

**THE RE-VESTING OF STATE HELD
ENTITLEMENTS
TO EXPLOIT MINERALS IN SOUTH AFRICA:
PRIVATISATION OR DEREGULATION?**

P J Badenhorst

**BLC LLB (Pretoria) LLM (Witwatersrand) LLM (Yale)
Attorney and Notary of the Supreme Court of South Africa**

**Inaugural address as Professor of Private Law,
University of the North, delivered on
4 April 1990.**

**(To the best of my ability the law and developments are stated as at the end of
February 1990)**

THE RE-VESTING OF STATE HELD ENTITLEMENTS TO EXPLOIT MINERALS IN SOUTH AFRICA: PRIVATISATION OR DEREGULATION?

P J BADENHORST.

1. INTRODUCTION.

The concept of State held entitlements to exploit minerals is a novel one and I will therefore discuss it more fully during the course of my address.¹ Suffice to say at this stage is that some of the entitlements to exploit minerals and certain mineral rights, which include the entitlements to exploit minerals, are presently vested in the State. [I will hereinafter, refer to those entitlements collectively as the *State held entitlements to exploit minerals.*]

During 1986 the Government confirmed its intention to promote private enterprise insofar as the exploitation of minerals was concerned.² On 15th December 1988 the Department of Mineral and Energy Affairs published a Proposed Minerals Bill for general information and comment.³ Despite

1. see 3.2. below.

2. See the **White Paper on the Mineral Policy of the Republic of South Africa** (1986) 5-6.

3. GN 856 of 1988. (Hereafter cited as the "**Proposed Minerals Bill, 1989**").

strong opposition from the mining industry, especially the Chamber of Mines⁴ and trade-unions, final approval of the Minerals Bill was granted by the Cabinet⁵ and the Bill has been introduced during the 1990-session in Parliament.⁶ It is submitted that insofar as the Minerals Bill will have the effect of re-vesting some of the State held entitlements in private individuals, it must be investigated against the background of a broader government policy of privatisation and deregulation of the economy.⁷

For purposes of the address tonight on the privatisation and deregulation of State held entitlements to exploit minerals, I wish to achieve the following goals:

Firstly, to set out the theory on mineral rights⁸, as I see it; and

4. See **The Memorandum to the Director General: Mineral and Energy Affairs on the Proposed Minerals Bil, 1989** by the Chamber of Mines of South Africa (1989). (Hereafter cited as the "**Chamber of Mines Memorandum**").

5. Press Release by the Bureau for Information on Behalf of The Minister of Mineral and Energy Affairs and Public Enterprises on 20 November 1989; see also "Govt presses ahead with Mineral Bill" **The Bussines Day** (1989-06-22) 1-2.

6. The Minerals Bill, 1990 as introduced, will hereafter be referred to as the "**Minerals Bill**".

7. See in general the **White Paper on Privatisation and Deregulation in the Republic of South Africa**. (1987) (Hereafter cited as the "**White Paper on Privatisation and Deregulation**").

secondly, to determine the nature and historical origin of the vesting of some of the entitlements to exploit minerals in favour of the State and,

lastly, to establish whether the re-vesting of some of the *State held entitlements to exploit minerals* by the Minerals Bill, can be regarded as a form of privatisation or deregulation of the economy.

2. THE THEORY OF MINERAL RIGHTS.

For purposes of the theory of mineral rights the concept of an entitlement of a real right will be used as a starting point.

2.1 THE CONCEPT OF AN ENTITLEMENT.

In terms of the doctrine of private-law rights⁹ an entitlement

8. See also Badenhorst "Towards a Theory on Mineral Rights" 1990 **TSAR** _____

9. See Joubert **Grondslae van die Persoonlikheidsreg** (1953) 19-21; "Die Realiteit van die Subjektiewe Reg en die Betekenis van n realistiese Begrip daarvan vir die Privaatreg" 1958 **THRHR** 12 and 98; Van der Vyver and Joubert **Persone en Familiereg** (1985) 1-34; Van Zyl and Van der Vyver **Inleiding tot die Regswetenskap** (1982) 371-439; Van der Vyver "Expropriation, Rights, Entitlements and Surface Support of Land" 1988 **SALJ** 1 5-9; "The doctrine of private-law rights" in **Huldigingsbundel vir WA Joubert** (Ed SA Straus) (1988) 201-246.

constitutes the contents of a right and denotes what a person, by virtue of having a right to a particular legal object, may lawfully do with the object of his right.¹⁰

2.2.FULL OWNERSHIP OF LAND .

Full ownership of land, being the most complete and comprehensive real right, in comparison with other real rights, in respect of land, has as its content the following entitlements:-

- (a) possession, ie the entitlement to have the land under your control;
- (b) use and enjoyment, ie the entitlement to use and enjoy the land;
- (c) disposition, ie the entitlement to determine what may and what may not be done with the land;
- (d) consumption and destruction, ie the entitlement to consume and destroy the land ;
- (e) alienation, ie the entitlement to transfer the ownership of the land to another legal subject.¹¹
- (f) mineral exploitation, ie the entitlements to ex-

10. Van der Vyver 1988 SALJ 6; **Huldigingsbundel** 209.

11. Van der Vyver and Joubert 30; see further Van der Merwe **The Law of Things** (1987) 98; Olivier, Pienaar and Van der Walt **Law of Property Students' Handbook** (1989) 8-9 38.

exploit the minerals of the land.

It is arguable that mineral exploitation forms part of the entitlements enumerated under (a)-(e) above. On the other hand it is also accepted that the entitlements enumerated under (a)-(e) do not provide a complete list of the entitlements inherent in the ownership of land.¹² For convenience sake mineral exploitation will be regarded as a separate entitlement.

As will be seen, the entitlements to exploit minerals may be separated from the ownership of land. Before such separation, it is stated in legal parlance that the owner of land is also the holder of the rights to minerals in respect of the land by virtue of his title deed.¹³ It has also been stated that "mineral rights" before such separation are portions of that complex of rights which make up the abstract notion of **dominium**¹⁴

It is however submitted that if the entitlements to exploit minerals have not been separated from the ownership of land it seems premature to talk of mineral rights, when one is actually referring to the entitlements which are normally included in the ownership of such land. It is submitted that the entitlements to exploit minerals, which are inherent to the mineral rights (in the sense of a limited real right), merely

12. Van der Merwe **The Law of Things** 98.

13. Wilmans **Minerale, Mineralregte en Verbandhoudende Kontrakte** (LLM dissertation UNISA 1977) 130.

14. **Natal Navigation Collieries and Estate Co Ltd v Minister of Mines** 1955 2 SA 698 (A) 705G.

form part of the entitlements of ownership of land. By way of an analogy we do not talk of servitudes, mortgage bonds or other real rights in respect of land before these rights are granted and acquired by someone other than the owner of the land. Why then do we talk of mineral rights while these "mineral rights" merely form part of the entitlements of ownership?¹⁵ Ambiguity of the term mineral rights can therefore be avoided if one rather talks of *full ownership* of land. Although this expression is not novel to property law¹⁶ and it is used in the context of ownership which is not burdened by any limited real rights, it will be used specifically in the context of mineral rights to indicate ownership of land including the entitlements to exploit the minerals of the land.

By virtue of *full ownership* of land an owner is entitled to exercise the entitlements to exploit minerals.

2.3. THE SEPARATION OF THE ENTITLEMENTS TO EXPLOIT MINERALS.

If still included, the entitlements to exploit minerals, may be separated from the *full ownership* of land¹⁷, by reservation in a

15. Badenhorst 1990 TSAR __

16. See for instance Van der Merwe *Sakereg* 171.

17. See further Jones *Conveyancing in South Africa* (1985) 514-24; Franklin and Kaplan *The Mining and Mineral Laws of South Africa* (1982) 6-7 593-605; Heyl *Grondregistrasie in Suid Afrika* (1977) 190; Laurens *Inleiding tot die Studie van Aktebesorging* (1984) 110-1; Badenhorst "Du Preez v Beyers 1989 1 SA 320 (T); Beyers v Du Preez 1989 1 SA 328 (T)" 1989 *De Jure* 379 380-3.

title deed,¹⁸ by exclusion from a partition of land¹⁹ or by a cession of mineral rights by the holder thereof to another person.²⁰ In ordinary legal parlance it is stated that "the right to minerals is one of the rights of ownership of land which can be subtracted from the full **dominium**."²¹ If the entitlements to exploit minerals have been separated from the ownership of land, the term mineral rights may be used when one is referring to these entitlements as separated from the ownership of land. Insofar as the object of a mineral right is the land as demarcated²² such a mineral right is a real right in respect of land.

