rights have been granted in respect of the affected area, he will call on the holders of those rights to make written or oral submissions in respect of the

²⁵⁴ *Dale et al South African Mineral and Petroleum Law* 436 list a few uses of land which may potentially constitute uses of land in respect of which section 53 will apply namely railway lines, tramways, railway sidings, buildings on site, townships, agricultural holdings, water works and dams and lakes.

²⁵⁵ *South African Mineral and Petroleum Law* 434. See also Franklin and Kaplan *Mining and Mineral Laws* 118 – 127.

potential impact which the surface use may have on the extraction of minerals. The Regional Manager has broad discretionary powers in deciding to either approve or refuse to grant land-use permission and it is not uncommon for the Regional Manager to require that permission be obtained from the holder of the affected mining right.

Although section 53 does not specifically require the mining right holder's consent, it is unlikely that the Department of Mineral Resources will grant section 53 approval without first considering whether the granting thereof may potentially have an adverse impact on any mining rights that have been granted in respect of that area. Section 53 is relevant whenever the use of land may potentially be contrary to the objects of the MPRDA and is, therefore, not limited to the land over which the mining right has been granted. According to Dale *et al*²⁵⁶ the holder of a mining right can enforce compliance with this provision even where a neighbouring property is used contrary to the provisions of the MPRDA.

The granting of section 53 approval does not, however, automatically preclude the further granting of mining rights in respect of the relevant area. The granting of section 53 approval simply means that the Minister of Mineral Resources has decided to consent to the proposed use of the surface of the particular land after weighing up the importance of the proposed land use and the extraction of minerals within the affected area. Section 53 appears to favour holders of prospecting and mining rights above landowners because it affords the holders of mining rights an opportunity to intervene, whereas a landowner, notwithstanding having received the Minister's consent in terms of section 53, may possibly fail to stop the granting of further prospecting and mining rights in respect of the affected land. Section 53 consent is not included in sections 22 and 23 as a factor which the Minister can take into account when considering to grant a mining right. Such land is also not mentioned in section 48 as an area in respect of which no prospecting or mining rights may be granted. Unless the land has already been incorporated in a town planning scheme and has been zoned for residential use,

²⁵⁶ Dale *et al* *South African Mineral and Petroleum Law* 436.

the Minister will not be prohibited from granting further mining rights in respect of the area.

It can be argued that section 53 was designed to promote mineral resource extraction in South Africa by obliging anyone who even intends to make use of the surface of land in a way which may impair mining, first to apply to the Minister of Mineral Resources for permission to do so. This section appears to favour mining rights over surface-use rights. In cases where mining rights have been granted in respect of such land, the Minister of Mineral Resources will more likely than not adhere to his mandate of promoting mineral exploitation, unless it is established that the proposed activity will not have any negative impact on mining activities in the area.

In light of the wording of section 53, which refers to land use being contrary to the objects of the Act and not specifically to the rights of existing holders of rights, it follows that the provision also provides a mechanism whereby the Minister will be entitled to protect mineral resources against adverse surface use, even where no prospecting or mining rights have been granted. If it were not for this provision, landowners would have been able to proceed freely with township development on mineral rich land and could have continued to build structures on land where no mining rights have been issued by the Department of Mineral Resources, notwithstanding the fact that such development could in future make it impossible to extract significant amounts of coal. This could result in considerable losses of available natural resources. The Minister is by virtue of section 53 of the MPRDA, accordingly allowed the discretion to decide whether the proposed utilisation of the surface of land would harm the objects of the MPRDA, and if he finds that it will, the Minister is entitled to refuse to grant section 53 consent.

In cases where a section 53 application is submitted in respect of land where a mining right application has been accepted by the Department of Mineral Resources, but has not been granted, the Minister will, in considering the merits of the section 53 application, have to determine whether the proposed land use will interfere with the proposed mining. If it is the case, the Minister or his delegated

representative, will need to balance the interests of the two parties and consider whether the opposing uses are compatible. Where the proposed land use will interfere with or adversely affect mining, permission in terms of section 53 will be withheld. Consideration of a section 53 application will therefore require a balancing of interests and is a question of fact. If the mining right has already been granted, the holder is entitled to all ancillary rights afforded by section 5 of the MPRDA. Essentially this means that where mining rights have been granted, the Minister has already applied his mind to whether the land should be reserved for mining and the balancing of the parties' respective interests will not take place in the circumstances.

Section 53(3) provides that the Minister can initiate an investigation if it is alleged that a person intends to use the surface of any land in any way that can possibly result in the mining of mineral resources being detrimentally affected. In terms of this provision, the holder of a mining right is entitled to lodge a complaint with the Minister alleging that the landowner intends to use the land in a way that would require permission under section 53. The Regional Manager will then be obliged to conduct an investigation into the merits of the complaint and if it is well-founded, will, in accordance with section 53(4), inform the person concerned of the allegation and of the intention to issue a directive to take corrective measures. These measures may range from placing limitations on the mining right holder regarding how the mining may be conducted, placing limitations on the type, size, and nature of the structure the landowner may build, or the landowner may even be directed to demolish and remove structures and rehabilitate the land.²⁵⁷

As I explain in 4.2.1.2 above, the MPRDA expressly prohibits the granting of mining rights in respect of certain areas, including residential land. The granting of permission for the proclamation of new townships or expansions to existing townships will, however, not lead to an automatic forfeiture of existing rights. This notwithstanding, due to the prohibitions in section 48 of the MPRDA, the Minister of Mineral Resources will be prohibited from granting any new rights in respect of

²⁵⁷ Dale *et al* *South African Mineral and Petroleum Law* 442.

an area where residential township proclamation has taken place. Stated differently, where the holder of a prospecting right who has applied for a mining right consents to township proclamation and the township development is granted before the mining right has been approved, section 48 will restrict the subsequent granting of a mining right to an applicant despite the fact that the holder of a prospecting right has the exclusive right to apply for a mining right.

Township development will not only impact on new applications, but could also impact on existing holders of existing mining rights in respect of areas where mining activities have not commenced. If, for example, such a holder applies for an amendment of its environmental management programme or environmental authorisation, the proposed amendment requires additional public consultation, providing yet another opportunity to aggrieved landowners to object on the basis that residential property development will be undertaken, potentially resulting in attendant delays in the commencement of mining operations.

In circumstances where a landowner obtained consent from the Department of Mineral Resources to use the surface of land as provided in section 53 of the MPRDA, the landowner will be entitled to use this consent as a ground for objecting to any subsequent application for mining rights on the basis that the Minister of Mineral Resources has allowed the area to be developed as a residential township.

Interestingly, the section 53(1) requirement of having to obtain the Minister's permission does not apply to all types of land use. In terms of section 53(2) the aforementioned requirement does not apply to: "(a) farming or any use incidental thereto; (b) the use of any land which lies within an approved town-planning scheme which has applied for and obtained approval in terms of subsection 1; or (c) any other use which the Minister may determine by notice in the *Government Gazette*."

The first exemption, farming, was in all probability included by the legislature in response to calls from farming communities concerned about proliferating mining

activities which are infringing upon more and more of our country's richest agricultural land. These mining activities increasingly place pressure on the few remaining farmers to secure the production of our country's dwindling food supply. What the legislature did not consider, however, is whether structural development on land providing for large grain storage areas, broiler houses, cattle feedlots and the like constitute farming activities. There appear to be conflicting views on the question of whether these activities fall within the definition of farming. Mining companies will argue that this type of land utilisation should rather be classified as agri-industrial or commercial use, and therefore requires approval in terms of section 53. On the other hand, it could be argued that the MPRDA clearly intended to exclude these types of use, exempting the farmer from the requirement of obtaining the Minister's approval. Interpretation of the meaning of farming in the context of section 53 has to date not been considered in our courts.²⁵⁸ Be that as it may, if the courts should find that this type of land utilisation is agri-industrial, the mining company will be within its rights to draw the attention of the Minister of Mineral Resources to the violation of section 53(1) of the MPRDA, and request the Minister to conduct an investigation and ultimately to direct the farmer to take appropriate corrective action to regularise his conduct. If this type of land use is found to be farming, mining companies will not be without recourse as section 53(2) does not limit the judicial remedies²⁵⁹ available to the holder of a mining right in terms of the MPRDA.²⁶⁰

The second exemption provides that the Minister's permission is not required where the land in question falls within an approved town-planning scheme for which approval in terms of section 53(1) has been applied for and obtained. Not all land within an approved town-planning scheme will automatically be exempted

²⁵⁸ Dale *et al South African Mineral and Petroleum Law* 334 comment that the term "farming" was used in s 6 of the repealed Mineral Laws Supplementary Act, 10 of 1975, and also in s 42 of the Minerals Act, but that the meaning of farming was not subjected to judicial interpretation. The proposed establishment of agricultural holdings has been regarded judicially as potentially detrimental to prospecting and mining.

²⁵⁹ See ch 6.

²⁶⁰ Dale *et al South African Mineral and Petroleum Law* 436.

from the requirement of having to apply for the Minister's permission.²⁶¹ The exclusion provided for in section 53(2)(b) only applies to the use of land within a town-planning scheme which has already applied for and received approval in accordance with section 53. An interesting question arises whether section 53 approval is required in respect of a town-planning scheme approved prior to the commencement of the MPRDA. In such a case the town-planning scheme will not have received the permission of the Minister. However, as no such permission had been obtained in respect of the town-planning scheme, and given that the exemption relates to the utilisation of the land and not to the scheme itself, section 53 approval would be required prior to the construction of any new structures within the town-planning scheme for which no section 53 approval has previously been granted. *Dale et al*²⁶² support the view that in these circumstances township establishment or approval of a new town-planning scheme will necessitate an application to the Minister in terms of section 53(1).

According to *Dale et al*,²⁶³ section 33(2)(j)(iv) of the DFA provides that a tribunal established in terms of the DFA can suspend any other law relating to land development which, in the opinion of the tribunal might have a dilatory effect on the development of a land development area or the settlement of persons there. I agree with Dale's view that the MPRDA should not be considered as such "other law" with the result that the tribunal is not empowered to suspend the requirement of having to comply with section 53 of the MPRDA. Regulation 21(6)(b) of the regulations promulgated in accordance with the provisions of the DFA²⁶⁴ provides that an applicant in terms of the DFA must give at least 65 days' notice of any development application and pre-hearing to any holders of rights, including mineral rights and limited real rights. It should however be noted that the Constitutional Court on 18 June 2010 declared Chapters V and VI of the DFA

²⁶¹ See s 53(2)(b) of the MPRDA.

²⁶² *Dale et al South African Mineral and Petroleum Law* 437.

²⁶³ *Id* 438.

²⁶⁴ *Government Gazette* 20775 of 7 January 2000.

unconstitutional as it undermines the decision-making powers of municipalities.²⁶⁵ The DFA predates the Constitution and while some its components remain useful, there are others that have become outdated and are no longer relevant. Government intends repealing the DFA in its entirety and replacing it with a national land use management act. The Spatial Planning and Land Use Management Act 16 of 2013, which repeals the DFA, was assented to by the President of the Republic of South Africa during 2013 but will only come into operation on a date to be fixed by the President upon proclamation in the *Government Gazette*. The Act confirms that deciding on land management applications is a function of the municipality. Section 52 of this Act, in addition, provides that where any land development application materially impacts the national interest or falls within the functional sphere of the national government, such an application must be referred to the Minister for a decision. Based on an analysis of the applicable legislation, Dale *et al*²⁶⁶ conclude that any applicant for approval in terms of town planning legislation or land development legislation will be obliged also to apply to the Minister of Mineral Resources for approval in terms of section 53.

Where an application for township proclamation remains to be approved, mining right holders will likely argue that the Ordinance requires the owner of land to consult them on the proposed development so that they may determine the impact, if any, on the extraction of minerals with the aim of reaching some form of compromise or consensus on how mining and township development can coexist. If no agreement can be reached, the mining right holder can lodge an objection with the municipality based on the negative impact on its ability to extract coal. The Department of Mineral Resources will have to consider the objection taking into consideration the importance of the extraction of coal which has recently been classified by government as a strategic mineral, as well as the fact that any limitation on coal mining will ultimately impact on energy security which is currently of national importance. The Minister must weigh-up the importance of mining

²⁶⁵ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC).

²⁶⁶ Dale *et al* *South African Mineral and Petroleum Law* 438.

against the importance of satisfying the housing needs of local communities, while considering the strategic nature of coal mining in the energy mix and the national interest.²⁶⁷

Section 53 consent is therefore required prior to the commencement of property development. Township proclamation, as explained above, will likely restrict coal mining right holders' ability to exercise their rights, or to do so optimally, and therefore constitutes land utilisation which may be regarded as contrary to mineral development in South Africa.

If, notwithstanding the objections received from the mining right holder, the municipality allows the township proclamation, the mining right holder may consider taking the decision allowing the township establishment on review or, considering the strategic nature of the mineral concerned and the national interest, make a representation to the Minister in accordance with section 48(2) of the MPRDA.²⁶⁸

4.2.3 MINING BENEATH EXISTING INFRASTRUCTURE

To understand the impact of township development on the rights of a mining right holder, one has to consider the position where the holder intends to exercise his rights in respect of areas with existing surface infrastructure. The legal requirements for applications to mine must be considered, and, Chapter 17 of the regulations promulgated in terms of the MHSA will have to be satisfied.²⁶⁹ I discuss these requirements in greater detail below.

²⁶⁷ See s 49 of the MPRD Amendment Bill of 2013 (B15B-2013).

²⁶⁸ Section 48(2) provides that a mining right may be issued in respect of land contemplated in s 48(1), including residential areas or land being used for public purposes, or land reserved in terms of any other law, if the Minister is satisfied that having regard to sustainable development of mineral resources and the national interest, it is still desirable to grant it.

²⁶⁹ Chapter 17 of the regulations was published in GN 527, GG 26275 of 23 April 2004 and was subsequently amended in GG 34308 of 27 May 2011.

Although township proclamation will not necessarily preclude mining, in practice it will be extremely difficult for mining and township development activities to coexist harmoniously. This is because the MHSA prescribes that, without the approval of the Chief Inspector of Mines, no mining may take place within one hundred metres horizontal distance of any existing surface structures.²⁷⁰

Sub-regulation 7 of Chapter 17 of the regulations promulgated in terms of the MHSA, provides that a mining company must “take reasonable care to ensure that no mining operations are carried out within a horizontal distance of 100 metres from reserve land, buildings, roads, railways, dams, waste dumps, or any structure whatsoever including such structures beyond the mining boundaries, or any surface, which may be necessary to protect, in order to prevent any significant risk.”

The Chief Inspector of Mines will not allow mining beneath any areas mentioned above without first being satisfied that sufficient support will remain underground to support the surface of the land and that the structures will be adequately protected from possible ground subsidence.²⁷¹

In the coal-mining industry in circumstances where mining is conducted underground, providing stability to the surface requires that larger blocks of coal will have to be left behind underground to serve as struts or pillars to hold up the ‘roof’ over areas where the coal has been extracted in order to protect the structural integrity of the land surface and the structures affixed to such land.²⁷² Leaving coal pillars behind underground will, however, result in lower yields and consequently substantial losses in revenue for mining companies. Legal restrictions on mining beneath surface structures, as I explain above, may lead to

²⁷⁰ The designation Chief Inspector of Mines is given to the official in the Department of Mineral Resources’ Mine Health and Safety Inspectorate, who is responsible for the management of activities related to occupational health and safety in mines.

²⁷¹ Chapter 17(7) of the MHSA regulations provide that no mining operations may be carried out in such mentioned areas, “unless a lesser distance has been determined safe by risk assessment and all restrictions and conditions determined in terms of the risk assessment are complied with.”

²⁷² Figures 1, 2, 3 and 4 of the Appendix illustrate the typical layout of an underground coal mine.

coal extraction losses ranging from anything between thirty percent to a complete loss of the relevant reserve.²⁷³ By not being able to extract all of the available coal, the shortfall will likely leave mining companies with no choice but to acquire additional reserves, often at hugely inflated premiums, or to face disruption of their coal supply or, in some cases, even premature mine closure.

Chapter 17 of the Mine Health and Safety Regulations also requires the applicant to provide sufficient information to allow the Chief Inspector of Mines to determine whether adequate protection will be afforded to the surface structure which has to be protected by the mining company. The information required may include the type of mining method to be used, the depth at which mining will take place, the height of the coal seam and the appropriate safety factors to be implemented to ensure the stability of the land above the mining area.

Although Chapter 17 of the Mine Health and Safety Regulations provides the Chief Inspector of Mines with a discretion to decide whether the applicant has identified sufficient mitigating measures in its application or to impose more stringent obligations, the Chief Inspector of Mines cannot oblige the applicant to obtain the written consent of a landowner as a requisite for approving mining beneath surface structures. Requiring the landowner's consent exceeds the competencies granted to him in terms of the Chapter 17 and is, therefore, *ultra vires*. From the wording of the provision it is also clear that although the Inspector's consent is not an express requirement, no mining may take place within 100 metres of any surface structures unless a lesser distance has been determined safe. Proposed mining activities at such lesser distances can only be determined safe by means of the applicant appointing a suitably qualified geotechnical specialist to conduct risk evaluations and submitting the outcome and recommendations of the evaluations to the Chief Inspector of Mines for review.

²⁷³ See Van der Merwe *Subsidence Caused by High Extraction Coal Mining* iii, ch12 12 - 16.

4.2.4 TOWNSHIP DEVELOPMENT ON LAND WHERE RELATIVELY SHALLOW UNDERGROUND COAL-MINING ACTIVITIES HAVE BEEN COMPLETED

What would the legal position of a landowner and mining right holder be if a multi-storey residential development is undertaken in respect of land where relatively shallow underground coal mining activities have been completed? Whose responsibility is it to determine whether the land is suitable and safe for the proposed development? Is it necessary for the landowner to obtain the consent of the mining right holder and/or the Department of Mineral Resources? Furthermore, if any damage or injury results from ground movement as a result of previous mining activities, who will be held accountable and how will the basis for and extent of liability be determined? In what follows I discuss the position of the respective parties based on these questions.

4.2.4.1 Legal position in respect of applications to build infrastructure on previously mined areas

Consider the following hypothetical example. A landowner buys vacant agricultural land directly adjoining an existing town for the sole purpose of developing a residential estate. Government, being the custodian of the nation's minerals in terms of section 3 of the MPRDA, grants a coal mining company a mining right for coal in respect of the land. Despite initial opposition from the landowner to give the mining right holder permission to enter his land, the mining right holder eventually succeeds in negotiating access to the land on the basis of section 54 of the Act, and proceeds to conduct underground mining at shallow depths below the surface of the relevant land. Several months later all underground mining activities in respect of the landowner's land have been completed. A few years later the landowner applies for town proclamation as prescribed by the Ordinance. Upon receiving the application, the local municipality informs the landowner that, in terms of section 69(5) of the Ordinance, permission for the township establishment need to be obtained from any possible holders of prospecting and mining rights. Meanwhile, the mining right holder having seen the application for town proclamation in the local newspaper submits an objection on the basis that

significant coal extraction has taken place and that the area potentially poses significant risk of future ground subsidence.

Acting on the advice of the municipality, the landowner proceeds to apply to the Chief Inspector of Mines of the Department of Mineral Resources for permission to develop infrastructure on his land in accordance with the provisions of Chapter 17 of the MHSA Regulations. Chapter 17 provides that “no person may erect, establish or construct any buildings, roads, railways, dams, waste dumps, reserve land, excavations or any other structures whatsoever within a horizontal distance of one hundred metres from workings,²⁷⁴ unless a lesser distance has been determined safe by a professional geotechnical specialist and all restrictions and conditions determined by him and the Chief Inspector of Mines are complied with.”

The Chief Inspector of Mines requires the owner to submit proof that the holder of the mining right has been consulted and has consented to the proposed development. The mining company, for fear of incurring liability for damage or injury which may possibly be caused by mining subsidence, refuses consent to the development. Based on the mining company’s unwillingness to allow the development, and for fear of himself incurring liability, the Chief Inspector of Mines refuses permission. The municipality, in the absence of consent from the mining right holder and the Department of Mineral Resources, turns down the application for town establishment.

Ignoring for the moment the question of whether the Inspector of Mines or the municipality acted correctly in refusing to allow the township development, the practical implication is that, in the absence of the mining company’s support for the development, the landowner will not be able to utilise his land for the purpose for which it was purchased. In the eyes of the landowner, the land is now worthless as its full potential cannot be realised. The burning question is what remedies, if any, are available to the landowner in these circumstances?

²⁷⁴ The term “workings” is defined in the regulations to mean any excavation made or being made for the purpose of searching for or winning minerals or for any purpose connected therewith.

The landowner may attempt to mitigate his losses by means of civil claims or claims in terms of section 54 of the MPRDA. Section 54 of the MPRDA sets out the process to be followed by a landowner who wishes to claim compensation where mining has caused, or is likely to cause damage to his land. In cases where mining has rendered the ground too unstable to build on, the landowner will argue that mining destroyed the land's effective use, and therefore the value of the land in question. Will claims based exclusively on prospective future economic losses succeed? This question is considered in Chapter 6.

In accordance with the MPRDA, where the mining right holder has already exercised his rights and conducted shallow underground coal mining activities, he remains responsible for any environmental damage, pollution, or ecological degradation and the management thereof, until the Minister has issued a closure certificate.²⁷⁵ Even though no further mining is envisaged, the holder of the mining right retains certain responsibilities, such as the rehabilitation of the land in accordance with its responsibilities and commitments made in the approved environmental management programme. Allowing township development before obtaining a closure certificate will in some cases hamper the mining right holder's mine closure actions and its ability to restore the land as closely as possible to its pre-mining condition.

Undoubtedly, the biggest concern to mining right holders in considering whether or not to allow surface development on land where shallow underground coal-mining has previously taken place, is the risk of incurring liability for damage to structures and injury to eventual occupants as a result of the earlier mining activities. Allowing structural development to take place on mined areas can lead to the mining right holder incurring liability for harm which may result, provided that the damage can be attributed to the mining. Since the risk of possible harm to persons and damage to property lies at the heart of the concerns of the mining right holder an evaluation of the nature and extent of the potential liability of each party in such an eventuality is appropriate. An examination of the statutory and

²⁷⁵ See s 43 of the MPRDA.

common law (delict) basis of liability under these circumstances undoubtedly warrants further evaluation, but the detail of such a determination falls beyond the scope of this study.

The relevance of the parties potentially incurring delictual liability lies in the fact that township development on areas where underground mining has taken place, although not impossible, will only be allowed in special circumstances and after both the mining right holder and the owner of the land have satisfied numerous requirements. This can only be achieved by conducting an extremely tedious, expensive and time consuming process. Underground coal mining therefore severely limits a landowner's ability to use and enjoy his land as he pleases, not only while mining activities are being conducted, but also after completion of such activities.

4.3 CONCLUSION

As a result of the destructive nature of mining activities, allowing mining on land will lead to a serious interference with the use and enjoyment a landowner normally enjoy in respect of his land. Conversely, the utilisation of land by a landowner for township development likewise restricts mining activities. As I explain above, legislation pertaining to township and spatial development, mine health and safety, as well as the protection of the environment, places significant restrictions on the utilisation of land, both for mining activities and for surface use. In the context of planning law, the sanctity of individual ownership is constantly challenged by the need to regulate property in the public interest.²⁷⁶ Promoting access to mining without doubt creates several challenges for a landowner and often results in a clash of interests. Because the relationship between the parties is regulated by statute, the question arises what the position would be were one of the parties' rights to be extinguished or severely curtailed by the relevant

²⁷⁶ See Mostert and Pope (eds) *Principles of the Law of Property* 157.

legislative provisions, and what would be the position if both parties were allowed to exercise their rights?

This question and possible remedies available to the respective parties are evaluated in Chapter 6. The extensive entitlements afforded a mining right holder by the MPRDA, bring such a holder into constant conflict with the recognised rights of the landowner. This brings us to the next question. If the exercise of one of these parties' entitlements gives rise to conflict with the other party who has entitlements in respect of the same land, how is this conflict to be resolved? Given that the relationship between a landowner and a mining right holder has previously been compared with the relationship between neighbours, albeit with slight differences, the applicability of neighbour law and its remedies are evaluated in the next chapter. The earlier classification of mineral rights as quasi-servitudes by our courts is also of interest to this study, in particular, whether the law relating to servitudes provides any useful measures as to how the conflict may be resolved.

CHAPTER 5

APPLICABILITY OF NEIGHBOUR LAW AND LAW RELATING TO SERVITUDES

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5.1 INTRODUCTION

Until the recent decision in *Anglo Operations v Sandhurst Estates (Pty) Ltd*,²⁷⁷ our courts applied neighbour-law principles relating to lateral and subjacent support to settle the conflict between a mining right holder and a landowner over mine subsidence. The relationship between a landowner and a mining right holder has previously been compared by the courts to that of vertical neighbours.²⁷⁸ As is the position between owners of neighbouring land, the relationship between a mining right holder and a landowner is bound to be affected if one of them decides to exercise his entitlements in a way that will interfere with the exercise of the other's rights.

²⁷⁷ 2007 (2) SA 363 (SCA) (hereafter the *Anglo* decision).

²⁷⁸ See *Coronation Collieries v Malan* 1911 TPD 577 590.

However, the position here differs from the normal neighbour-law position because in a conflict between a landowner and a mining right holder, the latter has extensive statutory entitlements over the owner's land (the same land). This is in contrast to normal neighbours who have the same rights (ownership) in respect of adjacent pieces of land (neighbouring land). The obvious challenge for the former relationship, is to reconcile the mining right holder's need to use the surface of the land to gain access to the minerals it contains, with the landowner's need to use the surface of the land.

Until the watershed *Anglo* judgment, the courts extended neighbour law to govern the relationship between mineral right holders and the owners of the same land. This judgment, however, established that an uncritical acceptance of the English-law position of lateral and subjacent support should not be extended to cases of conflict relating to the instability of the land surface as a result of mining activities. The conflict between the holders of mining rights and landowners, so it was determined, should not be resolved in accordance with English-law principles of neighbour law, but in accordance with the South African law regulating the use of servitudes. Brand JA held as follows:

The correct approach, in my view, is the one proposed by the appellant, that this conflict should be determined in accordance with the principles developed by our law in resolving the inherent conflicts between the holders of servitudal rights and the owners of servient properties. In accordance with the principles applicable to servitudes, the owner of a servient property is bound to allow the holder to do what is reasonably necessary for the proper exercise of his rights. The holder of the servitude is in turn bound to exercise his rights *civiliter modo*, that is, reasonably viewed, with as much possible consideration and with the least possible inconvenience to the servient property and its owner.

In this chapter I briefly consider the principles and applicability of the neighbour-law concepts of lateral and subjacent support. I then evaluate the law relating to the use and safeguarding of servitudes in light of the approach of the court in *Anglo* that mineral rights are in the nature of quasi-servitudes.²⁷⁹

²⁷⁹ It was stated in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 364 that it is a settled principle of our law that a right to minerals in the property of another is in the

In this section I consider whether the quasi-servitude formulation still applies after the enactment of the MPRDA, and is to be used to resolve disputes relating to mine subsidence.

5.2 EARLY DEVELOPMENT OF NEIGHBOUR LAW

Attempts to protect the rights of neighbours against arbitrary exercise of rights regarding land, can be traced as far back as the Roman Empire. The maxim *sic utere tuo ut alienum non laedas* provided that an owner of land was obliged to use his property in such a way that another person would not be burdened or prejudiced by his use.²⁸⁰

Early South African case law on mining determined that the grant of a right to mine does not deprive the surface owner of his right to have the surface supported in its natural state so that he may continue to enjoy the normal use of the surface.²⁸¹ The question raised in the decision in *Coronation Collieries v Malan*,²⁸² was whether the underground miner owed the landowner a duty of subjacent support of the surface. In this regard the court ruled:

[T]he right to have the surface of land in its natural state supported by the subjacent minerals is a right of property, and not of easement; and that a lease or conveyance of the minerals, even though accompanied by the widest powers of working carries with it no power to let down the surface, unless such power is granted either expressly or by necessary implication.

nature of a quasi-servitude over that property. See also *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 509. The concept of a quasi-servitude was also discussed by Badenhorst PJ "Trojan trilogy: III mineral rights and mineral law – *Trojan Exploration Co (Pty) Ltd* 1996 (4) SA 499 (A)" 1999 (10) *Stell LR* 99-101.

²⁸⁰ See Van der Walt and Pienaar *Introduction to the Law of Property* 43. See also Van der Walt *The Law of Neighbours* 17,91.

²⁸¹ *London and SA Exploration Company v Rouliot* (1980) 8 SC 74. See also *Coronation Collieries v Malan* 1911 TPD 577.

²⁸² 1911 TPD 577.

Holders of rights to mine in these early times, were obliged to mine in such a way that they did not withdraw the support they owed to the landowner.

The court in *Coronation Collieries* ruled that although the owner of land has a right to have the surface of his land supported in its natural state, this does not mean that he may use the surface in a way that would materially increase the obligation of the mineral-right holder to provide lateral support. The court further held that the surface owner may therefore not build structures such as a railway line on the surface if that would place a more onerous obligation on the miner to support the surface so as to avoid subsidence.²⁸³

Subsequently, the court in *Elektrisiteitsvoorsieningskommissie v Fourie*²⁸⁴ noted a difference between the principles of the right to lateral and surface support on the one hand, and the right to subterranean support, on the other. The difference between these principles is discussed below.

5.3 RIGHT TO LATERAL SUPPORT

The concept of lateral support of land was first adopted by Lord De Villiers in *London and South African Exploration Co v Rouliot*.²⁸⁵ Essentially, this principle means that every landowner has a right to lateral support which his land naturally derives from adjacent land.²⁸⁶ Van der Walt²⁸⁷ explains that every landowner can expect, as part of his use and enjoyment of the land, to have the natural condition, position and topography of his land preserved. This right is reciprocal between

²⁸³ *Coronation Collieries v Malan* 1911 TPD 592 593.

²⁸⁴ 1988 (2) SA 350 (T). See also *Douglas Colliery Ltd v Bothma* 1947 (3) SA 602 (T). The court stated that there is no natural right to support for that which is artificially constructed on land. Any right to support of such an artificial burden must in each case be acquired by grant, or by some means equivalent in law to a grant. It may be acquired by express grant, implied grant, prescription, or it may be created by statute.

²⁸⁵ 1890 (8) SC 74.

²⁸⁶ *Boyd Lateral and Subjacent Support* 1.

²⁸⁷ See Van der Walt *The Law of Neighbours* 88.

owners of neighbouring land, placing a negative obligation on each of the parties to refrain from conducting activities on their land in such a way that they would lead to the withdrawal of the support the land provides to the adjacent property. Where a landowner's land is damaged as a result of subsidence caused by the activities of his neighbour, he may claim compensation from the neighbour for the cost of repairing the damage caused by the withdrawal of support.²⁸⁸ This appears to be the position irrespective of whether the neighbour has been negligent, or not.²⁸⁹

5.4 RIGHT TO SUBJACENT SUPPORT

Whereas the principle of lateral support relates to the relationship between owners of contiguous land, subjacent support refers to the relationship between parties who hold rights in respect of the same land.²⁹⁰ Essentially the principle relates to the situation where a portion of land derives its stability from the subsoil, including the minerals beneath it, and as a result the owner is entitled to have his land supported by the subsurface. The application of the principle of subjacent support becomes relevant where the extraction of minerals compromises the stability of the ground above the area from which the minerals are extracted. Subjacent or subterranean support, therefore, refers to the natural right of vertical support a landowner enjoys in respect of the soil beneath the surface of his land. It is relevant in the context of the relationship between a mining right holder and a landowner, particularly in determining whether the mining right holder is duty bound to provide vertical or subjacent support to the surface of the land.

²⁸⁸ Van der Walt *The Law of Neighbours* 125.

²⁸⁹ Ibid. See also Boyd *Lateral and Subjacent Support* 1.

²⁹⁰ The court in *Elektrisiteitsvoorsieningskommissie v Fourie* 1988 (2) SA 627 (T) concluded that lateral support involves the relationship between neighbouring owners of land, whilst surface support involves the relationship between a holder of a mineral (or mining) right and the landowner in respect of the same land. See also Van der Walt AJ "Onteiening van die reg op laterale en onderstut – *Evkom v Fourie*" 1987 (50) *THRHR* 462 473.

The right of subjacent support was originally considered inherent to ownership and the landowner could not be deprived of this right unless he expressly or tacitly agreed.²⁹¹ The court in the *Anglo* judgment held that the right to subjacent support, like the right to lateral support, is a right of ownership. A landowner can therefore only be deprived of this right if it is waived by consensual agreement between the parties.²⁹² Van der Walt²⁹³ describes it as an inherent aspect of the relationship between the two parties. Therefore, while this right can be suspended, waived, renounced, or limited by agreement between the parties, it cannot be transferred to or held independently by a person outside of this relationship.

Returning to the conflict which arises between the landowner and the mining right holder, the question is whether the law pertaining to lateral and subjacent support also applies where competing rights are held, not in respect of two adjacent portions of land, but in respect of the same land.²⁹⁴ For years the English-law principles of lateral and subjacent support were applied in cases where damage resulted from underground mining.²⁹⁵ This approach was justified on the basis that although the principles of lateral and subjacent support do not form part of Roman-Dutch law, they are just and equitable and should be incorporated into our law.²⁹⁶ And so the rights of lateral and subjacent support were adopted in South African jurisprudence.

