

BOOK REVIEW

Mineral Law: Principles and Policies in Perspective

Hanri Mostert

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For more than 140 years, minerals have occupied a central position in the growth and development of the South African political economy. A number of core economic sectors, revolving around mining and energy (famously characterised by Fine and Rustomjee as the ‘Minerals-Energy-Complex’ or ‘MEC’¹), have fundamentally shaped the specifically South African system of accumulation and currently remain dominant.² But this continuity of economic clout masks the complex and shifting class, racial, ethnic and gendered power relations implicated in the extraction of South Africa’s considerable mineral wealth, and how these have affected, and been affected by, colonialism, apartheid and constitutional democracy. An account that sought to explain the role of ‘mineral law’ in these tortured historical transitions, while at the same time placing contemporary developments in this realm ‘in perspective’, promised to be an arresting read, and it was therefore with considerable eagerness that I approached Hanri Mostert’s new publication *Mineral Law: Principles and Policies in Perspective*.

Although a number of excellent publications on mineral law in South Africa already exist,³ what the field lacks is an accessible, succinct and up-to-date analysis of the contours of mineral regulation and how these have interfaced with property rights within a shifting historical context. Mostert commences her historical analysis with this paradox: for as long as South African mineral law has existed it has been both rooted in property law but simultaneously divorced from it. Because property relations in South Africa have traditionally been regarded as private in nature, governed by principles of Roman–Dutch common law, the evolution of South African mineral law

1 For Fine and Rustomjee’s original analysis of the MEC see B Fine and Z Rustomjee, *The Political Economy of South Africa* (London: Hurst & Co 1996).

2 B Fine, ‘Assessing South Africa’s New Growth Path: Framework for Change?’ (2012) 39 *Review of African Political Economy* 551 at 558.

3 The two best contemporary sources are PJ Bandenhorst and H Mostert, *Mineral and Petroleum Law of South Africa* (Cape Town: Juta 2004, rev 2010) and MO Dale, L Bekker, FJ Bashall, M Chaskalson, C Dixon, GL Grobler and CDA Loxton, *South African Mineral and Petroleum Law* (Durban: LexisNexis Butterworths 2005), with BLS Franklin and M Kaplan, *The Mining and Mineral Laws of South Africa* (Durban: Butterworths 1982) probably being the most authoritative earlier work.

is also a study in how the public and private have interacted, with one of the greatest challenges in this body of law thus being how to balance the state's regulatory powers with the rights of private parties.

This challenge is as alive as ever in what is perhaps the central controversy of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA),⁴ namely whether this statute expropriated pre-existing rights. At the time of publication of Mostert's book, this issue had already come before the courts in the matter of *Agri South Africa v Minister of Minerals and Energy*.⁵ Referencing the framing norms of the constitutional right to property, the judge in this case decided that the MPRDA had effected a deprivation of pre-existing rights, that this amounted to an expropriation and that the rightholder was accordingly entitled to compensation. Mostert disagrees with the outcome of this decision and her fine-grained historical analysis is aimed at elucidating and justifying her position that the MPRDA did not bring about the large-scale expropriation of pre-existing rights, and that where specific entitlements have been lost there is ample justification for this on the basis of the state exercising its sovereign right to control mineral resources in the public interest.

Although the book's publication preceded the outcome of an appeal in this case to the Supreme Court of Appeal (SCA),⁶ Mostert's arguments have been vindicated for the SCA held that from the perspective of the history of mining regulation in South Africa, it has been the policy of successive governments that the state controlled the right to mine and no wholesale expropriation of rights had therefore taken place.⁷ Although it departed from her analysis on certain points, the court specifically noted that Mostert's book had served as a 'useful check' on the conclusions reached in the judgment, which serves to underline the publication's timeliness and importance.⁸ It remains to be seen, however, whether the Constitutional Court, which heard an appeal in this matter in November 2012,⁹ will also affirm her views.

Apart from dealing with the 'expropriation question', Mostert also deals with the policy issue of nationalisation that has also raged of late in the South African mining industry, although this is much less of a focus of her analysis.

4 The MPRDA is the legislation that currently governs mineral (and petroleum) extraction in South Africa. It entered into force on 1 May 2004.

5 2012 (1) SA 171 (GNP). This is the substantive decision of the Gauteng North High Court. An earlier interlocutory decision in the same case was reported as *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP).

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

7 *Ibid* para 84.