Therefore, what I would term the entitlements to exploit minerals, **constitutes the content of a mineral right and denotes what a person, by virtue of having a mineral right to a demarcated piece of land, may lawfully do with such land for purposes of the exploitation of minerals.** In order to identify the entitlements that are being held by a holder of mineral rights more closely, it is important to distinguish between the content of :

(a) mineral rights and

18. ss 70, 71 and 72 of the Deeds Registries Act. (Hereafter cited as the "**Deeds Registries Act**").

19. ss 70(1) and 73 of the Deeds Registries Act.

20. s 70(1) of the Deeds Registries Act; see also s 3(1)m read together with s 16 of the Deeds Registries Act.

21. Franklin and Kaplan 5.

22. and not the minerals as indicated by Van der Merwe *Sakereg* (1989) 554

(b) ownership of **minerals** upon severance from the land,

In our case law²³ it is generally accepted that the holder of mineral rights (in the sense of a real right) is entitled to go upon the land to which they relate, to search for minerals, and, if he finds any, to sever them and carry them away. Therefore as a real right, a mineral right has as its content, what I have referred to before, as the entitlements to exploit the minerals. These entitlements would be the following:

(a) Use and enjoyment, ie the entitlement to use and enjoy the land for purposes of the exploitation of minerals to which the mineral rights relate. This entitlement includes the following :

(i) the entitlement to enter upon the land for the purpose of the exploitation of minerals;

(ii) the entitlement to prospect for minerals;

(iii) the entitlement to mine the minerals;

23. *Van Vuren v Registrar of Deeds* 1907 TS 289 294 295; *Rocher v Registrar of Deeds* 1911 TPD 311 316; *Gluckman v Solomon* 1921 TPD 335 338; *Douglas Colliery, Ltd v Bothma* 1947 3 SA 602 (T) 610; *Ex Parte Pierce* 1950 3 SA 628 (O) 634C-D; *Erasmus v Afikander Proprietary Mines Ltd* 1976 1 SA 950 (W) 956E.

(b) Disposition, ie the entitlement to determine what may and what may not be done on the land for purposes of the exploitation of minerals;

(c) Alienation, ie the entitlement to cede the mineral rights in respect of the land to another person.²⁴

It is however important to note that the ownership of **minerals** in land remains with the owner of land until the minerals are extracted from the land.²⁵ This is one of the consequences of the maxim *cujus est solum eius est usque ad coelum et ad inferos*. Once the minerals have been extracted from the land by the holder of the mineral rights, they become new things or movables which are acquired in ownership by the holder of the mineral rights.²⁶ Ownership of such severed minerals has as its

24. *Badenhorst* 1989 DE JURE 390; *Badenhorst and Van Heerden "Roets en n ander v Secundior Sand BK en n ander"* 1989 TSAR 452 459

25. *London and S.A. Exploration Company v Rouliot* (1891) 8 SC 75 91; *Neebe v Registrar of Mining Rigths* 1902 TS 65 85; *Van Vuren v Registrar of Deeds* 1907 TS 289 295; *Rocher v Registrar of Deeds* 1911 TPD 311 315; *Union Government (Minister of Railways and Harbours v Marais)* 1920 AD 240 246; *Odendaalsrust Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 1 SA 600 (K) 604E; *Erasmus and Lategan v Union Government* 1954 3 SA 415 (O) 417D.

26. *Dale An Historical and Comparative Study of the Concept and Acquisition of Mineral Rights* (LLD thesis UNISA 1979) 79-81; *Badenhorst* 1989 De Jure 390; *In Minister of Agriculture v Elandslaagte Collieries Limited* 26 (1905) WLR 475

content the entitlements which are normally conferred by ownership of movables and which has already been indicated.²⁷ Therefore apart from the entitlements enumerated above, the holder also acquires upon severance of the minerals from the land the normal entitlements of ownership.

Although the legal meaning of the concept mineral may vary from statute to statute or from contract to contract²⁸ the following classes of minerals are distinguished in the Mining Rights Act 20 of 1967 and the Precious Stones Act 73 of 1964:

484 it was incorrectly held that coal is not extracted from the land until it has left the mine and been brought to the surface. See further Dale 81.

27. See 2.2.above.

28. See in general Franklin and Kaplan 26-29 341 337; Dale 117-32; Wilmans 12 43; Jones 414-5; Silberberg and Schoeman 421-3; Viljoen and Bosman **A Guide to Mining Rights in South Africa** (1979) 29-30; Van der Merwe 554-56; Kaplan "Much Ado about Stone" 1976 SALJ 139 481; "Stones" 1976 SALJ 479; Viljoen "Wat is n Mineraal" 1976 **De Jure** 212; Welsh "Mining Law" 1976 ASSAL 228-30; Viljoen "Loubser en Andere v Suid-Afrikaanse Spoorwee en Hawens" 1976 4 SA 589 (T) 1977 **De Jure** 182; Lamprecht "Is Klip n Mineraal?" 1983 JJS 102; "Die Verheffing van n Klip tot n Mineraal" 1984 JJS98; "Die verheffing van klip" 1984 **DE Rebus** 484; Dale Mining Law" 1983 ASSAL 251; Lewis "Mining Law" 1985 ASSAL 267-9; Radesich and Trichardt "Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein" 1985 4 SA (A) 1986 **THRHR** 110; Badenhorst and Van Heerden 1989 **TSAR** 452.

(a) Precious metals²⁹ ;

(b) natural oil³⁰ ;

(c) base minerals³¹ ;and

(d) precious stones³².

2.4. THE SERVIDINAL EQUATION AND THE REAL RIGHTS SUI-GENERIS ESCAPE.

Our courts have equated mineral rights (in the sense of limited real rights) to quasi servitudes,³³ personal quasi servitudes,³⁴ and real rights analogous to a servitude.³⁵ Some earlier

29. See further s 1(xxix) of the Mining Rights Act 20 of 1967. (Hereafter cited as the "Mining Rights Act".)

30. See further s 1(xxvi) of the Mining Rights Act.

31. See s 1(iii) of the Mining Rights Act .

32. See s 1(xxxi) of the Precious Stones Act 73 of 1964.(Hereafter cited as the "Precious Stones Act").

33. **Rocher v Registrar of Deeds** 1911 TPD 311 316; **Coronation Collieries v Malan** 1911 TPD 577 591; **Webb v Beaver Investments (Pty) Ltd** 1954 1 SA 13 (T) 25A; **Ex Parte Marchini** 1964 1 SA 147 151B-C; See also **Jonordon Investment (Pty) Ltd de Aar Drankwinkel (Edms) Bpk** 1969 2 SA 117 (K) 126; **South African Railways and Harbours v Transvaal Consolidated Land and Exploration Company Ltd** 1961 SA 467 A 481G-482A 497A-B.

academics also adhered to the view that mineral rights constitute quasi personal servitudes or quasi servitudes.³⁶ Even today this approach is supported by such eminent scholars as Franklin and Kaplan³⁷ and Dale.³⁸

Although it is conceded that the servitudinal approach of regarding mineral rights as a personal servitude did provide the

34. **Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines, Ltd** 1903 TS 499 510; **Van Vuren v Registrar of Deeds** 1907 TS 289 294-5; **Ex Parte Marchini** 1964 1 SA 147 (T) 150G; **Manganese Corporation Ltd v South African Manganese Ltd** 1964 2 SA 185 (W) 189; See also **Aussenkjer Diamante (Pty) Ltd v Namex (Pty) Ltd** 1980 3 SA 896 (SWA) 902-3B.

35. **Witbank Colliery Ltd v Malan and Coronation Colliery Co, Ltd** 1910 TPD 667 676. See in general, Badenhorst 1989 *De Jure* 386-8; "Government of the Republic of South Africa v Oceana Development Investment Trust plc 1989 1 SA 35 (T)" 1989 *Obiter* ___.

36. **Maasdorp's Institutes of South African Law Volume 1 The Law of Property** by Hall (1976) 185; Lee *An Introduction to Roman-Dutch Law* (1953) 182; **Wille's Principles of South African Law** by Gibson (1970) 219; Hahlo and Kahn *The Union of South Africa The Developments of its Laws and Constitution* (1960) 763-4.

37. 14.