However, as I explain above, this approach was overturned by the *Anglo* decision where the court unequivocally ruled that the principle of lateral support pertains to neighbour law and applies only to the support owed between owners of

²⁹¹ In *Anglo Operations v Sandhurst Estates* 2007 (2) SA 363 (SCA) it was held that a landowner may not be deprived of vertical support which his land naturally derives from the minerals below the surface without the landowner's express or tacit consent.

²⁹² See Boyd *Lateral and Subjacent Support* 4.

²⁹³ Van der Walt *The Law of Neighbours* 112.

²⁹⁴ This position is evaluated in great detail in Boyd *Lateral and Subjacent Support*.

²⁹⁵ *London and South African Exploration Co v Rouliot* 1890 (8) SC 74; *Coronation Collieries v Malan* 1911 577 TPD 590.

²⁹⁶ *London and South African Exploration Co v Rouliot* 1890 (8) SC 74 91.

neighbouring properties. Brand JA established that the duty of the mineral-right holder *vis-à-vis* the owner of the land in regard to surface support, differs in the following material respects from the duty of lateral support owed between neighbouring landowners.²⁹⁷

(a) the owner of land and the holder of the mineral rights hold rights in the same land not in neighbouring lands; (b) in cases of conflict the entitlement of the mineral right holder to exploit the relevant minerals takes precedence over the entitlement of the surface owner to enjoy undisturbed possession; and (c) the process of mining for minerals under the surface of land necessarily involves letting down the surface.²⁹⁸

The principle of lateral support could therefore not be extended to the relationship between mineral-right (mining right) holders and landowners.

With regard to subjacent support, the court held that, unlike the position in English law, it is not possible to divide ownership of the subsoil into separate layers.²⁹⁹ In consequence, while in English law the holder of mineral rights actually becomes owner of a particular layer below the surface, this is not the position in our law. The answer, therefore, does not lie in the adoption of the English-law doctrine of subjacent support.

Cases dealing with conflicts relating to mining and surface rights have therefore authoritatively been removed from neighbour law and assigned to the law of servitudes.³⁰⁰

²⁹⁷ See Van der Walt 1987 (50) *THRHR* 473.

²⁹⁸ References to “letting down the surface” in this context is intended to signify a disturbance of the surface of the land.

²⁹⁹ See *London and SA Exploration Company v Rouliot* 1980 (8) SC 74 and *Rocher v Registrar of Deeds* 1911 TPD 311 315; *Union Government (Minister of Railways and Harbours) v Marais* 1920 AD 240 246.

³⁰⁰ Van der Walt *The Law of Neighbours* 130.

5.5 LAW RELATING TO USE OF SERVITUDES

5.5.1 GENERAL NATURE OF SERVITUDES

In our law, a servitude is regarded as a limited real right to another person's thing (*ius in re aliena*), which grants the holder thereof specific entitlements of use and enjoyment over the property of another.³⁰¹ Servitudes limit the entitlements of the owner of the servient tenement to the extent that he is obliged to exercise certain of his entitlements as owner in a way that would not interfere with those entitlements granted to the holder of a servitude.³⁰² Servitudes must be exercised in a reasonable manner (*civiliter modo*). Stated differently, a servitude must be exercised in a civilised and considerate way to ensure the least possible impact on and inconvenience to the rights of the owner of the servient tenement. The owner of the servient tenement must in turn allow the holder of the servitude to do what is reasonably necessary for the exercise of his servitude rights. In cases of conflict between the interests of servitude holders and the owners of servient tenements, the interests of the servitude holder will take precedence over those of the owner, subject to the principle of reasonableness.³⁰³

5.5.2 NATURE OF MINING RIGHTS AS QUASI-SERVITUDES

Before the introduction of the MPRDA, mining rights in South African law were regarded as bearing the nature of quasi-servitudes.³⁰⁴ The reason for this was

³⁰¹ Van der Walt and Pienaar *Introduction to the Law of Property* 230. Badenhorst, Pienaar and Mostert *The Law of Property* 321 explain that a servitude essentially confers "a real right to an advantage out of the property of another." See also Mostert and Pope (eds) *Principles of the Law of Property* 236.

³⁰² Badenhorst, Pienaar and Mostert *The Law of Property* 332.

³⁰³ See *Brink v Van Niekerk* 1986 (3) SA 482 (T) and *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A).

³⁰⁴ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 364: "It is a settled principle of our law that a right to minerals in the property of another is in the nature of a quasi-servitude over that property."

that these rights do not fit exactly in the traditional classification of servitudes.³⁰⁵ Mining rights are similar to personal servitudes, as they vest in a specific person or entity, but they do not terminate upon the death or dissolution of the right holder. They are, furthermore, transferable with Ministerial consent. They are not praedial servitudes as they are granted to a specific person and not to a dominant tenement. A mining right is therefore a hybrid of these two types of servitude - a class of real rights *sui generis*.³⁰⁶ According to Schutz JA in *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd*,³⁰⁷ mining rights have been described as quasi-servitudes, a denomination which has often been used by our courts.

The court in *Anglo Operations v Sandhurst Estates*³⁰⁸ held that conflicts pertaining to surface support should be determined in accordance with the Roman-Dutch principles developed by our law in resolving conflicts between servitude holders and the owners of servient properties. In accordance with these principles, the landowner must allow the mining right holder to do whatever is reasonably necessary for the proper exercise of his rights. The mining right holder, in turn, must exercise his rights *civiliter modo*,³⁰⁹ that is, with as much possible

³⁰⁵ See, eg, *Rocher v Registrar of Deeds* 1911 TPD 316; *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295; *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 (2) SA 467 (A) 490.

³⁰⁶ *Ex Parte Pierce and Others* 1950 (3) SA 628 (O).

³⁰⁷ 1996 (4) SA 499 (A).

³⁰⁸ *Anglo Operations Limited v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T); *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

³⁰⁹ See also Scott J "A growing trend in source application by our courts illustrated by a recent judgment of right of way" 2013 (76) *THRHR* 239 - 251 for a critical analysis of the meaning of the concept *civiliter modo*. According to Scott a more appropriate interpretation of the *civiliter modo* concept would be: the dominant owner may not make the position of the servient owner more burdensome than is necessary for the proper exercise of his right, or that the servitude holder has the right to do what is required for the enjoyment of his servitude, but this right is subject to the condition that he imposes no greater additional burden upon the servient property than is absolutely necessary.

consideration and with the least possible inconvenience, or in a manner least injurious to the surface owner.³¹⁰

Schutz JA in *Trojan* further held that each party had to exercise his rights “in a civil fashion.” The holder of a mining right is allowed to do whatever is reasonably necessary to attain his ultimate goal of extracting the mineral to which his right relates, provided he does this in the manner least injurious to the interests of the landowner.³¹¹ The mining right holder is however not obliged to forego ordinary and reasonable enjoyment of his rights merely because his mining operations will be detrimental to the interests of the landowner.³¹² The fact that the landowner has been using the land prior to the mining right holder obtaining his right and that the landowner’s activities can be described as “normal, ordinary or reasonable use” will not prevent the mining right holder from exercising his rights. In the absence of an express or tacit term to the contrary in the grant, and provided it is reasonably necessary and done in a manner least injurious to the landowner, the mining right holder may withdraw the support which the coal provides to the soil above it.³¹³

³¹⁰ See *Anglo Operations v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 373. The correct approach according to Brand JA is that “...this conflict should be determined in accordance with the principles developed by our law in resolving the inherent conflicts between the holders of servitudinal rights and the owners of the servient properties. In accordance with the principles applicable to servitudes, the owner of a servient property is bound to allow the holder to do whatever is reasonably necessary for the proper exercise of his rights. The holder of the servitude is in turn bound to exercise his rights *civiliter modo*, that is, reasonably viewed, with as much possible consideration and with the least possible inconvenience to the servient property and its owner. In applying these principles to mineral rights it can be accepted on good authority that the holder is entitled to go onto the property, search for minerals and, if he finds any, to remove them. This must include the right on the part of the holder to do whatever is reasonably necessary to attain his ultimate goal as empowered by the grant.” See also Scott 2013 (76) *THRHR* 239 - 251 for a critical analysis of the meaning of the concept *civiliter modo*.

³¹¹ *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 525.

³¹² *Hudson v Mann* 1950 (4) SA 485 (T) 488.

³¹³ *Boyd Lateral and Subjacent Support* 152.

In *Hudson v Mann*,³¹⁴ Malan J explains in a well-known passage, how disputes which arise in such circumstances can be resolved in accordance with the principles relating to servitudes:

In the case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploitation. The solution of a dispute in such a case appears to me to resolve itself into a determination of a question of fact, viz, whether or not the holder of the mineral rights acts *bona fide* and reasonably in the course of exercising his rights. He must exercise his rights in a manner least onerous or injurious to the owner of the surface rights, but he is not obliged to forego ordinary and reasonable enjoyment merely because his operations or activities are detrimental to the interests of the surface owner. The fact that his use is earlier in point of time cannot derogate from the rights of the holder of mineral rights.

Each party can, therefore, make use of his rights so as to obtain a benefit, but this should be done in a manner least likely to harm the other party's interests in the land. This entails that each party should be prepared to suffer such infringements of his rights as are reasonably imposed by the other party's use. Where conflict follows, the landowner's rights are subordinate to those of a mining right holder. Therefore, based on the principles of servitude, a mining right holder is entitled to withdraw the subjacent support where it is reasonably necessary and provided he does so with the least possible impact on the rights of the landowner. The mining right holder is also entitled to prohibit landowners from using their land in a way that it will limit the proper exercise of his mining activities.³¹⁵

It has, however, been argued that the introduction of the MPRDA and its application in the *Anglo* decision, have abolished the quasi-servitude approach to mineral rights and replaced it with a comprehensive statutory scheme that vests custodianship of all mineral and petroleum resources in the state.³¹⁶ According to Boyd,³¹⁷ the introduction of the MPRDA cast the conflict between mining right

³¹⁴ 1950 (4) SA 485 (T).

³¹⁵ Boyd *Lateral and Subjacent Support* 92.

³¹⁶ Id 186.

³¹⁷ Ibid.

holders and landowners in a completely new light. Whereas before the MPRDA landowners had the opportunity to protect their interests through the deed of grant by stipulating that the holder of mineral rights was precluded from withdrawing support, or agreeing to grant such right in return for compensation, this is no longer possible.

Boyd³¹⁸ expresses the view that in the case of servitudes in South African law, two individuals reach a mutual agreement to allow one party certain rights in respect of the land of another, while the other party consensually agrees to refrain from exercising his rights in a way which may interfere with the rights and interests of the other party. Before the introduction of the MPRDA, a landowner could alienate the minerals in his land on such conditions as he saw fit. The granting of these rights was effected by mutual consent and conflicts were resolved by applying the principle of reasonableness as embodied in the *civiliter modo* criterion.

Under the new dispensation, the right to mine is no longer granted by the landowner, but by the state as custodian of all natural resources. Landowners accordingly no longer have the opportunity to determine whether or not another acquires an interest in their land, and can no longer determine the conditions for such grant. The granting of rights over such land is, therefore, no longer by mutual agreement, but as a result of regulation by the state. Previously, the landowner at least had the ability to determine on which conditions the right to mine would be granted, and as such could protect his interests if necessary by means of monetary compensation. Under the new dispensation, the state as custodian of mineral resources grants mining rights to qualifying applicants. It is therefore argued that it is no longer appropriate to compare the relationship between the parties to the relationship between the holder of a servitude and the owner of the servient land.

³¹⁸ *Lateral and Subjacent Support* 187.

5.6 CONCLUSION

As I explain above, the resolution of conflict between landowners and mining right holders, resulting from mine subsidence, cannot be resolved, as it previously was, by applying neighbour-law principles relating to lateral and subjacent support, but possibly in terms of the South African law relating to the use of servitudes. In accordance with the previous classification of mineral rights as quasi-servitudes, and based on the *civilliter modo* criterion, mining right holders should be allowed to exercise their rights freely, provided this is done in a manner least injurious to the rights of the surface owner. Stated differently, the mining right holder has the right to do what is required for the enjoyment of his right to extract the minerals, but this right is subject to the condition that he imposes no greater additional burden upon the use of the surface of the land by the landowner than is absolutely necessary. If the landowner seeks to restrict the mining right holder in the exercise of his rights, he may apply to court for a declaration of rights, may in certain circumstances apply for an interdict, or will, under certain conditions, be entitled to claim compensation.³¹⁹

According to Boyd³²⁰ the quasi-servitude formulation in the *Anglo* decision has been abolished and replaced by a comprehensive statutory scheme, the MPRDA. Accordingly, the relationship between the parties is now regulated statutorily, and this raises the question of how a possible conflict should be resolved in terms of the MPRDA. In the next chapter I consider the nature of mining rights under the MPRDA, the entitlements afforded to the mining right holder and the landowner in terms of the MPRDA, as well as possible remedies available to each.

³¹⁹ See Badenhorst, Pienaar and Mostert *The Law of Property* 331 where it is stated that if the owner of the servient land seeks to restrict the owner of the dominant tenement in the exercise of his rights, the latter may apply to court for a declaration of rights and the same applies *mutatis mutandis* to the owner of the dominant tenement if the owner of the servient property exceeds his rights. They proceed to state that the specific duties may furthermore be enforced by way of an interdict if all the requirements have been met; and subject to these general rules, either party is entitled to claim damages if the other party exceeds his rights provided that he can prove patrimonial loss.

³²⁰ *Lateral and Subjacent Support* 187.

I also consider what the position would be if one of the parties' rights are extinguished or materially curtailed by the relevant legislative provisions of the MPRDA. This question will be evaluated on the basis of the property clause contained in the Bill of Rights.

CHAPTER 6

REMEDIES

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6.1 INTRODUCTION

As I indicate in the previous chapter, disputes related to mine subsidence resulting from the withdrawal of surface support were previously resolved by our courts in accordance with the principles applicable to servitudes. They are now regulated statutorily. The question therefore arises whether the MPRDA contains any guidance on how possible conflict between mining right holders and landowners should be resolved. To understand the rights and obligations of these parties, it is important first to consider the nature of mining rights and what entitlements they provide for their holders. In this chapter I also consider possible remedies available to mining right holders and landowners to protect their respective rights. Thereafter I turn to an evaluation of what remedy, if any, would be available to the landowner if certain of his entitlements were to be extinguished by the relevant legislative provisions of the MPRDA. In the final part of the chapter I consider the constitutionality of the severe infringement of a landowner's entitlements.

6.2 CONTENT OF LIMITED REAL RIGHTS

In terms of section 5 of the MPRDA, mining rights are limited real rights in respect of the mineral and the land to which the rights relate. Although the Act provides that the mining right holder has a limited real right, the implications of this approach are far from clear.

The nature of mining rights as "limited" real rights firstly denotes that these rights are limited in the sense that they do not constitute ownership, but are nevertheless rights in the property of another. They therefore limit the entitlements of the owner of the property over which they exist.³²¹ The holders of such rights have specific entitlements over the owner's land. Furthermore, the holder of a limited real right is entitled, for the duration of his right, to enforce the right against the landowner,

³²¹ See Badenhorst, Pienaar and Mostert *The Law of Property* 95. See further Mostert *Mineral Law* 80 and Van Wyk *Planning Law* 67.

any successor in title of the landowner, and against any person who deals with the land in a manner which interferes with the exercise of his rights.³²²

Whereas the granting of mineral rights and their content under the old Act were determined by the grantor, section 5 of the MPRDA now provides that the holder of a registered³²³ mining right has a limited real right in respect of the mineral and the land to which the right relates. When a mining right is granted and registered in accordance with the provisions of the MPRDA and the Mineral and Petroleum Titles Registration Amendment Act,³²⁴ the holder becomes entitled to the entitlements afforded by section 5 of the MPRDA. This section gives a mining right holder the following entitlements: the entitlement to enter the land to which such right relates together with the holder's employees and to bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under-sea infrastructure which may be required for the purpose of mining; the entitlement to mine, on or under that land and for his own account, for the mineral for which the right has been granted; the entitlement to carry out any other activity incidental to mining, which does not contravene the provisions of the MPRDA and the entitlement to remove and dispose of any mineral found during the course of mining. The holder also has the entitlement, subject to the provisions of the National Water Act 36 of 1998, to use any water from any natural spring, lake, river or stream situated on, or flowing through the land, or from any excavation previously made and used for prospecting or mining; and the entitlement to sink a well or borehole required for use relating to mining. In other words, where the mining right holder does not own the land, section 5 of the MPRDA entitles him to interfere with the use and enjoyment of the landowner by affording him the right to exercise the above entitlements.

³²² See Badenhorst, Pienaar and Mostert *The Law of Property* 51.

³²³ Section 5 of the MPRDA of 2002 was amended by the MPRDA Amendment Act of 2008 to the extent that mining rights will only obtain the status of limited real rights upon registration thereof in the Mineral and Petroleum Titles Registration Office.

³²⁴ Act 24 of 2003 (hereafter the MPTRAA).

The question arises whether, in the event of a conflict between the mining right holder and the landowner, the MPRDA also provides remedies to both parties. In this discussion I draw a distinction between the remedies afforded to the mining right holder and the owner of the land.

6.3 REMEDIES

6.3.1 INTRODUCTION

Coal is a finite natural resource on which the world, and South Africa in particular, currently depends for electricity generation and fuel production. It therefore follows that it will become ever more important to ensure adequate access to as much of the available coal resources, and to optimise the extraction and utilisation of what is available. The inescapable reality is that coal is found underground and needs to be uncovered in some way. The activities relating to the uncovering of coal are bound to create conflict between the mining right holder and those who own the land where the coal is located. The need for appropriate regulation of the relationship between holders of mining rights and landowners can only intensify as available coal resources become scarcer.

As I explain in Chapter 5 above, under the previous dispensation the conflict arising between a mining right holder and a landowner was resolved by applying the principles applicable to the use of servitudes. This entailed that the holder of a mining right was obliged to exercise his rights *civiliter modo*.³²⁵ Where the mining right holder exceeded his rights, or conducted his mining and ancillary activities in a way which was not reasonably necessary to uncover the minerals for which he held a mining right, the owner of the surface land who wished to restrict such exercise, could have applied to the court for a declaration of rights or an

³²⁵ The relationship between owners of dominant and servient land is governed by the principle of reasonableness, see discussion in 5.5.2 above.

interdict.³²⁶ This applied *mutatis mutandis* to the holder of a mining right who believed a landowner was conducting his activities in a way that prevented the reasonable exercise of his rights to mine.³²⁷ A holder of a mining right was entitled to exercise his rights and extract the minerals to which his right related, by using any method of extraction, provided it was reasonably necessary to do so and that his activities were conducted in a manner which caused the least possible inconvenience and injury to the interests of the landowner. In cases of irreconcilable conflict, the rights of the landowner were subordinate to those of the mining right holder.

I further explained in Chapter 5, that this position was overturned when the MPRDA was introduced. It has now become important to determine if any specific remedies are provided by the MPRDA because section 4(2) provides that in so far as the common law is inconsistent with this Act, the Act prevails.³²⁸ In the next section I first consider the remedies available to a mining right holder in terms of the MPRDA, followed by the remedies available to a landowner.

6.3.2 MINING RIGHT HOLDER

As I explain in 6.2, a holder of a mining right is the holder of a limited real right and is accordingly entitled to access land for mining purposes and to extract the mineral to which his right relates.

³²⁶ The maxim *sic utere tuo ut alienum non laedas* meaning that one has to use your property so as not to harm the property of others, supports the principle of reasonable use. In accordance with this principle, the owner of land may put his own property to any reasonable and lawful use, but should refrain from using it in a manner which will deprive the adjoining landowner of his (lawful) use and enjoyment of his property. According to Van der Walt and Pienaar *Introduction to the Law of Property* 249 the owner of an encumbered property may: institute action against holders of servitudes who exceed their entitlements by using the *actio negatoria*; apply for an interdict or a declaratory order; and in certain circumstances claim damages.

³²⁷ Holders of servitudes can use the *actio confessoria* to limit interference in the reasonable exercise of their rights by applying for an order of court or to claim damages for patrimonial loss.

³²⁸ The reference to “this Act” is to the MPRDA.

Where a mining right holder's right of access is denied by a landowner, or where a landowner refuses to allow the mining right holder to commence or continue with its mining activities, the holder of the mining right can invoke the provisions of section 54 of the MPRDA and, by way of notice, call on the Regional Manager of the Department of Mineral Resources to intervene. The Regional Manager must within fourteen days of receiving such a notice, call upon the landowner to respond or make representations regarding the complaints raised by the mining right holder. The Regional Manager will inform the landowner of the mining right holder's entitlements, and the provisions of the MPRDA which the landowner is contravening. The landowner will also be informed of the steps that will be taken should he persist in contravening the Act. The Regional Manager will allow the parties an opportunity to come to an agreement. If after having genuinely attempted to resolve the issue, the parties still cannot reach consensus and the Regional Manager concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the mining, he must again request the parties concerned to endeavour to reach an agreement on an amount of compensation for such loss or damage. Upon failure to reach agreement in respect of compensation, the issue will be determined by arbitration. Section 54(5) provides that if, after having considered the issues raised and the representations made by both parties, the Regional Manager concludes that any further negotiation may detrimentally affect the objects of the Act, the Regional Manager may recommend to the Minister that the land be expropriated. If, however, the Regional Manager concludes in terms of section 54(6) that failure to reach agreement is due to the fault of the mining right holder, the Regional Manager may prohibit the holder from commencing or continuing with mining operations until such time as the dispute has been resolved by arbitration or a competent court.

The process provided in section 54 is time consuming and cumbersome. In the recent and unreported judgment of *Coal of Africa Limited v Akkerland Boerdery (Pty) Ltd*³²⁹ the court had to consider whether an interdict could be issued to restrain a landowner from refusing access for prospecting activities, even in the

³²⁹ 2014 ZAGPPHC 510, unreported case number: 38528/2012 (judgment: 5 March 2014). See also *Joubert v Maranda Mining Company (Pty) Ltd* [2010] 2 All SA 67 (GNP).

absence of the holder first having exhausted alternatives such as those provided for in section 54 of the Act. Kgomo J confirmed that the applicant had established that it had a clear right, and was accordingly entitled to what section 5 of the MPRDA allows, including the entitlement to access the relevant land. The court further held that the purpose of section 54 is the general regulation or resolution of disputes between landowners and mining right holders concerning compensation, and does not adequately advance matters involving access.

This judgment confirms that mining right holders are entitled to enter land together with their employees, and to bring onto such land any plant, machinery or equipment, and build, construct, or lay down any surface, underground or undersea infrastructure, which may be required for the purpose of mining. The court also affirmed such holders' entitlement to apply to court for an interdict restraining landowners from unlawfully refusing them access to the land for mining purposes; for a declaratory order; or, where the landowner's actions cause loss or damage, to institute claims for damages.³³⁰

6.3.3 LANDOWNER

Based on the servitude construction of the previous dispensation, a landowner was free to exercise his rights of ownership but this freedom was limited to the extent that he could not interfere with or unreasonably limit the holder of a mining right in the exercise of its rights. The landowner could not grant further rights to others which could prevent the mining right holder from exercising its rights. The landowner, and his successors in title, were accordingly obliged to allow the mining right holder, as the holder of a limited real right, access to the land, to come onto it with his employees and equipment, and to do whatever was reasonably necessary to sever and remove the minerals.

Where a mineral right holder overstepped the boundaries of reasonable utilisation of his rights the landowner could apply for an interdict preventing the mineral right

³³⁰ See *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T).

holder from causing subsidence and resultant losses. To succeed, the plaintiff had to establish a clear right, a reasonable apprehension of damage and the absence of any other appropriate remedy.³³¹

Ownership of land, as I explain in Chapter 3, is the most comprehensive real right one can have over your property, and in principle entitles the owner to deal with his property as he pleases. Ownership is, however, subject to certain limitations which include statutory limitations and limitations brought about by the rights of others in respect of such property. Despite the multitude of restrictions on the exercise of ownership, it is still generally accepted that owners can protect the exercise of their rights from unjustified interference.³³² As a general rule, owners who have been deprived of their entitlements against their will, can, in terms of the common law, apply to court for an interdict or a declaratory order, or, can institute a claim for damages. There are, however, exceptions. Where an infringement on an owner's entitlements is allowed in terms of a law of general application which passes constitutional muster, such a limitation is permitted. This can, for example, occur where such an infringement is the result of the state's regulation of property, a so-called statutory limitation. It is therefore important to consider the provisions of the MPRDA that allow for interference in a landowner's entitlements.

Whereas under the previous mineral-law dispensation, landowners had control over whether or not to allow others access to the minerals in their land, under the new dispensation a landowner enjoys very limited protection. This is especially so because the Minister of Mineral Resources now decides whether or not to grant someone else the right to mine, thereby potentially limiting a landowner's use and enjoyment of his land. According to Badenhorst,³³³ the landowner's interests have been shifted to the background since he is now merely notified of intended mining operations. Furthermore, in the event of conflict after a mining right has been

³³¹ *Municipal Council of JHB v Robinson Gold Mining Co Ltd* 1923 WLD 99.

³³² See Badenhorst, Pienaar and Mostert *The Law of Property* 241.

³³³ Badenhorst PJ "Right of access to land for mining purposes: On *terra firma* at last?" 2010 (73) *THRHR* 318.

granted, he may only object to such a grant or resort to the limited protection provided by section 54 of the MPRDA.

Section 54, as I explain in 6.3.2 above, in reality only provides an opportunity for landowners to negotiate compensation for loss or damage caused to their land by mining. In terms of the MPRDA, landowners are only entitled to claim compensation where the Regional Manager of the Department of Mineral Resources is of the opinion that the landowner has suffered or is likely to suffer loss or damage. It is doubtful whether damage compensation will resolve conflicts resulting from the interference in the use and enjoyment of a landowner's land as, in many instances, a landowner's real concern is not the economic loss he has or may suffer, but the interference in his ownership. The landowner, as outlined above, is left in a vulnerable position as is evident from case law in support of the now-settled principle in South African mining law that in instances where the rights of a mining right holder and those of a landowner are in conflict, the mining of minerals will reign supreme, and all other land uses will be regarded as subservient.³³⁴

Under the new dispensation, the MPRDA affords landowners the right to be consulted regarding applications for prospecting and mining rights, and where a landowner believes that the applicant for a mining right has failed to comply with the prescribed processes or requirements of the MPRDA, he can object to the granting of the right. Where a landowner is of the opinion that his rights or legitimate expectations have been materially and adversely affected, or is aggrieved by an administrative decision by the Department of Mineral Resources, he must, in terms of section 96 of the MPRDA, lodge an appeal within 30 days of such administrative decision or may apply for a judicial review.³³⁵

It is therefore clear that the tables have been turned for a landowner who previously owned the minerals in his land and could decide whether or not to allow

³³⁴ See Chapter 2. This principle was confirmed by the court in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

³³⁵ See 4.2.1.1.

anyone to extract them. Under the new dispensation, a landowner not only must tolerate someone else extracting the minerals from his land, but he could also be deprived of the use and enjoyment of his land as a result of the state (as custodian) granting rights to minerals to another without the landowner's consent. The questions which fall to be answered are whether this serious infringement of a landowner's entitlement to use and enjoy his land, amounts to no more than permissible state regulation (deprivation) of property rights, or has possibly gone too far and amounts to an expropriation³³⁶ of property. This determination is very important because a landowner will only be entitled to claim compensation if the infringement amounts to an expropriation.

6.4 DOES MPRDA AMOUNT TO EXPROPRIATION OF LANDOWNER'S VESTED RIGHTS IN PROPERTY?

6.4.1 INTRODUCTION

Section 25 of the Constitution, 1996,³³⁷ provides that property may be expropriated only in terms of a law of general application, for a public purpose or

³³⁶ See s 25(2).

³³⁷ Section 25(1) provides that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." Subsection 2 provides that property may be expropriated "only in terms of law of general application - (a) for public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court." Subsection 3 provides that "the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including- (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation." Subsection 4 provides that "for the purpose of this section - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land."

in the public interest, and subject to payment of compensation.³³⁸ Section 25(4)(a) provides that reforms to bring about equitable access to all South Africa's natural resources, is a use which is considered to constitute a use in the public interest. In line with this provision the MPRDA sets out to facilitate equitable access to the mining industry, promote sustainable development of South Africa's mineral and petroleum resources, and to advance the eradication of all forms of discriminatory practices in the mining sector.³³⁹ Section 55 of the MPRDA recognises the need for expropriation of land under certain circumstances and provides the Minister with the power to expropriate land subject to the payment of compensation. Item 12 of Schedule II to the MPRDA determines the circumstances under which compensation would be payable.³⁴⁰

The question whether the introduction of the MPRDA amounted to the expropriation of old-order mineral rights, forms the centre of considerable literature review and debate.³⁴¹ This evaluation, however, falls beyond the scope of this

³³⁸ See Mostert *Mineral Law* 74–78 for a review of mineral policy during the political transition of 1994.

³³⁹ Section 2(c) of the MPRDA.

³⁴⁰ Item 12(1) provides that “any person who can prove that his or her property has been expropriated in terms of any provision of this Act may claim compensation from the state. When claiming compensation, a person must, in terms of item 12(2): (a) prove the extent and nature of actual loss and damage suffered by him; (b) indicate the current use of the property; (c) submit proof of ownership of such property; (d) give the history of acquisition of such property; (e) detail the nature of such property; (f) prove the market value of the property and the manner in which such value was determined; and (g) indicate the extent of the state assistance and benefits received in respect of such property.” Item 12(3) provides that “in determining just and equitable compensation all relevant factors must be taken into account, including in addition to s 25(2) and (3) of the Constitution: (a) the state's obligation to redress the results of past racial discrimination in the allocation of access to mineral and petroleum resources; (b) the state's obligation to bring about reforms to promote equitable access to all South Africa's natural resources; (c) the provision of s 25(8) of the Constitution; and (d) whether the person concerned will continue to benefit from the property in question or not.”

³⁴¹ See Badenhorst PJ and Mostert H “Revisiting the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the constitutional property clause” (Part one) 2003 (14) *Stell LR* 377 and (Part two) 2004 (15) *Stell LR* 22; Van der Walt AJ *Constitutional Property Law* (Juta Cape Town 2005) 370; Van der Vyver JD “Nationalisation of mineral rights in

study save for making reference to the recent decision by the Constitutional Court in *Agri South Africa v Minister for Minerals and Energy*³⁴² which settled aspects of the debate. The central question the court had to consider was whether the commencement of the MPRDA had the effect of expropriating mineral rights. The facts, in summary, are that before the introduction of the MPRDA, a mining company, Sebenza, bought certain coal rights from the liquidators of an insolvent estate and registered them in its name. Sebenza was, however, not the owner of the relevant land on which the coal was located. When the MPRDA was introduced on 1 May 2004, Sebenza therefore became holder of an unused old-order right, which remained in force for a period of one year after the commencement of the MPRDA.³⁴³ For Sebenza to exercise its exclusive right to apply for the conversion of its unused old-order right to a prospecting right or mining right under the MPRDA, it had to pay a prescribed application fee to obtain the required authorisation to prospect for or mine the coal in terms of the Minerals Act. At the time, Sebenza was financially incapable of applying for conversion of its rights. Sebenza then attempted to sell its coal rights to a third party for an amount of R750 000, but failed because the rights had ceased to exist under the MPRDA. Sebenza then lodged a claim for compensation in terms of Schedule II to the MPRDA on the ground that the state had expropriated its mineral rights.

On hearing the matter, the North Gauteng High Court³⁴⁴ held that the rights had been legislated “out of existence” and that this constituted a deprivation in terms of section 25 of the Constitution, 1996. It furthermore amounted to an expropriation as the rights were acquired by the state. The state, so the court held, acquired what landowners had lost in that the MPRDA entitles the state to grant mining

South Africa” 2012 (45) *De Jure* 126-143; Grobler GL “Constitutional property aspects of the Mineral and Petroleum Resources Development Act 28 of 2002: Expropriation and compensation” (2007) Lecture presented at the University of the Witwatersrand; Badenhorst PJ “Ownership of minerals *in situ* in South Africa: Australian darning to the rescue” 2010 *SALJ* 646.

³⁴² 2013 (4) SA 1 (CC); BCLR 727 (CC) heard on 18 April 2013.

³⁴³ See item 8 of Schedule II to the MPRDA.

³⁴⁴ See the decision in the court *a quo* in *Agri South Africa v The Minister of Minerals and Energy* 2010 (1) SA 104 (GNP) and *Agri South Africa v Minister of Minerals and Energy* (Amicus curiae: Centre for Applied Legal Studies) 2012 (1) SA 171 (GNP).

rights to third parties with substantially the same content as the right which previously vested in the holder of the mineral rights.

On appeal, the Supreme Court of Appeal³⁴⁵ held that the presence of minerals on or under the land confers no value to the landowner, unless the state has also authorised the landowner to extract those minerals. Mineral rights, in the absence of the right to mine, were, therefore, said to be devoid of any value and did not constitute property of which its holder could be deprived or which could be expropriated. As a result, Sebenza had neither been deprived of its rights, nor had they been expropriated. The decision of the High Court was overturned.

