

Transitioning Old Order Mining Rights into New Mining Rights: A Critical Analysis

T Mathebula*

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Author

Themba Mathebula

Affiliation

University of Limpopo, South Africa

Email

tempiseboss@gmail.com

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Abstract

The transformation of the mining industry has been a recurrent issue since the drafting of the Freedom Charter of 1955 and the dawn of democracy. Transformation had to be promoted through the development of the law, including the transitioning of the old mining rights into the new mining rights by the *Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)*. This paper focusses on the transition from the previous South African mining law in its historical context to the MPRDA, and the developments which brought it about, including various developments in law which assist in understanding the scope and limitations of the transition. The analysis clarifies the present position in our law associated with mining rights as well as how to deal with disputes arising out of it. The South African courts are critical in the interpretation of the transitional law and how it should apply. The judicial perspective on the development of the transitional law is empirically analysed.

Keywords

Mining law; transition; transitional law; mining rights; *Minerals and Petroleum Resources Development Act*

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1 Introduction

South African mining law was dominated specifically by laws and policies aimed at benefiting the minority in the country.¹ These laws and policies were created as part of the plan to prevent certain groups from exploiting and benefiting from the country's mining wealth. To manage this, independent states were created, thus separating the Africans from the wealth of the country. When the apartheid government came into power in 1948, more laws and policies were created to reinforce the principles of segregation. The first nationalist government, which ruled for a long time, engaged in racial demarcation which saw most people like the majority Africans suffering injustice in the process. Mostert contends that this was because of "increasing tension about the nationalist government's racial segregation policies",² which developed between 1948 and 1967.

As time went by, other mining laws were enacted, such as the *Precious Stones Act 73* of 1964 regulating diamonds and other precious metals and the *Mining Rights Act 20* of 1967 (*MRA*) regulating mining rights. The *Mining Titles Registration Act 16* of 1967, which required and regulated the registration of mining rights and titles, was also enacted to ensure registrations. These laws, like the *MRA*, were for the regulation of precious stones, precious metals, base minerals, natural oil and source materials.³ The *MRA* was later considered as the consolidating legislation. This law, which included provisions for the regulation of prospecting, was one of the tools used to tighten the industry's grip on racial power. For instance, the law on prospecting provided that the rights to prospect for, mine and dispose of oil will be regulated by the state, whilst the right to prospect for, mine and dispose of base minerals would be vested in or bestowed on the holder of the mining rights.⁴ For instance, the state recognised and granted a holder a mining right. The state regulated the requirements to be complied with for one to be regarded a mining right holder by the empowering legislation or the common law. Some power was reserved to the state, such as the power to regulate minerals and precious metals, because at some point no one could mine, prospect for, or dispose of any of these without state

* Themba Mathebula. PG Cert Mining (Wits) LLB LLM (UL). Lecturer and Head of Private Law Department, School of Law, University of Limpopo, South Africa. Email: tempiseboss@gmail.com. ORCID: <https://orcid.org/0000-0002-1558-1616>.

¹ The Crown Lands were established under the *Mining Leases Act 10* of 1865 in the Cape Colony. Also see the *Precious Stones and Minerals Mining Act 19* of 1883 which reserved the right to mine precious metals and precious stones for the Crown on Crown Lands. That is, there were reservations of title for the Crown. Private landowners remained the owners of precious stones discovered on their property. Also see Mostert *Mining Law 23*.

² Mostert *Mining Law 39*.

³ Mostert *Mining Law 39*.

⁴ See s 1(c) of the *Mining Rights Act 20* of 1967 (*MRA*).

authorisation. Transformation was necessary and it required the development of the law.

A change of trajectory with the coming into force in 1991⁵ of law which amended and repealed some of the preceding mining law such as the *MRA*, was necessary. Through the *Minerals Act 50 of 1991 (MA)* tenuous transition in terms of how certain rights and privileges were regulated was created. The state had the power to grant rights to mine and prospect for processing and the utilisation of minerals and also to grant such rights to qualifying persons. When the *MA* came into effect, existing rights granted under the preceding legislation and the common law were still recognised under this law. In other words, the *MA* guaranteed a limited continuation of certain portions of the preceding legislation and common law in so far as such legislation did not contradict or conflict with the *MA*. Thus, the rights to mine, prospect for and to extract or dispose of oil and precious metals or base minerals remained the focus of control by the state and to some extent by the common law holders of those rights.