38. 104-5.

necessary vehicle for the development of the theory of mineral rights, there are valid reasons why mineral rights cannot be regarded as being in the nature of a personal servitude. Mineral rights clearly differ from personal servitudes in the following respects:

(a) Unlike personal servitudes, mineral rights are freely assignable or transferable and capable of being transmitted to the heirs of the holder³⁹;

(b) Unlike personal servitudes, mineral rights endure beyond the lifetime or legal existence of the holder thereof⁴⁰;

(c) Unlike ordinary personal servitudes, mineral rights are not exercised *salva rei substantia*.⁴¹

Mineral rights, however, were not held to constitute praedial servitudes by our courts⁴². It is submitted that this is correct,

39. **Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines Ltd** 1903 TS 499 510; **Van Vuren v Registrar of Deeds** 1907 TS 289 294; **Du Preez v Beyers** 1989 1 SA 320 (T) 324H-I; Silberberg and Schoeman *The Law of Property* (1983) 424; Franklin and Kaplan 15; Viljoen *The Rights and duties of the Holder of Mineral Rights* (LLD thesis Leiden 1975) 33; Viljoen and Bosman 20.

40. Viljoen 33; Viljoen and Bosman 20.

41. Franklin and Kaplan 15; Van der Merwe *Sakereg* 560; Viljoen 33; Viljoen and Bosman 20; Silberberg and Schoeman 425.

because mineral rights clearly differ from praedial servitudes in the following respects:

(a) Unlike praedial servitudes, mineral rights are constituted in favour of a legal subject and not in favour of a dominant tenement⁴³;

(b) Unlike praedial servitudes, mineral rights can be alienated apart from the land to which they adhere⁴⁴;

(c) Mineral rights are divisible⁴⁵ in the sense that the holder may acquire or dispose of an undivided share in them, the separation may be in respect of a portion of an defined entity of land, or the share or whole or a portion of the defined entity of land, and may be in respect of all minerals generally, or

42. **Van Vuren and Others v Registrar of Deeds** 1907 TS 289 285; **Shandos v Registrar of Deeds** 1912 TPD 407 415. In **Webb v Beaver Investments (Pty) Ltd** 1954 1 SA 13 (T) 25A-B Judge Ramsbottom held that it was highly unlikely that mineral rights would constitute a praedial servitude.

43. Franklin and Kaplan 14; Van der Merwe **Sakereg** 560; Viljoen 33; Viljoen and Bosman 20.

44. Franklin and Kaplan 14; Van der Merwe **Sakereg** 560; Viljoen 33; Viljoen and Bosman 20.

45. Subject to s 2 of the Mineral Laws Supplementary Act 10 of 1975; See also s 20 of the Minerals Bill.

of a particular mineral or minerals. Praedial servitudes are not divisible.⁴⁶

(d) Once mineral rights have been separated from the ownership of land and held under separate title, the separation is final even in the event of merger which would have terminated a praedial servitude, as in the case when the right to minerals once again comes to vest in the owner of land.⁴⁷

If one extracts the common features of personal and praedial servitudes and compares mineral rights with these common features,⁴⁸ mineral rights differ from the common features in important respects. In order to understand these differences it is necessary that a further distinction be made between:

(a) instances in which mineral rights are separated from the ownership of land but are still vested in the registered owner of the land by virtue of a separate title deed. These instances are :

46. Franklin and Kaplan 15; Van der Merwe **Sakereg** 560; See further S 73 bis (1) of the Deeds Registries Act.

47. s 70(4) of the Deeds Registries Act; **Beyers v Du Preez** 1989 1 SA 328 (T) 336D; Franklin and Kaplan 15; Van der Merwe **Sakereg** 560; Viljoen 33; Viljoen and Bosman 20; Badenhorst 1989 **De Jure** 383-5.

48. See in this regard Van der Merwe **Sakereg** 461-4; Erasmus, Van der Merwe and Van Wyk **Lee and Honore' Family Things and Succession** (1983) 301; Olivier, Pienaar and Van der Walt 283-4

(i) If an owner of land obtains a certificate of rights to minerals in respect of all such rights held by him under the same title as that by which he is the registered owner of the land⁴⁹ ;

(ii) If the Minister of Agriculture deems it necessary that mineral rights be separated from the ownership of State land he may apply in writing to the registrar for the issue of a certificate of mineral rights⁵⁰ .

(iii) If an owner of land establishes a township on his land subject to the reservation of mineral rights, he must simultaneously, with the opening of the register, take out a certificate of rights to minerals⁵¹ ;

[These instances will hereafter be referred to as *the instances of dual holding of mineral rights and ownership of land*].

49. s 70(5) and (6) of the Deeds Registries Act.

50. s 72(2) of the Deeds Registries Act.

51. s 71(1) of the Deeds Registries Act.

(b) instances in which mineral rights are separated from the ownership of land and are vested in a person other than the owner of the land. These instances are:

(i) If land that is held in joint ownership is partitioned and any rights to minerals in that land are excluded from the partition, a certificate of mineral rights must be taken out simultaneously.⁵² The mineral rights are held by the former co-owners whilst they are sole owners of the respective tracts of land;

(ii) If an owner of land transfers the ownership of his land to another person subject to a reservation of mineral rights in his favour, he must simultaneously with the passing of the transfer of ownership take out a certificate of rights to minerals⁵³ ;

(iii) If land has been expropriated without the mineral rights and a deed of transfer is lodged a certificate of rights to minerals must simultaneously be taken out⁵⁴ ;

52. s 73(1) and (2) of the Deeds Registries Act.

53. s 71(1) of the Deeds Registries Act.

54. s 70(3) of the Deeds Registries Act.

(iv) If the Minister of Agriculture deems it necessary that land be granted or transferred to another person subject to a reservation of mineral rights in favour of the State, he may apply in writing to the registrar for the issue of a certificate of mineral rights⁵⁵;

(v) Mineral rights may be transferred from the holder of *full ownership* of the land to another person by means of a notarial Deed of Cession⁵⁶.

[These instances will hereafter be referred to as *the instances of separate holding of mineral rights*].

If this distinction is kept in mind it becomes clear that mineral rights differ from the common features of praedial and personal servitudes in important respects.

Firstly, the maxim *nemini res sua servit*, namely that a person cannot obtain a servitude over his own property applies to both praedial and personal servitudes.⁵⁷ In *the instances of dual*

55. s 72(2) of the Deeds Registries Act.

56. ss 3(1)(m) and 16 of the Deeds Registries Act.

57. Van der Merwe *Sakereg* 462; Erasmus, Van der Merwe and Van Wyk 301; Olivier, Pienaar and Van der Walt 283.

holding of mineral rights and ownership of land, the notion of mineral rights is in conflict with the maxim of *nulli res sua servit*.⁵⁸ For instance the reservation of mineral rights, upon the opening of a township register in a(iii) above, amounts to the acquisition of a real right by an owner in respect of his own land. In *Webb v Beaver Investments Pty Ltd*⁵⁹ Ramsbottom J had the following to say about the possible conflict of such a reservation of mineral rights with the maxim *nulli res sua servit*:

"The certificate must be taken out as soon as the register of the township is open - before the transfer of lots. So that the owner of land takes out a certificate of mineral rights which is registered against his own land, and he holds the land under one title and the mineral rights under another. I should hesitate to say that the owner owns a servitude over his own land - I do not think he does - but when he transfers lots in the township, there is an automatic reservation of mineral rights in respect of any lot sold - the transferee takes the lot subject to the general reservation and the title of the mineral rights in respect of each lot transferred is contained in the certificate of mineral rights in respect of the whole of the land."

It is submitted that before the transfer of the first lot such reservation does in fact conflict with the maxim *nemini res sua servit*. The explanation of the conflict can be attributed to the *sui generis* nature of mineral rights and the statutory recognition of an exception to the said maxim.⁶⁰

58. See also, Badenhorst 1989 *De Jure* 385-6.

59. 1954 1 SA 13 (T) 30H-31A.

It is submitted that only in *the instances of separate holding of mineral rights*, the notion of mineral rights is not in conflict with the maxim **nulla res sua servit**.

Secondly, unlike praedial and personal servitudes the maxim **servitus servitutis esse non potest** does not apply to mineral rights. This maxim means that no further servitudes can be imposed on an existing servitude.⁶¹ A servitude like usufruct can be imposed on mineral rights.⁶²

The theoretical problems inherent to the servitudinal approach, perhaps, led to the new approach by academics⁶³ and Judges⁶⁴ to regard mineral rights as being limited real rights

60. See Franklin and Kaplan 596-7.

61. Erasmus, Van der Merwe and Van Wyk 301; Van der Merwe **Sakereg** 463

62. Van der Merwe **Sakereg** 561.

63. De Wet 1943 **THRHR** 187 191-2; Van Warmelo 1959 **Acta Juridica** 84

90-1; Hall **Servitudes** (1973) 179; Viljoen 33-4; Viljoen and Bosman 20-1; Van der Merwe **Sakereg** 560-1; Silberberg and Schoeman 424; Delport and Olivier **Sakereg Vonnisbundel** 682; Olivier, Pienaar and Van der Walt 346.