The Constitutional Court, contrary to the Supreme Court of Appeal, found that the MPRDA in fact did deprive former mineral right holders of the entitlements they previously enjoyed, such as their entitlement to decide not to exploit the minerals or to withhold consent for the extraction of minerals to ensure that the surface of their land is not disturbed. Having established that the MPRDA did result in a deprivation, the court then turned to the next question: Did this deprivation rise to the level of an expropriation? In a majority judgment Mogoeng CJ concluded that, while the commencement of the MPRDA had the effect of depriving Sebenza of its coal rights, it did not amount to an expropriation. This is so because there can be no expropriation in circumstances where a deprivation does not result in property being acquired by the state:

The critical question is, however, whether this deprivation, the assumption of custodianship and the power to grant others what could previously have been granted only by holders, means that the state acquired ownership of rights to these mineral and petroleum resources. The answer is no.

[The state] is simply a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised.

An assertion by Agri SA that the state has in terms of the correct interpretation of section 25 expropriated the mineral rights, is an overly liberal one. It disregards the public interest

³⁴⁵ *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA).

and constitutional imperative to transform and facilitate equitable access to our mineral and natural resources, to which courts are enjoined to have regard when construing section 25.

Mogoeng CJ dismissed the appeal based mainly on the view that the state did not acquire that which had been lost by Sebenza. According to Mogoeng CJ, the state merely acted as facilitator or conduit through which others could obtain the right to prospect or mine, but did not acquire the rights for itself. In a minority judgment, Froneman J, also dismissed the appeal, albeit for different reasons. According to him, what private owners of minerals had under the old dispensation, the state now has. Froneman J, however, further held that Sebenza had been justly and equitably compensated as the transitional provisions provided Sebenza with the opportunity to convert and retain its rights, a so-called “compensation in kind.” As a result Sebenza had not been expropriated and it was not entitled to claim compensation.

Due to the facts of the case, the court was concerned only with the question of whether the MPRDA amounted to an expropriation from the perspective of a holder of an old-order right being deprived of his previous entitlements. The court did not examine whether the regulation by the state which affords a mining right holder the right severely to infringe upon the entitlements of a landowner, could in certain circumstances amount to a *de facto* expropriation. The question I evaluate in the following section is not whether previous holders of old-order mineral rights had those rights expropriated, but whether the impact of the exercise of mining rights could, in extreme circumstances, amount to an expropriation of a landowner’s entitlements. If the rights afforded a mining company by the MPRDA so excessively limit the landowner’s entitlements, or limit them to such an extent that he can no longer make effective use of his land, does such a limitation amount to an expropriation of his property?

The key issue to consider is whether the state, through the provisions of the MPRDA, expropriated vested rights in property, or whether the Act merely amounts to a constitutionally permissible deprivation. Considering that property rights are fundamental rights, does the exercise of mining rights in a manner which

limits the utilisation of land by a landowner excessively, amount to expropriation? The primary aim of fundamental rights surely, is to provide protection for individuals against any abuse of state power.³⁴⁶ It should therefore be considered whether the state's allowing mining right holders to infringe on the landowner's ownership, is constitutionally permissible and if not, what protection will the landowner be afforded and can he claim compensation based on the expropriation of a fundamental right?

6.4.2 EXPROPRIATION OR CONSTITUTIONALLY PERMITTED STATE REGULATION

State regulation fulfils an important role in any society. Measures are often taken by the state to regulate the use of property, *inter alia*, to promote economic prosperity and public safety and health.³⁴⁷ Where a social need requires it, the state may in terms of section 25(1) of the Constitution, change, restrict, limit, or control the use and enjoyment of property, provided this is done in terms of generally applicable, non-arbitrary law.³⁴⁸ The state may exercise control over the use of property to uphold law and civil order.³⁴⁹ Regulation of property merely prevents or restricts a person from using his property in a specific manner and does not result in the state acquiring the property or certain rights. Our law recognises that limitation of property rights is, to a certain extent, required and therefore allows such a deprivation, subject to the above conditions. Legitimate regulatory deprivations do not entitle a landowner to claim compensation.

The question is where the line should be drawn between allowing interference by the state and protecting private property rights. State interference pursuant to the

³⁴⁶ Mostert and Pope (eds) *Principles of the Law of Property* 118.

³⁴⁷ Van der Schyff E "Constructive appropriation – The key to constructive expropriation? Guidelines from Canada" 2007 (40) *CILSA* 308.

³⁴⁸ Badenhorst, Pienaar and Mostert *The Law of Property* 536.

³⁴⁹ The exercise of the state's control over property has been referred to as the state's police power. Interferences for the public welfare include town-planning, building regulations, environmental conservation, health and sanitation.

nation's commitment to achieve land reform and reforms to bring about equitable access to the wealth of our country's natural resources, should be weighed against the protection of an individual's property rights under the Constitution. Van der Schyff³⁵⁰ appropriately summarises the essence of the evaluation as follows:

Can regulatory action in some instances be regarded as expropriatory of private property interests where the property is destroyed or extinguished by regulatory control measures, or not acquired by the State but transferred to a third party for a legitimate government purpose, or where State action lays an excessive burden to the benefit of society at large, on an individual or small group of owners?

6.4.3 DEFINITION OF PROPERTY IN TERMS OF THE PROPERTY CLAUSE

The first step in this evaluation is to determine whether the particular rights or interests infringed by a specific law, in our case the MPRDA, qualify as "property" for which protection is afforded by section 25 of the Constitution. Section 25(4)(b) provides that property in this context is not limited to land. The concept "property" in South African law has been extended to include not only ownership, but also rights in property.³⁵¹ There is however no *numerus clausus* for the types of property which are, or should be protected by the Constitution.³⁵² The fact that particular types of right in respect of property are not specifically mentioned in section 25 does not mean that the term is not sufficiently broad to include them. Van der Walt³⁵³ argues that if section 25 protects property in general, and no distinction is made between specific kinds of property, it can be inferred that any kind of property interest that is not excluded explicitly or by necessary implication,

³⁵⁰ Van der Schyff *Constructive appropriation* 306 – 321.

³⁵¹ Van der Schyff E *Die Nasionalisering van Waterregte in Suid-Afrika: Ontnemings of Onteiening?* LLM Thesis North West University (2003) 6. Van der Walt and Pienaar *Introduction to the Law of Property* 307.

³⁵² Badenhorst, Pienaar and Mostert *The Law of Property* 533.

³⁵³ Van der Walt MM *The Concept of Beneficial Use in South African Water Law Reform* LLD Thesis North West University (2011) 148.

is included. The question here, however, is not whether the introduction of the MPRDA expropriated mineral rights previously belonging to a landowner, but whether the granting of a mining right in accordance with the provisions of the MPRDA, because of the serious curtailment of the landowner's entitlements of ownership, can amount to an expropriation of such entitlements or interests. The question can be posed whether both ownership and the entitlements of ownership are protected, in other words, are the entitlements of ownership protected as "property" as distinct from ownership.³⁵⁴

The argument then is that the MPRDA does not deprive the owner of the property itself, but of the entitlements to use and enjoy his property. Where mining places such severe restrictions on the entitlements of a landowner to use and enjoy his property for the purpose for which it was acquired, can it be said that such a deprivation of his rights in property amounts to expropriation? Although section 28 of the Interim Constitution³⁵⁵ included specific reference to "rights in property" the Constitution of 1996 refers only to "property" and does not define what is to be included or excluded from this category for purposes of interpretation. According to Badenhorst *et al*,³⁵⁶ there is a tendency in constitutional law to be generous in the acknowledgement of interests which would qualify as property, and that incorporeal property or intangible interests in property with a distinct economic value, should in principle qualify for the purposes of constitutional protection. They, however, warn against the risk of conceptually severing the incidents of property for the purpose of protection where there is no actual passing of ownership in the particular asset. They argue that this may frustrate government reform efforts as it will invoke a duty to compensate thereby burdening the treasury to an intolerable extent. The court in *Ex parte Optimal Property Solutions CC*³⁵⁷ stated that a purposive construction of property means that it should be

³⁵⁴ This is an interesting and controversial issue which merits further research, but falls outside the scope of this study.

³⁵⁵ Act 200 of 1993.

³⁵⁶ Badenhorst, Pienaar and Mostert *The Law of Property* 533.

³⁵⁷ 2003 (2) SA 136 (C).

read to include any right to or in property. Van der Walt MM³⁵⁸ supports the view that the development of the constitutional property clause requires that different entitlements of ownership may in certain circumstances individually be regarded as property for the purposes of section 25. If this were not so there would be little point in protecting the shell of ownership if the state could interfere as it wished with these entitlements. The ability to use and enjoy one's property, or to protect the integrity of the surface land, undoubtedly has distinct economic value to any owner, which if a generous interpretation as suggested by Badenhorst *et al* is followed, would qualify for protection under section 25.

A broad and generous interpretation of the concept "property" surely provides for protection of a landowner's entitlement to use and enjoy his land free from impermissible state interference. The next step then is to determine whether such interference amounts to a deprivation or an expropriation.

6.4.4 DIFFERENCE BETWEEN DEPRIVATION AND EXPROPRIATION

To determine whether the state's limitation of the entitlements of a landowner to use and enjoy his property results in a constitutionally justified deprivation, or whether this deprivation constitutes an expropriation for which compensation can be claimed, one needs to turn to section 25 of the Constitution. This section empowers the state either to deprive a landowner of ownership in accordance with section 25(1), or to expropriate ownership in accordance with section 25(2).³⁵⁹

6.4.4.1 Deprivation

The starting point of expropriation enquiries under section 25(1),³⁶⁰ is to determine whether the regulatory imposition amounts to a deprivation of property.³⁶¹

³⁵⁸ *Beneficial Use* 129.

³⁵⁹ Badenhorst, Pienaar and Mostert *The Law of Property* 96.

³⁶⁰ See 6.4.1 above.

The difference between the concepts “deprivation” and “expropriation” lies at the heart of this investigation as the landowner will only be able to claim compensation for severe inroads into his rights, if he can prove that he was not only deprived of certain rights or interests in property, but that the deprivation amounted to an expropriation.

At the outset it is important to note that not all deprivations amount to expropriations. In *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*,³⁶² Ackerman J pointed out that all expropriations of property are also deprivations of property; in other words an expropriation is a particular subspecies of deprivation.³⁶³

A deprivation has been described as an uncompensated, duly authorised and fairly imposed restriction on the use, enjoyment, exploitation or disposal of property for the sake of the common good.³⁶⁴

All limitations on property should first be tested against the provisions of section 25(1) which prescribes first, that no one may be deprived of property except in terms of law of general application, and secondly, that no law may permit arbitrary deprivations of property.³⁶⁵ To amount to a constitutionally allowed deprivation, both of these requirements must be met. Section 25(1) guards against the state depriving a landowner of his rights without sufficient reason for doing so, and ensures that if it is done, the process is procedurally fair.³⁶⁶

³⁶¹ According to Van der Walt and Pienaar *Introduction to the Law of Property* 310 a “deprivation” in the context of section 25, must be understood in the sense of an interference which, in the public interest, subjects the use and enjoyment of property to certain restrictions.

³⁶² 2002 (2) SA 768 (CC).

³⁶³ Currie I and De Waal J *The Bill of Rights Handbook* 5th ed (Juta Cape Town 2005) 551. The authors state that an expropriation is a subset of deprivation; not all deprivations are expropriations, but all expropriations are deprivations.

³⁶⁴ See Badenhorst, Pienaar and Mostert *The Law of Property* 544.

³⁶⁵ Mostert *Mineral Law* 119.

³⁶⁶ *Id* 120.

Any interference by the state which restricts the use and enjoyment of property constitutes a deprivation.³⁶⁷ In certain circumstances legislation may, however, effect a deprivation of property rights to serve the public interest,³⁶⁸ or limit such rights to facilitate the achievement of important social purposes, without payment of compensation.³⁶⁹

6.4.4.1.1 *Law of general application*

The deprivation, firstly, must be sanctioned by a law of general application. Section 25(1), therefore, aims to ensure that state regulation is authorised by the democratically elected legislature, acting within the constitutional parameters, and applies to everyone equally.³⁷⁰ Mostert and Pope³⁷¹ contend that a law will fall foul of this requirement if it singles out a particular person for unfair discriminatory treatment. The MPRDA is a statute accompanied by legislative regulations, which applies generally. A law will not comply with the requirement of general applicability if it singles out a particular person or group of persons for discriminatory treatment.³⁷² This is not the position with the MPRDA.

6.4.4.1.2 *Non-arbitrariness*

Section 25(1) prohibits arbitrary deprivation of property. For a limitation to be valid, it must be shown that there is sufficient reason for, or a proportionate connection between the deprivation and the purpose it is intended to serve. The law resulting in the deprivation should demonstrate a rational connection between a legitimate governmental purpose and how it is to be achieved; in other words,

³⁶⁷ Van der Walt *Constitutional Property Law* 132.

³⁶⁸ See *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 (2) SA 768 (CC).

³⁶⁹ *Reflect-All 1025 CC v MEC for Public Transport, Gauteng* 2009 (6) SA 391 (CC) as discussed by Mostert *Mineral Law* 119.

³⁷⁰ See Mostert and Pope (eds) *Principles of the Law of Property* 124.

³⁷¹ *Ibid.*

³⁷² See Badenhorst Pienaar and Mostert *The Law of Property* 545.

there must be an adequate cause³⁷³ or sufficient reason³⁷⁴ for the deprivation. Where the public purpose it is serving justifies the sacrifice an individual is called upon to make, the deprivation will not be regarded as arbitrary.³⁷⁵

The purpose of the infringement authorised by the MPRDA, is to enable and promote resource reform. It could therefore be argued that there is a sufficient and compelling reason to make inroads into a landowner's ownership.

Deprivations, according to Van der Walt and Pienaar,³⁷⁶ include all legitimate state interference in private rights in property in terms of section 25(1). They maintain that all state interference in private property should be seen as deprivations, while deprivations which actually acquire the property of a person for use by the state or some other public use, should be regarded as expropriations.

The question of whether the introduction of the MPRDA has had the effect of arbitrarily depriving landowners of their surface use, was at issue in the decision of *Anglo Operations Ltd v Sandhurst Estates*³⁷⁷ where the court had to decide whether or not opencast mining should be allowed on land if it was not specifically provided for in the cession of mineral rights. It was argued that the mining right holder's intention to conduct opencast mining on the land amounted to no more than reasonable interference with farming operations on the property. The court ruled that opencast mining would be allowed, if it was reasonably necessary for the exercise of the mining right holder's rights and provided that the mining was done with the least possible impact on the rights of the landowner.

³⁷³ Mostert and Pope (eds) *Principles of the Law of Property* 122.

³⁷⁴ See *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service* 2002 (7) BCLR 702 (CC).

³⁷⁵ Ibid. In *Colonial Development (Pty) Ltd v Outer West Local Council; Bailes v Town and Rentional Planning Commission* 2002 (2) SA 589 (N) it was explained that the rationale underlying such limitations on a landowner's rights is that the individual's interests had to yield to the interests of the community.

³⁷⁶ *Introduction to the Law of Property* 313.

³⁷⁷ 2007 (2) SA 363 (SCA).

Importantly, the court also had to deal with whether the landowner had been deprived of his use of the surface of land. It was argued that the owner of land had been deprived, without his having agreed thereto, of the last remaining aspect of his ownership which was of any practical value to him. The court noted that the landowner had not been arbitrarily deprived of anything as he, or his predecessor in title, had sold certain rights when the rights to the minerals and the rights to the land, were separated. The landowner's predecessor in title had received compensation in return for allowing the mining right holder access to mine coal. Although the matter was decided after the introduction of the MPRDA, the court did not examine what the situation would be had these rights not been sold or disposed of by means of a notarial cession of mineral rights in terms of which the old-order rights were later converted, but where the state, upon application, granted these rights in accordance with the MPRDA. The landowner in the latter circumstances does not dispose of the minerals and gains no economic value from the granting of the right to mine. His only stake in the matter is his right to submit comments on or objections to the application as an interested and affected party. He cannot stop the state from granting another the right to access his land for mining without his consent. This question is yet to be considered by our courts.

Interference in the rights of ownership in the circumstances relevant to this study, is authorised by a properly promulgated, generally applied law -- the MPRDA -- which serves the transformative goal of reforming access to minerals for the (public) benefit of the nation.

The promulgation of the MPRDA, which results in a substantial interference and limitation of ownership entitlements, which goes beyond the normal restrictions on the use and enjoyment of property in an open and democratic society, in light of the above, no doubt constitutes a deprivation as provided in section 25 of the Constitution, 1996.³⁷⁸

³⁷⁸ See *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffalo City Municipality*; *Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC).

Only once it has been established that the criteria of general application and arbitrariness have been satisfied, can one turn to the question of whether the deprivation also amounts to an expropriation.³⁷⁹

6.4.4.2 Expropriation

After establishing that the operation of the particular law amounted to a deprivation of property which occurred by virtue of a law of general application which was non-arbitrary, section 25(2) requires that a further set of criteria (in addition to those provided for in section 25(1)) be met for a deprivation to amount to an expropriation.³⁸⁰ First, section 25(2)(a) provides that the infringement must serve a justifiable public purpose or be in the public interest. Secondly, section 25(2)(b) requires that just and equitable compensation must be paid. If these requirements are not satisfied, the limitation should be tested under section 36 of the Constitution.³⁸¹

6.4.4.2.1 Public purpose or public interest

For an expropriation to be valid it must be shown to serve a public purpose or that it is in the public interest. The public interest referred to in section 25(4)(a), is defined specifically to include the nation's commitment to land reform and reforms to bring about equitable access to all South Africa's natural resources. Section 3 of the MPRDA states that mineral and petroleum resources are the common heritage of all the people of South Africa, and the state is the custodian thereof for the benefit of all South Africans. The MPRDA is therefore primarily a transformative law aimed at promoting access to minerals and opportunities for previously disadvantaged people for the benefit of all South Africans.

³⁷⁹ Mostert *Mineral Law* 121. See also *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA).

³⁸⁰ Expropriation of property in South Africa can only occur if it is allowed by a statutory provision, see *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) 258.

³⁸¹ See Mostert *Mineral Law* 119.

Through the MPRDA, the legislature seeks to improve access to minerals through state-imposed regulation. The limitations can be seen to have been necessary given that under the previous dispensation minerals vested in the owners of land which often resulted in those who sought to exploit minerals being unable to obtain access to them from unwilling landowners. By changing the law, mining has become more accessible to those with mining aspirations, ultimately benefiting the national economy and the nation as a whole.

The rationale provided for limiting the landowner's rights, therefore, constitutes a legitimate and compelling government purpose as referred to in the *Mkontwana*³⁸² decision. Constitutionally acknowledged objectives such as the redistribution of minerals, or the promotion of equitable access to the nation's mineral and petroleum resources, satisfy the requirement of regulation in the interest of the greater good.³⁸³

While the MPRDA seeks to justify the limitation of a landowner's rights based on the promotion of equitable access to mineral resources, one should also be mindful that not exploiting the minerals in the particular land, would not necessarily be contrary to the public interest.³⁸⁴ In some cases the benefits of other land uses can outweigh the benefits of mining. Where, for example, the prospects of finding lucrative resources are weak, but the land is high-grade agricultural land, or is strategically located for the development of affordable housing in an area with a

³⁸² *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 (2) BCLR 150 (CC).

³⁸³ Mostert and Pope (eds) *Principles of the Law of Property* 126, 127 refer to section 25(8) of the Constitution which provides that no section of the property clause may prohibit the state from taking legislative and other measures to achieve land, water and related reform, in order to address past racial discrimination. They therefore express the view that measures aimed at transforming land, water and minerals reform (through measures such as the MPRDA) would be considered to be in the public interest.

³⁸⁴ *Agri South Africa v Minister of Minerals and Energy* (Amicus curiae: Centre for Applied Legal Studies) 2012 (1) SA 171 (GNP).

housing shortage, the public interest may possibly best be served by not allowing mining.

6.4.4.2.2 Compensation

An expropriation, in accordance with section 25(2)(b), will only be valid if the legislative provision by which it is effected provides for compensation to be paid to the party suffering the limitation of his property interests.³⁸⁵ Item 12(2) of Schedule II of the transitional provisions of the MPRDA, provides that any person who can prove that his or her property has been expropriated, can claim compensation from the state.³⁸⁶ This will, however, be possible only if the landowner can prove the extent and nature of the actual loss and damage he has suffered.

In terms of section 25(2), the amount, time and the manner of payment has to be agreed upon by those affected or has to be determined by a competent court. To meet constitutional muster, the amount, time and manner of payment must further be reasonable, fair and proportionate in balancing the public interest with the interests of the party whose property has been expropriated.³⁸⁷ Section 25(3) provides guidance on how these interests should be balanced. It provides that the relevant circumstances and factors such as the current use of the property, the history of its acquisition and use, the market value, the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and the purpose of the expropriation must all be taken into consideration.

³⁸⁵ Section 25(2) of the Constitution provides that property may only be expropriated upon the payment of compensation.

³⁸⁶ See 6.4.1 above.

³⁸⁷ See Mostert and Pope (eds) *Principles of the Law of Property* 127.

6.4.4.2.3 Appropriation of rights or interests by state

The difference between a deprivation and expropriation in the circumstances, is that a deprivation legitimately restricts the owner's use and enjoyment of property for the public good without taking the property away, while in cases of expropriation the owner of land will no longer be able to use and enjoy the property itself, as it has been taken away for some public use. Stated differently, expropriation, in this case, could mean the loss of property for the benefit of extracting the country's mineral wealth. Van der Walt and Pienaar³⁸⁸ state that all state interference in private property should be seen as deprivations, while deprivations in terms of which the property of a person is actually acquired for state use, public use or another use that serves a public purpose or in the public interest, should be seen as expropriation. The authors sum the difference up as follows:

Deprivations include all legitimate state interferences with private rights in property in terms of section 25(1). Deprivations which do not amount to expropriations do not require compensation, but they must comply with the proper legal procedures and they may not be arbitrary. Expropriations include only those deprivations that amount to expropriations or forced sale of the property for public purposes in terms of section 25(2). Expropriations must be accompanied by compensation as prescribed by section 25(3).

Generally, an expropriation takes place where a person is deprived of his property or rights in property, without his permission, and the rights so deprived are appropriated by the state. An expropriation, therefore, not only requires a so-called 'taking of rights', but also requires that the rights so taken must be appropriated by the state.³⁸⁹

The court in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*,³⁹⁰ confirmed that expropriations refer to instances where the state, without the consent of the landowner, acquires that property or transfers

³⁸⁸ Van der Walt and Pienaar *Introduction to the Law of Property* 313.

³⁸⁹ See Van der Schyff *Constructive appropriation* 317.

³⁹⁰ 2002 (1) BCLR 23 (T) 30.

it to a third party. It is, however, not clear from this judgment whether the same would apply when rights in respect property -- and not the property itself -- are transferred to another. Usually only ownership of land entitles the owner to use the land or to give others rights in respect thereof.³⁹¹

Nkabinde J in the *Reflect-All*³⁹² judgment, cautioned against the extension of the meaning of expropriation to situations where the deprivation does not have the effect of the property being acquired by the state. Where state regulation deprives a landowner of his use and enjoyment, these entitlements are, however, not appropriated by the state. The state statutorily acquires custody and administration of the minerals and decides whether or not anyone will be allowed to extract minerals on or under the owner's property. Landowners, therefore, no longer enjoy this entitlement – they have lost it in favour of the state.

According to Hartzenberg J in *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy*,³⁹³ not all the rights in property have to be transferred; it would be sufficient if the expropriatee has been deprived of some of his rights to the property, and the expropriator has derived some benefit from the property. Du Plessis J in the court *a quo* decision in *Agri South Africa*³⁹⁴ expressed the view that the state, acting through the Minister, was vested with the power to grant rights with substantially the same content as the rights that the holders enjoyed before the MPRDA was introduced. What the landowner lost in this regard, the state has now acquired. Du Plessis J further stated that the physical taking of property is not required, as it will suffice if there has been

³⁹¹ The old adage, *nemo plus ius ad alium transferre potest quam ipse habet* (no one can transfer more rights to another than he himself has) as formulated by Ulpian (*Digest* 50.17.54). See *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 2011 (2) SA 508 (SCA) para 26.

³⁹² *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC).

³⁹³ 2010 (1) SA 104 (GNP) 13.

³⁹⁴ *Agri South Africa v Minister of Minerals and Energy* (Amicus curiae: Centre for Applied Legal Studies) 2012 (1) SA 171 (GNP) 42

interference in one or more of the entitlements of ownership.³⁹⁵ In the Constitutional Court,³⁹⁶ Mogoeng CJ added that to prove expropriation a claimant must establish that the state has acquired the substance or core content of that taken from the landowner. In other words, the rights acquired by the state need not be exactly the same as the rights that were lost. There would, however, have to be sufficient congruence or substantial similarity between what was lost and what was acquired.

Van Der Schyff³⁹⁷ argues that if the loss by the aggrieved party is accompanied by a form of appropriation by the state, compensation falls due, irrespective of whether the proper expropriation procedures have been set in motion; and the right or interest acquired need not necessarily be the same as the right or interest lost.

Based on the discussion above, interference in a landowner's use and enjoyment appears to constitute a regulatory deprivation of property. On a narrow interpretation, it would not constitute an expropriation as there can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.³⁹⁸ In *Agri SA*,³⁹⁹ Cameron J cautions against too narrow an interpretation of state acquisition as a requirement for expropriation, as it is inadvisable to extrapolate an inflexible general rule of state acquisition as a requirement in all cases. Mogoeng CJ, also in *Agri SA*,⁴⁰⁰ acknowledged that a one-size-fits-all determination of what acquisition entails, is not only elusive, but also inappropriate, particularly when an alleged expropriation of incorporeal rights is concerned. According to Mogoeng CJ, a case-by-case determination of

³⁹⁵ *Agri South Africa v Minister of Minerals and Energy* (Amicus curiae: Centre for Applied Legal Studies) 2012 (1) SA 171 (GNP) para 65

³⁹⁶ *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC)

³⁹⁷ Van der Schyff *Constructive appropriation* 314.

³⁹⁸ See *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 59.

³⁹⁹ *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 78.

⁴⁰⁰ *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 64.

whether acquisition has in fact taken place, presents itself as a more appropriate way of dealing with these matters. Mogoeng CJ in *Agri SA*⁴⁰¹ concludes:

[I]t would, however, be inappropriate to decide definitively, that expropriation is in terms of the MPRDA incapable of ever being established. Like the Supreme Court of Appeal, I accept that a case could be properly pleaded and argued, to demonstrate that expropriation did take place.

Including appropriation by the state as a requirement for expropriation, excludes a claim for compensation in all cases falling short of state acquisition, and allows state actions that destroy or extinguish rights.⁴⁰² The latter result highlights the need for the expansion of the concept of expropriation to recognise that regulatory action of the state can in some instances lead to an expropriation of private property interests.

Our law is not static, and in the constitutional era often requires further development to ensure equal treatment under the law. Van der Walt MM⁴⁰³ explains that in situations where the requirements of section 25(1) have been satisfied, some cases may warrant the opportunity to argue that the deprivation is so unreasonably disproportionate or unfair, that it amounts to an expropriation that requires compensation, even though it was intended and set up as a regulatory deprivation and not an expropriation.⁴⁰⁴

⁴⁰¹ 2013 (4) SA 1 (CC) para 75.

⁴⁰² See Van der Schyff *Constructive appropriation* 307.

⁴⁰³ *Beneficial Use* 157.

⁴⁰⁴ Van der Walt MM *Beneficial Use* 157 points out that there are divergent views on the matter. There are those who believe that a regulation which has a disproportionately burdensome effect on the individual should be attacked for constitutional validity, either in order to bring the regulation in line with the Constitution, or to declare it invalid, but not to found a claim for compensation. Then there are those who argue that compensation might be a way in which a balance between an individual's interest in property and the state's interest in acquiring it may be achieved.

As I explain below, there are circumstances in which excessive state regulation effectively destroys private property interests without an accompanying acquisition by the state, making it attractive to import the concept of *de facto* or constructive expropriation which is recognised by other legal systems.⁴⁰⁵

6.4.5 CONSTRUCTIVE EXPROPRIATION

The doctrine of constructive expropriation, often referred to as “*de facto* expropriation,” “regulatory expropriation”, or “inverse condemnation” becomes relevant where regulatory interference by the state in a landowner’s rights in property is so severe that it deprives him of the ability to exercise any or substantive portions of his entitlements.⁴⁰⁶ The doctrine, according to Mostert,⁴⁰⁷ is used in instances where the infringements were clearly not intended to be expropriatory, but nevertheless have the same effect. This is the position where private property interests are effectively destroyed or extinguished⁴⁰⁸ by state regulation without the state necessarily appropriating the property and under circumstances which cannot be justified on the basis of the state’s police power.

Application of the doctrine is especially attractive where individuals seek protection against excessive regulation of property by the state which is claimed to be for the public good. The doctrine of constructive expropriation has, however, not officially been accepted as part of South African law.⁴⁰⁹ This is mainly due to concerns that

⁴⁰⁵ The doctrine of *de facto* expropriation, also sometimes referred to as constructive or statutory expropriation, is recognised in countries such as the United States of America, Canada and Germany.

⁴⁰⁶ Van der Walt MM *Beneficial Use* 155. According to Van der Walt the doctrine can also be applied in circumstances where rights are simply extinguished.

⁴⁰⁷ *Mineral Law: Principles and Policies* 124.

⁴⁰⁸ Van der Schyff *Constructive appropriation* 310 refers to the long standing debate whether regulatory action, in some circumstances, can amount to expropriation of private property interests where the property is extinguished by regulatory control measures.

⁴⁰⁹ See *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA); Van der Schyff *Constructive appropriation* 310; Van der Walt AJ “Moving towards recognition of constructive expropriation” 2002 (65) *THRHR* 459-473, 469; Freedman W “The constitutional protection of

adoption of this doctrine in South African law will hinder land reform objectives and undermine legal certainty.⁴¹⁰ In *Steinberg v South Peninsula Municipality*⁴¹¹ the Supreme Court of Appeal nonetheless conceded that there may be room for the development of the doctrine in South Africa, but did not pursue the matter further. The Supreme Court of Appeal in *Agri*⁴¹² remarked that other jurisdictions have developed doctrines of constructive expropriation or inverse condemnation to deal with the effect that regulatory measures, such as planning regulations, may have on existing property rights. The court cited the *Steinberg*⁴¹³ and *Reflect-All*⁴¹⁴ decisions, but as it had not been asked to develop this doctrine in case before it, the matter was not pursued. In his concluding remarks Wallis JA interestingly notes the following:

[This] judgment does not exclude the possibility that the MPRDA may have effected an expropriation of certain rights that existed under the previous dispensation, but holds that whether it did so depends not on any general expropriation of mineral rights, but on the facts of a particular case. Nor does it decide that the effect of a broadly regulatory statute cannot be to effect an expropriation, but leaves that open for the future. In fact, the judgment is not concerned with the regulatory impact of the MPRDA as opposed to its substantive treatment of the right to mine.

The Constitutional Court in *Agri South Africa v Minister of Minerals and Energy*⁴¹⁵ also opened the door for the development of the doctrine by noting that regulatory expropriation should under certain circumstances be possible in South African jurisprudence.⁴¹⁶ Froneman J, in the minority judgment, stated that there is no

property, the conservation of the environment, and the doctrine of constructive expropriation" 2002 (9) SAJELP 61 – 71; and Van der Walt AJ and Marais EJ "Eiendomsverlies deur verkrygende verjaring: Onteining sonder vergoeding of nie?" (2012) *LITNET* University of Stellenbosch 308.

⁴¹⁰ See *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA).

⁴¹¹ 2001 (4) SA 1243 (SCA) para 8.

⁴¹² *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) para 15.

⁴¹³ *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA).

⁴¹⁴ *Reflect-All 1025 CC v MEC for Public Transport, Gauteng* 2009 (6) SA 391 (CC).

⁴¹⁵ 2013 (4) SA 1 (CC).

⁴¹⁶ Mogoeng CJ in *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) conceded that it would be inappropriate to decide definitely that expropriation in terms of the

binding precedent of the Constitutional Court addressing the kind of institutional change of the legal dispensation which is at stake under the MPRDA. He indicated that if the letting-go of the formal deprivation or expropriation analysis is too difficult to stomach, the same result may be achieved in a different manner, as experience in other jurisdictions has shown. Froneman J, also making reference to the *Reflect-All*⁴¹⁷ judgment in passing, further noted that foreign jurisprudence recognises that expropriation may take place even if the dispossessed rights or property have not been acquired by the state.

The following references are of particular relevance for the possibility of applying the relevant principles in future:

Starrett Housing Corporation, Starrett Systems Inc, Starrett Housing International Inc v The Government of the Islamic Republic of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat (1983) 4 Iran-U.S.C.T.R. 122 where the court noted the following:

‘[I]t is recognised in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they may be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.’

MPRDA is incapable of ever being established. He accepted that a case could be properly pleaded and argued to demonstrate that expropriation did take place and that this avenue must be left open, particularly when regard is had to the express provision made for expropriation in item 12 of Schedule II to the MPRDA. Froneman J in the minority judgment expressed the view that the provision for compensation upon proof of expropriation, appears to acknowledge the possibility that the legislative balancing of competing interests might, in individual cases, not have met the required standard of justice and equity. He further noted that as Mogoeng CJ correctly pointed out in the main judgment, the pre-MPRDA mineral ownership also had non-exploitation value, meaning that a landowner could decide to sterilise the reserves which increased the value of his land. Based on this fact, he further noted that persons falling within this category (those who chose not to exploit the minerals) have the best chance of proving that the lack of “compensation in kind” under the MPRDA translates into compensable expropriation under item 12 of Schedule II to the MPRDA.