2 The birth of the new order; the picture from 2004

The events described above saw the transition gradually kicking, particularly regarding the categorisation of rights regulated by the *MA*. On the 01st of May 2004 we saw the coming into law of the *Mineral and Petroleum Resources Development Act (MPRDA)*. The coming into force of this law saw the common law mining rights and the old order statutory rights assimilated under the *MPRDA*, the law of common heritage of the people of South Africa, the state being the custodian of the rights attached thereto.⁶ The common law and the statutory rights granted under the *MA* were therefore considered as old order rights in terms of the *MPRDA*.⁷ Old order rights meant prospecting and mining rights consisting of the common law prescripts and statutory elements which continued until 30 April 2004 and were transitioned into the *MPRDA* and the regulations. Those who held old order rights complained about the introduction of these regulations⁸ and the transitional arrangements brought about by the *MPRDA*, in terms of which old order rights would in time, cease to exist and would therefore be extinguished in the process.

⁵ See ch IV of the *Minerals Act 50 of 1991 (MA)*, the objective of which is to regulate prospecting for and the optimal exploitation, processing and utilisation of minerals, amongst others.

⁶ Sections 2 and 3(1) of the *Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA)*.

⁷ Section 2 of the *MPRDA*.

⁸ *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).

The *MA* recognised the position in common law regarding the surface landowner.⁹ The *MPRDA* repealed this common law position.¹⁰ Although the *MA* did not provide that the state is the owner of unmined minerals, the ability of a landowner to exercise absolute rights over the minerals found on or under his or her land has been neutralised. The owner retains ownership of the land, but not ownership in respect of the minerals. This transitional law has created a very complex shift in our law, because the common law says that the landowner must also be the owner of everything that is on or in his or her land. To separate the owner from this arrangement has become problematic because it means the owner now exercises limited use and enjoyment of his or her real rights in respect of his or her property or land. On the other hand, describing mining rights is complex. Section 3 of the *MPRDA*, which repealed the *MA* and did away with the provisions of the previous laws, made it clear that mineral and petroleum resources are now the common heritage of the people of South Africa and the state is their custodian. Furthermore, the *Constitution of the Republic of South Africa of 1996* (the *Constitution*) makes it clear that "no one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property."¹¹

3 The process and procedure for transitioning rights under *MPRDA*

This process is explained in the *MPRDA* in terms of the provisions in section 3 and Schedule II. The *MPRDA*¹² and its regulations¹³ introduced changes regarding how old order rights were transitioned into the *MPRDA*. It was those who transitioned as well as new applicants who benefited under the *MPRDA*. The focus here will be on the contributions by scholars¹⁴ who discuss the transition in detail¹⁵ and on relevant court decisions. The complexities associated with transitional law need to be examined.

Lack of condonation of late applications made the transitional law questionable because some applicants considered the legislation to be unfair and lacked clarity regarding the status of old order rights which had not timeously been transitioned. The *MPRDA* recognises the state as the

⁹ Sections 3 and 5 of the *MA*.

¹⁰ See ss 2(b) and 3(1)-(2) of the *MPRDA*.

¹¹ Section 25(1) of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*).

¹² See s 110 of the *MPRDA*.

¹³ Schedule II items 6 and 7 of GN R527 in GG 26275 of 23 April 2004 (the *MPRDA* Regulations).

¹⁴ Coto and Spalding 2014 <https://www.lexology.com/library/detail.aspx?g=511ddbbe-171f-454e-b646-6554b9bb2241>.

¹⁵ *Aquila Steel v. Minister of Mining Resources* 2019 3 SA 621 (CC) (hereafter the *Aquila Steel* case) paras 9-13.