64. **Ex Parte Pierce** 1950 2 SA 628 (O) 634D; **Erasmus v Afrikander Proprietary Mines Ltd** 1976 1 SA 950 (W) 956E; **Apex Mines Ltd v Administrator of Transvaal** 1986 4 SA 581 (T) 590I-591C.

sui generis.⁶⁵

The basic premise of this new approach is that mineral rights are still being regarded as **iura in re aliena**. This new approach can only be correct in *the instances of separate holding of mineral rights*, because, in *the instances of dual holding of mineral rights and ownership of land*, the notion of mineral rights is in conflict with the concept of an **iura in re aliena**.

Therefore, in *the instances of dual holding of mineral rights and ownership of land*, mineral rights are real rights in respect of land in the sense of a **ius in re sua**. The entitlements to exploit minerals are not transferred but are kept by the owner of land. By virtue of his **ius in re sua**, held under separate title, the holder is entitled to exercise these entitlements.

On the other hand in *the instances of separate holding of mineral rights*, mineral rights are real rights in the true sense of a **ius in re aliena**. The entitlements to exploit the minerals are transferred to another person. By virtue of his **ius in re aliena** the holder is entitled to exercise these entitlements.

2.5. THE EXCEPTION TO THE THEORY.

Although it is more or less trite law that mineral rights are limited real rights in respect of land⁶⁶ and even though in

65. See also Badenhorst 1989 **De Jure** 388-9.

66. **Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines Limited** 1903 TS 510; **Rocher v Registrar of Deeds** 1911 TPD 311 315; **Ex parte Pierce** 1950 3 SA 628 (O) 634C; **Erasmus v Afrikander Proprietary Mines Limited** 1976 1 SA 950 (W) 956D-E; **Government of the Republic of South Africa v Oceana**

conflict with the theory of mineral rights as just set out, one must take cognisance of legislation⁶⁷ and the common law approach⁶⁸ adopted by some judges⁶⁹, that mineral rights are

Development Investment Trust plc 1989 1 SA 35 (T) 36H.

67. In section 61 of the (previous) Deeds Registries Act 13 of 1918 "immovable property" was defined as to include "any myn-pacht or any right to minerals, precious stones or a lease thereof". Mineral rights are not explicitly included under the definition of "immovable property" in section 102 of the (current) Deeds Registries Act. However, if read subject to the common law, as set out the next footnote, mineral rights can also be used in the sense of incorporeal immovables.

68. Van der Merwe **The Law of Things** 20 25 pointed out that the common law did not only recognised abstract conceptions, like real rights in respect of immovable property, as things, namely incorporeals, but also classified these incorporeals as either movable or immovable by looking at the nature of the object to which it pertains. All real rights over immovable things were classified as immovable property whereas real rights over movable things and personal rights were regarded as movable.

69. For instance, in **Government of the Republic of South Africa v Oceana Development Trust plc 1989 1 SA 35 (T)** Judge Goldstone expressed the following viewpoint:

"Again, whatever the precise juristic nature of mineral rights may be, there is also no doubt that they are incorporeal rights relating to immovable property and hence must be regarded themselves as immovable incorporeals."(36I)

Although it is accepted that things can in terms of the common law be categorised as either *res corporales* or *res incorporales*, Judge Goldstone's reference to "incorporeal rights" is rather

immovable incorporeals.

If one however, accepts that a real right amounts to the claim of a legal subject as against another person to a thing,⁷⁰ and that different categories of rights are distinguished to the different categories of legal objects, the use of the word mineral rights in the sense of a thing and more specifically an incorporeal immovable is not theoretically acceptable. Firstly, given the modern definition of a thing,⁷¹ the concept of a thing should for dogmatic and systematic reasons be limited to corporeal objects.⁷² It is inconsistent to define a thing as being the object of a right and to assert in the same breath that the right itself can also be a thing, or in other words, that a right is also the object of a right.⁷³ Secondly, even if the concept of an incorporeal thing is accepted in accordance with the common law, the classification of incorporeals as either movable or immovable is not logical since the criterion of mobility is inapplicable to incorporeals which can by no means be moved.⁷⁴

confusing. Rights are by their very nature incorporeal. By using the term incorporeal rights the impression might be created that rights may also be corporeal! See further Badenhorst 1989 **Obiter** __

70. Van der Vyver **Huldigingsbundel** 209.

71. See Van der Merwe **The Law of Things** 12-5; Sakereg 20-7; Silberberg and Schoeman 10-15.

72. Van der Merwe **The Law of Things** 13.

73. Silberberg and Schoeman 11.

74. Van der Merwe **The Law of Things** 25; Badenhorst 1989 **De Jure** 387-8; 1989 **Obiter** __.

It must however be conceded that in practice mineral rights are sometimes approached as being things in the sense that they can be the object of a real right. For instance the law recognizes a usufruct of mineral rights,⁷⁵ a lease of mineral rights⁷⁶ and the hypothecation of mineral rights.⁷⁷ In any event it is accepted by Van der Vyver,⁷⁸ an eminent scholar on the doctrine of private-law rights, that one can have a right to a right, despite the untenability of the arguments that have been advanced in support of the proposition that a right can be the object of a right. This *prima facie* exception can therefore be reconciled with the theory of mineral rights if the theory is seen against the background of the common law. The use of the phrase mineral rights in the sense of incorporeal immovables should still be limited to the explanation of these exceptions in practice insofar as it runs contrary to the theory of mineral rights.

2.6. CONCLUDING REMARKS.

75. *Ex parte Eloff* 1953 1 SA 617 (T); Van der Merwe *The Law of Things* 21; See further *The Master v African Mines Corporation Limited* 1907 TS 925.

76. ss 71(5)-(6) and 77(1) of the Deeds Registries Act

77. See s 71(6) of the Deeds Registries Act.

78. *Huldigungsbundel* 234

In conclusion on the theory of mineral rights, the following points can be made:

(a) a distinction should be made between *full ownership* of land and ownership of land excluding the entitlements to exploit the minerals of the land. In the last instance, upon separation of the entitlements to exploit minerals from the ownership of land, a real right is created. Depending on whether the identity of the holder of such rights is the same as that of the owner of land, or not, such real right can, respectively, be a *ius in re sua* or a *ius in re aliena*.

(b) because the concept of mineral rights is used indiscriminately in practice, by the legislature and by the courts as an all embracing concept, one can still use mineral rights in this wide sense, provided one is mindful that mineral rights in the narrow sense of the word may either be:

(i) an entitlement of full ownership;

(ii) an *ius in re sua*;

(iii) an *ius in re aliena*; or

(iv) a legal object of another real right.

(c) Due to the terminological problems just discussed, it is perhaps scientifically more sound to concentrate on the content of *full ownership* of land or mineral rights rather than their nature. I will not enter into the controversy of the definition

of ownership at this stage⁷⁹. However, it is submitted that with reference to its content⁸⁰, a mineral right can be defined as a real right in respect of land which entitles its holder to go upon such land for the purposes of the exploitation of minerals, to prospect for such minerals, and if he finds any, to mine such minerals, to determine what may be done on the land for the foregoing purposes and to alienate such mineral rights⁸¹. Upon extraction of the minerals from the land the entitlement to dispose of such minerals is inter alia acquired by virtue of ownership.

3. THE HOLDING OF THE ENTITLEMENTS TO EXPLOIT MINERALS BY THE STATE.

3.1. THE NATURE OF STATE HOLDING.

In order to fully understand which entitlements are being held by the State the theory of mineral rights must be kept in mind as a foundation to build on. The form of state holding in this regard can differ according to the degree of vesting of entitlements in the State. The following forms of state holding can be postulated:

79. See further, Van der Merwe *Sakereg* 170-7; Olivier, Pienaar and Van der Walt 35-7.

80. See 2.3 above.

81. Badenhorst 1989 *Obiter*__

3.1.1. TOTAL STATE HOLDING.

Although the Government is empowered,⁸² subject to the duty to pay compensation, to expropriate immovable property and mineral rights, it has never been the policy of the South African government or any of its predecessors to expropriate or nationalise mineral rights on a large scale.⁸³

It is interesting to note that for a brief period it was determined by section 29 of a Volksraad resolution of 14 to 23 September 1858, of the old *Zuid Afrikaansche Republiek*, that the owners of land where minerals had been found would be bound to lease or sell such land to the the Government for a reasonable price:

"Met betrekking tot het voorstel van den Uitvoerende Raad, omtrent plaatsen waar mineralen gevonden worden, eigenaars van dergelijke plaatsen verplichtende dezelve aan het Government tegen een billijken prijs te verhuren of te verkoopen, word dit voorstel door den Volksraad eenparig geodgekeurd en bekrachtigd".