⁴¹⁷ *Reflect-All 1025 CC v MEC for Public Transport, Gauteng* 2009 (6) SA 391 (CC).

Compañía del Desarrollo de Santa Elena, S.A. v Republic of Costa Rica (2000) (ICSID Case No. ARB/96/1):

‘[P]roperty has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property.’

6.4.5.1 Excessive regulatory burden on individual

A comparative study of other legal systems shows that constructive expropriation is, in some instances, used as a measure to protect an individual from excessive state regulation.⁴¹⁸ State interference is often justified on the basis of the principle that every member of society needs to contribute towards the obligations of the community according to their means.⁴¹⁹ Mostert⁴²⁰ notes that in exercising its regulatory powers the state should aim to spread the burden evenly and fairly throughout society in a manner which will affect everyone relatively equally. When a landowner’s contribution to the community becomes excessive or unreasonably disproportionate to those of other members of society, compensation will be payable to the deprived individual.⁴²¹

Based on the doctrine of constructive expropriation, compensation can under certain circumstances be claimed for regulatory deprivations which are disproportionately excessive. Van der Walt MM⁴²² states that in situations where the requirement of section 25(1) is satisfied, some cases may warrant the opportunity to argue that the deprivation is so unreasonably disproportionate or unfair, that it also amounts to an expropriation for which compensation should be payable, even though it was intended and set up as a regulatory deprivation and not as an expropriation.

⁴¹⁸ See Mostert *Mineral Law* 124.

⁴¹⁹ Van der Schyff *Constructive appropriation* 308.

⁴²⁰ *Mineral Law: Principles and Policies* 123.

⁴²¹ Van der Walt MM *Beneficial Use* 148, 157.

⁴²² *Id* 157.

Ownership provides the most comprehensive entitlements one can possibly have in respect of one's land and includes the entitlement to use and enjoy the land to its fullest extent, within the parameters set by the law. When a mining right is granted by the state, this entitlement accruing to a landowner is seriously infringed, whilst substantial rights are granted to a third party -- the mining right holder. By granting a mining right the state gains an economic interest in the land in the form of state royalties. The state by virtue of the MPRDA, effectively grants rights in respect of property to another, but does not acquire the rights for itself.

As I explain above, when an applicant applies for a mining right in respect of land where the surface is owned by a private landowner, so long as the applicant complies with a minimum set of criteria, the Minister is obliged to grant him the right. The only ground upon which the landowner can possibly resist the granting of such a mining right, is on the basis that the granting of the mining right will result in irreparable environmental harm and have a significant negative impact on socio-economic development. When a mining right is granted by the state, the applicant becomes entitled to go upon such land and conduct mining and any mining-incidental activity which is reasonably required to extract the minerals. This cannot be done without, at least to some extent, causing damage to the land.⁴²³ Because of the serious impact coal mining has on the landowner, conflict between the parties is inevitable. Where this conflict cannot be resolved, the landowner's rights are outranked by the rights of the mining right holder.

In light of the significant inroads made in the landowner's normal use and enjoyment of the land surface, it is to be expected that the landowner will in some way be compensated for the inconvenience of having to allow mining on his land. According to Southalan,⁴²⁴ most jurisdictions around the globe afford compensation to landowners for their losses as a result of mining activities. In some jurisdictions the compensation for land lost to mining is identical to, or part

⁴²³ Brand JA in the *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA), noted that mining will of necessity involve damage to the land and a curtailment or even a deprivation of the rights of normal use normally enjoyed by the owner of land.

⁴²⁴ Southalan *Mining Law and Policy* 77.

of, the general procedure that exists for compulsory acquisition of land for public needs like transport or services.⁴²⁵ The general consensus is that compensation aims to place the injured party in the position he enjoyed before the commencement of mining on his land, and does not aim to afford the landowner greater compensation than that which he has lost. Compensation is generally paid only for damage suffered and not for loss of the use of his land. In Australia, landowners are compensated for reasonable expenses incurred to control damage to property, and even for inconvenience or hardship caused by mining.⁴²⁶

The fundamental difference between South Africa and many other jurisdictions, is that mining in the other jurisdictions cannot proceed without first having obtained the landowners' consent for mining on their land. In South Africa landowners do not have control over the issuing of mining rights by the state. This has however not always been the case. Under the previous mineral-law dispensation, landowners could debar others from gaining access to their land for mining by simply withholding their consent in the mineral cessions. Prior to the MPRDA, landowners could sever and sell their mineral rights to others, and where landowners wished to prevent disruptions of the surface of their land in order to pursue farming activities, they could simply refuse to give consent.⁴²⁷ This is no longer the case as the state is entitled in terms of the MPRDA to grant mining rights in respect of a landowner's land to another without requiring the consent of the landowner. It is therefore grossly unfair that section 54 of the MPRDA does not provide the landowner with a right to claim compensation. The MPRDA determines that the disputing parties must endeavour to reach agreement in respect of possible loss or damage. If the mining right holder and the landowner cannot resolve their differences regarding the payment of compensation, compensation must be determined by arbitration or by a competent court. If the Regional Manager, having considered the issues raised by the parties involved and the recommendation of the RMDEC, concludes that further negotiation may detrimentally affect the objects of the MPRDA, he may recommend to the Minister

⁴²⁵ Ibid.

⁴²⁶ See Chapter 7.

⁴²⁷ *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA).

that such land be expropriated for mining. If underground mining has taken place without any real impact on the surface of that land, it is questionable whether the landowner would succeed in claiming compensation based on prospective losses only.⁴²⁸

As I explain above, the landowner who due to the impact of mining activities cannot obtain the requisite approval for township establishment, is in practice prohibited from developing land for township purposes because of mining. The landowner cannot claim compensation if no damage has been caused to the land surface. Despite the fact that the mining right holder may be acting *bona fide* and reasonably in exercising his rights in a way that is least injurious to the rights of the surface owner, the fact remains that his actions will result in significant interference with the surface owner's entitlements and legitimate expectations. This raises the question of whether the landowner can claim for pure economic loss in delict. This topic merits further research, but falls beyond the scope of this study.

According to Van Der Schyff,⁴²⁹ any benefit falling to the state can be regarded as an expropriated interest. Where this appropriation has the effect of rendering property useless or extinguishing core elements of rights in relation to the property, the doctrine of constructive expropriation will, according to the author, justify the payment of compensation to the aggrieved party.

With regard to the possibility of claiming compensation for this unreasonably disproportionate infringement of a landowner's rights, it has been held that payment of compensation to an individual who has had unreasonably to shoulder a disproportionate burden as a result of state interference can be offered compensation to strike a balance between individual interest and regulatory

⁴²⁸ If the right of support is considered to be a natural entitlement of ownership, damage can only be claimed where the subsidence has caused damage.

⁴²⁹ 2007 (40) *CILSA* 319.

imposition.⁴³⁰ Compensation could in this light be used to restore the imbalance caused, rather than to declare an otherwise important act unconstitutional.

6.4.5.2 Disproportionate state regulation: arbitrary and therefore unconstitutional

Van der Walt MM⁴³¹ cautions that the development of the doctrine of constructive expropriation should be approached with great apprehension because a deprivation which is grossly unreasonable and disproportionate may be struck down as arbitrary during the section 25(1) analysis. Boyd⁴³² appears to support this notion arguing that it is in conflict with the guarantee against arbitrary deprivation of property where the mining right holder is allowed to destroy the surface or make it impossible for the owner to exercise beneficial use of his land and his entitlements of ownership.

Where the burden on an individual is unreasonably disproportionate in relation to that of others in society, but where the regulation is necessary, a possible alternative viewpoint could be to question the constitutionality of the imposition on the individual in terms of the equality clause in section 9(1) of the Constitution. Section 9(1) provides that everyone has the right to equal protection and benefit of the law. Based on the equality clause, one should consider whether the MPRDA can be struck down based on procedural unfairness, inequality, excessiveness or uneven distribution of the common burden. In doing so, one must remain mindful that section 36 of the Constitution requires any limitation of a right to be reasonable and justifiable in an open and democratic society.⁴³³

⁴³⁰ Van der Walt MM *Beneficial Use* 157. The author states that compensation could be the mechanism through which the burden of expropriatees to enlist their property for the public good is shared by society as a whole.

⁴³¹ *Beneficial Use* 157.

⁴³² *Lateral and Subjacent Support* 156.

⁴³³ The provisions of ss 25 and 36 of the Constitution, according to Badenhorst, Pienaar and Mostert *The Law of Property* 96, must be applied conjunctively. A fundamental right may be limited only if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

If it can be proven that as a result of statutory regulation the state failed to give equal protection to every individual in protecting their individual property rights, the individual can have the relevant provision set aside based on its unconstitutionality and, in certain circumstances, he can even claim constitutional damages. Badenhorst, Pienaar and Mostert⁴³⁴ refer to this solution as financial equalisation. The authors mention that in certain circumstances neither legislation nor case law provides clear answers as to how the undue limitation of individual interest should be resolved. Courts in these cases have to devise ways to restore the balance caused by the individual's sacrifice for the public good. A possible solution could be to afford the landowner constitutional damages. This compensation should be aimed at restoring the extraordinary sacrifice of one or a few for the public good. German case law provides that in cases of particular hardship, the payment of compensation as a means of financially equalising the burden on the individual owner may be contemplated.⁴³⁵

In the South African decisions of *Modderklip Boerdery v President van die Republiek van Suid Afrika*⁴³⁶ and *President of the Republic of South Africa v Modderklip Boerdery*,⁴³⁷ the courts had to deal with a similar problem. The rights of an individual stood to be disproportionately infringed as a result of a land-grab. The individual exhausted all possible remedies, such as eviction notices, but the squatters refused to vacate the property. The state's failure to enforce the eviction order gave rise to a serious infringement of the landowner's property rights under section 25(1) of the Constitution. The state also breached its obligations in terms

⁴³⁴ *The Law of Property* 556.

⁴³⁵ See Mostert *Mineral Law* 152. She refers to a judgment of the German Federal Constitutional Court, the *Nassauskiesung* BVerfGE 58 decision, where the court applied a narrow interpretation of expropriation and held that harsh infringements can amount to expropriations and where landowners are expected to make big sacrifices for the sake of the public good, it must be tempered by equalisation measures such as paying compensation.

⁴³⁶ *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid Afrika* [2003] 1 ALL SA 465 (T).

⁴³⁷ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC)

of sections 26(1) and (2) of the Constitution read with section 25(5), to take reasonable steps within its available resources to provide adequate access to housing for those occupying the land. The court found this failure resulted in an unlawful expropriation of the landowner's property and also infringed its right to equality in terms of section 9(1) and (2) of the Constitution. The court ultimately resolved that considering the need to promote land reform, the squatters were allowed to remain on the premises, but the landowner was entitled to compensation, which was to be determined and calculated on the same basis as compensation for expropriation.

For a landowner to succeed with a claim for compensation based on constitutional damages, he must substantiate his claim based on the criteria set out in Item 12(2) of Schedule II of the MPRDA. This item has regard to factors such as the current use of the land, its market value, the nature and extent of the landowner's loss, and whether he can still use the property. Although mining activities may restrict the use of the land surface, they will not necessarily always lead to the inability of a landowner to use his land. This will have to be taken into account when a claim for compensation is considered.

6.4.6 RELEVANCE OF EXPROPRIATION TO LANDOWNER

Compensation is paid for state interference in private property only if the interference amounts to expropriation.⁴³⁸ State interference will only in exceptionally amount to expropriation, as every society requires reasonable regulation of property to ensure the peaceful exercise of property rights.⁴³⁹ This implies that the state will, in some cases, for example, be allowed to limit or interfere in property rights for the sake of promoting or maintaining peace and civil order, without being obliged to compensate the landowner.⁴⁴⁰ While regulation is to a certain extent necessary, if such regulation oversteps the boundaries of

⁴³⁸ Van der Walt and Pienaar *Introduction to the Law of Property* 315.

⁴³⁹ *Id* 307.

⁴⁴⁰ See *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA).

reasonableness, our law should be developed to provide that where the burden on an individual is excessively disproportionate, it amounts to an expropriation.⁴⁴¹

Excessive regulatory interference limits economic growth and acts as a disincentive to investment. It is therefore extremely important to maintain a proper balance between allowing landowners to exercise their rights freely, and the state to interfere with these rights. The Supreme Court of the United States of America and the Federal Court of Germany have recognised the unfairness of the state placing the burden which society as a whole should bear, on the shoulders of any individual. Should a person be burdened in this way, the imbalance can be restored by affording the party whose entitlements have been infringed, compensation.⁴⁴²

6.5 CONCLUSION

A landowner's entitlement of use and enjoyment of his property is recognised in private law as an incident of ownership. It can be regarded as property for the purposes of the constitutional analysis of section 25 of the Constitution. Seeing that our courts regard expropriation as a subset of deprivation, the requirements of section 25(1) must first be met before considering whether the deprivation also amounts to an expropriation for which compensation can be claimed. In terms of section 25(1), the deprivation of property rights must be authorised by a law of general application and must be procedurally fair. It must accordingly be shown that there is sufficient justification for the far-reaching inroads into an individual's

⁴⁴¹ The court in *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) referred to a decision by the Supreme Court of the United States of America, *Pennsylvania Coal Co v Mahon* 260 US 393 415 (1922), where it was stated that the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be regarded as a taking.

⁴⁴² The court in *Penn Central Transportation Co v New York City* 438 US 104, 123-4 (1978) stated that the Fifth Amendment's guarantee is designed to bar government from forcing some people to bear public burdens alone which, in all fairness and justice, should be borne by the public as a whole. Mostert *Mineral Law* 152 also refers to the German decision of *Nassaukiesung* where recognition for compensation in exceptional circumstances was given.

private property rights and that there is a proportional balance between the sacrifice an individual has to bear on the one hand, and the public interest the limitation aims to serve, on the other.

The limitation of a landowner's ownership entitlements is sanctioned by a law of general application, the MPRDA. The limitations flow from the state regulating property rights for a legitimate, constitutionally acknowledged public purpose, namely, social reform of the mining industry. The infringement, if viewed in isolation, would not be arbitrary as there is a legitimate and rational connection between the interference in private property rights and the public purpose it aims to serve.

If the limitation is allowed by a law of general application; is not arbitrary; and is procedurally fair, one must consider whether the deprivation amounts to an expropriation as envisaged in section 25(2) and, if so, whether the deprivation complies with the requirements of section 25(a) and 25(b). These sections require that an expropriation must be for a public purpose and must involve payment of compensation. The final question is whether the expropriation can be justified in terms of the provisions of section 36.

Applying the criteria set out in section 25 strictly, it appears that the interference by a mining right holder in the entitlement of a landowner to use and enjoy his property, amounts to a constitutionally permitted deprivation and not an expropriation. Our courts have, however, recognised that in some cases the deprivation is so unreasonably disproportionate or unfair that it amounts to an expropriation which requires compensation, even though it was intended and set up as a regulatory deprivation and not an expropriation.

Viewed from the perspective of the landowner who has to shoulder the burden of the regulatory action for the benefit of the nation, the infringement in the circumstances seems overly harsh. The constitutional principle that every citizen of South Africa should enjoy equal treatment before the law enters the picture. No law should unfairly single out any individual to bear a burden which should be

spread evenly and fairly throughout society. Where state regulation becomes excessive and the burden placed on an individual is excessively disproportional, the infringement may result in an expropriation despite the fact that the deprivation was never intended to amount to an expropriation. Even in cases where the rights that are taken away are not appropriated by the state, but where the state derives some sort of benefit, albeit indirectly, or the deprived right is transferred to another, it can still amount to a form of *de facto* or constructive expropriation, compelling the payment of compensation in accordance with section 25(3).⁴⁴³

A deprivation does not rise to the level of an expropriation where, despite such a limitation, the landowner is still able to exercise most of his ownership entitlements. A deprivation amounts to expropriation of property where the limitation is so severe that a landowner is unable to exercise his ownership entitlements or utilise most of his land. It is suggested that where the use and enjoyment of a portion of a landowner's land is so severely infringed upon that he does not have the full use and enjoyment of his land, the doctrine of constructive expropriation should possibly apply in respect of the affected portion. He should then be compensated.

In instances where the requirements of section 25(1) are not met because the deprivation is arbitrary, the infringement can be invalidated as unconstitutional, unless it can be justified under section 36 of the Constitution.

⁴⁴³ See *Steinberg v South Peninsula Municipality* 2001 (4) SA1243 (SCA); *Reflect-All 1025 CC v MEC for Public Transport, Gauteng* 2009 (6) SA 391 (CC); and *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA).

CHAPTER 7

COMPARATIVE OVERVIEW

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7.1 INTRODUCTION

Despite growing global concern over the environmental impact of the use of fossil fuels, coal currently still provides approximately 40 percent of the world's electricity needs, and is the second source of primary energy in the world after oil.⁴⁴⁴

⁴⁴⁴ International Energy Agency *Key World Energy Statistics Report 2013* <http://www.iea.org> (Date of use: 17 December 2013).

The People's Republic of China remains the world's largest coal-producing country, followed by the United States of America, India, Indonesia and Australia.⁴⁴⁵ China annually produces more coal than the United States, India, Indonesia, Australia, Russia and South Africa combined. South Africa currently ranks only seventh on the above list.

As South Africa produces only a fraction of the coal produced in other jurisdictions, it may be beneficial to consider whether the laws of some of these jurisdictions present helpful solutions or guidelines to deal with the potential conflict between mining right holders and landowners. The information may prove valuable in the development of a more satisfactory local system. In the section to follow a very brief overview will be provided of how the conflict is regulated in the People's Republic of China, some states in Australia and the United States of America, India, Germany and Swaziland.

7.2 PEOPLE'S REPUBLIC OF CHINA

Although the People's Republic of China is by far the largest coal producing country globally, as a socialist country, its laws differ fundamentally from those of South Africa. In terms of article 9 of the Constitution of the People's Republic of China⁴⁴⁶ all mineral resources are owned by the state. Article 10 provides that land in the cities also belongs to the state. Article 10 further provides that land in rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law. House sites and privately farmed

⁴⁴⁵ International Energy Agency *Key World Energy Statistics Report* 2013 <http://www.iea.org> (Date of use: 17 December 2013).

⁴⁴⁶ Adopted at the Fifth Session of the Fifth National People's Congress and promulgated for implementation by the Proclamation of the National People's Congress on December 4, 1982, and amended in accordance with the amendments to the Constitution of the People's Republic of China adopted at the First Session of the Seventh National People's Congress on April 12, 1988, at the First Session of the Eighth National People's Congress on March 29, 1993, at the Second Session of the Ninth National People's Congress on March 15, 1999, and at the Second Session of the 10th National People's Congress on March 14, 2004.

plots of cropland and hilly land, are furthermore owned by collectives.⁴⁴⁷ In China land users obtain land-use rights, but cannot own land or resources below the land. As the state owns the land, expropriation only is the withdrawal of land-use rights for the good of the public interest.⁴⁴⁸ If land is required for the “public interest”,⁴⁴⁹ the land-use holder is entitled to compensation.⁴⁵⁰ This compensation, however, is not paid in respect of the loss of the holder’s land-use rights, but rather for the private property he has lost. The compensation is usually based on relocation or replacement cost. Despite the fact that the regulation of mining differs substantially from the South African model, there are some interesting provisions worth considering.

The Land Administration Law⁴⁵¹ requires all government bodies at all levels to formulate land plans so that cultivated land is not converted to other uses without proper approval and justification. Article 4 requires the state to apply a system of control over the purposes for land-use. In accordance with this directive, the state formulates overall plans for land utilisation and defines the purpose for which land is to be used. Land is classified into land for agriculture, for construction and unused land. Special protection is afforded to cultivated land, and the conversion of land from agricultural use to “land for construction” will only be allowed under strict conditions. “Land for construction” is defined in article 4 to mean land for constructing buildings and other structures, including land for housing in urban and rural areas, for public utilities, for factories and mines, for communications and water conservancy, for tourism and for military installations. Unused land means land other than land for agriculture and construction.

⁴⁴⁷ See http://www.english.gov.cn/2005-08/05/content_20813.htm (Date of use 6 July 2014).

⁴⁴⁸ See a 58 of the Land Administration Law 2004.

⁴⁴⁹ This would be the case if the land is required for the public benefit, for example, to build roads, power-lines or to establish a mining operation.

⁴⁵⁰ See a 46 of the Land Administration Law 2004.

⁴⁵¹ 1987.

Coal mining in China is mainly regulated by the Mineral Resources Law of the People's Republic of China.⁴⁵² In terms of article 3 of this Law, all mineral resources belong to the state and such ownership is exercised by the State Council. Article 3 further provides that seizing or damaging mineral resources by any means and by any organisation or individual is prohibited. With regard to the exploration and development of mineral resources, the state applies the principles of unified planning, rational geographical distribution, multi-purpose exploration, rational mining and multi-purpose utilisation.⁴⁵³

Article 20 provides that unless approved by the competent departments authorised by the State Council, no one may mine mineral resources in the following places:

- i) within delimited areas of harbours, airports and national defence projects or installations;
- ii) within a certain distance from important industrial districts, large-scale water conservancy works, or municipal engineering installation of cities and towns;
- iii) within certain limits on both sides of railways and important highways;
- iv) within certain limits on both sides of important rivers and embankments;
- v) nature reserves and important scenic spots designated by the state, major sites of immovable historical relics and places of historical interest and scenic beauty that are under state protection; and
- vi) other areas where mineral mining is prohibited by the state.

The position in the People's Republic of China where a person only obtains a land-use right from the state differs significantly from the position of a landowner in South Africa. Most notably, conflict is minimised as the state retains the power to withdraw a person's land-use rights, if it requires the land for mining.

⁴⁵² The Minerals Resources Law of the People's Republic of China was adopted on 19 March 1986 and was subsequently amended on 29 August 1996. See also <http://www.china.org.cn> (Date of use: 17 December 2013).

⁴⁵³ Article 7 of the Mineral Resources Law of the People's Republic of China.

7.3 AUSTRALIA

Ownership of all Australia's coal is vested in the Crown.⁴⁵⁴ The different states and territories in Australia all have their own laws governing how mining of minerals takes place.⁴⁵⁵ I refer here briefly to how underground coal mining is regulated in those jurisdictions well-known for coal-mining activities.

7.3.1 NEW SOUTH WALES

The main piece of legislation regulating mining in New South Wales is the Mining Act 29 of 1992. In terms of this Act any person who wishes to extract minerals needs to lodge an application for a mining lease with the Director-General of the Department of Mineral Resources. Similar to the position in South Africa, mining is not allowed in respect of certain areas unless specific approval has been obtained. In terms of the provisions of section 62 of the Mining Act a mining lease may not be granted over the surface of any land within 200 metres of a dwelling house that is the principal place of residence of the person occupying it, or within 50 metres of a garden, or over the surface of any land with significant improvements, unless with the written consent of the owner of the dwelling house, garden, or improvement, and in the case of the dwelling house, the occupant thereof. In terms of section 62(7) a mining lease may not be granted over land described above except at such depths and subject to such conditions as the Minister considers sufficient to minimise damage to the surface. No mining lease may, therefore, be granted in respect of the areas mentioned unless the landowner consents and the Minister is satisfied that the mining activities will not

⁴⁵⁴ Section 5 of the Coal Acquisition Act 109 of 1981. See also Hunt MW *Mining Law in Western Australia* 4th ed (The Federation Press 2009) 1 36.

⁴⁵⁵ The various states and territories each adopted its own statute such as the Mining Act of 1992 in New South Wales; the Mineral Resources Act of 1989 in Queensland; the Mining Act of 1971 in South Australia; the Mining Act of 1978 in Western Australia; the Mining Act of 1980 in the Northern Territories; the Mineral Resources Development Act of 1995 in Tasmania and the Mineral Resources Development Act of 1990 in Victoria. See also Hunt *Mining Law in Western Australia* 10 for a general discussion of Australian mineral laws.

cause any damage to the residential dwelling, garden or significant improvements on the surface of the relevant land.⁴⁵⁶

As in South Africa, mine safety and mining-induced subsidence are regulated by the Chief Inspector of Mines who, based on prescribed standards, ensures that mining takes place in a responsible manner. It is interesting to note that the Mining Act is administered by the Minister for Industrial Relations who, after the owner of the relevant structure has been requested to investigate the building's structural integrity, may decide to restrict mining by requiring a mine operator to leave protective pillars.⁴⁵⁷ Permission from the Minister is required to conduct any method other than bord-and-pillar mining.⁴⁵⁸ Section 87 of the Coal Mine Health and Safety Act of 2002, which, as the name implies, specifically regulates safety at coal mines, requires that consideration be given to improvements and features on the surface of land.

The Mine Subsidence Compensation Act, 1961, regulates infrastructure development (improvements) on land where mining has been completed. In terms of this Act, the Governor is entitled to publish a notice in the *Government Gazette* proclaiming certain areas where the potential for ground movement is relatively high, as mine-subsidence districts. When buying a property in such a mine-subsidence district the deed of sale must be accompanied by a certificate which reflects that the property falls within such subsidence district. The certificate also assists landowners by providing subdivision, building and construction guidelines for property development in the affected areas. The Act does not aim to prevent subsidence from occurring, but rather focuses on ensuring damage is minimised by setting conditions for infrastructure development, and ensuring proper, well-coordinated planning of infrastructure development in subsidence areas in such a manner that it does not pose a high risk.

⁴⁵⁶ Section 62(7) bears striking resemblance to regulation 17 of the MHSa.

⁴⁵⁷ Van der Merwe *Subsidence Caused by High Extraction Coal Mining* (ch 3) 6.

⁴⁵⁸ See Figures 5 and 6 of the Appendix for an illustration of the bord-and-pillar mining method.

In these proclaimed subsidence districts improvements must be planned and constructed in such a way that the structures can withstand the expected degree of subsidence. The Act also seeks to protect available coal reserves from unwarranted interference by owners of land, because any person who intends to erect improvements within a mine-subsidence district, or wishes to subdivide such land, is obliged to apply to the Mine Subsidence Board for permission to do so. The Mine Subsidence Board is a service organisation established with the main aim of ensuring compatibility between surface development and underground mines. Members of the Mine Subsidence Board include the Director-General of the Department of Primary Industries, the Chief Inspector of Coal Mines, a representative from each of the following: the Department of Commerce; Colliery Proprietors; owners of improvements (ie the community); and local government or the department of planning. The Board is primarily responsible for reducing the risk of mine-subsidence damage to properties by assessing and controlling the types of buildings and improvements which can be erected in mine subsidence districts.⁴⁵⁹ The Mine Subsidence Board is also responsible for the elimination of public and private danger caused by mine subsidence and the provision of a comprehensive and accessible advisory and technical service to the general public. The Board has the power to stop any illegal construction from proceeding in mine-subsidence districts by issuing stop-work notices. Importantly, the Board is also responsible for administering the Mine Subsidence Compensation Act of 1961 which regulates how compensation is to be paid for the damage caused by mining subsidence. Successful claims for compensation as a result of mining subsidence are not paid by the mining lease holder, but by the Mine Subsidence Board from a fund which is built up from statutorily prescribed payments collected from mining companies based on the land value of their collieries. The merits of claims for damages and the amount of compensation payable are determined independently by the Board. This ensures an objective and consistent approach to such claims.

⁴⁵⁹ The Mine Subsidence Board can determine the nature or class of improvements which may be developed; prescribe height restrictions; prescribe the type of building material to be used; the use of control joints for articulation of larger improvements; place restrictions on the maximum length of masonry and concrete sections, as well as brickwork; and determine the method of construction.

When an application for structural development in subsidence districts is received by the Board, it may either grant unconditional consent, stipulate certain conditions, or, where the risk of damage as a result of subsidence is too great, refuse to grant approval. Unlike the position in South Africa where applicants are obliged to conduct the required risk evaluations themselves, to apply to the Chief Inspector of Mines for permission to build in mining areas and to identify and implement risk-mitigation measures, the Mine Subsidence Board plays a much more active role in the application process by initiating and undertaking rigorous evaluations which are conducted by in-house experts on the Board. The Board conducts site inspections, provides advice to landowners regarding construction specifications, prescribes building requirements and monitors the building process to ensure that the work is performed according to specification.

Of importance for this study, is the fact that mining below structures is allowed where special design and detailing techniques have been identified by the Mine Subsidence Board and have been agreed upon between the mining company and the affected landowner(s). The Board protects the landowner by ensuring that as far as practically possible, the mining does not impact on his activities. In cases where subsidence does occur, the Board prescribes how repairs should be done, compensation should be paid, or, in certain cases, that the structure or the land must be purchased by the mining lease holder. The Board not only assists landowners, but also mining lease holders in that anyone who wants to develop structures in subsidence districts can only do so with the prior written consent of the Board. Provided the mining lease holder has complied with the conditions prescribed by the Subsidence Board, the holder will be protected from claims for compensation, unless the damage was caused by the holder's negligence. Where a landowner erects surface structures in subsidence districts without obtaining the Subsidence Board's consent or where such structures are erected in breach of the conditions imposed on the development, no compensation may be claimed from the Subsidence Board.

Another control measure aimed at ensuring integrated spatial planning is contained in section 65 of the Mining Act, 1992, and which provides that a mining

lease may only be granted if approval has been obtained in terms of the Environmental Planning and Assessment Act 203 of 1979. Before a mining lease is granted, the Mining Minister must notify the Planning Minister and if the Planning Minister objects, for example in cases where the land is earmarked as a future township, the lease cannot be granted over the area unless the Premier approves.⁴⁶⁰ This ensures interaction between the affected state departments and promotes more coordinated planning. It further provides a platform for the state to resolve issues of conflicting land interests. Any application for the rezoning of land for residential purposes in a coal-mining area, must observe a Ministerial directive that such an application has to consider the effect this development may have on coal mining or the winning of extractive minerals. Consultation is therefore required with the mines department and if any conflict between township development and mining is identified, it is up to the Ministers of the two affected state departments to determine if townships or mining will be more important in the area, and to resolve the conflict.

7.3.2 QUEENSLAND

According to the World Coal Association,⁴⁶¹ Australia not only outranks South Africa in terms of coal production, but it is also the second largest coal exporter globally. Queensland claims to be the largest exporter of seaborne coal in the world.⁴⁶² Queensland is the most densely populated state in Australia. It is therefore interesting to consider how it manages to regulate the extraction of coal so as not to harm the interests of landowners.

Queensland is currently experiencing a resource boom through expansion of mining and coal-seam gas activities.⁴⁶³ Like South Africa, considerable

⁴⁶⁰ See s 121.

⁴⁶¹ See <http://www.worldcoal.org/resources/coal-statistics> (Date of use: 10 September 2014).

⁴⁶² See <http://mines.industry.qld.gov.au/mining/coal.htm> (Date of use: 10 September 2014).

⁴⁶³ See <http://www.law.uq.edu.au/documents/pro-bono-centre/publications/Research-note-comparative-study-landholders-rights-July-2012.pdf> (Date of use: 10 September 2014).

challenges are experienced with regard to land access as no *prima facie* right is afforded to landowners to deny mining tenement holders access to their land.

Although the Mineral Resources Act of 1989, which regulates the extraction of minerals in Queensland, requires negotiation with landowners, disputes are usually referred to the Land Court which generally tends to grant access for mining.⁴⁶⁴ To conduct preliminary activities, a mining tenement holder only needs to issue the landowner with a notice of entry ten days prior to commencement of any activities.⁴⁶⁵ Preliminary activities include those which have no or negligible impact on the landowner's business or land use. Such activities may include walking the area, taking soil samples, or surveying the mineral area. Landowners have a right of compensation and, before the mining tenement holder embarks on any advanced activities, it must negotiate a 'conduct and compensation' agreement with the landowner. The negotiation process must adhere to a specific mandatory process.⁴⁶⁶ Advanced activities are activities which will have a significant impact on the rights of a landowner for example drilling wells. If the negotiations related to the compensation agreement are unsuccessful, the matter can be referred to the Department of Employment, Economic Development and Innovation to be decided through mediation, or, if both parties agree, through a process of alternative dispute resolution.⁴⁶⁷ If this fails, the matter can be referred to a Land Court for determination.⁴⁶⁸ Interestingly, if the negotiations prove unsuccessful and the matter is brought to the Land Court, the Queensland legislation authorises the mining tenement holder to access the land and commence with advanced activities despite the fact that no conduct and compensation agreement has been negotiated. There is little doubt that landowners are placed in a position of inequity compared to the mineral lease holder. At first glance there seems to be no compelling incentive for mineral lease holders to take negotiations seriously as the legislation appears to afford the

⁴⁶⁴ See Part 5 s 16.

⁴⁶⁵ See s 32.

⁴⁶⁶ See Part 5 of the Mineral Resources Act.

⁴⁶⁷ See Sch 1 s 20.

⁴⁶⁸ See Part 6.

mineral lease holder access to the land irrespective of the outcome of the negotiations. If the conflict cannot be resolved through mediation or alternative dispute resolution, the mineral lease holder is allowed to access the land pending determination of compensation by the Land Court.