custodian of minerals and petroleum resources. This is the starting point for further discussion. Old order rights granted under the previous law were extinguished because of the transitional arrangements in the *MPRDA* and as a result of failure by holders to transition them. Various disputes arose blaming the state for lack of clarity and its undue benefitting of new applicants at the expense of old order rights holders.¹⁶ Clearly, as noted above, South Africa is emerging from a very difficult period in this respect, where minerals are still largely concentrated in the hands of the minority, who were privileged by private ownership under the common law.¹⁷ Difficulties were created because some surface land owners who were oblivious of the transitional law and who were supposed to be the preferred applicants when the transitional law came into effect were ignored. When the *Constitution* and the *MPRDA* came into effect, equal treatment and benefit before the law were required. However, the approach adopted in lodging applications for the transition of old order rights to new rights was limited in that it did not give enough time for the old order holders to come forward with their applications, more especially those who were unaware of the transitional arrangements. In respect of old order prospecting rights, the state required that such rights be transitioned within two years of the coming into effect of the *MPRDA*. As for the old order mining rights, the state granted a period of five years from the coming into effect of the *MPRDA*. Perhaps it would be helpful to clarify this process in order to avoid further confusion in future.

4 Measures which could develop the transitional law

The transitioning of old order rights is measured against many factors in South Africa, including the history context, a variety of interests and the current constitutional dispensation. This discussion attempts to ensure there is fairness and justice in all the relevant processes and also that the transitional law not only adopts a set of applicable principles, laws and policies but that it did so in terms of the need for promoting equality. The *Freedom Charter* of 1955¹⁸ (the *Freedom Charter*) addresses two important principles which are critical to the position of all people in the country, which is that all people shall be equal before the law and that people shall share in the country's wealth. The *Freedom Charter* realised the importance of the rights and treatment of people regarding their socio-economic status. The *Freedom Charter* was also clear that "the land shall be shared equally amongst those who work it". In the writer's view,¹⁹ this indicated that the *Freedom Charter* sought to end restrictions on land ownership on racial

¹⁶ *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 16 and 20.

¹⁷ Section 5(1) of the *MA*.

¹⁸ ANC 1955 <https://www.anc1912.org.za/the-freedom-charter-2/>.

¹⁹ Cawood 2004 *JSAIMM*.

grounds. However, mining continued to be concentrated in the hands of the minority, and most African people remained excluded from forming part of the mining exploitation systems. Cawood²⁰ notes that the *Freedom Charter* highlights an important part of South African mining law history. Cawood pointed out that "the shift revealed the intent of the new dispensation when it called for radical transformation of mining development".²¹ The *Freedom Charter* indicated that equality must prevail to ensure that all races participate in and benefit from the mining sector, which principle was recognised only in 2000 and finally approved in 2004.²² Various statutes such as the *MA* and the *MRA* attempted to comply with the *Freedom Charter* but fell short, as they could not strike a balance between equality and the fair distribution of minerals to all in the industry. These two pieces of legislation recognised the owners of old order rights as private owners rather than as holders in the public interest, as required extensively by the *MPRDA*. As the state continued to authorise and have control of the country's minerals from 1991 and after 2004, when the new law took effect, pockets of dispute still lingered. Since the coming into force of the *Constitution*,²³ mining law has largely changed, and it is still changing. Informed by the *Constitution*, the *MPRDA* sought to balance equality and fair distribution amongst all people in the country, as well as to ensure that people benefit meaningfully and sustainably from the land they own or occupy.²⁴ The coming into law of the *MPRDA* has transformed the law on how mineral rights are regulated in South Africa. The *MPRDA* has endorsed a "use it or lose it" principle which opened up channels to allow foreign companies to seek a stake in the country's mining sector through the initiative of black economic empowerment, production and initiatives to sustain the economy. The *MPRDA* requires the state to be the overseer or the custodian of the nation's minerals and petroleum resources.²⁵ Therefore the state holds the regulatory and administrative powers to receive, assess, grant or reject any mining rights application that may be made, including

²⁰ Cawood 2004 *JSAIMM*.

²¹ Cawood 2004 *JSAIMM* 53.

²² The date on which the *MPRDA* came into effect.

²³ Section 9 of the *Constitution* which provides that "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

²⁴ See s (2)(a) of the *MPRDA* which provides that: "to ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mining resources".

²⁵ See s 2(b) of the *MPRDA*.

associated rights under the *MPRDA*. Accordingly, the *MPRDA* gives the holder of the transitioned right limited real rights of use over such minerals whilst the state remains the custodian of those real rights.²⁶

5 Empirical literature review

According to *Chamber of Mines of South Africa v Minister of Mineral Resources*,²⁷

transitional arrangements in Schedule II of the *MPRDA* regarding the transition of old order rights to new order rights in terms of the *MPRDA*, shall be in the past tense on the premise that the transition processes are now, by virtue of the time limitations that applied in terms of Schedule II, in the past.