This policy, approximating to a right of expropriation, was however repealed by section 68 of the Volksraad resolution of 21 September 1859.⁸⁴ Large scale expropriations or

82. Section 2 of the Expropriation Act 63 of 1975; See further note 114 below.

83. See Dale 174.

84. See Dale 176.

nationalizations of mineral rights are unknown in the mineral law history of South Africa.

In the **Freedom Charter** it is stated that "(t)he mineral wealth beneath the soil....shall be transferred to the ownership of the people as a whole." Maybe it is suffice to say at this stage, that the policy of the **African National Congress** on nationalisations is in a state of flux and the last word on nationalisations has not yet been spoken.

3.1.2 PARTIAL STATE HOLDING.

Partial state holding can take the form of **taking**⁸⁵ by means of reservation of :

- (a) the ownership of unsevered **minerals**, as specified ;
- (b) certain **mineral rights** ; or
- (c) the **entitlements** of certain mineral rights.

Reservation can take place either by statute or by a condition contained in the title deed of the land concerned. Historical⁸⁶ and present day examples of the foregoing can be given :

(a) THE RESERVATION OF OWNERSHIP OF UNSEVERED MINERALS.

85. ie. expropriation without compensation.

86. See in general Dale 174- 237.

An example of the reservation of the ownership of unsevered minerals by statutory decree, can be found in Section 2 of Law 1 of 1883 of the old **Zuid-Afrikaansche Reubliek** :

"Het eigendom in, en mijnregt op alle edelgesteenten en edele metalen behooren aan den Staat, met uitzondering nogthans van alle vroegere wet-tige overmaking van dat regt door middel van concessie aan private personen of venootschapen."
(my underlining)

Dale⁸⁷ pointed out that this section was not only contrary to the maxim **cuius est solum** but it also amounted to an expropriation of unsevered minerals, rendering the mineral rights worthless. The section was however repealed by section 90 of Law 8 of 1885, presumably having the effect of re-vesting the ownership of such stones and metals in the owner of the land. Because this section was not in line with other *Zuid-Afrikaansche Republiek* legislation and was probably a result of poor draftmanship rather than an attempt to reserve ownership of unsevered minerals **per se** to the State, it can not be regarded of much further significance⁸⁸. Reservation of ownership of unsevered minerals can therefore take place by means of a statute.

(b) THE RESERVATION OF MINERAL RIGHTS.

87. 181-5.

88. It is however conceded, that in s 1 of Law 17 of 1895, s 1 of Law 14 of 1897 and s 1 of the Precious and Base Metals Act 1908 the word "ownership" is also used in relation to unsevered base minerals. These sections are, however, coorrect in terms of the **cuius est solum** rule insofar as base minerals are concerned.

Section 4 of Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure, dated 6th August 1813, preserved the English Law concept of the Crown prerogative in the Cape Colony in regard to precious stones, gold and silver:⁸⁹

"Government reserves no other rights but those on mines of Precious Stones, Gold or Silver...

Despite the ambiguity of the wording, Sir John Cradock's Proclamation has been regarded as a statutory reservation of the rights to gold, silver and precious stones.⁹⁰ The Crown Lands Act 14 of 1878 which provided for the sale of Crown land, also preserved the royal prerogative, and provided in section 10(e) that the rights of a prospective purchasers would not extend to any deposits of gold, silver and precious stones.⁹¹ The British administration of the Cape Colony therefore introduced the practice of granting Crown land to subjects subject to the reservation of some mineral rights in favour of the Crown.⁹²

Another example of a statute empowering the Government to

89. Dale 217; Sir John Cradock's Proclamation was repealed by Act 44 of 1968.

90. Franklin and Kaplan 36 note 33; Jones 37 405.

91. Dale 218.

92. Van der Merwe Sakereg 553.

grant land subject to the reservation of mineral rights in favour of the Crown, is to be found in the Transvaal, after the Anglo-Boer War. Section 7(1) of the Crown and Land Disposal Ordinance 57 of 1903 determined that all rights to minerals, mineral products and precious stones on Crown land granted, sold or leased under the Ordinance shall be reserved⁹³ to the Crown.⁹⁴ This practice was followed during the Union of South Africa.⁹⁵ These may serve as examples of the reservation of mineral rights by statute.

As indicated before⁹⁶, the Minister of Agriculture may upon application to the registrar of Deeds, grant or transfer the ownership of land owned by the State, subject to a reservation of mineral rights in favour of the State.⁹⁷ This is an example of the reservation of mineral rights in the title deed of land upon transfer of ownership from the State.

(c) RESERVATION OF THE ENTITLEMENTS OF MINERAL RIGHTS.

93. The word "shall" be reserved was replaced by the word "may" be reserved by s 1 of the Crown Land Disposal Amendment Ordinance 13 of 1906.

94. See Dale 196.

95. Dale 227 236; See also s 31(1) of the Land Settlement Act 12 of 1912 and s 48(1) of the Land Settlement Act 21 of 1956.

96. See b(iv) under 2.4 above.

97. s 72(2) of the Deeds Registries Act.

Existing mining and mineral legislation provides an example of the reservation of entitlements pertaining to specific mineral rights. In terms of section 2(1)(a) of the Mining Rights Act and section 2 of the Precious Stones Act the following entitlements⁹⁸ are vested in the State:

(a) the entitlements of prospecting for, mining for and disposing of natural oil;

(b) the entitlements of mining for and disposing of precious metals and precious stones .

The following entitlements are still retained as follows:

(a) the entitlements of prospecting for precious metals and precious stones by the holder of the right to precious stones and precious minerals⁹⁹

98. Although the word right is used by the courts and legislature, these "rights" are strictly speaking entitlements in terms of the doctrine of private-law rights.

99. Franklin and Kaplan⁷⁹ correctly point out that there is a hiatus in section 2(1) of the Mining Rights Act with regard to the "right" to prospect insofar as the subsection is silent as to who has the right of prospecting for precious metals. The same criticism can be leveled against section 2 of the Precious Stones Act in so far as the section is also silent as to who has the "right" of prospecting for precious stones . In *Eliot The South African Notary* by Lowe and others (1987) 216 Dale points out that although the "right to prospect for precious metals and precious stones is not vested in the State, it is not permissible to prospect for these minerals without a prospecting permit,

;and

(b) the entitlements of prospecting and mining for and disposing of base minerals by the holder of the right to base minerals¹⁰⁰ .

The philosophy whereby certain entitlements of mineral rights were vested in the State can, in the Transvaal, be traced back to section 1 of Law 1 of 1871¹⁰¹ . This section established the vesting in the State of the entitlements of mining for precious stones and precious metals by providing :

"Het mijnregt op alle edelgesteenten en edele metalen behoort aan den Staat...."

The said vesting was confirmed in other statutes.¹⁰² The vest-

prospecting license or a prospecting lease." He regards the necessity to obtain such statutory permission merely as "a necessary precursor to the exercise of the right to prospect by the person in whom such right is already vested or to the person in whom he granted such right and does not constitute the right itself." It is submitted that because the entitlement to prospect for precious metals and precious stones are not expressly reserved to the State, they vest in the holder of such rights.

100. Section 2(1)(b) of the Mining Rights Act.

101. Dale 177.

102. s 1 of Law 2 of 1872; s 1 of Law 7 of 1874; s 3 of Law 6 of 1875.

ing of the the entitlements to dispose of precious stones and precious metals, in the State, was added by section 1 of Law 8 of 1885 which determined as follows:

"Het mijn- en beschikkingsrecht op alle edelgesteenten en edele metaalen behoort aan den Staat".