Landowners are, however, afforded a veto right in respect of certain areas. Section 3 of the Mineral Resources Act prohibits mining in protected areas such as national parks. Section 238 of the Act provides that a mining lease may be granted over the surface of land that was restricted land when the application for the lease was lodged, only if the owner of the land where the relevant permanent building or relevant feature is situated, consents in writing to the application. Once consent has been given by the landowner, it cannot be withdrawn. The Mineral Resources Act distinguishes between two types of restricted land. Category A restricted land is land within 100 metres laterally of a permanent building used mainly as accommodation, or for business purposes, or for community, sporting or recreational purposes, or as a place of worship. Category B restricted land is any land within 50 metres laterally of any stockyard, borehole or artesian well, dam, artificial water storage connected to a water supply, or cemetery or burial place.

The position with regard to compensation differs somewhat from the position in South Africa. Whereas landowners in South Africa are only entitled to compensation for actual damage caused in accordance with section 54 of the Mineral and Petroleum Resources Development Act, the Mineral Resources Act of 1989 entitles landowners to compensation for, *inter alia*, “deprivation of possession of the surface of the land; diminution in value of the land; diminution of the use made or that may be made of the land or any improvement on it; severance of any part of the land from other parts thereof or from other land of the owner; infringement of any surface rights of access and all loss or expense that arises as a consequence of the grant or renewal of the mining lease.”⁴⁶⁹ The grounds on which compensation can be claimed therefore extend much further

⁴⁶⁹ See s 281.

than actual damage and from a landowner's perspective provide far greater protection than that available in South Africa.

The resources industry in Queensland must comply with the Land Access Code of 2010⁴⁷⁰ which seeks to balance the interests of the agricultural and resource sectors by providing a best practice guideline on how to deal with issues related to land access. The Land Access Code does not afford landowners any rights *per se*, but rather provides guidance on how negotiations for land access should be conducted. If the mining lease holder acts in breach of the Land Access Code, the landowner can refer the matter to the Department of Employment, Economic Development and Innovation or to a Land Court for determination which may lead to a reduction in the lease area, imposition of new conditions on the mine, or a fine.

An interesting approach has been adopted by Queensland to protect agricultural land. Protection is granted at the mining tenement approval stage for land covered by the Strategic Cropping Land Act 47 of 2011. As the name suggests, the Act has been introduced to protect high-grade agricultural land in Queensland by preserving its productive capacity for future generations, and to manage development on such land.⁴⁷¹ Unless there are exceptional circumstances warranting a departure from the general principle, no permanent development will be allowed on land which has been classified as strategic in accordance with this Act.⁴⁷² If such exceptional circumstances exist, the Minister will have to be satisfied that carrying out the development is an overwhelmingly significant opportunity for the state and that the benefit outweighs the state's interest in protecting the strategic cropping land.

It is also interesting to note how spatial planning is coordinated. From reading the preamble to the Mineral Resources Act, 1989, it is already clear that Queensland

⁴⁷⁰ See <http://www.business.qld.gov.au/industry/csg-Ing-industry/csg-Ing-information-landholders/csg-land-access-laws> (Date of use: 10 September 2014).

⁴⁷¹ See s 3.

⁴⁷² See s 4(3).

aims to ensure that mineral resources are used to the maximum extent practicable, but only if this is consistent with sound economic and land-use management practices. The principle objectives of the Act include minimising land use conflict with respect to prospecting, exploring and mining,⁴⁷³ encouraging environmental responsibility⁴⁷⁴ and responsible land-care management.⁴⁷⁵

To ensure more coordinated and better integrated planning, the Mineral Resources Act, 1989 provides that whenever a mining lease is granted, the Chief Executive of the planning department of the relevant municipality, must be informed of such fact by the mine tenement holder to enable the Chief Executive to make a note on the local government's planning scheme.⁴⁷⁶ This ensures local government has up to date knowledge of the granting of any mining lease, any renewal application, or the lapsing of such lease.

7.3.3 WESTERN AUSTRALIA

In Western Australia the position is similar to that of New South Wales and Queensland, but there are a few interesting variances to which I briefly refer. Protection is afforded to private landowners by excluding certain Crown Land from mining activities.⁴⁷⁷ Western Australian legislation provides a much broader list of exemptions which includes land under cultivation which includes land used for agricultural purposes such as crops or pastures. No mining may take place within 100 metres of such an area. The exemptions further include land situated within 100 metres of any yard, stockyard, garden, cultivated field, orchard, vineyard, plantation, airstrip or airfield; or which is situated within 100 metres of any land that is in actual occupation and on which a house or other substantial building is erected. Mining in these areas is prohibited unless the consent of the occupier

⁴⁷³ Section 2(c) of the Mineral Resources Act of 1989.

⁴⁷⁴ Section 2(d).

⁴⁷⁵ Section 2(g).

⁴⁷⁶ The Chief Executive means the chief executive of the department in which the Sustainable Planning Act of 2009 is administered. See s 319A of the Mineral Resources Act of 1989.

⁴⁷⁷ See s 20(5) of the Mining Act of 1978.

has specifically been obtained, or the warden⁴⁷⁸ by order directs otherwise, or the mining activity is confined to take place below 30 metres from the surface. In the event that the mining activities will be confined to depths below 30 metres from the surface, at least fourteen days written notice must be given to the occupier. The Warden may not make an order allowing mining in such prohibited areas unless an agreement has been reached between the mining company and the occupier with regard to compensation for all loss or damage suffered, or likely to be suffered by the occupier during the course of the mining activities. The compensation will either be determined by agreement between the mining company and the occupier, or will be determined by the Warden's Court.⁴⁷⁹

Section 25(1) read with section 25(3A) and 25(3B) of the Mining Act of 1978, provides that mining on land which is reserved for or constituted as a town site will only be allowed if approval has been obtained from the Minister of Mineral Resources -- the Minister responsible for land administration and the local government in whose district the land is situated.

On private land no mining tenement may be granted in respect of land on which a substantial improvement has been erected, without the written consent of the owner and occupier.⁴⁸⁰ However, permission is not required where mining will take place not less than 30 metres below the lowest point of the natural surface and where subsurface rights have been obtained. Section 35 of the Mining Act of 1978 provides that the holder of a mining tenement is not entitled to commence mining on the natural surface, or within a depth of 30 metres from the lowest part of the natural surface of any private land, unless he has paid or tendered to the owner and occupier a predetermined amount as compensation.

⁴⁷⁸ The Warden's Court is established in accordance with the provisions of the Mining Act 1978 and its jurisdiction extends throughout Western Australia. Any person holding office as a Stipendiary Magistrate may be appointed as a Warden and can preside in a Warden's Court. A Warden's Court has jurisdiction to hear and determine all actions, suits and other proceedings recognised by any court of civil jurisdiction as set out in s 132 of the Act.

⁴⁷⁹ Section 20(5b) of the Mining Act of 1978.

⁴⁸⁰ See s 29 of the Mining Act of 1978.

Underground mining below structures in Western Australia will, therefore, not be allowed until the consent of the landowner and occupier has been obtained and agreement has been reached in respect of how much the landowner will be compensated for the impact on his land. Mining will not be conducted below town sites unless the Ministers of Mineral Resources and Land Administration have both consented. Section 29(2) requires consent to the granting of a mining tenement from the owner or occupier of the private land concerned, which results in the miner and the owner or lawful occupier of private land having to negotiate compensation, which is often paid in sums of money based upon the amount of minerals won from the land.⁴⁸¹ This ensures that the compensation paid to the landowner is fair.

7.4 UNITED STATES OF AMERICA

7.4.1 FEDERAL LAW

In the United States of America the mining industry is regulated by various laws, but coal-mine subsidence was not regulated until 1977.⁴⁸² Since 1977 mining-induced subsidence has been regulated by the Federal Government of the United States in accordance with the provisions of a federal law, Public Law 95-87, which is referred to as the Surface Mining Control and Reclamation Act of 1977 (SMCRA).⁴⁸³ The Federal Government regulates mining-induced subsidence in accordance with the SMCRA, but leaves it to each individual state to adopt its own

⁴⁸¹ Hunt *Mining Law in Western Australia* 67 296. According to Hunt, in terms of s 29(2) of the Mining Act of 1978 the consent of the owner and occupier of land is required before a mining tenement may be granted in respect of certain land, including land used as a yard or garden, land under cultivation or land where improvements have been made.

⁴⁸² Illinois Department of Natural Resources <http://www.dnr.illinois.gov> (Date of use: 18 December 2013). See also Bauer RA *Planned coal mine subsidence in Illinois: A public information booklet* (2008) 9 <http://library.isgs.uiuc.edu/Pubs/pdfs/circulars/c573.pdf> (Date of use: 15 December 2013).

⁴⁸³ Surface Mining Control and Reclamation Act of 1977. See also <http://www.nma.org> (Date of use: 15 December 2013).

programme for implementation of the Act's provisions, including how subsidence should be managed.⁴⁸⁴

The SMCRA requires mine operators to adopt measures consistent with known technology: “i) to take precautionary action to prevent subsidence from causing material damage to the extent that it is technologically and economically feasible; ii) to maximise mine stability; and iii) to maintain the value and reasonable foreseeable future use of land.”⁴⁸⁵ These measures may include leaving adequate support, initiating controlled subsidence, or restoring the stability of the subsoil by backfilling. The focus of the Act appears to be more on the prevention of material damage than the prevention of subsidence *per se*. Despite having implemented precautionary measures, the mining company will remain responsible to repair the damage caused, whether this damage could have been foreseen or not. If the land cannot be repaired, restored or rehabilitated to its pre-subsidence condition, or the damaged object replaced, the structure must be purchased based on a market value transaction, taking into account the pre-subsidence value of the land. The land must be restored to a condition capable of supporting any structural and other foreseeable uses.⁴⁸⁶ The regulatory authorities are entitled to regulate or even prohibit mining underneath, *inter alia*, public buildings, urbanised areas, dams, and perennial streams or aquifers serving as major sources of water to public water systems.⁴⁸⁷

The Code of Federal Regulations of the United States of America,⁴⁸⁸ provides that the holder of a mining permit must adopt measures consistent with known technology that prevent subsidence from causing material damage to the extent that it is technologically and economically feasible.⁴⁸⁹ Mining permit holders are

⁴⁸⁴ Van der Merwe *Subsidence Caused by High Extraction Coal Mining* 145.

⁴⁸⁵ Bauer RA *Planned coal mine subsidence in Illinois* 9.

⁴⁸⁶ Van der Merwe *Subsidence Caused by High Extraction Coal Mining* ch 3 18.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ The Code of Federal Regulations or (CFR) contains codified rules and regulations published by the Federal Government of the United States. See Title 30, Ch VII, sub para K.

⁴⁸⁹ See Title 30, Ch VII, sub para K, s 817 of the CFR.

obliged to maintain the value and reasonably foreseeable use of surface lands or adopt mining technology that provides for planned subsidence in a predictable and controlled manner. Where the holder of the permit employs this technology, he must take necessary and prudent measures, consistent with the mining method employed, to minimise material damage to the extent that it is technologically and economically feasible. This would be the case with regard to mining activities underneath occupied residential dwellings and structures related thereto, unless the holder of the permit has the written consent of the owner of such structures, or unless the anticipated damage would constitute a threat to health and safety, or the costs of such measures exceed the anticipated costs of repair. The Code of Federal Regulations with regard to mining subsidence beneath infrastructure specifically provides:⁴⁹⁰

d) Underground mining activities shall not be conducted beneath or adjacent to (1) public buildings and facilities; (2) churches, schools, and hospitals; or (3) impoundments with a storage capacity of 20 acre-feet or more or bodies of water with a volume of 20 acre-feet or more, unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of, such features or facilities. If the regulatory authority determines that it is necessary in order to minimize the potential for material damage to the features or facilities described above or to any aquifer or body of water that serves as a significant water source for any public water supply system, it may limit the percentage of coal extracted under or adjacent thereto.

(e) If subsidence causes material damage to any of the features or facilities covered by paragraph (d) of this section, the regulatory authority may suspend mining under or adjacent to such features or facilities until the subsidence control plan is modified to ensure prevention of further material damage to such features or facilities.

(f) The regulatory authority shall suspend underground mining activities under urbanized areas, cities, towns, and communities, and adjacent to industrial or commercial buildings, major impoundments, or perennial streams, if imminent danger is found to inhabitants of the urbanized areas, cities, towns, or communities.

Interestingly, mining underneath such structures is not totally prohibited and the CFR does not restrict the standard “room-and-pillar” mining method. The holder of

⁴⁹⁰ See part 817.121 of subsec K, Ch VII of Title 30 of the CFR.

a mining permit is obliged either to repair the damaged structure, or to compensate the owner for his losses.⁴⁹¹ The CFR also contains a rebuttable presumption of causation by subsidence which provides that if damage to any non-commercial building or occupied residential dwelling or structure related thereto, occurs as a result of earth movement within an area determined by projecting a specified angle of draw from the outermost boundary of any underground mine workings to the surface of the land, the mining operation is presumed to have caused the damage.⁴⁹²

7.4.2 STATE LAW

7.4.2.1 Illinois

In February 1983, the State of Illinois adopted regulations to give effect to the federal law and the SMCRA federal provisions relating to the management of mining subsidence.⁴⁹³ Before the commencement of any mining and as part of the relevant application for a mining permit, the mine operator must submit a mine subsidence plan for approval to the Illinois Department of Natural Resources, Office of Mines and Minerals. This plan must show any existing surface infrastructure which will be affected by the proposed mining activities. Once approval has been granted and the mine operator intends to conduct mining beneath any structures, the surface property owner and occupants of dwellings above the underground workings must be given at least six months prior notice.

⁴⁹¹ Title 30, Ch VII, sub-para K, s 817 of the CFR provides: "The permittee must promptly repair, or compensate the owner for material damage resulting from subsidence caused to any non-commercial building or occupied residential dwelling or structure related thereto that existed at the time of mining. If the repair option is selected, the permittee must fully rehabilitate, restore or replace the damaged structure. If compensation is selected, the permittee must compensate the owner of the damaged structure for the full amount of the decrease in value resulting from the subsidence-related damage. The permittee may provide compensation by the purchase, before mining, of a non-cancelable premium-prepaid insurance policy."

⁴⁹² Section 817 of sub-para K Ch VII of Title 30 of the CFR.

⁴⁹³ Bauer *Planned Coal Mine Subsidence in Illinois* 9.

According to Bauer,⁴⁹⁴ any land which has been damaged by mining subsidence must be restored to a condition capable of maintaining the uses the land was capable of supporting before the subsidence damage. Relevant restoration methods include cut-and-fill grading, tiling, and the installation of waterways and ditches. The landowner will be entitled to claim compensation for any crop losses. Any structures damaged by subsidence must be repaired or replaced and the owner compensated for their value. If the quality or quantity of water supply is affected in any way, it must be restored. If methods which may lead to surface subsidence are to be used, a pre-work inspection will be held to record the condition of potentially affected structures. This will enable the mine operator to restore the structures to their original condition after the subsidence has taken place. Unless the landowner has signed a waiver, the mine operator must properly plan the mining in such a manner that it causes the minimum impact on the land. The mine operator must endeavour to reduce potential damage by using risk-minimising techniques such as the installation of flexible utility connections, supporting the surface portion of the structure on beams to keep it level while subsidence takes place and trenching around the foundation to minimise damage to foundations.⁴⁹⁵

The State of Illinois makes it compulsory for all insurance companies who provide property insurance, to include mine-subsidence insurance in both residential and commercial insurance policies.⁴⁹⁶ These insurance companies are required to place this coverage on the policies of private landowners, unless the coverage is rejected in writing. The insurance premiums are prescribed by state law and in high-risk subsidence areas the landowners will be covered automatically unless they sign a waiver stating in writing that they do not want coverage. The main purpose of the insurance is to assist landowners to institute claims for restoration to damaged houses or financial assistance in instances where the mining activities

⁴⁹⁴ Bauer *Planned Coal Mine Subsidence in Illinois* 9.

⁴⁹⁵ Ibid.

⁴⁹⁶ See <http://www.imsif.com> (Date of use 17 December 2013) for more detail on the Illinois Mine Safety Insurance Fund.

have long been abandoned and the mining companies either no longer exist, or are insolvent.

7.4.2.2 Pennsylvania

A novel approach is followed in Pennsylvania where a landowner who does not have the right of subjacent support, is offered an opportunity by the mine owner to purchase support for his property.⁴⁹⁷ In essence, the landowner compensates the mine owner for the direct loss of income incurred by not being able to extract the coal directly beneath the structure that needs to be protected. The determination of the quantum may, however, prove difficult. Another interesting aspect of this model is the classification of different types of building and categories of damage. This allows determination of compensation payable based on a subsidence index.

In South Africa, reference is made only to “structures” and no distinction is made in regard to the extent of subsidence and the resulting damage. This creates the absurd situation that, as Van der Merwe⁴⁹⁸ appropriately puts it, a derelict farmhouse is afforded the same protection as a nuclear plant. No statutory opportunity is provided for the mine operator to show that his actions may lead to only insignificant damage.

7.5 INDIA

In India mines and minerals are owned by the state which regulates the granting of mining leases and licences in accordance with the provisions of the Mines and Minerals (Development and Regulation) Act 67 of 1957, and the Mineral Concession Rules, 1960.⁴⁹⁹ Mining of major minerals in India is regulated by the

⁴⁹⁷ See <http://www.dep.state.pa.us> (Date of use: 18 December 2013) for a discussion, illustrations and photos of the impacts of mining subsidence on residences in Pennsylvania.

⁴⁹⁸ Van der Merwe *Subsidence Caused by High Extraction Coal Mining* (ch 3) 30.

⁴⁹⁹ In India approval has to be obtained from the state to acquire a mineral lease. The term ‘mineral lease’ includes a reconnaissance permit, prospecting licence, mining lease and quarry

national government, although the mineral title vests in the provincial governments.⁵⁰⁰

Those applying for a mining lease in respect of land in which the minerals vest in the state, or for renewal of such a lease, must submit their applications in accordance with section 20 of the Mineral Concession Rules of 1960. One of the requirements of such an application is that it must be accompanied by a statement in writing that the applicant has, where the land is not owned by him, obtained surface rights over the area, or has obtained the consent of the owner to start mining operations.⁵⁰¹ The applicant of a mining lease must provide proof that this consent has been obtained from the landowner before entry onto the land for mining purposes will be allowed. Section 27 of the Mineral Concession Rules⁵⁰² stipulates the conditions under which a mining lease may be granted. These conditions, *inter alia*, require the lessee to pay for the surface area used by him for mining operations, a surface rent and water rates at a rate not exceeding the land revenue as specified by the state in the lease.⁵⁰³ Section 15(1A)(h) of the Mines and Minerals (Development and Regulation) Act provides that the Mineral Concession Rules will regulate how third parties are protected, either by means of payment of compensation or otherwise, where a party is prejudicially affected by mining operations. In accordance with section 72 of the Mineral Concession Rules, the holder of a mining lease shall be liable to pay the occupier of the land over which he holds the lease, annual compensation as determined by an officer appointed by the state. In the case of non-agricultural land, the compensation is calculated based on the average letting value of the land for the preceding three years. In terms of section 73, once the mining lease has terminated, the state

lease. Unless specifically indicated, the following section on India mineral laws is based on the text of Majumbar PKB *Law of Mines and Minerals* (Universal Law Publishing New Delhi 2011) 1. See also <http://mines.nic.in/mmrd.html> (Date of use: 1 January 2014).

⁵⁰⁰ Southalan *Mining Law and Policy* 42.

⁵⁰¹ Section 22(3)(h) of the Mineral Concession Rules of 1960.

⁵⁰² The Mineral Concession Rules of 1960 was published in the State Gazette on 11 November 1960 (GSR number 1398). See also http://mines.nic.in/writereaddata/Filelinks/a241c4c2_MCR_%201960.pdf (Date of use: 31 December 2013).

⁵⁰³ Majumbar *Law of Mines and Minerals* 73.

must inspect the land to determine if any further compensation is payable to the occupier of the surface of the land.

Mining below infrastructure in India is restricted unless specific permission has been obtained prior to the commencement of mining. Item 5 of Part II of the Mineral Concession Rules provide that “holders may not mine or allow anyone to carry on mining operations at any point within a distance of 50 metres from: i) any railway line unless permission of the railway administration has been obtained; ii) under or beneath any ropeway or ropeway trestle or station unless the required authority’s permission has been obtained; and iii) any reservoir, canal or other public works, or buildings, except under and in accordance with the prior permission of the state.”⁵⁰⁴ In the case of village roads, no mining will be allowed within ten metres of the outer edge of the cutting without prior permission of the Deputy State Commissioner. Where specific permission has been obtained to mine below or underneath any of these improvements, the holder of the mining lease must to the satisfaction of the relevant authority concerned, strengthen and support any part of the mine which in its opinion requires strengthening.

The position in India is therefore not that different from that in South Africa in that mining beneath surface infrastructure will not be allowed without permission from the state. If in the opinion of the state additional measures need to be implemented by the holder of the mining lease to protect any surface land, the state can compel such holder to implement measures aimed at providing sufficient support to guard against unacceptable mine subsidence. The applicant for a mining lease will, unlike the position of a mining right holder in South Africa, have to provide proof that consent has been obtained from the landowner before entry onto the land for mining purposes will be allowed.

⁵⁰⁴ Majumbar *Law of Mines and Minerals* 75.

7.6 GERMANY

Mining in Germany is regulated mainly by a Federal Mining Act, the Mining Law (*“Bundesberggesetz”*) No 1310 of 1980, as amended by Law No 2585 of 2009. Mineral resources in Germany can be divided into three main categories: i) free for mining minerals (*“bergfreie Rohstoffe”*); ii) minerals owned by the landowner and covered by the Federal Mining Act; and iii) minerals owned by the landowner and not covered by the Federal Mining Act.⁵⁰⁵ Coal is included in the first category, free for mining or free minerals. The concept of free minerals is used to describe the types of mineral which are owned neither by the state, nor by the landowner. The right to extract free minerals remains separate from the ownership of land and the right to explore for and extract free minerals must be obtained from the state by means of a mining permit.

In Germany, mining companies are obliged to take precautions against danger to the life, health and property of third parties. These precautionary measures must be reflected in the operating plan of the mine, but the law does not prescribe the extent of the measures necessary within the framework of this provision. The landowner has a legal obligation to adopt precautionary measures in regard to the erection of buildings.⁵⁰⁶ At the request of the mining company, the landowner must, when planning the position of his buildings, take into account the effect of the surface use on mining operations. According to Norton⁵⁰⁷ minor expenses incurred in this regard are borne by the landowner, but major expenses are refunded to him by the mining company. In some cases it may not be possible to equip buildings with adequate safeguards to prevent damage caused by subsidence, or the expenditure involved may be unreasonably high. The mining company is then obliged to notify the landowner in writing of such facts. This written notification has two consequences: “(i) the mining company is free from liability for damage to the building, if despite the written notification the building is

⁵⁰⁵ Ties G *Legal Basis of Mineral Policy in Europe* (Springer Wien New York 2011) 127.

⁵⁰⁶ See article 110 of the Federal Mining Act No 1310 of 1980.

⁵⁰⁷ Norton GE *Conflict Between the Landowner, Mineral Right Holder and the Mining Title Holder in South African Mining Law* LLM Thesis University of the Witwatersrand (1985) 203.

erected; or (ii) if due to the written notification the development does not take place, the mining company is obliged to compensate the landowner for the depreciation in the value of this land.” Both personal injury and damage resulting from searching, extracting or preparing coal (*Bergschaden*) has to be properly compensated by both the mine operator and the holder of the mining right, who are regarded as joint debtors. Liability is not restricted to damage flowing from subsidence, but extends to all damage arising from practically any mining operation. Liability is incurred regardless of unlawfulness or fault on the part of the operator or mining title holder, but the mining company is free from liability if the landowner has contractually waived his right to compensation.

The Federal Regional Planning Act of Germany (*“Raumordnungsgesetz”*) provides that the entire territory of the Federal Republic of Germany and the regions of which it is made-up, shall be developed, organised and protected by integrative general regional plans.⁵⁰⁸ The Act aims to enable harmonised regional planning and to provide measures on how conflict arising from the planning measures, will be resolved to ensure sustainable regional integration and the development and protection of natural resources. In accordance with this principle, areas are “reserved for precautionary protection and systematic prospecting and extraction of site-specific raw materials.”⁵⁰⁹

7.7 SWAZILAND

According to Norton,⁵¹⁰ Swaziland has succeeded in creating a framework within which the owner of land can exercise his rights of ownership compatibly with the exploitation of minerals. He explains that “the parties are able to pursue their respective objectives in an ordered sequence, without retardation of either activity thus maximising each kind of resource with a minimal degree of conflict.” In accordance with the Mines, Works and Minerals Ordinance 20 of 1968 (SWA), all

⁵⁰⁸ See s 1.

⁵⁰⁹ See s 2 of the Federal Regional Planning Act.

⁵¹⁰ Norton *Conflict* 192.

minerals vest in the state. In accordance with this Ordinance, no mining may take place on any land pegged as a claim until such time as the pegging has been registered and if the claim is situated on private land, a permit has been issued. The permit will only be issued if a written agreement has been entered into between the holder of the claim and the owner of the land in question, as to the conditions subject to which the landowner shall be compensated. If precious or base minerals have been regularly won from a claim for a period of two years and the Mining Commissioner is of the opinion that such minerals exist in financially viable quantities, he is entitled to call upon the holder of the claim to convert such claim area to a mining area. Every owner of a mining area shall within two years from the date of conversion begin regular mining operations and shall continue the operations without interruption unless prevented by circumstances over which he has no control. Every mine owner is obliged to maintain the surface of land in a safe condition and if he fails to do so, is guilty of an offence. Landowners are entitled to claim compensation for damage to their land. Land under cultivation or on which buildings or enclosures for farming or industrial purposes have been erected, may not be used for any purpose ancillary to mining unless the prospector or miner can prove that the landowner cultivated this land or built such structures purely to obstruct the mining operations. Under the Ordinance, a landowner is entitled to compensation for damage to, diminution of surface value, and interruption of occupation of his land. Any failure to comply with the compensation provision can lead to operations being stopped. A mine owner who fails to pay such compensation will, in addition, be guilty of an offence and be liable for the payment of prescribed penalties. A landowner can further require mine owners to provide adequate security for payment of compensation. If the mine owner fails to provide adequate security, the mining commissioner will be entitled to prohibit the continuation of mining operations until sufficient security has been furnished.

7.8 CONCLUSION

Compared to other jurisdictions, the South African mineral-law framework provides little statutory direction as to how conflict between holders of mining rights and affected landowners resulting from competing land use should and can be resolved. In this brief comparative evaluation I searched in these foreign systems for provisions which could be useful to better address the needs of the respective parties and to protect the interests of the parties involved in, or affected by coal mining.

Although mineral policy, and in particular the regulation of coal mining, differs substantially from jurisdiction to jurisdiction, there are certain common features worth noting. In this conclusion I briefly summarise what we can learn from these jurisdictions. Although not all foreign solutions would be suitable or relevant to resolve local problems, it is nevertheless interesting to note how similar issues are regulated in these countries. The relevant provisions may serve as guidelines for future legislative intervention in South Africa. Proper implementation of these measures will increase the protection afforded to landowners and will, at least to a large extent, alleviate potential conflict with mining right holders.

My brief comparative study shows that many jurisdictions have adopted specific laws to regulate coal mining and its impact. One such example is the state of New South Wales which adopted the Coal Mine Health and Safety Act and the Mine Subsidence Compensation Act.⁵¹¹

In most jurisdictions where land is privately owned, a landowner's⁵¹² consent is required in the form of an agreement in respect of access to the land and the compensation to be paid.⁵¹³ Where an agreement cannot be reached,

⁵¹¹ See para 7.3.1 above.

⁵¹² Sometimes referred to as the surface holder.

⁵¹³ In Swaziland a permit to mine will only be issued if a written agreement has been entered into between the holder of the claim and the owner of the land in question as to the conditions subject to which the landowner will be compensated. In India an application for a mining lease has to be

jurisdictions such as the United States, provide for arbitration and compensation.⁵¹⁴ In certain countries where access to the land and land-use rights are enforced against the wishes of the landowner, this is done on condition that the landowner is compensated.⁵¹⁵ Compensation is generally extended beyond actual damage to the land which provides far greater protection to landowners.⁵¹⁶

Based on the concept of integrated land-use planning, certain of the foreign systems aim to strike a balance between protecting the interests of the individual and those of society as a whole. They strive to properly coordinate the different land uses.⁵¹⁷ Stated differently, these jurisdictions aim to achieve orderly development while ensuring that the impact of development is not disproportionate to individual rights. There is also proper consultation between the affected bodies. For example, in New South Wales a mining lease may only be granted after considerable interaction between state departments and after both the Mining and Planning Ministers have consented to the granting of the mining lease. In Queensland interaction and free sharing of information between state departments are promoted statutorily as the Chief Executive of the planning department must be informed whenever a mining lease is granted, renewed or abandoned. Whenever a mining lease is granted or renewed, the Registrar for the area of the mining tenement must provide the relevant details to each local government in whose area the land is situated and to the Chief Executive of the planning

accompanied by a written statement that, where the land is not owned by the applicant, he has obtained surface rights over the area or has obtained the consent of the owner.

⁵¹⁴ The United States provides for expropriation or easements, allowing the mining right holder to use the land while the ownership remains with the original landowner who is entitled to compensation.

⁵¹⁵ See para 7.3.3 above with regard to the position in Western Australia. See also s 21 of the Mining Act of 1978 regarding the taking of land required for a public purpose.

⁵¹⁶ See paras 7.3.2 and 7.3.3 regarding the position in Queensland and Western Australia.

⁵¹⁷ See paras 7.3.1 and 7.3.2 above with regard to the position in New South Wales and Queensland.

department to make a note of such application on each relevant map of the local government's planning scheme.⁵¹⁸

In urban (residential) areas, mining and ancillary activities are invariably prohibited within certain distances of settlements unless the written consent of the affected landowner has been obtained. In New South Wales no mining may be conducted within 200 metres of a dwelling house that is the principal place of residence for the person occupying it, or within 50 metres of a garden, or over any significant improvements, unless with the written consent of the owner. Mining in New South Wales will also not be allowed underneath such areas except at such depths and subject to such conditions as the Minister considers sufficient to minimise damage to the surface, and no mining method other than bord-and-pillar mining will be allowed unless with the Minister's permission. In Western Australia no mining tenement may be granted in respect of land on which a substantial improvement has been erected, without the written consent of the owner and occupier. Furthermore, no mining may be allowed in Western Australia within 100 metres of any land under cultivation or land in actual occupation and on which a house or other substantial building has been erected, unless the owner consents. This does not, however, apply where a subsurface mining right has been obtained and the mining will take place not less than 30 metres below the lowest point of the natural surface. Queensland also requires the consent of a landowner prior to granting a mining lease in respect of restricted land (land within 100 metres horizontally of a permanent building used, *inter alia*, as accommodation or for business purposes).

Certain jurisdictions have adopted provisions aimed at affording better protection to the agricultural sector. In Western Australia farmers have a veto right over mining.⁵¹⁹ In Queensland, unless there are exceptional circumstances, no permanent development⁵²⁰ will be allowed on areas declared strategic in terms of

⁵¹⁸ See part 7 s 319A of the Mineral Resources Act of 1989.

⁵¹⁹ See para 7.3.3 above. See also in particular, s 20 in respect of prospecting on Crown Land and s 29(2) with regard to the granting of a mining tenement on private land.

⁵²⁰ Mining is included in "development".

the Strategic Cropping Land Act. In China the conversion of cultivated land to another use such as mining, will only be allowed under strict conditions. In Swaziland, land under cultivation or on which buildings or enclosures for farming or industrial purposes have been erected, may not be used for mining or any purpose ancillary to mining, unless the miner can prove that the landowner cultivated his land or built structures purely to obstruct the mining operations.

Mining underneath urban areas is allowed in exceptional circumstances only. In Western Australia mining underneath an area classified as a “town site” can only take place if approved by the Minister.⁵²¹ In the US, if the land in respect of which mining has taken place cannot be repaired, restored, or rehabilitated to its pre-subsidence condition, or the damaged object replaced, the structure must be purchased based on a market value transaction and taking into account the pre-subsidence value of the land. The mine subsidence index used in Pennsylvania allows determination of compensation based on a subsidence index which is very useful in determining the quantum of subsidence claims.

In Queensland subsidence districts are declared over land where coal-mining subsidence is expected. In these districts landowners are obliged to take out specific mine-subsidence insurance. A Mine Subsidence Board prescribes strict building requirements and no infrastructure development may take place within such an area without the Subsidence Board’s consent. The Mine Subsidence Board furthermore assists in determining damages and acts as an independent body of experts which guides the parties towards resolving possible conflicts.

Dispute resolution with regard to coal mining subsidence is facilitated by an independent body of industry experts. The New South Wales Subsidence Board discussed in 7.3.1 above, is a prime example. New South Wales further provides a platform for the Mines and Planning Ministers to consider and decide on competing land-use issues. In Western Australia government Ministers through administrative systems can also become involved in resolving conflict by deciding

⁵²¹ See subsecs (3A) and (3B) of s 25 and ss 26 and 26A of the Mining Act of 1978.

on the importance of competing land uses. The relevant Minister in such circumstances follows clearly defined criteria which guide his decision-making and, after having invited and considered public comment, can make a ruling on which use should prevail. In certain jurisdictions disputes are referred to specialist tribunals or courts, for example the Warden's Court in Western Australia and the Land Court in Queensland.⁵²²

⁵²² See para 7.3 above.