The old order rights were carefully accommodated in the *MPRDA* until they were transitioned.²⁸ In *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Limited*²⁹ the court mentioned the transitional law and the impact it had on the old order rights. The court explained the period allowed for the transitioning of old order rights and the consequences of a failure to do so. As stated above, the *MPRDA* allowed old order mining rights to be transitioned within five years of the coming into being of the *MPRDA* and the old order prospecting rights within two years. These time periods have been criticised as problematic, especially for people who failed to lodge for transition or who had no knowledge of the transition process. Furthermore, on the topic of transitioning old order rights, Badenhorst and Olivier³⁰ for instance gave a slightly different narrative with regard to the procedure for transitioning the jointly held rights and the extinction of an undivided share in an old order mining right that was held in a consortium but where one holder did not apply for transition. The authors averred that by upholding the decision of the court *a quo* the appeal court in the *Sishen* case made the holder of one part of the jointly held old order mining right who had applied for the transition of the old order mining right (in accordance with *MPRDA*) become the "exclusive holder" of the new mining right in respect of the minerals concerned (iron ore and quartzite). Badenhorst and Olivier³¹ noted the impact brought about by the *MPRDA* on the existing rights.³² In the context of those authors' contribution to some of the challenges with transition, an analysis will be made of the jurisprudence where similar issues were raised.

²⁶ Tucker and Muleza 2008 Tucker and Muleza 2008 <https://www.bowmanslaw.com/insights/new-order-mining-rights-four-years-into-a-new-mining-regime-by-claire-tucker-and-twaambo-muleza/>.

²⁷ *Chamber of Mines of South Africa v Minister of Mining Resources* 2018 4 SA 581 (GP) (hereafter the *Chamber of Mines* case) paras 39 and 71.

²⁸ Schedule II items 6 and 7 of the *MPRDA*.

²⁹ *Minister of Mining Resources v Sishen Iron Ore Company (Pty) Limited* 2014 2 SA 603 (CC) (hereafter the *Sishen* case) para 17.

³⁰ Badenhorst and Olivier 2014 *THRHR*.

³¹ Badenhorst and Olivier 2014 *THRHR*.

³² Badenhorst and Olivier 2012 *THRHR*.

In the *Sishen* case, as the authors indicated, this meant that two different rights which were jointly held by a form of consortium were not automatically transitioned when one of them was. This created a problem, according to the authors, because these rights had been jointly held rights irrespective of their nature, which meant that the other old order right should have been automatically converted.

The adoption of the *MPRDA* and the recognition of the regulations in schedule II have brought about a strange development in the mining industry. However, some challenges continue to linger as a result of the transition, namely the status of old order rights that have passed the period imposed for transition, as well as the status of jointly held old order rights. The state of the matter since the coming into effect of the *MPRDA* was that a failure to lodge an old order right for conversion extinguished such a right and a new right could be allocated to a new applicant in terms of the *MPRDA*. Some ask whether such an arrangement did not arbitrarily or unlawfully deprive old holders of this new privilege, a question that will be investigated and answered here. Taking their lead from the *Sishen* case, some argued that if old order rights ceased to exist and were forfeited this amounted to expropriation, and such expropriation led to unfair and inequitable deprivation.³³ Section 25 of the *Constitution* provides that:

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application—
 - (a) for a 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.

The analysis further considers whether the ceased and forfeited old order rights amounted to the unlawful deprivation of old order rights. First, the state required an old order prospecting right to be lodged to be transitioned into a new right as defined by the *MPRDA* within two years of the coming into effect or operation of the *MPRDA* and old order mining rights were to be lodged within five years. These periods have not been properly clarified, particularly in relation to those old order rights which were to expire beyond 2004. The *Constitution* is clear that no law may permit the unlawful deprivation of property based on a right attached to it. *MPRDA* does not and did not provide for the condonation of late applications beyond the transition

³³ *De Beers Consolidated Mines Ltd v Ataqwa Mining (Pty) Ltd (O)* (unreported) case number 3215/06 of 13 December 2007 paras 45-46. Also see s 25 of the *Constitution*.

period, which thus made the rights cease automatically. For the law to automatically extinguish rights and strengthen the state's position, one may argue, was indicative of a kind of bullying and mistreatment of those who were not familiar with the system, and at the same time was favourable to those who were aware of and had complied with the transitional law arrangements.