The philosophy whereby the foregoing entitlements were vested in the State, was confirmed in various statutes thereafter.¹⁰³ During the Union of South Africa, vesting in the State was further extended to the entitlements of prospecting and mining for natural oil¹⁰⁴ and prospecting, mining and disposing of prescribed materials of the uranium family.¹⁰⁵

The non-holding by the State of the entitlements to exploit base minerals in the Transvaal, can be traced back to section 1 of Law 17 of 1895¹⁰⁶ which determined as follows:

"Het eigendomsrecht van en het beschikkingsrecht over onedelen metalen en mineralen, zoowel op

103. s 1 of Law 8 of 1889; s 1 Law 18 of 1892; s 1 of Law 14 of 1894; s 1 of Law 19 of 1895; s 1 of Law 21 of 1896; s 1 of Law 15 of 1898; s 1 of Law 22 of 1898; s 3 of the Precious Stones Ordinance 66 of 1903; s 1 of the Precious and Base Metals Act 35 of 1908; and s 1 of the Precious Stones Act 44 of 1927.

104. s 2 of the Natural Oil Act 46 of 1942.

105. s 2(1)(a) of the Atomic Energy Act 35 of 1948; See s 5 of the Atomic Energy Act 90 of 1967.

106. see Dale 191-2.

geproclameerde als ongeproclameerde gronden, behoort aan den eigenaar van den grond."

This trend was followed in other legislation.¹⁰⁷

In the Colony of Natal the philosophy was one of vesting in the State of the entitlements of mining for and disposing of all minerals¹⁰⁸. This reservation can be traced back to Section 4 of the Natal Mines Law 17 of 1887 which determined:

"The right of mining for and disposing of all gold, precious stones and precious metals, and all other minerals in the Colony of Natal, is hereby vested in the Crown for the purposes of and subject to the provisions of this Law."

This philosophy was contained in the later Natal Laws.¹⁰⁹

3.1.3. THE ABSENCE OF STATE HOLDING.

The Mining Industry is of such great national importance in a country like South Africa, which is blessed with mineral wealth, that from the very earliest time, the State has sought to control it in some form or another.¹¹⁰ Even as early as in Roman

107. s 1 of Law 14 of 1897; s 1 of the Precious and Base Metals Act 35 of 1908.

108. See Dale 210.

109. s 4 of the Natal Mines Law 34 of 1888; s 9 of the Natal Mines Act 43 of 1899.

times the so-called right to mine was eventually vested in the State, and the interest of the State, the miner and owner of the land were sought to be protected by the State.¹¹¹ Due to the monetary importance of the exercise of mineral rights some form of state control, even in the absence of holding of entitlements to exploit minerals by the State, is necessary in any society.

The absence of the holding of entitlements to exploit minerals by the state, but not the absence of reasonable control over the exercise of the entitlements to exploit minerals, by the private sector, is to be striven for in the future.

3.2. CURRENT STATE HOLDING.

It can today be said that the State is the holder of :

(a) *full ownership* of land. This category of land which is owned by the State and in respect of which the State is also the holder of the right to precious metals, base minerals, natural oil or precious stones is defined as "State Land" in terms of existing legislation.¹¹²;

110. Dale 171.

111. Dale 11; For a detailed discussion of the development of the right to mine in Roman times, see further Dale 3-12.

112. s 1(xlix) of the Mining Rights Act and s 1(xlv) of the Precious Stones Act.

(b) rights in respect of precious metals, base minerals, natural oil or precious stones reserved to the State, which mineral rights include the entitlements to exploit the specific mineral or minerals contained in the land. This category of land which forms the object of the mineral right and which is not owned by the State is defined as "Alienated State Land" in existing mining legislation¹¹³ ;

(c) rights in respect of precious metals, base minerals, natural oil or precious stones purchased or expropriated¹¹⁴ by the State, which mineral rights include the entitlements to exploit the specific mineral or minerals contained in the land;

(d) the entitlements to prospect for natural oil and the entitlements to mine and dispose of natural oil, precious metals and precious stones of all mineral rights in South Africa.¹¹⁵

The sum total of the foregoing entitlements therefore, makes up the concept of the so-called *State held entitlements to exploit minerals*.¹¹⁶

113. s 1(i) of the Mining Rights Act ; s 1(iii) of the Precious Stones Act.

114. See further Gildenhuys *Onteieningsreg* (1976) 28-30; Franklin and Kaplan 679-98 and s 24 of the Minerals Bill.

115. s 2(1)(a) of the Mining Rights Act 20 of 1967 and s 2 of the Precious Stones Act 73 of 1967,

116. see 1 above.

As the holder of these entitlements the State can of course grant the entitlements in different ways to private individuals. The various modes of granting of such entitlements, however, fall beyond the scope of my address and will not be discussed. As holder of these entitlements the exercise thereof is controlled by the State. State control can of course take other forms, which however fall beyond the scope of my address.

3.3. THE ARGUMENTS SUPPORTING THE POLICY OF PARTIAL STATE HOLDING.

The present policy regarding the exploitation of minerals of this country lies between the two absolutes of complete State monopoly and unfettered private enterprise.¹¹⁷ The policy of partial state holding of certain entitlements tries to recognise the aspirations and ability of private enterprise in the mining industry by not opting for large scale nationalisation, while at the same time preserving State interest in the exercise of certain entitlements.¹¹⁸ The arguments advanced in favour of the policy of partial state holding are briefly as follows:

(a) According to the capitalistic policy argument, the maximum exploitation of minerals can only be achieved by private enterprise and not the by State. That this sentiment is also shared by legislatures can be deduced from the fact that even though the State was and still is empowered to establish state mines¹¹⁹, it has never done so in the

117. Franklin and Kaplan 1.

118. See Dale 174.

119. ss 30(c), 49, 50 and 51(2) of the Precious and Base Metals Act 35 of 1908; Section 43 of the Mining Rights Act; See fur-

past.

(b) The full exploitation of the mineral wealth of the country could be ensured by granting State held entitlements to exploit minerals, to successful and viable entrepreneurs, thus ensuring that sterilization of valuable minerals did not occur merely because private individuals did not wish or were not financially in a position to prospect and mine their land.¹²⁰

(c) By granting the entitlements to exploit minerals to successful entrepreneurs the State could secure a share in revenue derived from the mining operations.¹²¹

(d) From a strategic point of view it is important for the State to be the holder of the entitlements to prospect for, mine for and dispose of strategic minerals like "source material" and "natural oil".

(e) Due to the paramount importance of the mining industry in the economy of this country it is argued that the State must exercise some form of control in the advancement of the industry.

ther **Turffontein Estates Ltd v Mining Commissioner of Johannesburg** 1917 AD 419 433; Franklin and Kaplan 83 395.

120. See Dale 172.

121. Dale 172.

4.THE PRIVATISATION OR DEREGULATION OF STATE HELD ENTITLEMENTS TO EXPLOIT MINERALS.

4.1 THE PROPOSED RE-VESTING OF SOME STATE HELD ENTITLEMENTS TO EXPLOIT MINERALS.

A dramatic shift in the vesting of the entitlements to prospect for, mine for and dispose of natural oil and the entitlements to mine for and dispose of, precious metals and precious stones, will take place with the passing of the Minerals Bill. In terms of section 5(1) of the said Act it is determined that:

"Subject to the provisions of this Act, the holder of the right to any mineral in respect of land or tailings...shall have the right to enter upon such land or the land on which such tailings are situated...together with such persons, plant or equipment as may be required for purposes of prospecting or mining and to prospect and mine for such mineral on or in such land or tailings...and to dispose thereof."

In other words in this instance¹²² the entitlements to enter upon the land, to prospect for, mine for and dispose of natural oil and the entitlements to enter upon the land, to mine for and dispose of, precious metals and precious stones, would no longer vest in in the State but would be re-vested in the registered holders of the mineral rights.¹²³ [For convenience sake I

122. namely, 3.2.(d) above.

123. See s 1(ix) of the Minerals Bill.

will hereafter refer to such entitlements as *the former State held entitlements to exploit minerals.*]

The remainder of the *State held entitlements to exploit minerals* will not be affected by section 5(1) of the Minerals Bill and will therefore be retained by the State. This would be those instances in which the State is the registered holder of full ownership of land or mineral rights.¹²⁴ [I will hereafter refer to these entitlements as *the balance of State held entitlements to exploit minerals.*]

The proposed re-vesting of *the former State held entitlements to exploit minerals* raise the following questions, namely :

(a) whether the proposed re-vesting of *the former State held entitlements to exploit minerals* can be regarded as a form of privatisation or deregulation; and

(b) whether *the balance of State held entitlements to exploit minerals* should also be privatised or not ?

In an attempt to provide answers to the foregoing question the concepts of privatisation and deregulation must first be examined.