CHAPTER 8

RESOLUTION OF CONFLICT

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8.1 INTRODUCTION

Mining of minerals presents a unique challenge in that mineral deposits are formed as a result of geological processes over millions of years and occur naturally in the earth's crust. As a result, mineral deposits are geographically fixed and because they are not renewable, are finite. Seeing that mineral deposits are location bound, they have to be worked where they are found. Where these deposits are located beneath valuable land with high potential for agricultural use

or township establishment, the exercise of a mining right will inevitably lead to a temporary or permanent interruption of these land-uses. This is the primary cause of conflict between the holders of mining rights and those with interests in the utilisation of the land surface.

I indicate above that land in Mpumalanga is equally valuable for coal mining companies and landowners as both require it to realise their economic aspirations. Mining companies require land for the extraction of coal and landowners need it for farming activities or township development. Like mining, township development is a national development imperative. From the above discussion it is clear that allowing underground coal mining and township development in respect of the same land, is potentially a great source of conflict. Coexistence of underground coal mining and township development remains a formidable challenge in South Africa due to the limitations imposed by the current mineral-law dispensation and applicable spatial planning legislation. The MPRDA encourages optimal extraction of the country's wealth of mineral resources to promote economic and socio-economic growth. Reserving too much land for mining will, however, undoubtedly constrain township expansion; threaten agriculture and food supply; and stifle economic growth.⁵²³ An acceptable balance needs to be struck between owners of land on the one hand, and the rights of mining companies on the other, to ensure that the interests of both parties are equally protected. Resource reform objectives should not be achieved by marginalising landowners who wish to utilise their properties to their full potential. My brief comparative survey shows that the need to harmonise potential conflict in this field can and has been addressed satisfactorily in other jurisdictions.

⁵²³ An article headed "Flagrant coal mining threatens food security" which appeared in the City Press of 27 May 2012, warns that unbridled coal mining in Mpumalanga is placing agriculture (food security) under threat as 54 percent of the province's surface area may be turned into wasteland. It further states that pending mining permits and prospecting applications sitting with the Department of Mineral Resources indicate that if they were granted, some 80 percent of the region's land surface area could be allocated to mines for mining operations. This supports my reservation that the relationship between mining and township development will only grow increasingly troublesome as residential land becomes increasingly scarce.

The purpose of this study is not only to evaluate the legal relationship between a landowner and a mining right holder, but also to consider some practical solutions of how possible conflicts arising from different land-uses over the same land can be resolved or mitigated.

From a mining perspective, most of the restrictions can be overcome technically if methods are developed to mine safely and economically beneath structures. Van der Merwe⁵²⁴ argues that the provisions regulating mining beneath infrastructure in South Africa are somewhat archaic. They were drafted at a time when the effect of mining-induced subsidence was largely unknown, and the only safe approach was a conservative one. Allowing responsible high-extraction mining beneath surface structures will limit the potential losses resulting from leaving more coal underground to improve ground stability. Mining beneath surface structures should however only be allowed if sufficient support and protection is afforded to the surface. Ideally, both the mining right holder and the landowner should be entitled to utilise their respective rights, provided that this is done in a reasonable fashion with no -- or the least minimal -- impact on the interests of the other party.⁵²⁵ Theoretically, where coal extraction takes place at reasonable depths and sufficient pillars are left behind to ensure acceptable safety conditions, township development may be allowed, provided sufficient precautionary measures are taken and proper mitigation measures are implemented to ensure that foreseeable risks are prevented or their effects adequately mitigated.

8.2 INADEQUACY OF PRE-MPRDA LAW AND MPRDA PROVISIONS TO RESOLVE CONFLICT

Under the pre-MPRDA dispensation, ownership of minerals vested in the owners of land who could control the granting of mineral rights.⁵²⁶ Under the common law, landowners could sell, lease or cede mineral rights to others. A landowner

⁵²⁴ Van der Merwe *Subsidence Caused by High Extraction Coal Mining* 32.

⁵²⁵ *Hudson v Mann and Another* 1950 (4) SA 485 (T).

⁵²⁶ See ch 2.

could also decide not to exploit the minerals in, on, or under his land.⁵²⁷ A landowner wishing to preserve the surface of his land could simply decide not to sell, cede, or lease his mineral rights. Landowners accordingly had control over access to their land and the minerals therein. Landowners who were willing to part with their mineral rights, could sever them from the title to the land and could dispose of them for economic gain. These landowners benefitted from allowing mining in that they were not only compensated for damage, but also for selling the rights to minerals. Owners of land who parted with the mineral rights to their land were therefore largely the authors of their own misery.⁵²⁸

The MPRDA completely overturned this position and the situation has become increasingly precarious for landowners. They can no longer grant the right to mine or control who gains access to their land to extract minerals. This power is now within the sole discretion of the state which acts as the custodian of all mineral resources in the Republic. The interference in mining activities on the use and enjoyment of land, apart from a landowner's entitlement to claim compensation for damage caused to the land, is therefore no longer balanced by the economic value received in return for selling the mineral rights. Because of the adoption of the MPRDA, the conflict between mining right holders and landowners needs to be approached differently. Whereas before the MPRDA landowners had the opportunity to protect themselves through the deed of grant by stipulating that the holder of mineral rights was precluded from withdrawing support, or by agreeing to grant such right in return for compensation, landowners now no longer have control over whether a mining right is granted by the state, or subject to what conditions it is granted. This is determined by the MPRDA. Therefore, the granting of mineral rights over land today does not occur in terms of an agreement with the owner of the relevant land,⁵²⁹ but in terms of the MPRDA which

⁵²⁷ The court in *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) described this entitlement of a landowner as the "entitlement to sterilise mineral rights" or the "entitlement not to sell or exploit minerals."

⁵²⁸ See *Norton Conflict* 191.

⁵²⁹ During the previous minerals dispensation conflict was resolved in accordance with the servitude construction, see discussion in ch 5 para 5.5.2.

determines both the content of the mining right holder's entitlements and how these entitlements may be exercised.

Because of this altered legal position, it is no longer feasible to compare the position of a landowner and the holder of a mining right to that of a landowner and the holder of a servitude. Boyd⁵³⁰ correctly indicates that the quasi-servitude formulation explained in *Anglo Operations v Sandhurst Estates (Pty) Ltd*⁵³¹ was replaced by a comprehensive statutory framework when the MPRDA was introduced. Boyd shows that the respective rights of the parties are defined in this new statutory framework. The MPRDA has deprived landowners of their former control over access to their land because they no longer have the opportunity to determine the nature and extent of the rights afforded to mining right holders contractually. The landowner has only a right to be consulted, and if he refuses access based on the limitations to his use and enjoyment, his actions will be regarded as unreasonable and unlawful in terms of section 54 of the MPRDA. The mining right holder, in terms of section 5 of the MPRDA, has a clear statutory right allowing him to enter the land and commence mining. The only valid grounds upon which the landowner can refuse access appear to be if the mining right holder has failed to comply with the provisions of the MPRDA or the relevant mining right or if the mining right holder's actions lead to unacceptable environmental degradation.⁵³² Under these circumstances, a landowner will have to rely on his ordinary common-law remedies such as an interdict, declaratory order, or claim for compensation for damage to the land. Compensation can only be claimed if the landowner has suffered actual damage. If no damage has occurred, no compensation can be claimed. The MPRDA, as I explain above,⁵³³ does not afford sufficient protection to landowners and does not provide a workable framework as to how a conflict between a landowner and a mining right holder can be resolved. A few recommendations are, therefore, apposite.

⁵³⁰ Boyd *Lateral and Subjacent Support* 179.

⁵³¹ 2007 (2) SA 363 (SCA).

⁵³² See discussion in ch 4 para 4.2.1.2.

⁵³³ See ch 6 para 6.6.3.

8.3 POSSIBLE SOLUTIONS TO RESOLVE OR MINIMISE CONFLICT

8.3.1 CORRECT POLICY FRAMEWORK

Coal mining in most jurisdictions attracts the serious attention of governments, not only because it is an important source of revenue, but also due to the strategic value of coal as a central source of energy. As a result, coal mining is often regulated more intensively than some of the other minerals such as sand and gravel. Due to the potential conflict that can arise between mining and the use of the surface land, some jurisdictions, such as Australia, have adopted specific legislation to regulate the impact of coal-mining subsidence. My research, however, shows that the current regulation of coal mining in South Africa and its impact on the rights of landowners is not sufficiently regulated.

The role of the state in resolving possible conflict between mining right holders and landowners should surely be to provide an appropriate framework to resolve disputes over land-use.⁵³⁴ The extensive measures taken in this regard in other jurisdictions support my view.⁵³⁵ Ideally, dispute resolution should take place in a coherent, well defined system under control of a body that is independent of the parties involved.⁵³⁶ The process needs to be transparent, regulated by law, and allow few discretionary powers. It is vitally important for the controlling body to be objective and respected by both parties.⁵³⁷ The current South African regulatory dispensation leaves much to be desired.

When an application for a mining right is submitted and the affected landowner is of the opinion that the particular mining method will limit his land-use rights excessively and is not reasonably necessary for the extraction of coal, he is entitled, in terms of section 10 of the MPRDA, to lodge an objection with the

⁵³⁴ See ch 4.

⁵³⁵ See ch 7.

⁵³⁶ See ch 7 regarding the benefits of Australia's independent Subsidence Board.

⁵³⁷ Affected parties will more easily abide by an unbiased decision taken by specialists, having properly considered all relevant facts.

Department of Mineral Resources. When this objection is lodged with the Department, section 10 provides that the Regional Manager of the Department of Mineral Resources must refer the objection to the Regional Mining Development and Environmental Committee to consider the objections and advise the Minister.⁵³⁸

Regulation 39(2) of the regulations promulgated in accordance with the MPRDA provides that the composition of the Regional Mining Development and Environmental Committee must ensure competency and expertise in minerals and mining development, petroleum exploration and production, social and labour plan issues pertaining to the MPRDA, and mining environmental management. Regulation 39(4) provides that the Board⁵³⁹ may from time to time appoint a representative from any relevant parastatal organisation or a consultant. Such a person, however, has no right to vote at the meeting of the Regional Mining Development and Environmental Committee. This committee typically consists predominantly of members nominated by the Department of Mineral Resources and is chaired by the Regional Manager of this Department. The Regional Mining Development and Environmental Committee therefore lacks representation from industries other than mining, and is consequently not perceived to be objective. This provision may be improved by including representatives of the national and provincial departments responsible for land management, water and agriculture. To attain the required levels of expertise and objectivity, it may be preferable to refer the matter to a special tribunal or court which has the required specialist knowledge not only of mining, but also of other social and economic activities relevant to spatial development. Ideally, such an independent decision-making body should consider clear criteria to decide which activity is in the national interest and to prioritise which activity should prevail.

⁵³⁸ See ch 4 para 4.2.1.1. See further Dale *et al South African Mineral and Petroleum Law* 475.

⁵³⁹ The “Board” refers to the Minerals and Mining Development Board contemplated in s 57 of the MPRDA.

As I explain in paragraph 6.3.2, section 54 of the MPRDA becomes relevant where a mining right is granted to an applicant and the owner of the affected land, due to the serious impact which the proposed mining will have on his surface land-use, refuses permission to the mining right holder to enter his land and commence with mining. The first step to be taken in accordance with section 54 is to notify the Regional Manager and the Regional Manager is, therefore, often the first port of call for parties who cannot reach agreement with regard to land access and the payment of compensation for damage caused by mining activities.⁵⁴⁰ Section 54 regrettably does not provide clear criteria as to how the Regional Manager is expected to resolve these disputes. If a dispute arises between the parties with the result that access is refused by the landowner, section 54(2) provides that the Regional Manager will call upon the landowner to make representations as to why access has been refused. He will inform the landowner of the provisions of the MPRDA that he is contravening by refusing access and inform him of the steps that may be taken should he persist in contravening the said provisions. If the Regional Manager, having heard the representations of the landowner, is of the opinion that the landowner or lawful occupier has suffered or is likely to suffer loss or damage as a result of the mining operations, he must request the parties to endeavour to reach an agreement for the payment of compensation. If they fail, the compensation will be determined by arbitration or by a competent court.⁵⁴¹

Section 54, as I explain in 8.3.6 below, does not provide an automatic right to landowners to claim compensation for damage caused by subsidence in the course of mining.⁵⁴² Where landowners and mining right holders reach a deadlock with regard to payment of compensation for damage caused to land or surface structures, the Department of Mineral Resources has a discretion to refer the matter for arbitration or to a competent court for adjudication. In conducting such an enquiry the court or arbitrator will probably require expert evidence and advice,

⁵⁴⁰ Apart from s 54, landowners still have their common-law remedies such as an interdict and declaratory order.

⁵⁴¹ See ch 6 para 6.3.2.

⁵⁴² See ch8 para 8.3.6 and in particular the references to Badenhorst PJ “Conflict resolution between owners of land and holders of minerals: A lopsided triangle?” 2011 (2) *TSAR* 327.

which further highlights the value of an independent body to deal with subsidence-related matters. Section 54(5) read with section 55 of the MPRDA further provides that if in the Regional Manager's opinion further negotiation will detrimentally affect the objects of the MPRDA, the Regional Manager may recommend to the Minister that such land be expropriated. This approach is unsatisfactory and could even further add to the marginalisation of landowners.

Notably the majority of policy frameworks in other jurisdictions referred to above⁵⁴³ require an applicant for a mining right or mining licence to first obtain the consent of the affected landowner. Such consent will only be given if agreement has been reached with regard to the payment of compensation. The need for adequate compensation will be considered in greater detail below.

It is accordingly my observation that South Africa's mineral policy will be improved if the severe infringement of a landowner's entitlements is alleviated by requiring a landowner's consent as a precondition for the commencement of mining activities, and provide clear criteria on how conflicts may be resolved when consent is withheld. If this is not possible, a statutory right for adequate compensation should at least be introduced which should extend beyond damage only. Furthermore, legal certainty will be promoted by amending the wording of section 69 of the Ordinance to state clearly that a mining right holder's consent is a requirement for township establishment.

8.3.2 VALUE OF TECHNOLOGICAL ADVANCES

Advances made in regard to better use of technology and improved mining and engineering methods may lessen the impact which mining has on the environment and especially on the rights of landowners. If the impact of underground mining on the use of the surface land can be reduced, there will be a far less likelihood of conflict. For example, properly developed mining pillars such as commonly

⁵⁴³ See ch 7.

practised with the Nevid and bord-and-pillar⁵⁴⁴ type mining methods, have far less ramifications for those who intend to use the land surface for property development than methods such as longwall mining.⁵⁴⁵ If the negative impact of mining on surface developments can be sufficiently mitigated, legislation would theoretically not have to limit mining beneath areas where surface infrastructure is to be built.

The largest limiting factor in this regard remains cost. Conducting the requisite risk analysis and implementing precautionary or risk-mitigation measures is extremely expensive. Mining companies will not attempt the extraction of coal where the cost of mining is excessive compared to the mining yields. It will, however, unlock immense value if underground coal mining can be done not only safely, but also economically beneath surface infrastructure such as residential dwellings without exposing the mining company to liability or the occupants to harm.

To achieve safe mining beneath surface infrastructure, mining right holders need to be able to predict with great levels of accuracy the possible amount and extent of mining-induced subsidence. New technologies, more readily available in-field research and case studies, will make it easier to predict the degree of expected subsidence reliably. Based on the available research, the reaction of different types of structure to the level of expected subsidence needs to be properly planned and accurately forecasted. Better knowledge of the expected levels of subsidence and the reaction of the proposed infrastructure under the specific conditions, will greatly assist mining companies to take the required steps adequately to mitigate potential risks and calculate damage compensation. Of prime importance, it will allow the parties to determine the benefits versus the risks.

⁵⁴⁴ See Figures 4 to 6 of the Appendix and the 3D animation on the enclosed compact disc.

⁵⁴⁵ See Figures 7 to 10 of the Appendix.

New technology, such as improved ground-monitoring systems, allow mining companies to abstract better quality real-time data regarding ground movements. This can assist them to react timeously to prevent risk and resulting damage. Improvements to the type of building and construction methods used on surface land can also reduce the impact of mining subsidence. Planning mining layouts in such a way that the surface infrastructure is positioned in the centre of a high-extraction mining panel has also returned positive results in mitigating possible damage.⁵⁴⁶ Improved construction methods and building material enhance flexibility and allow buildings to withstand the strain caused by subsidence. In the majority of cases considered by Van der Merwe,⁵⁴⁷ the cost of implementing precautionary steps and the cost of repairs were not even a fraction of the value of the extracted coal.

8.3.3 PRINCIPLES OF SUSTAINABLE DEVELOPMENT

After agriculture, mining is traditionally regarded as the world's oldest and most important activity.⁵⁴⁸ Recognition must be given to the vital role mining plays in the economy of our country. Apart from producing the wide range of minerals which have become indispensable to our daily lives, mining companies make a significant contribution towards taxes in the form of royalties. In addition, they create thousands of jobs and annually invest significant sums in, *inter alia*, human resource development and the socio-economic uplifting of communities in areas where their mines operate. Without the contributions from the mining industry the economy will falter. Unsurprisingly, the MPRDA encourages mineral extraction in order to promote economic and social development. To achieve its goals the Act, however, appears to subordinate surface land use to mining rights. The benefits of mining and the need to promote access to minerals must, however, be carefully balanced against the detrimental impact on landowners' rights. The long-term national demand for coal mining in South Africa and its benefits to the local

⁵⁴⁶ Van der Merwe *Subsidence Caused by High Extraction Coal Mining* ch 12 12.

⁵⁴⁷ *Subsidence Caused by High Extraction Coal Mining* ch 12 6.

⁵⁴⁸ Anon "Regulating Mine Land Reclamation in Developing Countries: The Case of China" http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=57148 (Date of use 20 July 2014).

communities clearly compete with the growing demand for residential and agricultural land.

Mining generally impacts on more than just the actual mining site. Consider the following examples where the impact of mining affects more land than the actual mining site: the land needed for the sinking of mining and ventilation shafts; the land needed for the construction of the site offices and change houses; the areas required for the construction of roads and conveyor systems; the land needed for water-treatment dams, coal washing plants and coal silos. Many other interrelated activities affect the rights of those who live in or near mining areas. These include the transport of coal, equipment and employees; the use of water; the sourcing of services, electricity generation or delivery; the processing of the raw minerals and administration.

As a result of the far-reaching impact of mining, there is a fast growing emphasis on sustainable mining development. The concept of sustainable development essentially means development which meets the needs of the present without compromising the ability of future generations to meet their needs.⁵⁴⁹ Mining companies today have both corporate and social responsibilities and need to show that they are converting the wealth provided by our country's mineral resources into societal capital.⁵⁵⁰ Government should, therefore, be mindful of sustainable development when formulating the national, provincial and regional planning policies and land-use management schemes in areas where mining is prevalent. Land-use planning and regulation should aim to strike a balance between the interests of the individual and society as a whole. The concept of integrated land-use planning, although not a novel concept, essentially seeks to avoid planning any industry or sector development in isolation. Integrated land-use planning seeks to give recognition to the various interests in land and aims to accommodate these interests in the best possible way. It also seeks better involvement of affected parties, such as mining companies, communities living in close proximity to the proposed mining operation, service providers, landowners,

⁵⁴⁹ Southalan *Mining Law and Policy* 24.

⁵⁵⁰ Id 25.

transport companies, local governments, and so on. Town planning needs to take into account the economic, social, agricultural and environmental value of the land. When the integrated planning of an area is done it should clearly delineate certain areas as either mining or township areas. If the circumstances require that mining be allowed underneath township areas, the mining right holder must be obliged to provide sufficient proof that it adhere to clearly defined and strict criteria and will sufficiently mitigate any possible risks. Applications for township development on previously mined land, or permission to mine beneath existing structures, need to be reviewed by an independent industry body consisting of people with the required level of skill and expertise to properly assess the possible impact. When applicants for mining rights conduct their site investigations to plan new mine developments, the other uses of the land must also be taken into consideration.

Section 3(3) of the MPRDA provides that the Minister of Mineral Resources must ensure sustainable development of South Africa's mineral and petroleum resources within the framework of the national environmental policy, norms and standards while promoting economic and social development. Perhaps it should be added that the Minister must, in the interest of sustainable development, also give due consideration to the current and potential use of the land. Sustainable development planning should not consider only the future benefits of mining, but also all relevant factors, including the growing need for housing and the constraints which mining places on agriculture.

Section 37(2) of the MPRDA could perhaps be expanded by including a new requirement obliging mining companies to relinquish their mining rights, or those portions of the right where the land is suitable for township development, but where mining, due to geological restrictions, cannot take place. This will obviously only be possible once the required prospecting results have been obtained and once the mining right holder has sufficient information to assess whether or not mining will be viable. The Department of Mineral Resources is currently in favour of neither partial abandonment of rights, nor of companies applying for mine closure in respect of selected portions of their mining areas. It would perhaps be

more sensible to oblige mining right holders, in consultation with local authorities and affected landowners, to identify areas where mining activities will not detrimentally affect the development of townships, and to provide measures compelling mining right holders to assist in providing the required geological and other required information and permissions to enable township development in these areas. It has been recommended that section 23(1)(d) should be amended to provide not only that a mining right may only be granted where the mining will not result in unacceptable pollution or ecological degradation of the environment, but also that

a mining right may not be granted where it will amount to an unacceptable loss of high-grade land which in the opinion of the Minerals and Mining Development Board is essential for township development or agriculture and for which an environmental authorisation is issued.⁵⁵¹

The ultimate aim should be to plan the land use in such a way that the energy needs of the country can be met sustainably, on the one hand by not allowing landowners to unjustly limit the extraction of minerals, and on the other hand, only allowing mining in or near urban areas where the national interest requires it.

8.3.4 ADVISORY BOARDS

My brief comparative overview in Chapter 7 regarding the regulation of mining in the coal districts of Australia, highlights the benefits of having an independent advisory body that can provide support to mining right holders, as well as affected parties in conducting the required risk assessments. Such a body can provide advice regarding adequate mitigation measures; prescribe construction methods; prescribe the type of material to be used; monitor the construction of buildings on mined areas; and determine compensation payable in the event of damage occurring. In Australia decisions on whether mining can be done safely below the

⁵⁵¹ See the submission made to the Parliamentary Portfolio Committee by Crosby A on behalf of AGRI SA during the public hearings on the Draft Mineral and Petroleum Resources Development Bill, 11 September 2013.

surface of land on which structures have been erected, is left to the determination of the Subsidence Board which ensures that planning is done in a well-coordinated manner and that the needs and concerns of affected parties receive proper consideration.⁵⁵²

Section 57 of the MPRDA makes provision for the establishment of a Minerals and Mining Development Board. Similar to the Australian Subsidence Board, the Minerals and Mining Development Board has diverse representation which includes the Chief Inspector of Mines, three persons representing any relevant state department, members from organised labour, the business sector, relevant non-governmental organisations, and community-based organisations. What the Board lacks, is representation of the directly affected landowners.⁵⁵³ The functions of the Board, *inter alia*, include advising the Minister of Mineral Resources on matters relating to the sustainable development of the nation's mineral resources, and dispute resolution. South Africa, therefore, has an extant platform to deal with the coordination of land-use planning and should be able to address disputes arising from competing land-users. It is, however, not clear whether the Board will be sufficiently represented by experts with specialist knowledge of mineral and spatial planning laws. It is also unclear whether the Minerals and Mining Development Board is currently effective in resolving conflicts related to competing land interests. No evidence could be found during the course of this study that the Minerals and Mining Development Board has effectively dealt with any dispute relating to land-use planning versus mining. This leads me to believe that either the Board is non-operative, or is not functioning optimally.

With regard to land-use planning, there is a pressing need for greater involvement of industry bodies, such as the Council of Geosciences, during the design and planning phase of land-use schemes and spatial-development frameworks. A deeper understanding of the prevalent geological structures and higher levels of

⁵⁵² See ch 7 para 7.3.1.

⁵⁵³ Members of the Subsidence Board in New South Wales, Australia, include the owners of improvements. See ch 7 para 7.3.1.

knowledge of factors such as the impact of mining subsidence will surely improve the quality of spatial planning. Currently local municipalities plan and prepare spatial-development frameworks with little or no input from the mining industry. The Mining Development Board can perhaps fulfil an advisory role to municipalities during this planning phase by providing information regarding the occurrence of specific minerals, geological features, existing holders of prospecting and mining rights and the likelihood of mine subsidence.

8.3.5 MEANINGFUL INVOLVEMENT OF LANDOWNERS

Parties with a financial interest in land would rarely willingly forego their rights to contribute to a better overall outcome.⁵⁵⁴ It is furthermore unrealistic to think that both the landowner and the mining right holder will be able to obtain the maximum benefit from exercising their respective interests over the same land. To resolve the possible conflict, parties will have to reach some measure of compromise. The only way in which the interests of these parties can be harmonised, is if an acceptable agreement can be reached in terms of how these parties may exercise their respective rights.⁵⁵⁵ This will not likely be reached amicably and has to be coordinated by clearly-defined principles set out in and imposed by law. Such a framework will certainly not resolve all problems, or produce complete harmony of interests. Nevertheless, it must aim to provide a framework under which the parties' respective interests can be protected objectively in a way which is beneficial to both.

Landowners in mining areas generally fear being marginalised by bureaucratic policies. They fear that their livelihoods are being threatened leaving them feeling helpless. The general sentiment is that they are insufficiently protected by the law in the name of serving the public good. The MPRDA's provisions successfully promote access to minerals, but fail to provide proper protection to landowners who are left with no choice but to accept significant inroads into their ownership.

⁵⁵⁴ Southalan *Mining Law and Policy* 15.

⁵⁵⁵ Id 75.

Closer involvement of affected parties during the planning and execution phase of mining projects, is therefore critical.

8.3.5.1 Landowner's involvement in application stage

Landowners, as I explain above,⁵⁵⁶ have no control over the granting of mining rights in respect of their land. In complete contrast to this position, other jurisdictions such as New South Wales⁵⁵⁷ provide that a mining lease may not be granted over certain areas, unless with the written consent of the affected landowner. Although this system allows far better protection of landowner's rights than the current position in South Africa, the objectives of the MPRDA should not be forgotten. The entitlements of a landowner have to be balanced against the need to promote access to minerals. If landowners are simply allowed to veto mining rights, it would hinder South Africa's resource reform objectives.⁵⁵⁸ Considering these objectives, it would possibly be more appropriate to recommend that the current provisions of notification and consultation of the MPRDA be expanded to allow for more meaningful involvement of landowners, especially during the mining right application phase.

In terms of the MPRDA, landowners are only involved to the extent that they need to be notified of and consulted about the applicant's intention to conduct mining on their land. No specific criteria are provided for what proper consultation means and what information should be provided to the landowner to allow him to apprise himself of the possible impact the mining may have on his land.⁵⁵⁹ It is equally unclear to what extent the decision of the Department of Mineral Resources will be influenced by the comments received from landowners when considering the granting of a mining right application.

⁵⁵⁶ See ch 6 para 6.3.3.

⁵⁵⁷ See ch 7 para 7.3.1.

⁵⁵⁸ See ch 6 para 6.4.5.

⁵⁵⁹ Indications are that with the pending amendment of the MPRDA, government will seek to introduce clear requirements regarding consultation to give effect to the views raised in *Bengwenyama v Genorah Resources* 2011 (4) SA 113 (CC).

The MPRDA, as I explain in paragraph 4.2.1.1 above, is grossly inadequate as far as reasonable and proper consultation is concerned. This is, *inter alia*, because the current provisions are inadequate as regards the identification and notification of affected parties are concerned; the period allowed for comments of affected parties to be submitted to the Department of Mineral Resources is too short; and insufficient information regarding the proposed mining activities and their impact is provided to landowners with the result that they are unable to comment effectively on applications. I indicate in paragraph 4.2.1.1 above, that affected landowners need to be provided with sufficient detail of what the proposed mining activities will entail and its impacts on the use of their land. Landowners need to be in a position to make a well-informed decision regarding a suitable response to the application. They should, at least, be able to determine whether the mining right application, the environmental studies and the administrative processes followed by the applicant comply with the requirements of the MPRDA and applicable environmental provisions. To enable affected landowners to familiarise themselves with the proposed activities and the possible impact of these on their land, it is suggested that a copy of the application for a mining right, as well as a copy of the environmental management programme, be provided to affected landowners without their having to apply for these under the provisions of the Promotion of Administrative Justice Act.⁵⁶⁰

8.3.5.2 Landowner's involvement in access stage

The MPRDA, as I explain in paragraph 4.2.1.1 above, requires two stages of consultation. First, when an application for a mining right is submitted the applicant is required to notify and consult interested and affected parties in order to obtain their comments. The Department of Mineral Resources requires these comments to decide whether or not to grant a mining right.

Further consultation is required upon the granting of the mining right by the Department of Mineral Resources. This consultation, as Froneman J explains in

⁵⁶⁰ Act 3 of 2000. See discussion above in ch 4 para 4.2.1.1.

Bengwenyama,⁵⁶¹ is required because of the grave and considerable impact of mining on the use and enjoyment of the land. Mining right holders need to consult properly with the owner of land to see whether some sort of accommodation is possible as far as the interference with the landowner's use of his property is concerned. Moreover, the parties must endeavour, in good faith, to come to some sort of agreement on how each party can exercise its respective rights in a manner which will not unreasonably interfere with the exercise of the other party's rights.

The court in *S v Smith*⁵⁶² held that consultation cannot be a mere formal process but must be genuine and effective engagement to reach a meeting of minds. In *Bengwenyama*⁵⁶³ Froneman J added that consultation must be undertaken with the view of reaching agreement to the satisfaction of both parties with regard to the possible impact of the proposed activities. Leaving it to the parties involved to come to some type of an agreement is an unsatisfactory solution. To ensure the landowner's concerns are properly taken into consideration, it has been recommended that an additional requirement should be introduced to section 5 of the MPRDA to the effect that mining right holders will be obliged to conclude a separate mining agreement with landowners in which the amount, time and mode of compensation are negotiated and agreed upon between the parties prior to commencement of mining activities.⁵⁶⁴ The Queensland approach in terms of which mining tenement holders are obliged to negotiate a conduct and compensation agreement before being allowed access to land serves as a good example.⁵⁶⁵

⁵⁶¹ *Bengwenyama v Genorah Resources* 2011 (4) SA 113 (CC).

⁵⁶² 2008 (1) SA 135 (T). See Majoni F *Mine or yours? A closer look at s 5 of the Mineral and Petroleum Resources Development Act* [Aug 2013] *DEREBUS* 42.

⁵⁶³ *Bengwenyama v Genorah Resources* 2011 (4) SA 113 (CC).

⁵⁶⁴ See Badenhorst 2011 (2) *TSAR* 327.

⁵⁶⁵ See ch 7 para 7.3.2.

In certain jurisdictions⁵⁶⁶ the consent of a landowner is a prerequisite for gaining access to the land. Reaching an agreement with regard to the amount of compensation to be paid for any damage to the land or impediment of the landowner's use of his land, would, therefore, be of fundamental importance as the landowner will not provide his consent until the amount of compensation has been agreed upon.

In the United States of America where access is granted without a landowner's consent, the mining right holder may be required to provide a bond to cover possible future damage.⁵⁶⁷ A mining right holder in Brazil may be required to enter into some royalty agreement with the landowner, while in the United Kingdom holders of mineral leases will only be granted access where the mining can be shown to be in the national interest and an agreement has been reached with the landowner with regard to compensation.⁵⁶⁸

Enforcing access against the landowner's wishes, only where it can be shown to be in the national interest, affords better protection to landowners and will ensure that mining does not unreasonably limit urban growth without proper justification. Mining in potential township areas will therefore only be allowed if it can be shown that the extraction is in the national interest, reasonably necessary and can be performed with the least possible impact and inconvenience to the users of the surface of the land. If the mining is properly planned and the correct mining technology and methods are implemented, future development of townships will not be jeopardised.

8.3.6 BALANCED COMPENSATION

According to Badenhorst⁵⁶⁹ the mining of minerals in most systems involves three parties: the landowner; the holder of rights to minerals; and the state.

⁵⁶⁶ See, for example, the discussion on mining in Western Australia in ch 7.

⁵⁶⁷ See ch 7 para 7.4.2.1.

⁵⁶⁸ Southalan *Mining Law and Policy* 69.

⁵⁶⁹ Badenhorst 2011 (2) *TSAR* 327.

This relationship is described as the ‘triangular legal relationship’. As he explains, before the adoption of the MPRDA this triangle was balanced in the sense that landowners received direct or indirect compensation for disposing of their ownership in minerals and subsequent infringement on the use of their land. Landowners were therefore compensated for the inroads they had to allow into the use and enjoyment of their land. The role of the state in the triangular legal relationship was to ensure that applicants for the required licences complied with the requirements of the Act before it authorised the mining. The MPRDA, however, knocked the triangle off balance by limiting the landowner’s control over the granting of rights to his land. He describes a situation where the MPRDA resulted in “a lopsided legal triangle skewed in favour of the holder of rights at the expense of the owner of land.”⁵⁷⁰ The only involvement of landowners during the process of the granting of rights is that the applicant must consult with them, but as soon as a dispute between them reaches a deadlock (despite having exhausted the avenues set out in section 54 of the MPRDA), the rights of the landowner will be subordinate to those of the holder of the mining right.⁵⁷¹ This leaves landowners in a vulnerable position. Badenhorst⁵⁷² further raises the concern that section 54 is hugely problematic insofar as it is based on the supposition that compensation will only be payable if the owner or lawful occupier refuses to allow access to the land for mining, makes unreasonable demands in return for access, or cannot be found in order to apply for access. Where a landowner is likely to suffer damage as a result of the planned mining, but does not refuse access and as a result the process provided for in section 54 has not been initiated, he would on a strict interpretation not be able to claim compensation. Recognition should according to Badenhorst⁵⁷³ be provided in the MPRDA for a statutory claim for compensation for damage or loss suffered by the owners of private land. Whereas an expropriation claim is aimed at possible

⁵⁷⁰ Badenhorst 2011 (2) TSAR 340.