The common-law principles that applied and which still apply now, like those attached to the surface landowner, must be considered in the context of the *MPRDA* when solving some of the lingering challenges. The law requires that any law which deprives people of their rights be tested against the Constitution to test its validity and constitutionality, unless the action is permitted by the law of general application, in terms of which there must be fairness and impartiality. The *Constitution* also allows for the adoption of other laws to remedy the invalidity or inconsistencies. Thus, if common law is adopted and is found to be inconsistent with the *MPRDA*, the *MPRDA* must prevail.³⁴ In other words, section 4(2) of the *MPRDA* operates as the collateral should there be a gap in the interpretation of some of the intentions of the legislature. If there is a dispute of law which the *MPRDA* is not clear about and the common law cannot solve it or if there is contradiction, the *MPRDA* prevails. Thus, only in instances where the *MPRDA* provides no clarity or solution to the issues at hand will the common law principles apply. The intentions of the legislature with the regard to the transitional law remained unclear, however, especially as to what was to occur beyond its tenure.

In *De Beers Mines Ltd v Ataquia Mining (Pty) Ltd*³⁵ the transition of old order prospecting rights was not well understood or interpreted in respect of the times set, in that De Beers argued that their old order right was to expire beyond the transitional arrangements. When the time for the transition of their old order right came, De Beers was invited to do so. De Beers had been prospecting the land for a very long time and when the *MPRDA* came with the transitional law, De Beers was still a holder of the old order prospecting right in terms of the *MA*. The De Beers contention was that when the *MPRDA* came into effect the final date of the duration of its right had not yet arrived and that it had existed beyond the period, and the *MPRDA* delayed to inform or give timeous notice regarding the transition. This created some difficulties as Schedule II of the *MPRDA* was clear that all preceding mining law legislation was repealed, and everything was controlled by the *MPRDA*. This meant that the *MA* could not possibly be applicable to De Beers under *MPRDA*, since the effect of the *MPRDA* in

³⁴ Section 4(2) of the *MPRDA*.

³⁵ *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd* (O) (unreported) case number 3215/06 of 13 December 2007 para 68.

2004 was to end everything that was regulated under the *MA*. In this case, the granting of the right to Ataquá was therefore considered to be well within the law and justified in argument. However, upon closer scrutiny, the state's intention in the legislation should have been made clearer in respect of rights granted before the transitional law in that De Beers old order rights were supposed to have been automatically converted when the new order kicked in because they were to expire in anyway. The discussion must also be considered from the perspective of what the legislator's actual intentions were regarding achieving certain provisions. From this perspective it is easy to understand the intention of the legislator as applied to the *De Beers* case. Section 4(2) of the *MPRDA* provides that,

when interpreting a provision of this Act, any reasonable interpretation which is consistent with the object of this Act must be preferred over any other interpretation which is inconsistent with such objects. In so far as the common law is inconsistent with this Act, the Act prevails.

In the above regard De Beers used the definition of an old order right in the *MA*, which is significant in the case. The lack of notice to De Beers to transition their old order prospecting right and the fact that transitioning didn't happen automatically did not justify why the *MPRDA* should not apply, since the *MPRDA* provides that one of its objects is to:³⁶

promote equitable access to the nation's mining and petroleum resources to all the people of South Africa.

In this analysis it appears the court erred when considering whether the state was justified in awarding the right to Ataquá. The court did not sufficiently put clear if the State had powers to grant a new prospecting right outside the transitional arrangements imposed by the *MPRDA*. With reference to *Minister of Mining Resources v Agri South Africa*,³⁷ section 3 of the *MPRDA* was the main provision which was scrutinised, and which was seen as allowing the Minister to expropriate a right and to grant a new right to a new applicant. Section 3(1) of the *MPRDA* replaced the *MA*, however granted transitional periods for specific old order rights that were already held or unused. With specific reference to *De Beers* case above, it appeared that before another person could be granted a new right in respect of the same land, the old holder must always be consulted and informed, more especially if that right was to expire beyond the transitional periods. Procedurally therefore, *De Beers* was justified to apply for the review of the granting of a new prospecting right to Ataquá. According to the *Sishen* case, when old order rights ceased to exist, they reverted to the state and the state granted new rights to third parties in terms of sections 17 and 23 of

³⁶ Sections 2(a) of the *MPRDA*.