4.2. PRIVATISATION.

Briefly **privatisation** means the systematic transfer of government functions, activities or property from the public to the

124. In other words, 3.2.(a)-(c) above.

private sector, where services, production and consumption can be regulated more efficiently by market and price mechanisms.¹²⁵

Government foresees the following methods of privatisation :

(a) the sale of public sector enterprises and assets;

(b) the entering into of a partnership arrangement between the State and the private sector, if it is not feasible to transfer an existing state enterprise to the private sector in its entirety or where the nature or extent of a new enterprise would require the involvement of the state and private sector;

(c) the leasing of business rights by the state by allowing the private sector to use a facility to conduct a business for its own account;

(d) the contracting out of public services or activities to the private sector on its behalf for a consideration. In other word the government still funds the service but invites private firms to bid

125. The **White Paper on Privatisation and Deregulation** 8; Barrie "Privatization: the legal issues are as important as the economic ones." 1988 **De Rebus** 407; Evans "Some economic and legal aspects of privatisation of the public sector with specific reference to the South African Transport Services" 1989 **Merc LJ** 373; See also "Privatisering: vooruitgang of regeringstaktiek?" **Vrye Weekblad** (1990-1-26); "Privatisering in SA nie soos in Brittanje" **Sake-Rapport**(1990-1-21)6;"Privatisation-the path to future prosperity" **Saturday Star** (1990-2-10) 11.

for the right to provide the service under contract;
and

(e) the discontinuation of a service or activity which was previously provided by the public sector.¹²⁶

It is submitted that the proposed re-vesting of *the former State held entitlements to exploit minerals* in registered holders of mineral rights must *prima facie* be seen as a form of privatisation, although it does not readily fall under any of the methods of privatisation envisaged by government. The truth of the matter is that the re-vesting amounts to a return to the common law position, before inroads in the holding of entitlements by the registered holder of mineral rights were made by the legislature. As will be seen later on, the exercise of the entitlements to exploit minerals by the private sector will to such an extent, be subject to the necessary granting of State authorization¹²⁷ that it is doubted whether section 5(1) of the Minerals Bill really amounts to privatisation. Even if privatised the exercise of *the former State held entitlements to exploit minerals* are so over regulated that it can not be seen as being privatised.

On the one hand provisions are made in the Minerals Bill for the State to authorize the exercise of *the balance of the state held entitlements to exploit minerals* in the same manner as the private sector holder of equivalent entitlements¹²⁸ . On the

126. The **White Paper on Privatisation and Deregulation** 9-11; Barrie 408; Evans 375.

127. see 4.3. below.

128. See for instance ss 6(3), 8(2), 9(2) of the Minerals Bill.

other hand provision is made for the State to alienate "state-owned mineral rights".¹²⁹ Real privatisation will only take place if *the balance of State held entitlements to exploit minerals* are sold to the private sector. In short, much more needs to be done in future. One might ask why not? The State has never in the past taken it upon itself to exercise the entitlements to exploit minerals. The government has already declared itself willing "to consider the sale of ...assets in appropriate cases, if it is convinced that this will be in the long term-interest of the Republic's inhabitants."¹³⁰ In the present context it is stated to be government policy to gradually privatise mineral rights which are at present registered in the name of the State, thus bringing about a reduction of government involvement in the economy.¹³¹

It is submitted that it will be in the long term interest of all South Africans if *the balance of the State held entitlements to exploit minerals* are alienated on the following lines:

(a) The alienations must not just be to obtain the non-recurring additional income from the proceeds¹³²;

(b) The alienations should not have the effect of replacing a state monopoly with a private sector monopoly.¹³³ In other words *the balance of State*

129. s 64 of the Minerals Bill.

130. The White Paper on Privatisation and Deregulation 9.

131. Memorandum on the objects of the Minerals Bill, 1990 on p 77 of the Minerals Bill.

132. The White Paper on Privatisation and Deregulation 9.

held entitlements to exploit minerals should not be bargains up for grabs by the big mining houses of this country;

(c) The alienations could take place in accordance with a policy of affirmative redistribution of wealth. This aspect warrants some further discussion.

Unlike *full ownership* of land, mineral rights, the entitlements to prospect and mine have to some extent escaped the madness of the Verwoerdian *apartheid* laws. Although the Group Areas Act 36 of 1966 is not applicable to mineral rights, prospecting contracts, mineral leases or mining titles,¹³⁴ there are restrictions in section 61(4) of the Mining Rights Act against the transfer of claims to coloured persons unless the claim is situated on State Land in the Cape province or on land in which the ownership vest in any coloured person and against the transfer of claims to Blacks unless the claim is situated on Land of which the South African Development Trust or a Black is the owner or which is held in trust for Blacks.¹³⁵ Claims however do not play an important role in mineral exploitation.

Given the amount of restrictions imposed upon Black, Coloured and Indian entrepreneurs by other racist laws¹³⁶ and the socio-economic deprivation caused in general by the apart-

133. See the White Paper on Privatisation and Deregulation 9.

134. See the definition of "immovable property" in s 1(1) of the Group Areas Act 36 of 1966.

135. See Franklin and Kaplan 618 650 664.

136. See further Mathews Law, Order and Liberty in South

heid policies, *the balance of state held entitlements to exploit minerals* might be used as part of a policy of affirmative action to redistribute wealth in order to achieve an equilibrium among different groups in our society. Affirmative actions "are not reparations, nor are they some sort of revenge for past wrongs. Their object is to remedy the continuing consequences of past wrongs and the future consequences of present wrongs."¹³⁷ How redistribution of wealth, to what extent, at what cost and at whose expense it should take place is of course open to debate. Perhaps this is not the time nor place for such debate but it is something that must be raised and investigated in future. It is enough to say at this stage that the deprived runners should be moved into the capitalistic race of the maximum and profitable exploitation of minerals, to the benefit of the country as a whole, without effecting the performance of the existing runners. With some fancy footwork and bold imagination this could be achieved by the future policymakers of this country.

4.3.DEREGULATION.

Africa (1971) 240-52; Van der Vyver *Die Beskerming van Menseregte in Suid-Afrika*(1975) 84-112; Van der Vyver and Joubert 249-89; Boberg *The Law of Persons and the Family* (1977) 78-98; Barnard, Cronje and Olivier *Die Suid-Afrikaanse Persone en Familiereg* (1986) 107-20; "SA ekonomie se sosialistiese gesig" *Finansies en Tegniek* (1990-01-26)12-3.

137. Livingston *Fair Game? Inequality and Affirmative Action* (1979) 44 as cited in the South African Law Commissions Working Paper on Group and Human Rights 437.

Deregulation on the other hand¹³⁸ is seen as "the process through which the measures taken by the State to regulate transactions between private parties are brought into line with the objectives of its deregulation policy".¹³⁹ Deregulation is aimed at the reduction of the restrictive effect of regulation by public institutions on the development of private entrepreneurship, the promotion of competition and the creation of employment opportunities.¹⁴⁰

To the extent that *the former State held entitlements to exploit minerals* would in future vest in the private holders and could accordingly be exercised by the private sector, without participation of the State, it seems **prima facie** like a form of deregulation. The truth of the matter is, however, that the Minerals Bill still maintains unnecessary State control. A few examples of the regulatory effect of the Minerals Bill can be given :

(a) No person¹⁴¹ may exercise the entitlements

138. Although it is pointed out in the **White Paper on Privatisation and Deregulation** 13 that there is wide acceptance of the premise that privatisation and deregulation are in many respects closely related processes, the stand is taken that the two concepts are distinguishable. See however Barrie 408 who regard deregulation as a form of privatisation. The approach adopted in the **White Paper on Privatisation and Deregulation** will be followed for practical purposes.

139. The **White Paper** 13.

140. See the **White Paper** 13.

141. In terms of a proviso to s 5(2) of the Minerals Bill the following persons are exempted from the prohibition:

to prospect or mine for (and dispose of) any mineral without the necessary authority granted to him under the Act¹⁴² :

(i) The exercising of the entitlement to prospect for any mineral will be subject to the issue of a prospecting permit by the appropriate regional director¹⁴³ The permit will be issued for a period of one year¹⁴⁴ ;

(ii) the prospecting permit will be renewable by the regional director for periods of one year at a time¹⁴⁵ ;

(a) The South African Roads Board and any provincial administration, only for purposes of the searching for and the taking of sand, stone, rock, gravel, clay and soil for road-building purposes;and

(b) an occupier of land who otherwise lawfully takes sand, stone, rock, gravel, clay or soil for agricultural uses or for the effecting of improvements in connection with such uses on such land.