⁵⁷¹ *Joubert v Maranda Mining Company (Pty) Ltd* [2010] 2 All SA 67 (GNP).

⁵⁷² Badenhorst 2011 TSAR 326.

⁵⁷³ *Ibid.* See also Badenhorst PJ “Right of access to land for mining purposes: On *terra firma* at last?” 2010 (73) *THRHR* 326, in particular, the discussion of *Joubert v Maranda Mining Company (Pty) Ltd* [2010] 2 All SA 67 (GNP).

deprivations resulting from the MPRDA, an independent statutory claim is aimed at loss or damage caused by prospecting or mining operations authorised by the MPRDA.⁵⁷⁴

My brief research conducted into the position in other jurisdictions such as Australia, clearly highlighted that entry onto land (for mining) should not be permitted until a negotiated or arbitrated agreement, with adequate provision for compensation, is in place. In Western Australia the Mining Act of 1978 provides that compensation is payable to landowners: “i) for being deprived of the possession or use of the natural surface or any part of the land; ii) where damage is caused to the natural surface or any part of the land; iii) for severance of such land from other land of, or used by, that person; iv) for loss or restriction of a right of way, easement (such as a servitude) or right; v) for the loss of or damage to improvements; vi) for social disruption; and vii) for any reasonable expense properly arising from the need to reduce or control the damage resulting from mining.” In accordance with these provisions, landowners are therefore entitled to claim for losses suffered as a result of not being able to use their land to its fullest potential, and for expenses incurred for implementing measures aimed at minimising the risk of subsidence.

Expropriation of land by the state as a result of the parties failing to resolve their conflict, will only be possible if the Regional Manager is convinced that further negotiations between the parties will detrimentally affect the objects of the MPRDA. These provisions are not aimed at protecting the landowner’s rights as was the case under section 42 of the Minerals Act 50 of 1991.⁵⁷⁵ The provisions of section 42 of the repealed Minerals Act 50 of 1991 have not been carried over to the MPRDA, which appears to be another attempt to promote access to mineral resources, but which in reality unreasonably limits the use and enjoyment of landowners. In accordance with the Minerals Act, landowners could invoke the provisions of section 42 where mining has rendered land uneconomic for farming purposes. Where the Minister of Agriculture agreed that economic farming was no

⁵⁷⁴ Badenhorst 2010 (73) *THRHR* 326.

⁵⁷⁵ See ch 2 para 2.2.2.2.

longer possible because mining had hindered or prevented economic farming activities, he could recommend that the land be deemed to be required for public purposes and order that it be acquired by the state in accordance with the provisions of the Expropriation Act 63 of 1975.⁵⁷⁶ The landowner was then offered compensation equal to the market value of his land. If section 42 of the now repealed Minerals Act 50 of 1991 intended to restore the balance by directing the state to purchase land in circumstances where limitations resulting from mining activities had placed an unreasonable burden on the landowner's farming activities, could and should it not be extended to the MPRDA and include other uses such as township development? One would expect this to be so in light of the equality provision in the Constitution.

Many conflicts can be resolved by simply ensuring that the compensation is fair. What is considered fair by some, will not be seen to be adequate compensation to others. A clear, well-researched, uniform compensation model is therefore required which can be used as a framework for determining compensation. The model should perhaps not only provide for compensation, but should also specify in which circumstances structures which have been damaged by subsidence must be repaired, restored, or replaced. According to Badenhorst,⁵⁷⁷ proper compensation for any interference in the landowner's rights and not only for actual damage suffered, will at least to some extent alleviate the infringement of a landowner's use of his land. Either the mining right holder who profits from selling the mineral wealth it extracts from the land, or the state as part of their royalty entitlement, will have to contribute towards compensation for the infringement of a landowner's rights. It is therefore suggested that in the circumstances where the parties fail to reach agreement in respect of compensation payable, the matter should be referred to a competent, independent advisory board for determination.⁵⁷⁸

⁵⁷⁶ See ch 6 para 6.4.4.2 with regard to expropriation.

⁵⁷⁷ Badenhorst 2010 (73) *THRHR* 326.

⁵⁷⁸ See discussion in ch 7 para 7.3.1 and ch 8 para 8.3.4 above.

As I explain in Chapter 4 above, the current South African legislative framework for mineral resources in practice precludes a landowner from developing a township on his land where the holder of a mining right is not willing to grant its consent or support for the development. As such a refusal does not entail damage to the land itself, it is doubtful whether the landowner's claim for damages based on pure economic losses will succeed. It is also apparent from *Meepo v Kotze*⁵⁷⁹ that in these circumstances no provision is made in the MPRDA for compulsory compensation to be paid to a landowner based on the loss of the use of the surface of his land, except where his land is expropriated, or if compensation is awarded during the process of arbitration.⁵⁸⁰ This infringement of a landowner's entitlements for the sake of promoting access to natural resources appears unfair and needs to be offset by the state in some way. A possible solution may be for the state to restore the balance by providing that the use and enjoyment which landowners are forced to forego, should be compensated based on the principles of constructive expropriation of property in accordance with item 12 of the transitional arrangements contained in Schedule II to the MPRDA and section 25 of the Constitution.⁵⁸¹

8.3.7 IMPLEMENTATION OF PRECAUTIONARY MEASURES

One of the key reasons why holders of mining rights almost without exception oppose any attempt by landowners to proclaim townships on land where underground coal mining activities have been completed, is the risk of incurring liability for possible damage which might occur in future. If solutions could be found to sufficiently reduce the potential risks typically associated with township development on such land, vast areas could be made available to potential township developers.

⁵⁷⁹ 2008 (1) SA 104 (NC).

⁵⁸⁰ See also the discussion of *Joubert v Maranda Mining Company (Pty) Ltd* [2010] 2 All SA 67 (GNP) by Badenhorst 2010 (73) *THRHR* 326.

⁵⁸¹ See discussion in ch 6 para 6.4.

Mining right holders, as I explain in paragraph 4.2.4.1 above, have a legal duty to take steps to prevent or minimise foreseeable risks from materialising. Although an in-depth evaluation of the nature and the extent of this legal duty warrants further investigation, it falls beyond the scope of this study. A mining right holder's legal duty to avoid damage remains at least until a mine closure certificate has been issued to the mine. Mining right holders are therefore compelled to devise creative measures to ensure that any possible risks are adequately mitigated before consenting to any surface development.

Various technological methods exist which can be used to determine the stability of the land and the likelihood of further ground movement taking place as a result of mining subsidence. Comprehensive geotechnical and methane related evaluations can be conducted by means of various surveys ranging from satellite radar interferometry,⁵⁸² fixed-wing mounted remote sensing technologies,⁵⁸³ or manual visual inspections.

Where such evaluations reveal that significant risk of subsidence exists to the extent that there is a high probability of imminent harm, the mining company will have to consider entering into negotiations with the landowner with the view to purchasing the land, requesting the Chief Inspector of Mines to intervene, or the company must apply to court for an interdict to prevent the landowner from proceeding with the erection of structures on that land. Even where the probability of harm is low, mining right holders should at the very least warn landowners of the potential risks and should provide sufficient information regarding the type of mining and depths at which it has occurred to both the landowner and the Chief Inspector of Mines to enable them accurately to determine the extent of the possible risks and the appropriate risk mitigation measures to be implemented.

⁵⁸² See http://www.gmat.unsw.edu.au/snap/publications/ge_etal2004a.pdf (date of use 18 October 2014).

⁵⁸³ Various remote sensing technologies are available making use of amongst others, infrared, laser or thermal imagery. See Figure 35 in the Appendix.

There are a range of practical measures which may be implemented to mitigate possible risks.⁵⁸⁴ As indicate in paragraph 4.2.4.1, a suitably qualified geotechnical specialist should conduct a comprehensive risk evaluation to determine the likelihood of future subsidence. If high-risk areas are identified, the mining right holder or Chief Inspector of Mines may require that such areas are excluded from the township development plan; are fenced off or otherwise demarcated and that warning signs are erected informing potential entrants of the nature and extent of the risks present. To mitigate possible risks related to the release of harmful methane gas, the drilling of boreholes into the mining cavities and the installation of non-return valves may sufficiently reduce the effect of the release of harmful gas. Another possible safeguard for mining right holders is to compel the municipality to impose certain title restrictions in the deed of sale of properties to ensure that successors in titles are fully appraised of the potential risks. These title restrictions may vary from merely indicating that underground mining has taken place, to restricting landowners from conducting deep excavations or drilling water-boreholes and prescribing whether single or double story structures will be allowed on the property. In cooperation with the Chief Inspector of Mines, the Minerals and Mining Development Board may also need to advise the landowner on the use of specific building materials or require special attention to the foundation design and construction specifications.⁵⁸⁵

8.4 CONCLUDING REMARKS

Control over land remains a deeply emotive issue in South Africa and this is particularly true where landowners and mining right holders compete for the same land. The interests of the mining company in extracting valuable coal resources must be balanced against the interests of the landowner in the use and enjoyment of his property to its fullest potential, including use for agricultural or township

⁵⁸⁴ In certain instances ground stability can be restored by doing backfilling. See the 3D animation in the enclosed compact disc.

⁵⁸⁵ See the Australian model, especially the establishment of an independent Subsidence Board which assesses potential risks and advise landowners regarding construction specifications (ch 7).

development purposes. A mining operation must operate within the boundaries of the comprehensive set of laws which regulate it, including the applicable mining regulatory laws, mine health and safety laws, environmental law, and importantly spatial planning law. As I explain above, South Africa's current mineral-law dispensation limits township development,⁵⁸⁶ not only in areas where mining companies intend to extract coal reserves in future, but also where mining has been completed. Conversely, township development limits mineral exploitation.⁵⁸⁷

As in other jurisdictions, mineral regulation in South Africa should aim to develop a legal framework which regulates the orderly development of mineral resources in a manner which strikes a proper balance between the growing demand for resources on the one hand, and the need to protect the environment and high-grade land for agriculture and township development on the other hand. The framework should provide for safe, sustainable and economically viable operations without marginalising the private landowner. This can only be achieved if the legislation which regulates the position is transparent, comprehensive, clear, and consistent. Currently there is no balance between the conflicting interests of landowners and mining right holders. As I suggest above, several measures can be implemented to address the conflict between holders of mining rights and affected landowners. These include amendment of the MPRDA, utilisation of appropriate mining technology and methods, ensuring comprehensive consultation and involvement of affected parties, and, most importantly, proper integrated planning.

⁵⁸⁶Our courts have on many occasions expressed the view that the use of the surface of the land should be subordinate to mineral extraction, affording the holder of mining rights strong protection. The *locus classicus* here is *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) (hereafter referred to as the *Anglo* case), where it was restated that in cases of irreconcilable conflict, the use of the surface should yield to mineral exploitation. Opencast mining and even shallow coal mining could, therefore in practice have the effect of restricting township development.

⁵⁸⁷ The MHSA's provisions effectively prevent a mining company from conducting high extraction mining beneath structures on the surface of land. Coupled with a mining company's liability in cases of damage or injury, a mining company's right to extract reserves under a proclaimed township is effectively neutralised.

Landowners need to be treated fairly. This requires that compensation for any interference in the use and enjoyment of their land must be reasonable. From the brief overview of selected jurisdictions, it is clear that such a balanced approach to the protection of the interests of both landowners and mining right holders is essential for peaceful coexistence and the welfare of society.

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Figure 1: *Open-pit coal mining operation*

Source: http://en.wikipedia.org/wiki/Wikipedia:WikiProject_Mining/Assessment

Date of use: 13 February 2014

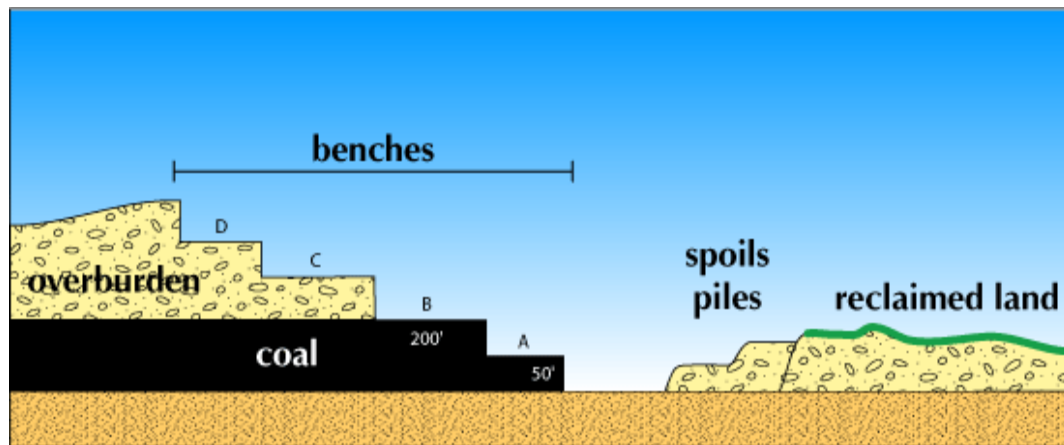


Figure 2: *Cross-section of an open-pit coal mining operation*

Source: http://www.gg.uwyo.edu/content/laboratory/mining/surface/mine_types/open-pit/pit_coal.asp?callNumber=34981&SubcallNumber=0&color=6692CC&unit=goldIII

Date of use: 13 February 2014

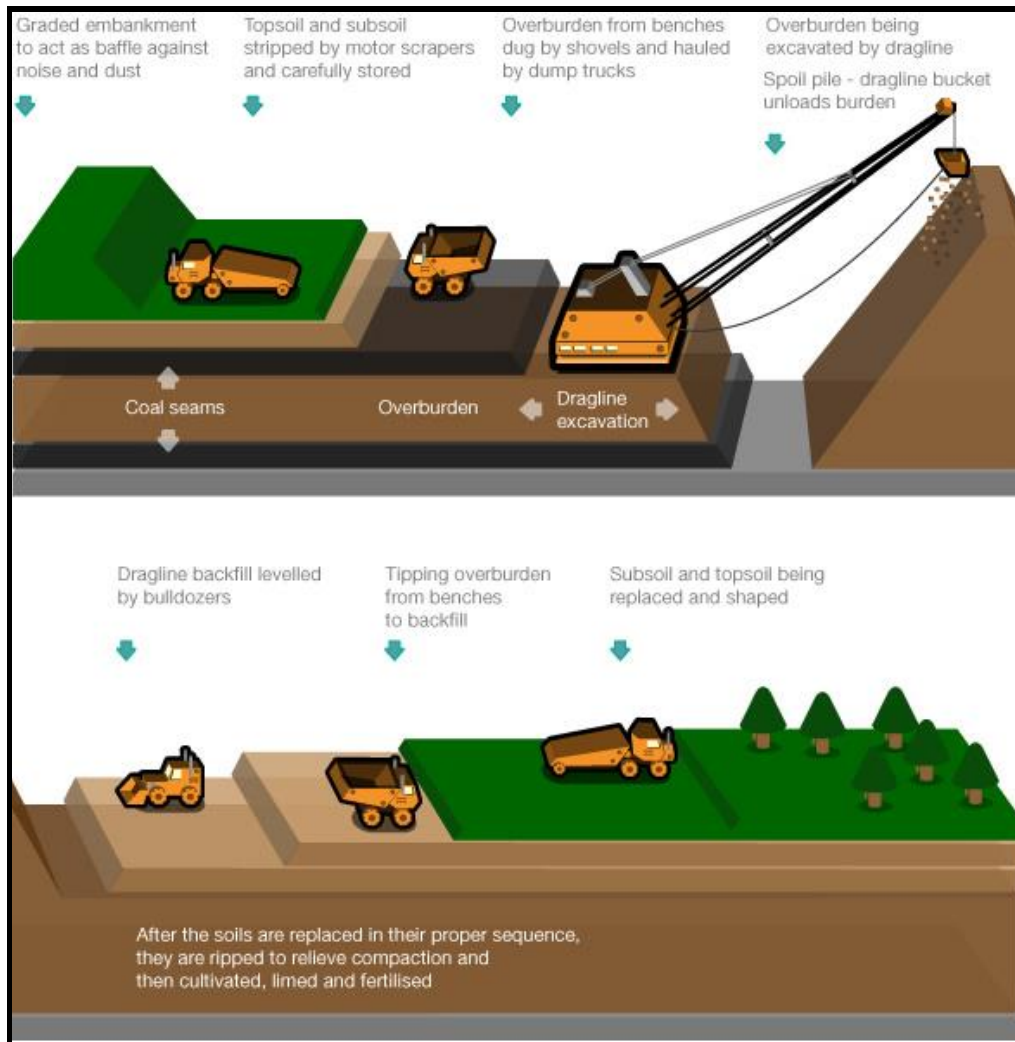


Figure 3: Cross-section of an opencast coal mining operation using a dragline

Source: World Coal Association: <http://www.worldcoal.org/coal/coal-mining/>

Date of use: 13 February 2014

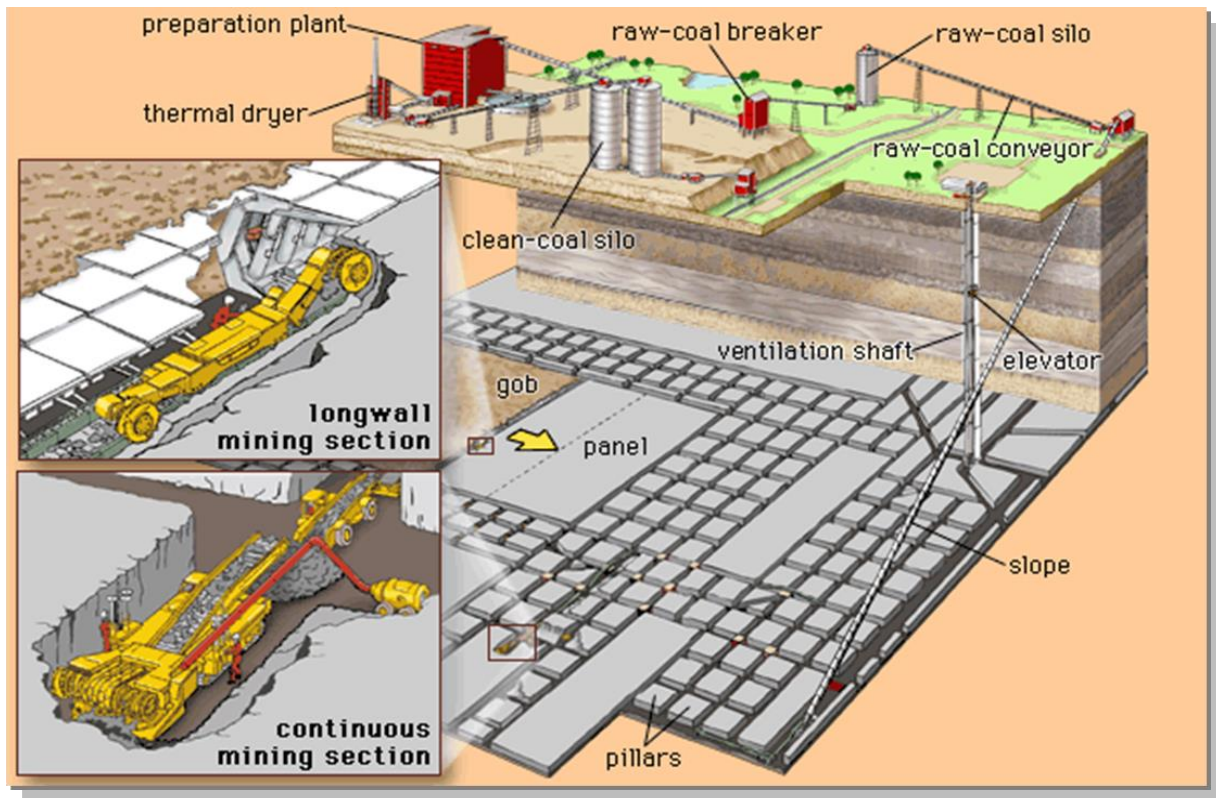
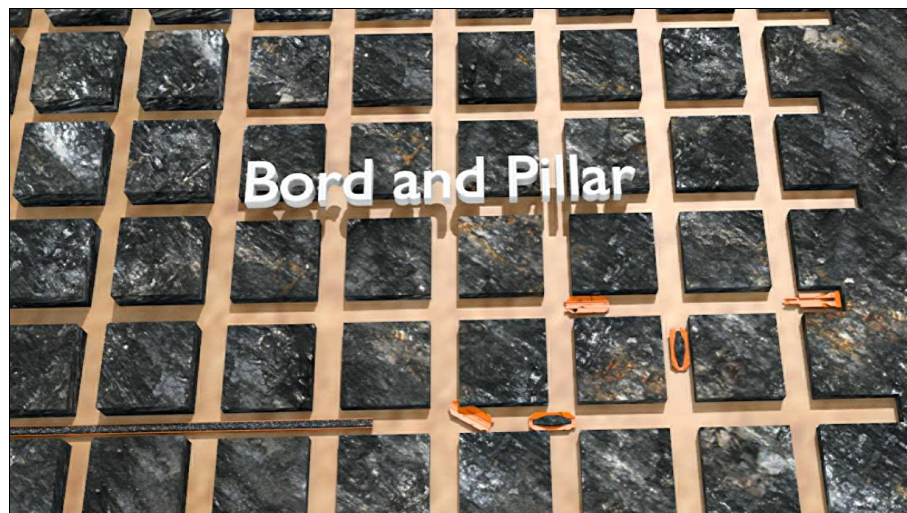


Figure 4: A typical underground coal mining operation

Source: <http://www.shibang-china.com/coal-project/coal-mining-methods.html>

Date of use: 13 February 2013



See also the enclosed compact disc for a 3D animation showing the workings of an underground coal mine, some of the different types of underground coal mining methods and the impact of coal mining subsidence.

Source: Courtesy of Sasol Mining

Date of use: 31 October 2014

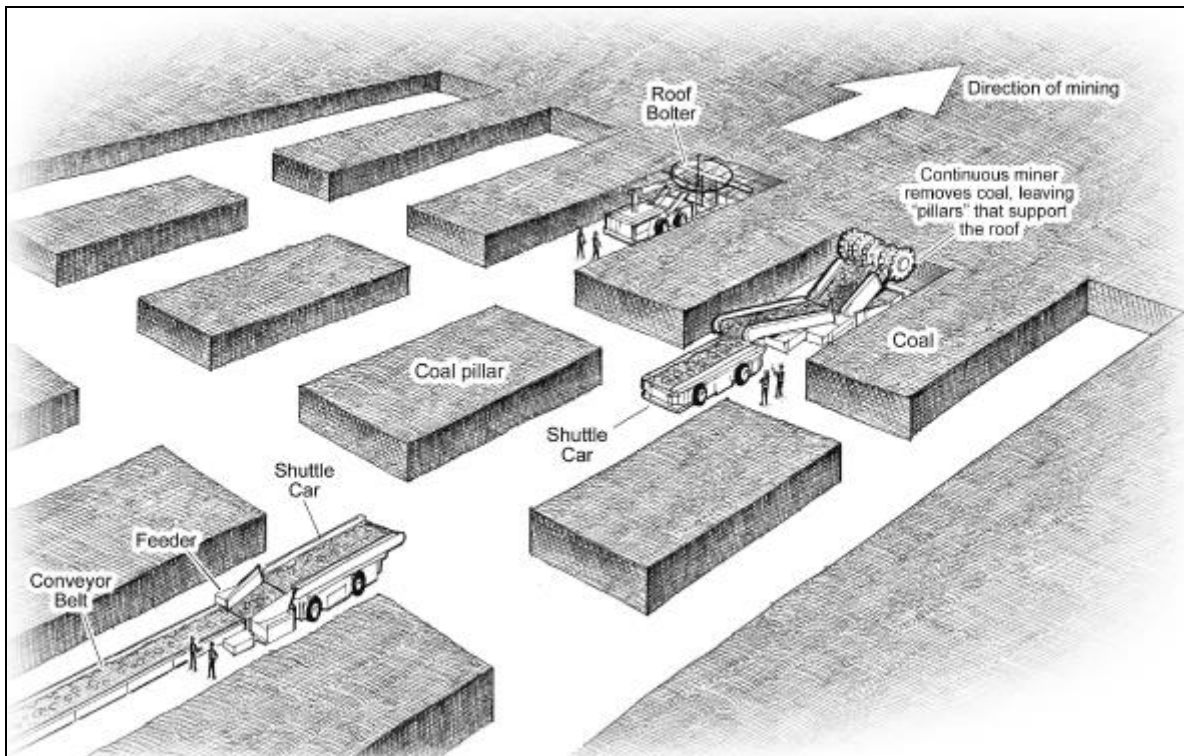


Figure 5: Bord-and-pillar mining method

Source: <http://www.sec.gov/Archives/edgar/data/1037676/000095015209001922/c48697e10vk.htm>

Date of use: 13 February 2014

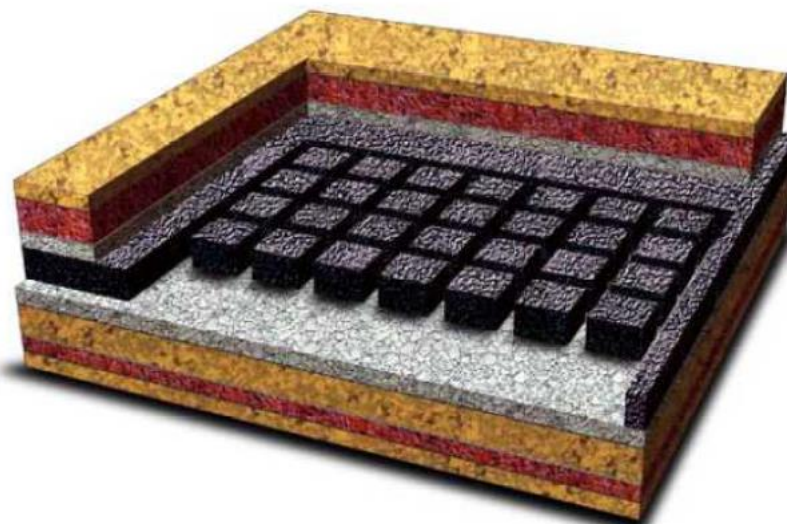


Figure 6: Bord-and-pillar mining method

Source: http://cottonaustralia.com.au/uploads/blog/Subsidence_paper_QLD.pdf

Date of use: 7 January 2014

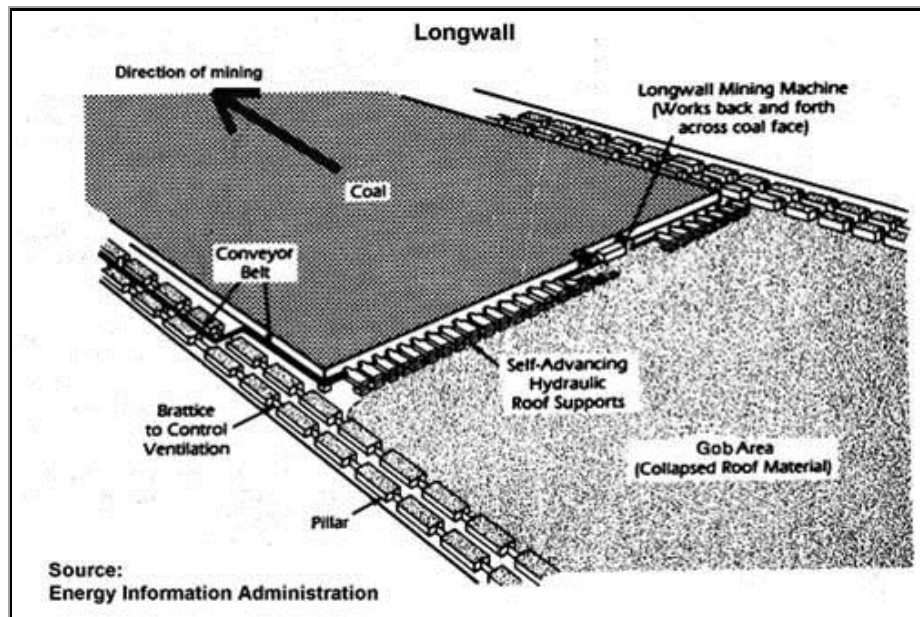


Figure 7: Illustration of a longwall mining section

Source: <http://www.personal.psu.edu/mrg5035/long%20wall.jpg>

Date of use: 13 February 2014



Figure 8: Photos of longwall mining : Hydraulic shield supports and cutting drum

Source: <http://library.isgs.uiuc.edu/Pubs/pdfs/circulars/c573.pdf>

Date of use: 13 February 2014

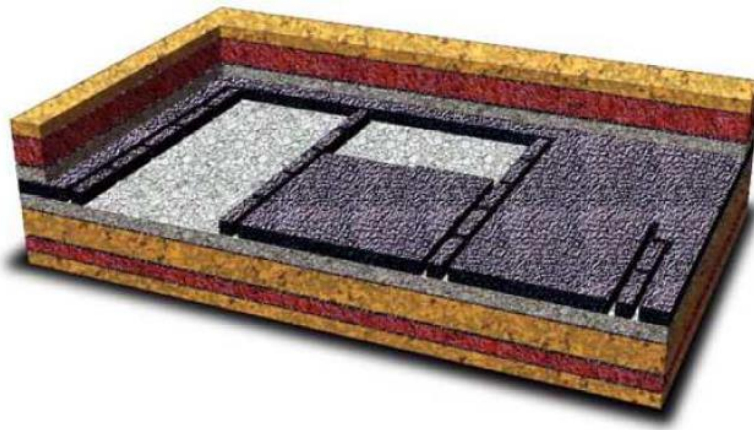


Figure 9: Illustration of a longwall mining section

Source: http://cottonaustralia.com.au/uploads/blog/Subsidence_paper_QLD.pdf

Date of use: 7 January 2014

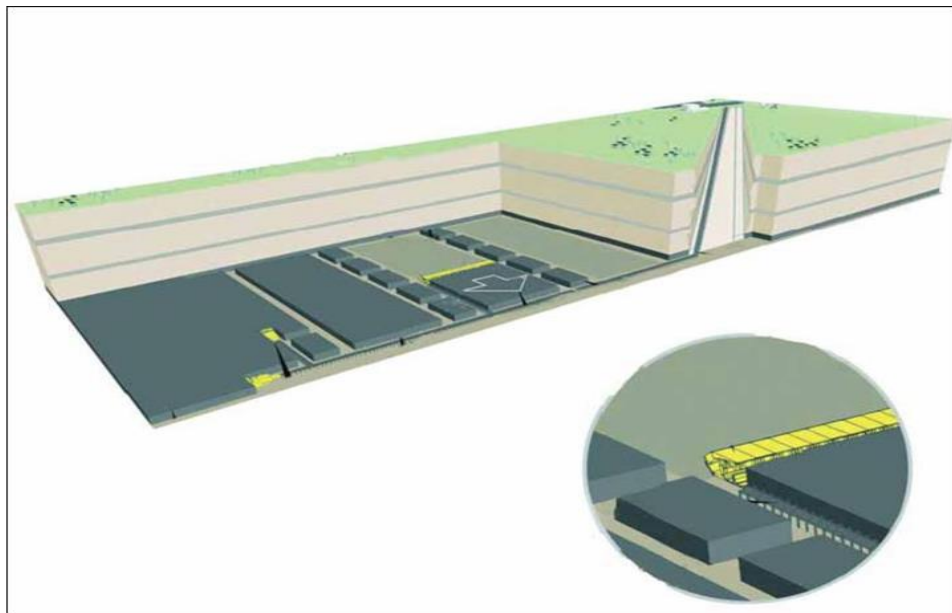


Figure 10: Illustration of a longwall mining section

Source: http://www.coalleader.com/longwall_mining.htm

Date of use: 7 January 2014

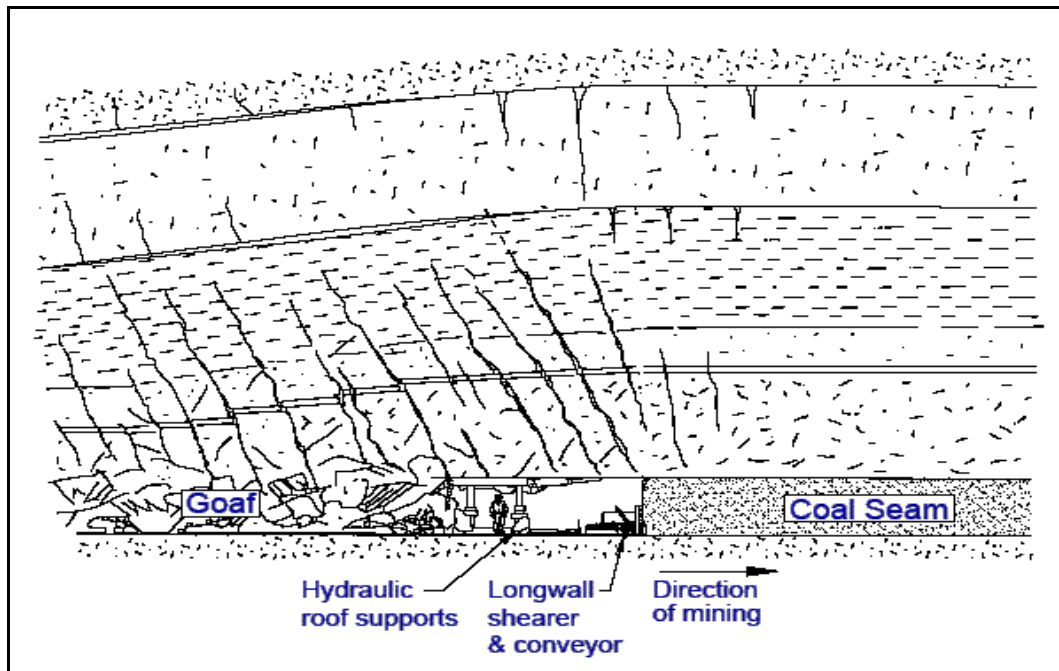


Figure 11: Sketch illustrating subsidence caused by removal of support

Source:

http://www.gmat.unsw.edu.au/currentstudents/ug/projects/Sparkes/index_files/Page380.htm