8 *Ibid* fn 41.

9 For copies of the heads of argument and pleadings in this case, see the website of the South African Constitutional Court, www.constitutionalcourt.org.za/uhtbin/cgisirsi/606aD7KVwt/MAIN/75360012/9.

After a brief introductory chapter, Chapter Two outlines the foundations of mineral law in South Africa, particularly the *cuius est solum* rule. The possibility of ‘severance’ and state regulation of mineral rights are the most significant. In Roman–Dutch law, the principle *cuius est solum eius est usque caelum et ad inferos* implies that the landowner’s dominion extends from the depths to the skies, thus clearly including minerals beneath the surface. This principle was further reflective of the unitary concept of ownership that prevailed in Roman and Roman–Dutch law and is still the mainstream view in South Africa. In terms of this conceptualisation, the scope of residual entitlements is greater than a conceptualisation of ownership as a ‘bundle of rights’ comprising, among others, the right to use the property (*ius utendi*), the right to dispose of the property (*ius dispondendi*) and the right not to develop the property (*ius abutendi*). Based on the *cuius est solum* principle, common law mineral rightholders were recognised as having a number of entitlements including the right to prospect for minerals themselves or the right to transfer this entitlement to others. Roman–Dutch law did, however, recognise the right to mine for minerals as a privilege that could be exercised by the state. The reception of Roman–Dutch law during the first phase of South Africa’s colonisation thus meant that the stage was set for viewing mineral rights as an aspect of (private) property law.

Subsequent British occupation of the Cape did not change this common law basis, but with the discovery of South Africa’s extensive mineral resources from the 1880s onwards the need for severance of the mineral rights from the land became an economic necessity as individual landowners could not always afford the high costs of prospecting and mining. Severance entailed recognising the rights of mineral rightholders, alongside the surface owner,¹⁰ through either reservation on transfer or cession, with both methods resulting in the registration of title in the Deeds Registry. According to Mostert, by 1911 the practice of severance had become firmly established in both legislation and case law, facilitating the free transfer of mineral rights. Through the severance of mineral rights the possibility of conflict between the surface owner and mineral rightholder also increased, but in the event of an irreconcilable conflict the interests of the latter prevailed.

While scholars and the judiciary continued to treat mineral rights as an incidence of property law, from the 1870s onwards there was nevertheless intense state regulation of minerals and mining based on various policy objectives, raising the question of whether mineral law should not be treated as a branch of administrative (public) law. While the mineral rightholder controlled access to the resource, state regulation imposed a second layer of

10 Not as ‘ownership’ but as a form of limited real right. The theoretical basis of the severed mineral right has not, however, been satisfactorily resolved.

rights in the form of authorisations or licences that were required to actually extract the minerals.

Mostert thus proceeds to identify and outline four ‘generations’ of mineral law – largely informed by changes in the scope and content of state regulation – in the ensuing four chapters:

1. the first generation of ‘piecemeal regulation’ during the colonial and Union eras, which extended from around 1860 until 1964;
2. the second generation of ‘conferrals’ extending from the introduction of the Precious Stones Act 73 of 1964 and the Mining Rights Act 20 of 1967 until the introduction of the Minerals Act 50 of 1991;
3. the third generation of ‘authorisations’ under the Minerals Act, which lasted until 2004; and
4. the fourth generation ‘custodianship’ model introduced by the MPRDA in 2004, which currently still prevails.

In Chapter Three, Mostert provides broad insight into the ‘haphazard’ regulation that produced an extremely complex system of common-law based, state-conferred rights pertaining to various aspects of mining between circa 1860 and 1964. The overarching policy objective of the colonial governments¹¹ and the subsequent Union government was to promote the exploitation of the country’s mineral wealth. Regulations differed from colony to colony, but also in terms of the type of mineral (distinctions were drawn between precious stones, precious metals, base metals and/or minerals, natural oil and nuclear source material), the type of land involved (whether ‘Crown land’ or ‘private land’ during the colonial period, or ‘state land’, ‘alienated state land’, or ‘private land’ during the period of Union government), and whether or not the land had been proclaimed. Notwithstanding these differences, the overall trend observable during this time was for the state to arrogate to itself the right to prospect/mine for and the right to dispose of the most strategic mineral resources, thus parsing the exploitation component from the traditional common law mineral right. In the former South African Republic (Transvaal) and the Orange Free State, for instance, the right to mine for and the right to dispose of precious metals (defined as gold, silver, iridium and platinum) vested in the state, whereas ownership of and the right to mine base metals and minerals still vested in the mineral rightholder. Although, for base metals a prospecting permit from the state was required and in the case of base minerals the right to prospect could be forfeited to another if it was not exercised. In this way,