³⁷ *Minister of Mining Resources v Agri South Africa (Centre for Applied Legal Studies as Amicus Curiae)* 2012 3 All SA 266 (CC) (hereafter the *Agri SA* case) para 56.

MPRDA,³⁸ which in the writer's view did not afford old order rights holders time to re-apply.³⁹

6 Factors interrogating transitional law from the judicial perspective

In the *De Beers* case above, it is significant to note that, once a right has expired, one cannot continue to use that right, as was the case under the *MPRDA* transitional arrangement. Compared with the case of *Ekapa Minerals (Pty) Ltd v Seekoei*,⁴⁰ it was correct of the court to indicate that a mining permit was required by *MPRDA* for mining tailings on mine dumps. The *MPRDA* regulates any activity in relation to minerals. The court had noted that even artisan and small-scale mining⁴¹ needed to apply for a mining permit and comply with the environmental management plans required.⁴² This meant that when the transitional arrangements took effect even the artisan miners needed to apply for them to comply with this law. Their continued ignorance of this law created difficulties for the economy to grow therefore causing the black market to grow as there are no taxes charged there. Thus, a license, permit or a right is required for any mining activity conducted.

Further, in *Bosaletse v Minister of Mining Resources*⁴³ it was noted that the communal landowners needed to be consulted before a decision to grant rights is taken, more especially if such a decision adversely affects their rights. In other words, no transition of rights could take place without consultation with the communal landowner. The communal landowners were to be informed of the impact of granting such a right on their land. The decision to grant a right, including the decision to change the status of a right without proper consultation limited the rights of the landowner and the subsequent granting of any right was unfair. In *Meepo v Kotze*⁴⁴ it was noted that the legislature, when promulgating the *MPRDA* after *PAJA* had already come into operation, had intended to regulate the whole subject of access to courts and the *MPRDA*, necessarily supersedes and repeals all former Acts in so far as it differs from their prescripts. So said, it emerges that the legislature intended making room for access to the courts because of disputes arising out of the *MPRDA*.

³⁸ *Sishen* case para 108.

³⁹ Badenhorst and Olivier 2012 *THRHR* 8.

⁴⁰ *Ekapa Minerals (Pty) Ltd v Seekoei* (NCHC) (unreported) case number 2057/2016 of 13 January 2017 para19.

⁴¹ Regulations 39 and 52 of the *MPRDA* Regulations.

⁴² De Greef 2017 <https://www.aljazeera.com/features/2017/2/3/illicit-miners-scrape-for-diamonds-on-abandoned-mines>.

⁴³ *Bosaletse v Minister of Mining Resources* (1891/2013) [2013] ZAFSHC 166 (26 September 2013) para 27.

⁴⁴ *Meepo v Kotze* 2008 1 SA 104 (NC) 119B-C.

Furthermore, in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*,⁴⁵ the High Court discussed issues of competing or simultaneous applications lodged based on the same right. Section 104 of the *MPRDA* requires the preferential treatment of certain applicants. This includes a background check as to whether the person who applies for a particular right is historically disadvantaged or is a holder of old order right. In most cases, as in *Bengwenyama*, the notion of historically disadvantaged was not canvassed and accurately recognised. If a new applicant is preferred to the old order right holder, this amounts to unfairness and the deprivation of rights without just cause. The state has not dealt much with the condonation period during which old order right holders could still apply beyond the term of the *MPRDA*. Since the old order rights have ceased to exist, holders must be invited and be preferred to apply under the *MPRDA* to alleviate most of the emerging disputes. This has the potential to reopen the wounds created under the transitional law when the *MPRDA* became law.

The transitional arrangements of the *MPRDA*, when crafted, did not cater for the continued life of the old order rights once they expired. In other words, the *MPRDA* extinguished the old order rights that had not been lodged for transition. But what happens to those common law landowners or occupiers who were oblivious to or unaware of the transitional law and had rights which have since been extinguished in their entirety and permanently? This question has been answered in line with the *MPRDA*, since the old law was consumed by the *MPRDA*.