142. s 5(2) of the Minerals Bill.

143. s 6(1) of the Minerals Bill.

144. s 6(4) of the Minerals Bill.

145. s 6(4) of the Minerals Bill

(iii) the exercising of the entitlement to prospect on certain types of land will be prohibited or restricted, except with the written consent of the Minister. Consent will be given by the Minister subject to such conditions as he may determine.¹⁴⁶ The regional director will be given the power to determine the boundaries of the prohibited prospecting area¹⁴⁷ ;

(iv) the exercising of the entitlement to remove or dispose of minerals found during prospecting operations, excluding samples removed for tests, identification or analysis thereof will be *inter alia*, subject to the permission of the regional director. The consent will be given by the regional director subject to such conditions as he may determine¹⁴⁸ ;

(v) the exercising of the entitlement to mine for and dispose of a mineral , will be subject to the issue of a mining authorization. The authorization will be issued by the

146. s 7(1) of the Minerals Bill.

147. s 7(2) of the Minerals Bill.

148. s 8(1) of the Minerals Bill.

regional director for a period determined by him.¹⁴⁹ The regional director must be satisfied as to the manner and scale whereby the applicant intends to mine the mineral optimally and safely and the manner whereby he intends to rehabilitate disturbances of the surface and his ability to mine the mineral optimally and safely and to rehabilitate disturbances of the surface.¹⁵⁰ He must also be satisfied that :

(aa) the mineral concerned occurs in limited quantities or will be mined on a limited scale and on a temporary basis¹⁵¹ ; or

(bb) that there are reasonable grounds to believe that the mineral concerned occurs in more than limited quantities or will be mined on a larger than limited scale and for a longer period than two years¹⁵².

149. s 9(1) of the Minerals Bill.

150. s 9(3)(a)-(c).

151. s 9(3)(d) of the Minerals Bill.

152. s 9(3)(e) of the Minerals Bill.

(vi) The alienation, transfer or encumbrance of a prospecting permit or mining authorization is prohibited¹⁵³ ;

(vii) a prospecting permit, permission referred to in (iv) above, or mining authorization may be suspended or cancelled by the Minister if the holder contravenes or fails to comply with any of the relevant provisions of the Minerals Bill. If a holder fails to comply with the provisions concerning the rehabilitation of the surface of the land, the said permit, permission of authorization shall be suspended by the Minister¹⁵⁴ ;

(viii) any prospecting permit, permission referred to in (iv) above or mining authorization may be cancelled by the Minister or the issue or granting thereof may be refused on instruction of the Minister if, in his opinion, the security of the State may be jeopardized¹⁵⁵ ;

153. s 13 of the Minerals Bill.

154. s 14(1) of the Minerals Bill

155. s 14(3) of the Minerals Bill.

(b) Certain prescribed information in respect of prospecting must within one year of prospecting or mining be furnished to the regional director by the holder of a prospecting permit¹⁵⁶ ;

(c) if the Minister is of the opinion that the holder of a mining authorization conducts his mining operations contrary to the optimal exploitation of any mineral, he may issue an order after an investigation to the holder to take rectifying steps within a specified period of time¹⁵⁷ ;

(d) The rehabilitation of the surface of the land during prospecting and mining and the restoration of the surface to its natural state as far as practicable must be to the satisfaction of the regional director¹⁵⁸ ;

(e) The safety and health of workers and the public is also regulated.¹⁵⁹

The necessity of some form of regulation in matters like protection of the environment and safety and health is not disputed. It is also true that a system of only 3 authorizations in

156. See further s 19(1) of the Minerals Bill.

157. s 22(1) of the Minerals Bill.

158. See further Chapter VI of the Minerals Bill

159. See further Chapter V of the Minerals Bill.

respect of all minerals will replace approximately 40 existing types of permits, licenses and permissions.¹⁶⁰ However insofar as the exploitation of minerals is concerned, the Minerals Bill is characterised by a cradle to the grave form of regulation. In regard to the system of state authorization to prospect or mine, as first set out in the Proposed Minerals Bill, 1989 and which forms the crux of the Bill, it is stated:

"The State will maintain complete control of all mining for and disposal of all minerals, precious as well as base; firstly by laying down conditions for the grant of permits and licences with power to vary such conditions; and secondly by being in a position to dictate.....that the manner in which the mining operations and marketing of minerals are being conducted must be in the Minister's liking. With respect, mines are not the Minister's investments. Market forces will ensure the optimal exploitation of the mineral resource."¹⁶¹

It is however conceded and welcomed that the provisions of the Proposed Minerals Bill, 1989¹⁶² at which the foregoing

160. Memorandum on the Objects of the Minerals Bill, 1990 on p 78 of Minerals Bill.

161. Chamber of Mines Memorandum 37.

162. In terms of ss 18(1), 21(1) and 22(1) the regional director could have imposed conditions for the grant of permits, permissions and licenses. The conditions of a mining license could in terms of s 23(b) have been extended or amended unilaterally whenever the director general deemed it necessary. In terms of s 27(1)(c) failure by the holder to mine, utilize or dispose of a mineral to the satisfaction of the Minister could have resulted in the suspension or cancelation of the relevant

criticisms were levelled, have been omitted from the Minerals Bill¹⁶³. However the Minerals Bill still amounts to an increase instead of a decrease of state control, because:

Firstly, the foregoing authorization measures will also restrict the holder of base mineral rights on what is currently defined as "private land" from prospecting or mining for and disposing of base minerals without authority from or interference by the State. Presently such authority would not have been necessary. It will mainly be the smaller entrepreneur that will be unnecessarily burdened by new regulation instead of deregulation.

Secondly, government officials are not only granted very broad discretions and powers in the administration of the Minerals Bill¹⁶⁴ but they are also expected to make decisions on economic matters, like the viability of the mining operations, which they are not equipped for. Let the private sector make the business calculations. At least they carry the risks.

authorization.

163. See s 8(1) of the Minerals Bill.

164. See the Memorandum to the Minister of Economic Affairs and Technology on the Proposed Minerals Bill, 1989 by the Chamber of Mines of South Africa (1989) 6.

Thirdly, the exercise of *the former State held entitlements to exploit minerals* as well as the entitlements to exploit base minerals will remain under firm State control. In other words it is a question of giving with one hand (**prima facie** privatisation) and taking with the other hand (over regulation). Or to put it differently, it is still a policy of partial State holding, although in another disguise.

A much better approach would have been the recognition of the legal rule that the holder is of "right" entitled to exercise the entitlements to exploit minerals. Or this should at least have been the approach in respect of base minerals. Only in those instances, where necessary, limitations could have been imposed upon the exercise of the entitlements of mineral exploitation by the legislature. In other words make the prohibition the exception, not the rule. To use an analogy: We recognize ownership of land but do not require that the owner of land should obtain State authorization before he can exercise most of the entitlements inherent in ownership! Restrictions are imposed by law on ownership of land, only if necessary.

It will be up to the State to give the go-ahead in the exploitation of all kinds of minerals. The function of the State should have been limited to matters like the recordal of mineral rights in the interest of legal certainty, the protection of the environment and the safety and health of workers and the community.

5. CONCLUSION.

Although the proposed re-vesting of *the former State held entitlements to exploit minerals* in the registered holders seems **prima facie** like a form of privatisation, the exercising of the

entitlements to exploit all kinds of minerals has not escaped extensive government control and amounts neither to privatisation or deregulation in the true sense of the word. By increasing instead of decreasing state control in the exercising of the entitlements to exploit minerals, the government will miss out a golden opportunity to deregulate the exercise of such entitlements. A system in terms of which the holder would automatically be entitled to exercise the entitlements to exploit minerals, subject only to necessary limitations should be introduced.

Real privatisation of *the former state held entitlements to exploit minerals* and real deregulation of the exercise of mineral rights and not the scrutiny of government officials will ensure the maximum exploitation of the mineral wealth of this country, by existing holders to the indirect benefit of all its peoples.

The *balance of State held entitlements to exploit minerals* must receive the attention of the government as part of a policy of affirmative action to redistribute wealth. Only when Government realizes that in order to be custodian of the private enterprise system, which it purports to protect and which it has denied the majority of its citizens to be part of, for so many years, it must distribute the *balance of State held entitlements to exploit minerals* to the full extent and free itself from its life long obsession to over regulate all spheres of life, including the economy.

Corrigenda

Ad p21 3rd par: After "the entitlements to exploit the minerals are" insert "kept by the former owner but ownership is".