11 The four former colonies of South Africa were the English-dominated Cape Colony and Natal and the Afrikaner-dominated ‘South African Republic’ (later becoming the province of the Transvaal under Union) and the Orange Free State.

state regulation indelibly changed common law rights, already during this early period. At the same time, racial and class discrimination were clearly evident, features that Mostert deals with summarily in this chapter under the headings of colonial treatment of claims to land and minerals (examining the Richtersveld conflict), racial prejudice and the labour issue, and racial segregation and group areas.

The second generation of mineral law, discussed in Chapter Four, perpetuated the trend of common law mineral rights recognition and concomitant state control of exploitation. The cacophony of colonial and Union mineral legislation was consolidated into two principal mineral law statutes, the aforementioned Mining Rights and Precious Stones Acts, both of which were supported by the Mining Titles Registration Act 16 of 1967. Notwithstanding this apparent rationalisation, the intensity of state control still varied in terms of the class of minerals, type of land and fact of proclamation, which resulted in a byzantine system of approximately 40 types of mining title. Continuing the trend of the previous generation, no one could prospect for or mine precious stones or precious metals without the state having conferred the right to exploit these resources on them. In the case of base minerals, conferral took the form of the state's recognition of the attendant common law entitlement to exploit, though this was subject to increased police powers relating to the state's capacity to investigate the land for the occurrence of base minerals and to determine whether mining was being conducted satisfactorily. Discrimination during this period incorporated the apartheid state's infamous 'homeland' policy, which legitimised the 'resettlement' of black people from 'white' South Africa. Unwittingly, some of the independent homelands and self-governing areas were established on land later found to be particularly well-endowed with deposits of platinum, chromium and other metals.¹² Mostert's account of the scope of constitutional and statutory instruments pertaining to mineral resources in these areas is short but informative.

The Minerals Act 50 of 1991, heralding the third generation of mineral law discussed in Chapter Five, seemingly involved a U-turn in policy because the right to prospect or mine was revested in the common law mineral rightholder. The Act vastly simplified the regulatory landscape, doing away with all the complicated distinctions among minerals and types of land and 'deproclaiming' all land. In essence, this meant that the right to decide who could exploit the mineral resource lay with the common law rightholder, whereas in previous generations of mineral law this decisional power had vested with the state insofar as strategic minerals were concerned.

12 Parts of Bophuthatswana and Lebowa, for instance, are situated on the Bushveld complex, which holds 80 per cent of the world's platinum reserves.

Functionally, however, the truncation of the common law mineral right persisted as any prospecting or mining was illegal in the absence of an authorisation granted by the state in terms of the Minerals Act. The pseudo-privatisation of the statute, therefore, masked an extension of state control over exploitation. To the persistent policy objective of ensuring optimal utilisation of mineral resources, the Act added mine health and safety and environmental rehabilitation. Although Mostert does not make this explicit, very detailed health and safety regulations, and (to a lesser extent) environmental obligations, had previously been set out in a series of 'mines and works' Acts and their regulations. The change introduced by the Minerals Act was that a mining company's capacity to rehabilitate became a compulsory consideration *prior* to the grant of an authorisation for the first time. Although the Minerals Act contained no obviously discriminatory provisions, it failed to address the festering problems of exclusivity and discrimination that had undergirded mineral law in South Africa from colonial times.

The transformation of the South African mining industry was, however, squarely addressed by the MPRDA, which introduced the fourth generation 'custodianship' model that Mostert discusses in Chapter Six. In pursuit of the multiple objectives of equitable access to resources, economic development, social welfare, black economic empowerment and implementation of the constitutional right to environment, the MPRDA challenges the underlying property law paradigm for mineral law in ways more extreme than any previous statute, but without wholly moving into a system of administrative grants. The Act states that mineral and petroleum resources are the common heritage of the people of South Africa and that the state is the custodian thereof. The state exercises its custodianship by granting a range of so-called 'new order' rights to successful applicants. The new order prospecting and mining rights under this Act are expressly identified as limited real rights in respect of the mineral and the land, and in order to provide security of tenure they must be registered at the mineral and petroleum titles registration office. This characterisation of the rights thus adds a 'proprietary and possibly contractual overlay' to what would otherwise simply be an administrative instrument. As Mostert explains, whereas a dual system of the mineral rightholder controlling access to the resource while the state controlled access to exploitation prevailed under previous generations of mineral law, the MPRDA inverts the process so that the *starting-point* is now the exercise of the state's regulatory powers and the end effect is the reinforcement of private interests. In order to ensure a smooth transition between third- and fourth-generation mineral law, the MPRDA also contains detailed provisions on

the conversion of all previous mining titles (which became ‘old order rights’ on the commencement of the MPRDA). Mostert discusses this latter area at length.

Chapter Seven is the heart of the book in which Mostert grapples with the ‘expropriation question’ in light of the preceding historical analysis. Section 25 of the South African Constitution serves as the starting point in an inquiry into the expropriating effect of a statute such as the MPRDA. Its provisions distinguish between a deprivation and an expropriation – concepts that Mostert argues are ‘conceptually continuous’. Because expropriations are a subset of deprivations, compensation for an expropriation will be payable only if it can be established that a deprivation of property has taken place. Mostert provides a very useful summary of the most recent Constitutional Court precedents pertaining to the ‘deprivation question’ and the ‘expropriation question’ before turning to a critique of how this inquiry was handled in the first *Agri SA* decision.¹³

The core of her argument is that the High Court in the *Agri SA* matter failed properly to consider whether the MPRDA had effected a wholesale deprivation of pre-existing rights because it failed to acknowledge the state’s historical control over exploitation, the importance of the transitional provisions in the MPRDA and the nature of the model of custodianship that empowers the state to achieve greater participation in the industry but without transferring property rights to itself. She then proceeds to deal with the ‘deprivation question’ herself in terms of the *ius utendi*, *ius dispondendi* and *ius abutendi*. Her conclusion is that the MPRDA in fact took very little away from pre-existing rights: the *ius utendi* was not present in the rights under the Minerals Act anyway, the *ius dispondendi* was merely administratively curtailed and while the *ius abutendi* was indeed lost, this could easily be justified in terms of what the MPRDA aims to achieve. She nevertheless holds that there is scope for considering how the MPRDA may have affected individual cases and argues that in these situations equalisation (rather than expropriation) payments along the lines of the *Nassaukiesung* decision¹⁴ of the German Federal Constitutional Court would be more appropriate. Her position on the MPRDA’s expropriating effect additionally provides an answer to the nationalisation question and she maintains that the MPRDA was at pains *not* to nationalise by virtue of the custodianship model (which does not confer any property on the state) and the detailed focus on conversion of old order rights.

13 See n 5 above.

14 BVerfGE 58 300.

Chapter Eight provides a concluding summary of the main themes of the book.

Mineral Law: Principles and Policies in Perspective is a significant contribution to the literature on mineral law in South Africa and its value, as already mentioned, was expressly highlighted in the SCA's *Agri SA* case. The 'perspective' that the book provides, however, is limited to the relationship between mineral and property law and it provides very little insight into the broader social, political and economic dynamics that shaped the provisions of the law: the struggle between Afrikaner political power and English imperial capital, for instance, or the significance of the 'privatisation' of mineral rights on the cusp of the period leading to the democratic transition, or the manner in which the MPRDA has spawned a new black elite who prosper while the people in mining-affected areas still receive very few benefits. The sections on 'discrimination' in the descriptive chapters are too thin and fragmented to elucidate the various powers that have held sway over South Africa's mineral resources, or to enable one to draw conclusions about the way in which the balance between private property rights and the state's regulatory interests throughout the various generations of mineral law favoured particular players over others. The book is also very much a study on mineral law and not on the equally significant sphere of mining law, which are the rules one would turn to in order to understand how the severely negative and discriminatory health, safety, gender and environmental impacts of mining were (and are continuing to be) externalised. Finally, given the imminent decision of the Constitutional Court in the *Agri SA* matter, as well as impending amendments to the MPRDA,¹⁵ Professor Mostert might very well need to start working on the second edition of her book very soon!

These criticisms, however, do not detract from *Mineral Law: Principles and Policies in Perspective* being an extremely valuable exposition on the correct doctrinal approach to mineral law in South Africa.

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15 The latest amendments to the MPRDA were published in December 2012. The Department of Mineral Resources hopes to finalise these by June 2013.