7 The disadvantages and advantages of developing mining law

Whilst it remains feasible by law for old order right holders to raise compensation for the unlawful deprivation of rights, it only becomes harder when the law affords “use it or lose it” type of relief. In other words, to prove that a right was unlawfully deprived is one thing, but failure to prove it existed is another.⁴⁶ The principle of “use or lose it” means that when you have a right such as an old order right in this analysis, and fail to use it within the appropriate times and regulations set and if developments in law occur, such a right may be lost.

The *Constitution* states that the deprivation of property without justification is unlawful.⁴⁷ It is said that deprivation may be necessary at some extent as long as it is not arbitrarily and capriciously done. As a result, when the state determines the status of a right for the purpose of transition, the state must

⁴⁵ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) (hereafter the *Bengwenyama* case) para 31.

⁴⁶ Section 12 of the *MPRDA*.

⁴⁷ Section 25 of the *Constitution*.

consider all relevant factors and interests of other parties, to ensure that no right is granted or extended to another party without due diligence. To recapitulate on this, the state plays the role of custodian of mineral rights, which role entails that the state must grant rights in line with the non-violation of other people's rights. As the case is, the state must ensure the consistency of the *MPRDA* with the *Constitution*. In this analysis, the state must, in terms of the *MPRDA*, have full powers and rights over the minerals and petroleum resources and determine to whom rights are granted. Therefore, those who held rights under the common law and the *MA* before the *MPRDA* must have applied to transition.⁴⁸ Since the *MA* has been repealed, the *MPRDA* does not provide for the retrospective or automatic transition of rights held in terms of the *MA*. This disadvantages those who held rights under the *MA* and who had no chance to convert their old rights beyond the date when the new law became effective. Failure by the *MPRDA* to provide for the continued life of old order rights beyond the end of the transitional period made the *MPRDA* weak. As discussed above, the disregard of the old order rights in the *MPRDA* suggested an automatic expropriation. Automatic transition was necessary to avoid number of disputes brought against the state. In both instances, lethargy in both the common law and the statutory holders in transitioning their rights when the opportunity presented itself saw them having limited use and enjoyment of their rights as a result. This meant that when section 3 of *MPRDA* was applied, old order rights ceased to exist unless such rights fell under Item 3 of Schedule II in the *MPRDA*. The position is that the common law holder of a mineral right who used to exercise such a right could no longer exercise it under the *MPRDA* if the holder failed to apply for conversion of that right or did not have any pending application under the old law when the *MPRDA* took effect.

Any discovery of minerals and petroleum resources needed to be licensed. The state must decide whether to grant particular rights. Accordingly, when the *MPRDA* came into force, section 104 required preferential treatment. In several cases communities have been removed from their homes and remained excluded from them by the subsequent mining processes.⁴⁹ Sometimes these removals happened without any form of compensation. In such instances rights could be granted to mining entities who in turn had to obtain the exercise of and control over minerals and petroleum resources on those lands. This was occasionally done with minimal involvement of previous holders or even the occupiers of communal land, as the law requires. This analysis links with the transitioning of old order rights, in that in *Pan African Mineral Development Company (Pty) Ltd v Aquila Steel*

⁴⁸ Schedule II, Items 6 to 8 of the *MPRDA* Regulations.

⁴⁹ The mining communities of Lepelle-Nkumpi in the Limpopo Province.

(South Africa) (Pty) Ltd,⁵⁰ for instance, an issue regarding the granting of a right to another person on the same land where one was holding unused old order rights arose. Thus, a prospecting right was granted to a new applicant because of the old holder been unable to use it during its tenure. The coming into force of the *MPRDA* transitional arrangements made the release and granting of such a right to the new applicant easy. This meant that due to the time limits introduced by the *MPRDA* the holder of the unused old order right had no further claim to the right. Again, the court in this particular case dealt with the issue in dispute by using what was termed a priority or preferential measurement which could see the holders of old order rights continuing to use those rights if they were already doing so beyond the transitional law. However, those who did not use those rights when the transitional law time limits expired could not use them beyond that period as they remained unused during the transitional period.