Date of use: 7 January 2014

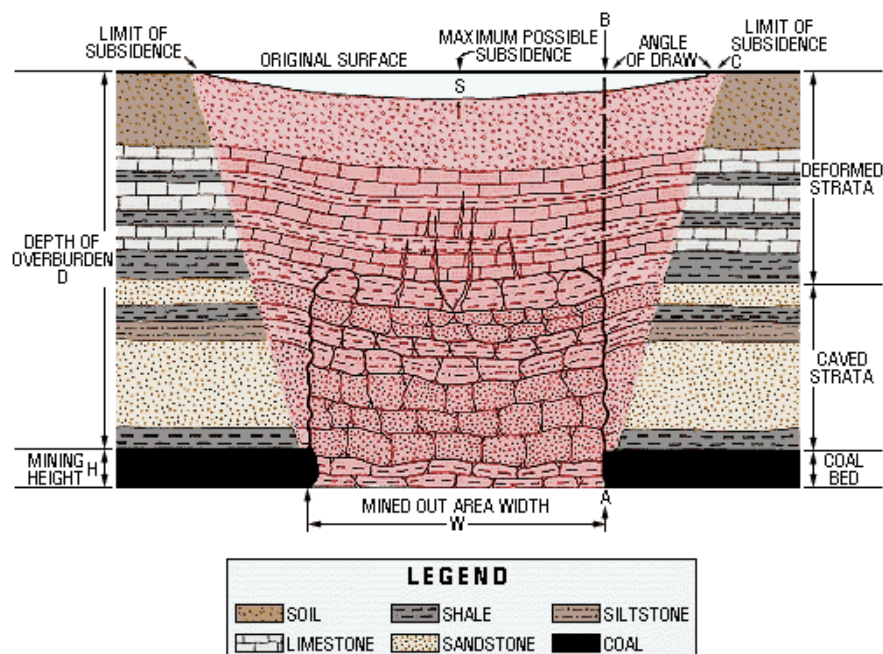
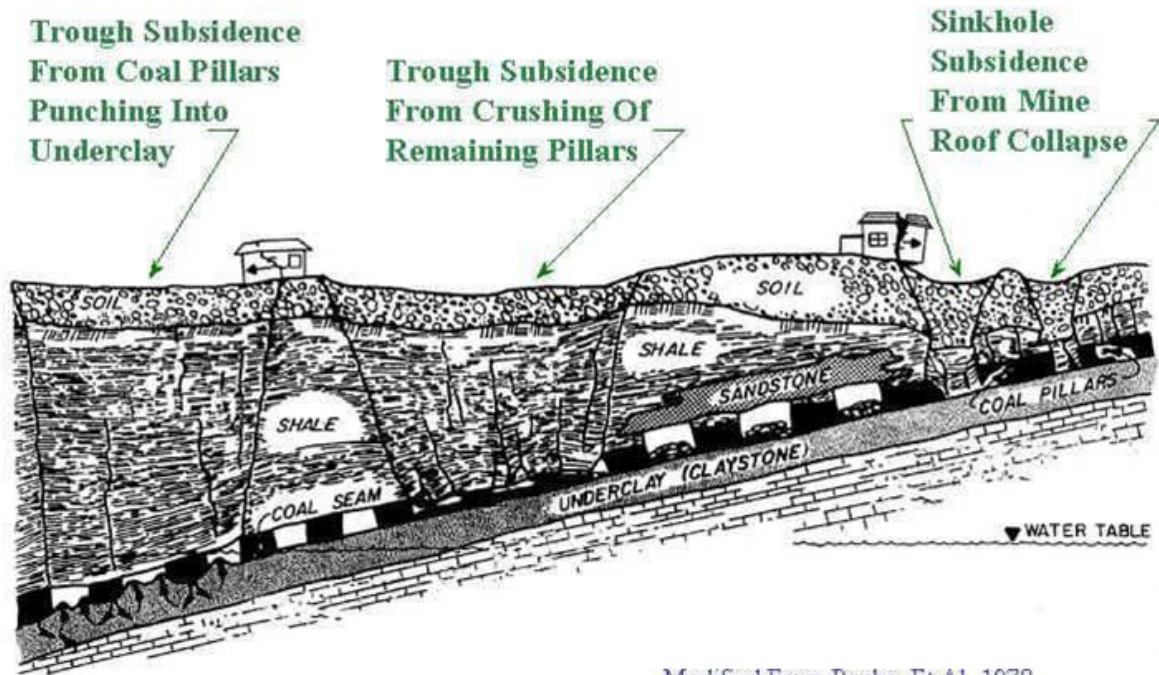


Figure 12: The mechanics of coal-mining subsidence

Source: <http://www.wvgs.wvnet.edu/www/geohaz/geohaz3.htm>

Date of use: 7 January 2014

MODES OF SUBSIDENCE



Modified From Bruhn, Et Al, 1978

Figure 13: Modes of subsidence

Source: <http://www.dep.state.pa.us/msi/illus/html/ModesOfSubsidence.html>

Date of use: 7 January 2013

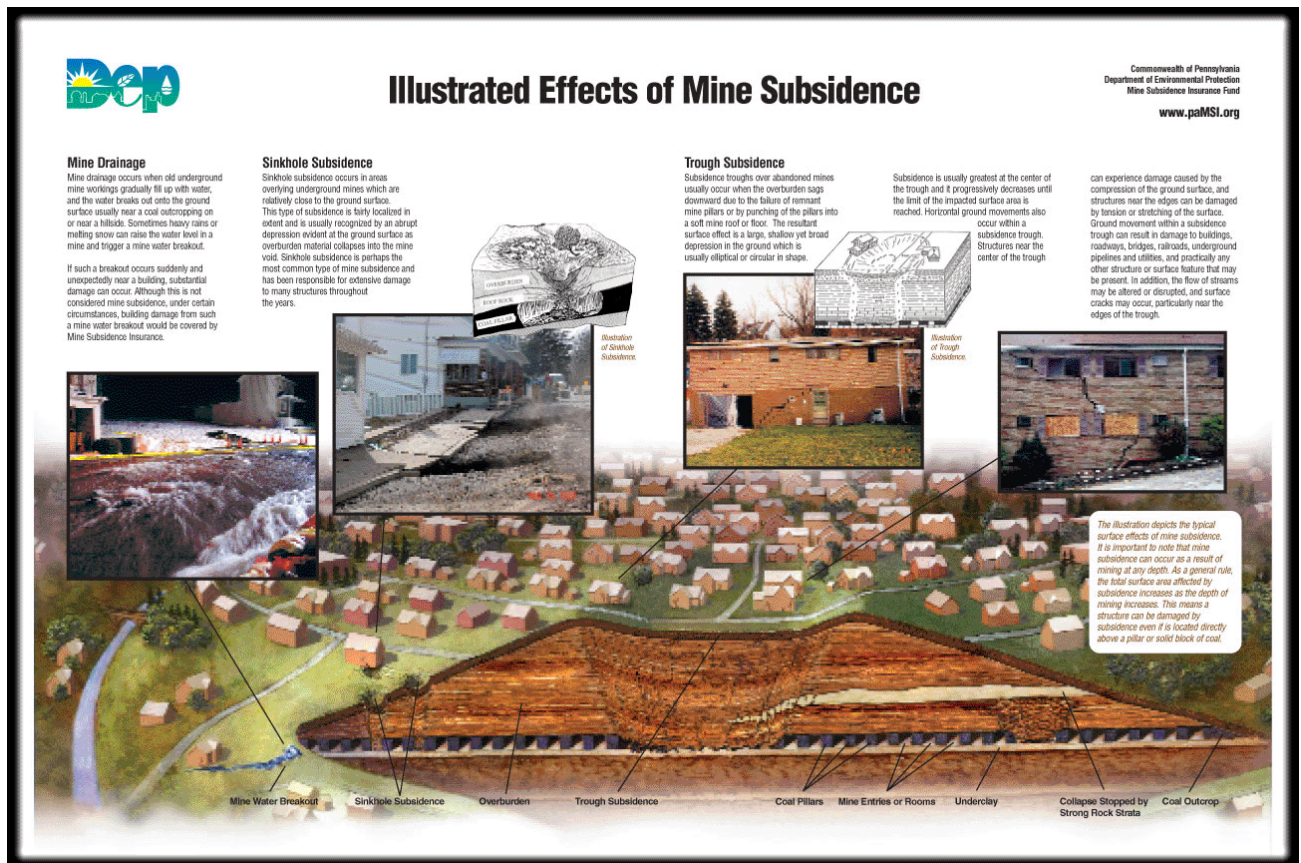


Figure 14: Illustrated effects of mine subsidence

Source: http://www.dep.state.pa.us/msi/illus/Mine_Subsidence_Illustration.gif

Date of use: 7 January 2014

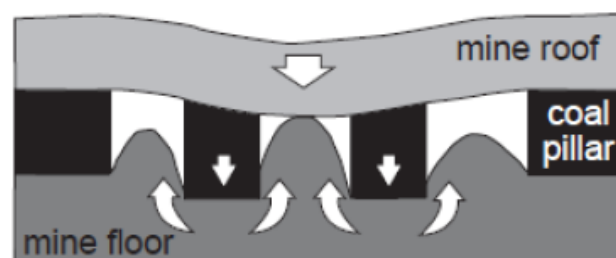


Figure 15: Through subsidence caused by failure of the mining floor

Source: <http://library.isgs.uiuc.edu/Pubs/pdfs/circulars/c573.pdf>

Date of use: 7 January 2014

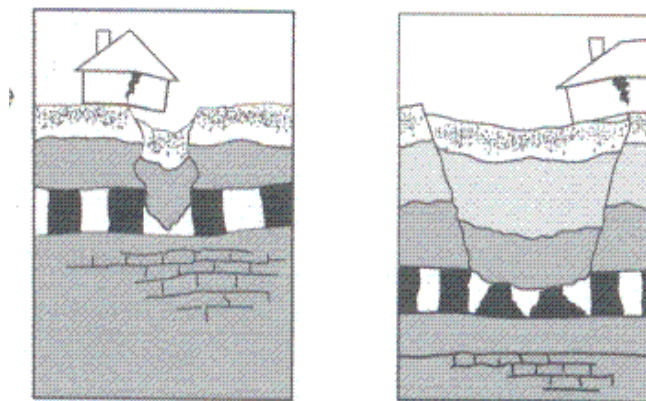


Figure 16: Subsidence caused by the collapse of the roof and crushing of pillars

Source: <http://bretdixonins.com/covg-minesubsidence.html>

Date of use: 14 February 2014

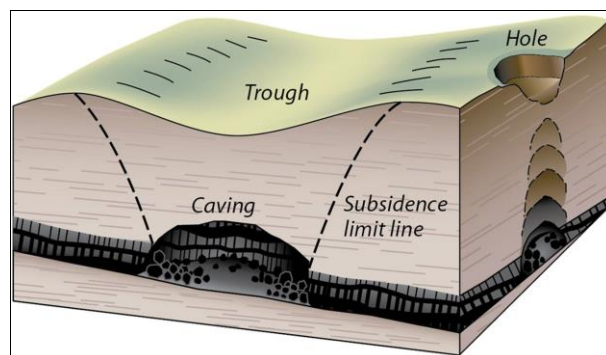
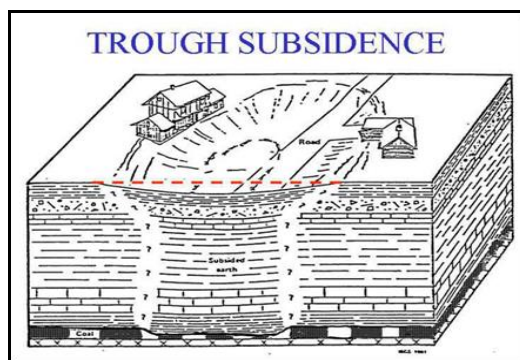


Figure 17: Trough subsidence

Source: <http://www.dep.state.pa.us/msi/WhatIsMS.html>;

<http://www.dep.state.pa.us/msi/WhatIsMS.html#1pics>

Date of use: 13 February 2014

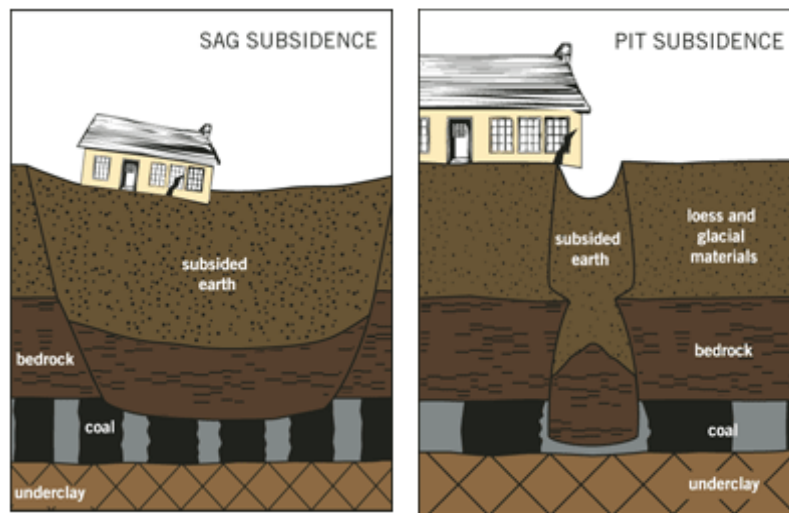


Figure 18: Sag subsidence and pit subsidence

Source: <https://www.imsif.com/typesMineSub>

Date of use: 7 January 2014



Figure 19: Damage caused by mining subsidence

Source: http://www.pebblescience.org/Pebble-Mine/block_caving.html

Date of use: 7 January 2014



Figure 20: Photo (a) illustrates the condition of a road in Illinois resulting from longwall mining. Photo (b) indicates the condition of the road following repairs having been done.

Source: <http://library.isgs.uiuc.edu/Pubs/pdfs/circulars/c573.pdf>

Date of use: 7 January 2014



Figure 21: *Damage caused to a road*

Source: techtransfer.osmre.gov

Date of use: 7 January 2014



Figure 22: *Field in Uni, Indiana affected by coal mine subsidence causing waterlogging*

Source: http://cottonaustralia.com.au/uploads/blog/Subsidence_paper_QLD.pdf

Date of use: 7 January 2014)



Figure 8.4. Subsidence in an Indiana field (Source: Uni Indiana, Indiana Geological Survey web site accessed 18.1.2013).

According to the Central Queensland Golden Triangle website (accessed 15.1.2013), *'the subsidence occurring as a result of underground mining will significantly alter surface topography, and drainage of runoff. Farmers have made significant investments in drainage works, including contour banks, waterways, levee banks, laser and other levelling works, to help reduce erosion in their paddocks, and to facilitate the efficient disposal of runoff or overland flow water. This infrastructure will be rendered useless if substantial subsidence changes surface topography and surface drainage patterns. Repairing such damage would be very expensive and unviable for family farms.'*

Figure 22: Damage to agricultural land

Source: http://cottonaustralia.com.au/uploads/blog/Subsidence_paper_QLD.pdf

Date of use: 7 January 2014)



Figure 23: *Example of damage caused by mine subsidence*

Source: Pennsylvania Department of Environmental Protection

<http://www.dep.state.pa.us/msi/damage.html>

Date of use: 7 January 2014



Figure 24: *Restoration work being performed on a residence to repair the effects of mining*

Source: Pennsylvania Department of Environmental Protection

<http://www.dep.state.pa.us/msi/damage.html>

Date of use: 7 January 2014



Figure 25: *Damage caused to foundations*

Source: Pennsylvania Department of Environmental Protection

<http://www.dep.state.pa.us/msi/damage.html>

Date of use: 7 January 2014



Figure 26: *Residence collapsed as a result of mine subsidence*

Source: Pennsylvania Department of Environmental Protection

<http://www.dep.state.pa.us/msi/damage.html>

Date of use: 7 January 2014



Figure 27: Formation of cracks

Source: <http://www.dep.state.pa.us/msi/illus/html/Collapse.html>

Date of use: 7 January 2014



Figure 28: The photos shows the structures during and after repairwork has been performed to residences damaged as a result of coal mining

Source: Bauer Planned Coal Mine Subsidence in Illinois

<http://library.isgs.uiuc.edu/Pubs/pdfs/circulars/c573.pdf>

Date of use: 7 January 2014



Figure 29: This unoccupied structure located above the centreline of a longwall panel was subsided 4.5 feet. The white line represents the level of the original ground surface

Source: Bauer *Planned Coal Mine Subsidence in Illinois*

<http://library.isgs.uiuc.edu/Pubs/pdfs/circulars/c573.pdf>

Date of use: 7 February 2014



Figure 30: Subsidence above abandoned coal mines in Indiana

Source: Indiana Department of Natural Resources: <http://www.in.gov/dnr/reclamation/2709.htm>

Date of use: 7 January 2014



Figure 31: *Caving in of a driveway*

Source: Pennsylvania department of environmental protection

<http://www.dep.state.pa.us/msi/illus/html/Collapse.html>

Date of use: 7 January 2014



Figure 32: *Structural damage*

Source: Pennsylvania department of environmental protection

<http://www.dep.state.pa.us/msi/illus/html/Collapse.html>

Date of use: 7 January 2014

Figure 33: Newspaper clipping on the impacts of coal mine fire in Pennsylvania

Source: <http://www.roadsideamerica.com/story/2196>

Date of use: 13 February 2014



Centralia Mine Fire

Field Review by
the Team at
RoadsideAmerica.com

Centralia, Pennsylvania

No one knows exactly how it started, but a coal vein has been burning under the Pennsylvania mining town of Centralia since 1961. Some trace it back to careless trash incineration in an open pit mine igniting a coal vein. The fire crawled, insidiously, along coal-rich deposits far from the miner's pick, venting hot and poisonous gases up into town, through the basements of homes and businesses.

With dawning horror, residents came to realize that the fire was not going to be extinguished, or ever burn itself out -- at least not until all the interconnected coal veins in eastern Pennsylvania were spent in some epic, meatless barbecue. As the underground fire worked its way under rows of homes and businesses, the threat of fires, asphyxiation, carbon monoxide poisoning, and long-term health impact became a daily concern.

The government eventually stepped in, and Centralia joined an elite club of communities, including **Love Canal** and **Times Beach**. Declared *municipalis non grata*, Centralia was slowly abandoned as houses were demolished or burned, and citizens relocated.



We first visited in the mid-1980s, when 80% of Centralia had already been abandoned. The hillsides were punctured with craggy vent pipes spewing noxious gases. Large, cracked holes and pits threatened the roads through town. Though there were no visible flames, you could feel the heat radiating from the latest breaches. It was said that snow never stuck here in places, because the ground was so warm...

Remaining residents had their hopes pinned on an ambitious plan to contain the blaze, the last in a series of elaborate schemes. We heard the details at the Centralia branch of the county fire department, the only new building constructed since the fire started. They hoped to dig a **500-foot deep trench** completely across the hill which Centralia sprawled, holding back the fire and saving nearby Ashland (beloved by tourists for its **Anthracite Museum**, mine tour, steam



Figure 34: Newspaper clippings regarding hazards of coal mine fires

Source: http://news.nationalgeographic.com/news/energy/2013/01/pictures/130108-centralia-mine-fire/#/centralia-coal-fire-still-burning-hillside_62965_600x450.jpg

Date of use: 13 February 2014



Clouded Future

Photograph by Leif Skoogfors, Corbis

Steam from the Centralia mine fire in 1982 streams skyward, as if pouring from a volcano.

For years, many Centralia residents worried about the possible health consequences of inhaling fumes from the fire. For some who lived near the blaze, gas samples taken by government officials revealed a litany of harrowing possibilities: low levels of oxygen; high levels of carbon dioxide; traces of carbon monoxide. In the early 1980s, several families lived with carbon-monoxide monitors in their homes, set to sound an alarm when readings spiked.

In the Gaughans' neighborhood, residents had reason for concern. According to test results from a federal laboratory, the carbon monoxide level inside the cave-in that Todd Domboski fell into had reached 1,154 parts per million, more than 30 times the federal government's recommended exposure threshold.

State officials still keep tabs on about 40 Centralia boreholes, though not as frequently as they once did, given the borough's population decline.

"We know as long as the fire is burning, the gases coming off have carbon monoxide in it," said Tim Altares, a professional geologist manager in Pennsylvania's Bureau of Abandoned Mine Reclamation.

Published January 8, 2013



Fire Begets Fire

Photograph by Andrea Booher, FEMA via AP

Smoke from a forest fire, sparked by a long-burning blaze in an abandoned underground coal mine, engulfs a Colorado mountainside in June 2002.

Roughly 4 miles (6.4 kilometers) west of Glenwood Springs, Colorado, a coal mine has smoldered since 1910. No one knows what caused the flare-up inside the South Cañon Number One Mine, according to Stracher, who wrote a 2004 field guide on the colliery fire for the Geological Society of America. But the spread of the underground blaze forced a halt in mining in the early 1950s.

Half a century later, on June 8, 2002, a mine-fire vent ignited dried brush at the surface, on South Canyon's western slope. The fire plowed through the canyon, vaulted the Colorado River, surged across Interstate 70, and swept into a residential area. Police officers, dispatched to evacuate residents, reported seeing flames leaping over their squad cars, according to Glenwood Springs Police Chief Terry Wilson. "It's nothing I want to do again," said Wilson.

The forest fire, known as the Coal Seam Fire, consumed more than 12,000 acres of land and destroyed 29 homes. The South Cañon mine is still burning.

Published January 8, 2013



India Inferno

Photograph by Chris Stowers, Panos Pictures/Felix Pictures

Children perch atop a smoldering outcrop in Jharia, India, where underground mine fires menace nearby villagers.

As many as 70 coal fires have raged across Jharia, a 450-square-kilometer (174-square-mile) coalfield in northeast India. The first reported blaze ignited in 1916, according to a World Bank study completed in 1996. In that report, investigators said the Jharia blazes could affect the health, safety, and well-being of one million people. (Two of the investigators worked for a Pittsburgh-based U.S. firm, GAI Consultants, Inc., that analyzed the Centralia mine fire in the 1980s.)

Beginning in 1996, officials crafted a \$1.4 billion plan to deal with the fires and resettle 90,000 residents, according to a report in the *Los Angeles Times* last year. That's roughly 90 times the size of Centralia's relocation. "Centralia is nothing, nothing at all, compared to this," said Stanley R. Michalski, a retired project manager at GAI Consultants and principal investigator of the World Bank study. So far, only about 1,150 Jharia families have relocated, according to the *Times*. Many people are too poor to move, and make a living by illegal mining and scavenging of coal. (See related story: ["Coal Power Loses Its Luster in India as Costs Rise."](#))

Published January 8, 2013



Saved From the Void

Photograph from AP

Hours after plunging into the Earth, Todd Domboski stares at the abyss that briefly swallowed him—a hole swirling with toxic gases from an underground mine fire.

On February 14, 1981, 12-year-old Domboski sank into a cave-in that ruptured the soil in his grandmother's backyard in Centralia, Pennsylvania, where an abandoned coal mine had smoldered for 19 years.

The Centralia blaze, still burning more than 50 years after it began, ranks as the worst mine fire in the United States. But it is by no means the only one. More than 200 underground and surface coal fires are burning in 14 states, according to the U.S. Department of Interior's [Office of Surface Mining Reclamation and Enforcement](#).

And with worldwide demand for coal surging, especially in industrializing nations such as India and China, mine fires have emerged as a global environmental and public health threat. Thousands of coal fires rage on every continent but Antarctica, endangering nearby communities. The blazes spew toxic substances such as benzene, hydrogen sulfide, mercury, and arsenic, as well as greenhouse gases like methane and carbon dioxide. (See related story: "[Seeking a Safer Future for Electricity's Coal Ash Waste](#).")

In Centralia, Domboski survived his 45-second ordeal by grabbing onto tree roots. He screamed for help until his cousin ran to his aid, reached into the void, and hoisted him out.

Many Centralia residents had long feared a calamity like the one that nearly unfolded that Valentine's Day. Four years earlier, Domboski's father had told a reporter, "I guess some kid will have to get killed by the gas or by falling in one of these steamy holes before anyone will call it an emergency."

—Joan Quigley

Joan Quigley is author of the 2007 book about Centralia, [The Day the Earth Caved In: An American Mining Tragedy](#).

This story is part of a [special series](#) that explores energy issues. For more, visit [The Great Energy Challenge](#).

Published January 8, 2013

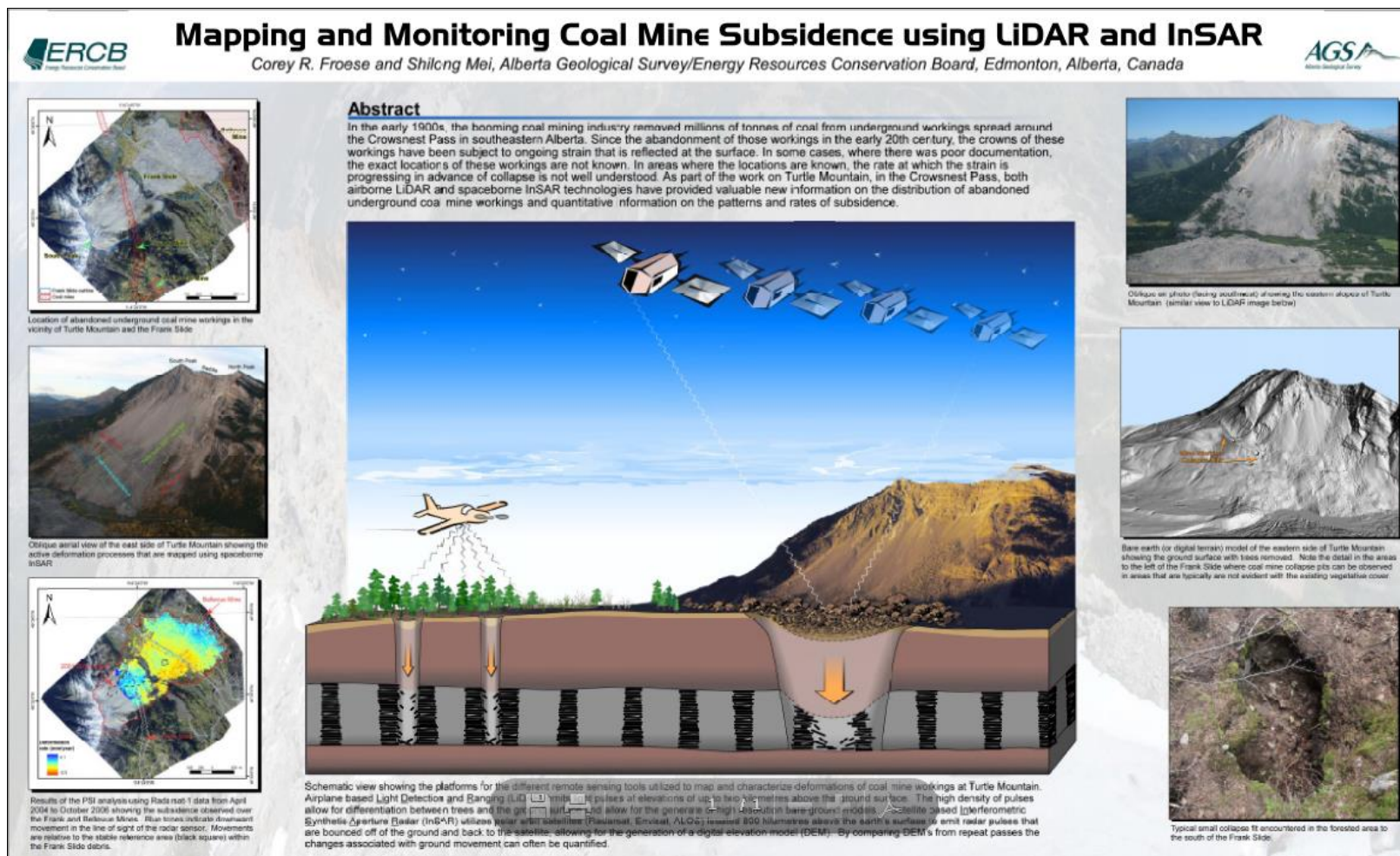


Figure 35: Remote Sensing Technology

Source: http://www.ags.gov.ab.ca/geohazards/pdf/tm_poster_coal_lidar.pdf

Date of use: 20 May 2014

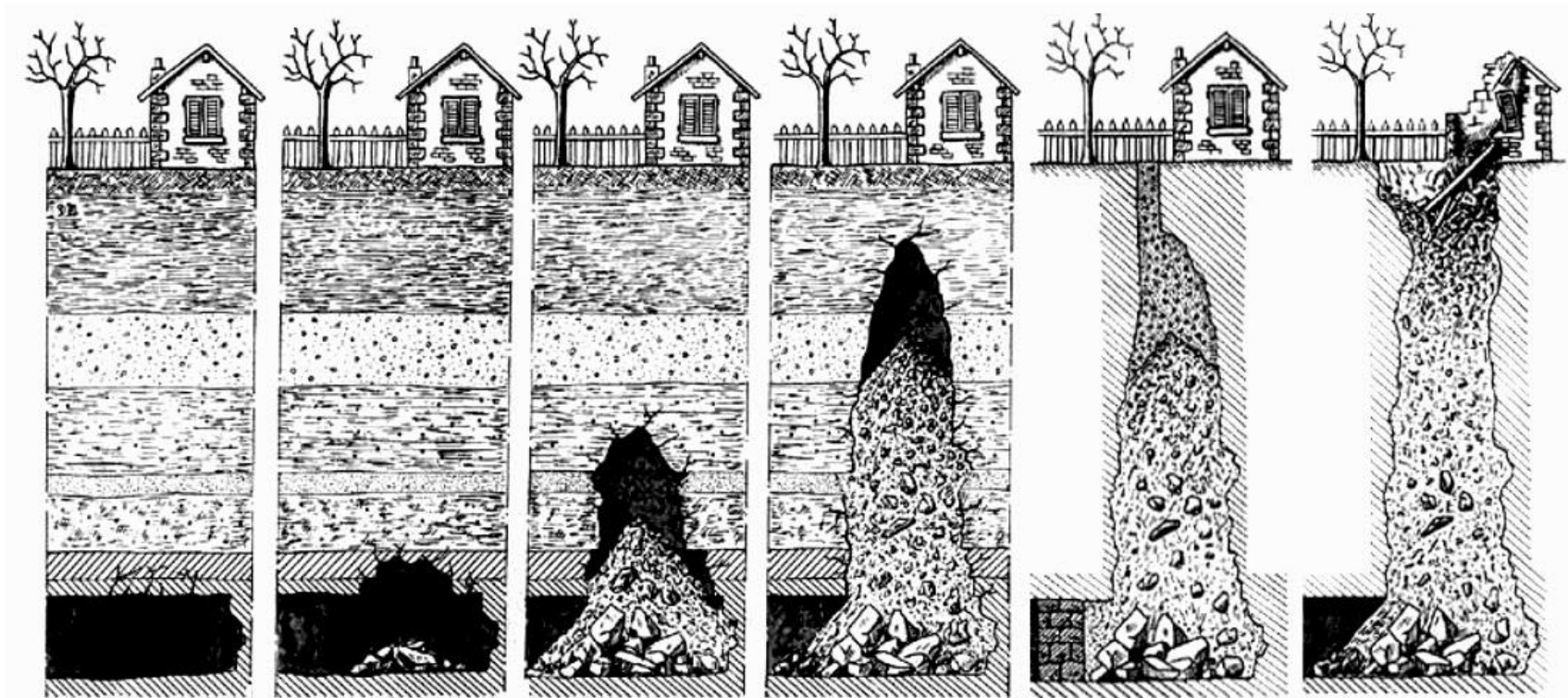


Figure 36 : Geological Legacies of the Paris Basin: Part II – Subterranean Limestone Quarries and Catacombs of Paris

Source: http://3.bp.blogspot.com/-tZh__b93IUA/U6a-1kWdJ8I/AAAAAAAAFIU/Wc07nvNrIg/s1600/gypsum+fortis.jpg

Date of use: 18 November 2014