The *MPRDA* has failed to indicate and implement a proper turnaround transition strategy that will accommodate everyone affected. It has also given an unfair advantage to new applicants, despite the old holders being actively involved with those rights during the transitional arrangements. This has created a gap, in that it has not provided for an option for remedy after the expiration period, despite the provisions of section 25 of the *Constitution*. Failure by the *MPRDA* to provide condonation to old order rights holders is arbitrary and a form of deprivation, as some of the old order holders were continuing their mining activity. In a wider sense, the deprivation of rights by the state through this form of extinction is somewhat unlawful in that there was no clear guarantee that holders of old order rights would be preferred first even when new applications are brought, as the case was in the *Bengwenyama* case.⁵¹

The two court cases discussed above⁵² as well as the recent *Aquila Steel v Minister of Mining Resources*⁵³ indicate the importance and extent of the application of the *MPRDA*. The courts have been adamant about the interpretation of the transitional law, mostly finding that the approach to the transitional arrangements of the *MPRDA* is defective, if not wrong. This in turn has challenged the very nature of Schedule II, in that neither the state's approach nor the *MPRDA* were clear on the interpretation and handling of applications falling outside the transition periods.

⁵⁰ *Pan African Mineral Development Company (Pty) Ltd v Aquila Steel (South Africa) (Pty) Ltd* 2018 5 SA 124 (SCA). Also see Badenhorst 2019 *Colo Nat Resources Energy & Envtl L Rev* 50.

⁵¹ *Bengwenyama* case para 31.

⁵² *Sishen* and *Agri SA* cases.

⁵³ *Aquila Steel* case.

Until the *MPRDA* is amended there will still be inconsistencies in the approach by the state to granting mining rights. The handling of applications must always be in terms of section 104 of the *MPRDA*. This will aid in assisting those who had active old order rights before the transitional law came into effect. The inconsistent application of the *MPRDA* by the state has created problems for those holding various mining rights.

8 Conclusion

The analysis of this work was conducted to gain an in-depth understanding of concepts of transitional law. It was discovered very important for mining law to be developed to cater for the gaps left by the transitional law. The *MPRDA* does not provide for condonation in respect of certain categories of people and this posed a great risk because most of them find themselves arbitrarily deprived of their rights and their rights expropriated without just cause. The law needed to be clear as to how old order holders are accommodated rather than extinguishing them or having them cease to exist. The analysis recommends a further amendment to the *MPRDA* in order to make provisions clear for condonation and automatic transitions which will cater for those who were unfamiliar with the *MPRDA* arrangements or just to simply prioritise the applications of those who were already using their granted rights when the transitional law took effect, because the *MPRDA* already provided for that.

The introduction of the *MPRDA* transitional period created difficulties for communal landowners as well. After the repeal of the *MA* the communal landowners were neutralised in terms of the land they owned and their entitlements. An owner therefore became a potential holder making it difficult for him or her to apply because he or she was unaware of the *MPRDA* new arrangements and their impact. In other words, at common law the owner of the mineral land is in control of the rights to which the ownership is related.⁵⁴ When the state introduced the *MA*, this position remained the same until the *MPRDA* took over, which neutralised the concept of ownership, leaving the owner with the land but not entitlements to the mineral rights. This created difficulties since the common law stated that the owner of the land is also the owner of the things in that land. Ownership is self-propagating in that the owner of any property often owns the economic benefits of that property as well. But in South Africa this is

⁵⁴ Van der Walt and Pienaar *Constitutional Property Law* 171-172. Also see *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC), where the Constitutional Court found that the purpose of s 25 of the *Constitution* has to be seen as both protecting existing private property rights and serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions. See para 50.

sometimes not the case as some property owners have issues relating to benefits that could be attached to their property. For instance, the communities' right to be consulted and informed about the intended mining activity has raised quite contentious issues where such communities often required that the granting of rights be reviewed and set aside by our courts.⁵⁵ In terms of this analysis, it is therefore fit to also follow the law applied in the *Pan African Mineral Development* and *Aquila Steel* cases. The transitioning of old order mining rights to new mining rights should always bear significance by adjuring the provisions of the *MPRDA*.

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⁵⁵ *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP). Also see *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 1 BCLR 53 (CC).

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List of Abbreviations

ANC	African National Congress
Colo Nat Resources Energy & Env'tl L Rev	Colorado Natural Resources, Energy and Environmental Law Review
JSAIMM	Journal of the South African Institute of Mining and Metallurgy
MA	Minerals Act 50 of 1991
MRA	Mining Rights Act 20 of 1967

MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
PAJA	Promotion of Access to Justice Act 3 of 2000
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg