CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 51/13
[2013] ZACC 45

In the matter between:

MINISTER OF MINERAL RESOURCES	First Applicant
DIRECTOR-GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES	Second Applicant
DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION, DEPARTMENT OF MINERAL RESOURCES	Third Applicant
REGIONAL MANAGER, NORTHERN CAPE REGION, DEPARTMENT OF MINERAL RESOURCES	Fourth Applicant
IMPERIAL CROWN TRADING 289 (PTY) LIMITED	Fifth Applicant
and	
SISHEN IRON ORE COMPANY (PTY) LIMITED	First Respondent
ARCELORMITTAL SOUTH AFRICA LIMITED	Second Respondent

Heard on : 3 September 2013

Decided on : 12 December 2013

JUDGMENT

JAFTA J (Mogoeng CJ, Moseneke DCJ, Madlanga J, Mhlantla AJ, Nkabinde J, Skweyiya J and Van der Westhuizen J concurring):

Introduction

[1] This case concerns the interpretation and application of the transitional provisions of the Mineral and Petroleum Resources Development Act[1] (MPRDA) which came into force on 1 May 2004. The matter comes before this Court as an application for leave to appeal against an order issued by the Supreme Court of Appeal.[2]

[2] The applicants are the Minister of Mineral Resources (Minister); the Director-General of the Department of Mineral Resources (Director-General); the Deputy Director-General: Mineral Regulation, Department of Mineral Resources (Deputy Director-General); the Regional Manager, Northern Cape Region, Department of Mineral Resources (Regional Manager); and Imperial Crown Trading 289 (Pty) Limited (Imperial Crown). They cite as first and second respondents Sishen Iron Ore Company (Pty) Limited (Sishen) and ArcelorMittal South Africa Limited (AMSA).

[1] 28 of 2002.

[2] *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Others* [2013] ZASCA 50; 2013 (4) SA 461 (SCA) (Supreme Court of Appeal judgment). Before the hearing in this Court, the parties were invited to address the merits of the appeal in their respective arguments. This meant that the application for leave and the appeal were to be heard together to save time, costs and judicial resources. Therefore, in the event of this Court granting leave to appeal, the merits of the appeal will be determined.

Historical background

[3] For centuries legislation that regulated access to and exploitation of mineral and petroleum resources was exclusive on a racial basis and discriminatory.[3] From the time when minerals were discovered, the governing authorities refused to recognise claims to mineral rights held by black people.[4] When diamonds were discovered in the area then known as the Griqualand West, occupied by the Griquas, an indigenous community, the governments of nearby areas[5] refused to recognise the Griquas' claim to the minerals on their land. The same applied to the minerals found nearby on the land occupied by the Batswana, another indigenous community. In the eyes of colonialists these areas were regarded as "no-man's land".[6]

[4] Having realised that mineral wealth existed in those areas, the British promptly annexed them to the Cape Colony. The indigenous communities were dispossessed of claims they had to diamonds and their land.[7] The Batswana community was forced out of the area which was then known as the diamond fields and later had the town of Kimberley as its capital.

[5] At an early stage mineral rights were recognised under the common law in terms of which they became assignable from one person to the other. The transfer of rights to minerals could be effected by means of a private agreement such as cession

[3] Mostert *Mineral Law: Principles & Policies in Perspective* (Juta and Co Ltd, Cape Town 2012) at 33.

[4] Id at 30-1.

[5] Cape Colony and Orange Free State.

[6] Mostert above n 3 at 31.

[7] Id.

or lease. But as early as the nineteenth century, the authorities saw the need for statutory regulation that dealt with the disposal of mineral rights.[8] The Gold Law of the Zuid-Afrikaansche Republiek vested in the state the sole rights of mining for and the disposing of precious metals, including diamonds, gold and silver. Ownership of the minerals, however, remained in the hands of the landowners and those to whom they had transferred the rights. The state enjoyed the power to authorise mining operations and the disposal of minerals owned by private persons.

[6] Consistent with the policy of not recognising mineral rights held by black people, the authorities ignored the rights held under indigenous law. For example, the Richtersveld community of the Khoi and San people was dispossessed of its land rich in diamonds in the area called Namaqualand.[9] Namaqualand was annexed to the British Colony in 1847. From then onwards, successive governments under whose authority the land fell held the view that the discriminatory statutes which precluded black people from holding mineral rights and conducting mining applied to Namaqualand. The consequence of this was that Nama people were denied the right to mine minerals on their land even though they had been doing so before the annexation. The community also lost the power to grant mining leases to outsiders, the power it had exercised between 1856 and 1910.[10]

[8] *Minister of Minerals and Energy v Agri South Africa* [2012] ZASCA 93; 2012 (5) SA 1 (SCA) (*Agri South Africa SCA*) at paras 35-48.

[9] *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC).

[10] Id at para 61.

[7] A major dispossession of land occurred in 1913 when 13% of the country's land was set aside for the use and occupation of the African majority and 87% of the land was reserved for other races.[11] The Natives Land Act of 1913[12] was later reinforced by a suite of statutes which advanced the policy of apartheid. Chief among those statutes were the Natives (Urban Areas) Act,[13] the Group Areas Act[14] and the Native Laws Amendment Act.[15] Because in the main, mineral rights were held by landowners, the effect of these statutes was to exclude black people from holding mineral rights but for negligible exceptions in the areas set aside for occupation by them.

[8] The only role that was permitted to black people in the mining industry under apartheid was the provision of cheap, unskilled labour. These workers were obliged to perform their work under appalling conditions which exposed them to all sorts of illnesses and dangers associated with mining operations.[16] The apartheid government reserved skilled work for white workers.[17]

[9] When racist statutes were repealed before the dawn of the democratic dispensation in 1994, the inequalities and imbalances they had caused remained

[11] *Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC).

[12] 27 of 1913.

[13] 21 of 1923.

[14] 41 of 1950.

[15] 54 of 1952.

[16] See *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC).

[17] Mostert above n 3 at 33-4.

embedded in our society. The Constitution not only rejected the racist policies of the past but it also imposed obligations on the democratic government to take legislative and other measures to address the inequalities caused by racist colonial and apartheid laws.

The scheme of the MPRDA

[10] In the discharge of its obligations to transform the mining industry, one of the major sectors of our economy, Parliament passed the MPRDA. As its preamble proclaims, the MPRDA was enacted in part to eradicate all forms of discriminatory practices in the mining and petroleum industries and to redress the inequalities of past racial discrimination. Pivotal to achieving these objectives was placing all mineral and petroleum resources in the hands of the nation as a whole and making the state the custodian of the resources on behalf of the nation. This is one of the fundamental changes brought about by the MPRDA. By vesting all mineral and petroleum resources in the nation, the MPRDA dispensed with the notion of mineral rights or rights to minerals which before 1 May 2004 were held by private persons.

[11] The only rights that may be granted under the MPRDA are exploration rights, prospecting rights, mining rights and production rights.[18] Unlike its predecessors, the

[18] Section 3(2) of the MPRDA provides:

> "As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister may—
>
> (a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and

MPRDA does not recognise mineral rights irrespective of whether they are sourced from the common law or indigenous law. This is so because private ownership of mineral rights is incompatible with the principle that mineral and petroleum resources belong to the nation and that they are held by the state as custodian.[19]

[12] For a better understanding of the MPRDA, it is necessary to outline the scheme of its predecessor. Under the Minerals Act,[20] the holder of a right was defined with reference to, inter alia, ownership of a mineral to which the right applied.[21] Where the mineral was not severed from the land, the right-holder was the landowner. If severed, the right-holder was the person in whose name the right to a mineral had been registered or a person who had acquired the right by permissible legal means. Being a right-holder was critical to obtaining a prospecting permit under section 6(1)[22] or a mining authorisation under section 9(1)[23] of the Minerals Act. The granting of a

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(b) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament."

[19] Exploration, prospecting, mining and production rights allocated under the MPRDA may of course be held privately by individuals.

[20] 50 of 1991.

[21] Section 1(ix) of the Minerals Act.

[22] Section 6(1) provided:

> "The regional director shall, subject to the provisions of this Act, upon application in the prescribed form and on payment of the prescribed application fee, issue a prospecting permit in the prescribed form authorising the applicant to prospect for a mineral in respect of which he—
>
> (a) is the holder of the right thereto; or
>
> (b) has acquired the written consent to prospect on his own account, from such holder,
>
> in respect of the land or tailings, as the case may be, comprising the subject of the application."

[23] Section 9(1) provided:

> "The regional director shall, subject to the provisions of this Act, upon application in the prescribed form and on payment of the prescribed application fee, issue a mining authorisation in the prescribed form for a period determined by him authorising the applicant to mine for and dispose of a mineral in respect of which he—

prospecting permit or a mining authorisation was open only to a right-holder or a person who had acquired written consent from the right-holder to prospect or mine.

[13] The Minerals Act distinguished between the right to a mineral or mineral right on the one hand, and a prospecting permit or mining authorisation on the other. Generally, a prospecting permit or mining authorisation was issued to the owner of the mineral right or someone who had the written consent of the owner. It was this condition that perpetuated the exclusion of black people from access to minerals and participation in the mining industry. In view of the fact that black people did not own land because of dispossession and legal instruments that prohibited ownership, drastic measures were necessary to open up opportunities in the mining industry for the previously excluded majority. This became one of the primary objectives of the MPRDA.

[14] In making the grant of a prospecting permit or mining authorisation dependent on the existence of the underlying mineral right, the Minerals Act recognised that right in its different forms, including the right held by two or more persons in undivided shares. Under that Act, the holder of a right to a mineral could, without more, enter the land in which the mineral was located, together with his or her employees and equipment necessary for prospecting or mining. But he or she could not commence

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(a) is the holder of the right thereto; or

(b) has acquired the written consent of such holder to mine therefor on his own account and dispose thereof,

in respect of the land or tailings, as the case may be, comprising the subject of the application."

any prospecting or mining operation without authorisation granted by the state under the Act.[24] This illustrates that although the owner of a mineral could sell it or deal with it in whatever manner he or she pleased, state authorisation was required for mining and disposing of the extracted mineral. Accordingly, the authorisation enhanced the value of the mineral because it could be extracted from the land.[25]

[15] As this illustrates, under the Minerals Act the emphasis was more on regulating mineral rights that were in existence. That Act was not concerned with addressing the inequalities and exclusion brought about by its predecessors or related legislation which supported the racist policy of apartheid. This is hardly surprising because the Minerals Act itself was the product of the apartheid regime.

[24] In relevant part, section 5 of the Minerals Act read:

> "(1) Subject to the provisions of this Act, the holder of the right to any mineral in respect of land or tailings, as the case may be, or any person who has acquired the consent of such holder in accordance with section 6(1)(b) or 9(1)(b), shall have the right to enter upon such land or the land on which such tailings are situated, as the case may be, 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, as the case may be, and to dispose thereof.
>
> (2) No person shall prospect or mine for any mineral without the necessary authorisation granted to him in accordance with this Act: Provided that—
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> (a) the South African Roads Board established by section 2 of the South African Roads Board Act, 1988 (Act No 74 of 1988), and any provincial administration shall not require any such authorisation for the searching for and the taking of sand, stone, rock, gravel, clay and soil for road-building purposes under the laws applicable to them: Provided further that the said Roads Board or provincial administration shall, in any such case for the purposes of this Act, be deemed to be the holder of or applicant for a prospecting permit or mining authorisation, in respect of the mineral and land concerned; and
>
> (b) the occupier of land who otherwise lawfully takes sand, stone, rock, gravel, clay or soil for farming purposes or for the effecting of improvements in connection with such purposes on such land, shall not require any such authorisation and the provisions of this Act shall not be applicable in any such case."

[25] See *Agri South Africa SCA* above n 8 at para 71.

[16] As the MPRDA was enacted to overhaul the apartheid structures in the mining industry, it had to destroy the lifeline of those structures. In doing so, the MPRDA abolished private ownership of mineral rights. Ownership of all mineral and petroleum resources is now vested in the nation. Rights in minerals are no longer a prerequisite to the granting of prospecting or mining permits. To a large degree, the abolition of private ownership of minerals has levelled the playing field in the context of applying for prospecting and mining authorisations. Even those who were previously denied ownership of land and minerals may now apply for authorisation to participate in the mining industry, provided they meet the requirements of the MPRDA.

[17] Whilst the MPRDA introduced a new legal framework that governs the mining industry, it did not abolish old order rights immediately upon coming into operation. It contains transitional provisions which preserved some of the old order rights for a period of time. During this period, the holders of the old order rights had a choice to convert their rights in terms of the MPRDA or allow them to lapse. Those old order rights ceased to exist upon conversion or when they lapsed. As mentioned earlier, in this case we are concerned with the interpretation and application of the transitional provisions. But before examining these provisions, it is necessary to set out the factual background and the history of this litigation.

The facts

[18] Before the MPRDA came into force and during the currency of the Minerals Act, Sishen and AMSA conducted mining operations for iron ore and quartzite on eight properties near Kuruman, in the Northern Cape Province. By agreement between those parties, the actual mining was conducted by Sishen, on its behalf and on behalf of AMSA, which was charged a fee for Sishen's services.

[19] The background to the relationship is this. AMSA's predecessor, Iscor, was the holder of the mining right and owner of the mine and the relevant properties. Apart from mining, Iscor was involved in steel manufacturing. In 2001 Iscor decided to unbundle its businesses. It sold part of the mining business to Sishen but retained a minority shareholding in it. The shareholding between the parties was divided into shares of 78.6% held by Sishen and 21.4% held by Iscor. It may be noted that Iscor was owned by the state and it was the state that insisted that Iscor should retain 21.4% of the rights to iron ore and quartzite at the mine that was sold to Sishen in order to ensure the supply of 6.25 mtpa[26] of iron ore in the event of Sishen disposing of its interest in the mine.

[20] The division of the right to iron ore and quartzite into 78.6% and 21.4% could not be registered under the Minerals Act unless approved by the Director-General in the Department of Mineral Resources.[27] Section 20 of that Act prohibited division of

[26] Million tonnes per annum.

[27] Section 20 of the Minerals Act provided:

a mineral right held in undivided shares unless approved by the Director-General. The section conferred a discretion on the Director-General to grant approval if satisfied that the division would not "detrimentally affect any of the objects of [the] Act."

[21] In October 2001, Sishen and Iscor applied for the division of the right to iron ore and quartzite which they held in undivided shares of 78.6% and 21.4%, respectively. Approval for dividing the right was granted on 13 November 2001. Meanwhile, Iscor changed its name to AMSA.

[22] As joint holders of undivided shares, Sishen and AMSA applied for mining authorisations from the Department of Mineral Resources. Each obtained authorisation pertaining to its undivided share of the right. Sishen was issued permit number ML07/2002 in respect of its 78.6% share and AMSA was granted permit number ML06/2002 in relation to its 21.4% share. Both permits were issued on 17 October 2002 and were to be valid until 16 October 2032. Therefore, when the

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"(1) Notwithstanding anything to the contrary contained in any law, but subject to sections 71(2)(a) and 73*bis* of the Deeds Registries Act, 1937 (Act No 47 of 1937), no deed which, if it would be registered, would give effect to—

(a) the division of any right to any mineral or minerals in respect of land among two or more persons into undivided shares; or

(b) an increase in the number of holders of undivided shares in any right to any mineral or minerals in respect of land,

shall be registered by the registrar of deeds concerned, unless the Director-General has under subsection (3) in writing approved such division or increase.

(2) Any person who desires the approval of the Director-General for any division or increase referred to in subsection (1), shall lodge with the regional director an application in writing together with the prescribed application fee, as well as any such documents and any other information as may be necessary to enable the Director-General to come to a proper decision.

(3) The Director-General may, after consideration of any application referred to in subsection (2), approve the division or increase comprising the subject of such application in writing, or refuse so to approve it if he is satisfied that such division or increase may detrimentally affect any of the objects of this Act."

MPRDA came into operation on 1 May 2004, both permits were in force. Each permit entitled the holder to mine for iron ore and quartzite on the same properties. But as stated earlier, the mining operations were conducted by Sishen on behalf of both companies.

[23] The coming into force of the MPRDA drastically changed the legal landscape. Apart from abolishing the private rights to minerals, the MPRDA also cut the currency of existing mining permits to a period of five years. The holders of permits were required to convert their rights within five years to avoid losing them. Upon the expiry of five years, an unconverted right ceased to exist.

[24] The MPRDA defined these rights as "old order mining rights". I will return to the interpretation of these words below. For now suffice it to mention that Sishen lodged its application for conversion of its old order mining right in December 2005, before the expiry of five years on 30 April 2009. Sishen's conversion was approved by the Director-General on 5 May 2008.

[25] But AMSA did not apply for conversion of its old order mining right within the mandatory five-year period. Upon the expiry of this period, Sishen applied for a mining right in respect of the right previously held by AMSA, namely the 21.4% share. Imperial Crown applied for a prospecting right in respect of iron ore and manganese on the same properties. Sishen lodged an objection to the application by

Imperial Crown. However, on 30 November 2009 Imperial Crown was granted the prospecting right for which it had applied. Sishen's application was not successful.

[26] In March 2010, Sishen appealed against the grant of the prospecting right to Imperial Crown. In August 2010 the Minister dismissed Sishen's appeal. Meanwhile, Sishen had brought a review application in the North Gauteng High Court, Pretoria (High Court).

Litigation history

[27] Sishen instituted review proceedings in the High Court. It sought to impugn various administrative decisions, including the acceptance of the application for and the grant of prospecting rights to Imperial Crown. AMSA was joined as an applicant. For its part, AMSA sought an order declaring that Sishen sought and was granted conversion of 100% of the undivided share in the right to iron ore and quartzite, including the 21.4% that was held by AMSA.

[28] The High Court approached the case on the footing that it should first determine the claim made by AMSA because if indeed Sishen had been granted conversion of the whole right, the decision to grant prospecting rights to Imperial Crown would have been invalid.[28] The other decisions ancillary to it would equally have been invalid.

[28] *Sishen Iron Ore Company (Pty) Ltd and Another v Minister of Mineral Resources and Others* [2011] ZAGPPHC 220 (High Court judgment) at para 28.

[29] In its evaluation of the issue, the High Court commenced by tracing the nature of mineral rights at common law and found that those rights were easily assignable from one person to the other. It recognised the value of mineral rights before mining and extraction from the land and that the holders of mineral rights were under no obligation to exploit them.[29]

[30] Departing from the premise that the right in question was held in undivided shares, the High Court held that Sishen and AMSA were joint holders of the right. Each one as a co-owner, found the High Court, had no specific identifiable portion of the mineral right but each held the undivided share in the mineral right as a whole. Influenced by this common-law position and its interpretation of the relevant provisions of the Minerals Act, the High Court rejected the argument advanced by Sishen that, before the MPRDA came into force, Sishen held a separate and discrete right.[30] The High Court reasoned that at a practical level Sishen could not mine only 78.6% of the iron ore and that at common law, as joint owner of a right to a mineral, Sishen was entitled to mine the whole area.[31]

[31] Following its interpretation of Item 7 to Schedule II of the MPRDA, the High Court examined the details of the application lodged for conversion by Sishen and concluded that it applied for and was granted conversion of the entire mining right, including AMSA's share. The High Court held that, since the Minister had granted

[29] Id at paras 63-6.

[30] Id at para 81.

[31] Id at para 85.

Sishen the "full 100% mining right", AMSA could not competently seek conversion of its share of the right before the expiry of the five-year period on 30 April 2009.[32]

[32] For this finding, the High Court relied on *Oudekraal*.[33] The High Court reasoned that, since the grant to Sishen was for a full 100% mining right, the Minister or her delegate could not issue the prospecting right to Imperial Crown. As long as the conversion to Sishen stood, the Court held, irrespective of whether it was lawful or unlawful, that decision had legal consequences which included the fact that it was not competent for the authorities to award any portion of the mining right to a third party. To buttress its finding, the High Court also relied on sections 16(2), 19(1) and 22(2) of the MPRDA which, it held, precluded the grant of a prospecting right to another person as long as Sishen held the entire mining right.[34]

[33] Accordingly, the High Court declared that Sishen was granted the full right on conversion as the sole and exclusive holder of the converted mining right. Flowing from this declaration, the High Court set aside the grant of a prospecting right to Imperial Crown and issued further ancillary relief. Unhappy with this outcome, the Minister, the Director-General, the Deputy Director-General, the Regional Manager and Imperial Crown appealed to the Supreme Court of Appeal.

[32] Id at para 98.

[33] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (*Oudekraal*).

[34] High Court judgment above n 28 at paras 101-2.

In the Supreme Court of Appeal

[34] In the Supreme Court of Appeal, Imperial Crown indicated that it did not intend to exercise the prospecting right purportedly granted to it. This waiver rendered the appeal on this issue and the related ancillary orders moot. Accordingly, the Supreme Court of Appeal dismissed it on that basis.[35]

[35] The sole issue adjudicated by the Supreme Court of Appeal was the consequence of AMSA's failure to lodge its old order mining right for conversion within the prescribed period of five years. The Court was asked to determine whether AMSA's right passed on to Sishen when it obtained conversion of its own right, as the High Court had held, or Sishen's acquisition of that right occurred on the expiry of the five-year period on 30 April 2009.

[36] Having reviewed its jurisprudence on the subject and having construed the relevant transitional provisions, the Supreme Court of Appeal held that, on the facts, Sishen obtained conversion of its own and AMSA's old order mining rights on 5 May 2008. As long as that decision stands, held that Court, the minerals which were subject to AMSA's right were not available for reallocation. Moreover, as a matter of law, the Supreme Court of Appeal concluded that at midnight on 30 April 2009 and due to AMSA's failure to convert its old order mining right, Sishen became the sole holder of the mining right in respect of the relevant properties.[36] The order issued by the High Court was slightly altered to state that Sishen became the sole holder of the

[35] Supreme Court of Appeal judgment above n 2 at para 6.

[36] Id at para 56.

mining right on 30 April 2009. The appeal was dismissed with costs, including the costs of three counsel.[37]

In this Court

[37] The applicants seek leave to appeal against the order of the Supreme Court of Appeal. There can be no doubt that this case raises constitutional issues of importance. It involves the interpretation and application of a statute that was enacted to discharge a constitutional obligation to redress inequalities caused by past racial discrimination and to create equitable access to mineral and petroleum resources. Furthermore, this legislation regulates the mining industry which is a vital component of this country's economy, not only in terms of its contribution to the national GDP,[38] but also in respect of creating jobs for thousands of people who otherwise would be unemployed. These facts, coupled with the good prospects of success, warrant the granting of leave.

The issues

[38] The issues raised here relate to AMSA's failure to convert its old order mining right within the prescribed five-year period. This failure must be examined in the context of Sishen having converted its right and the fact that the two companies held, albeit in defined percentages, undivided shares of a right to iron ore and quartzite when the MPRDA came into force. Therefore, the issues are:

[37] Id at para 61.

[38] National Gross Domestic Product (GDP) is the market value of all officially recognised final goods and services produced within a country in a given period of time.

(a) Whether Sishen applied for and was granted conversion of its own and AMSA's old order mining rights.

(b) If so, what was the legal basis for the granting of AMSA's right to Sishen.

(c) If, at the level of fact, Sishen was granted AMSA's old order right, did that decision have legal consequences in the light of the *Oudekraal* principle?

(d) If Sishen's conversion did not extend to AMSA's right, what happened to AMSA's old order mining right upon the expiry of five years on 30 April 2009?

[39] The determination of these issues depends mainly on the interpretation of the transitional provisions of the MPRDA and, in particular, Item 7 of Schedule II. But before interpreting Item 7 I must outline the correct approach to the construction of a statute like the MPRDA.

Interpretive approach

[40] It is a fundamental principle of our law that every statute must be interpreted in a manner that is consistent with the Constitution, insofar as the language of the construed provision reasonably permits.[39] In addition, section 39(2) of the Constitution[40] enjoins every court when interpreting legislation to promote the spirit,

[39] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 21.

[40] Section 39(2) provides:

purport and objects of the Bill of Rights. This Court has described the principle as a "mandatory constitutional canon of statutory interpretation".[41] In *Phumelela Gaming and Leisure Ltd*,[42] Langa CJ said:

> "A court is required to promote the spirit, purport and objects of the Bill of Rights when 'interpreting any legislation, and when developing the common law or customary law'. In this no court has a discretion. The duty applies to the interpretation of all legislation and whenever a court embarks on the exercise of developing the common law or customary law. The initial question is not whether interpreting legislation through the prism of the Bill of Rights will bring about a different result. A court is simply obliged to deal with the legislation it has to interpret in a manner that promotes the spirit, purport and objects of the Bill of Rights."[43] (Footnotes omitted.)

[41] It cannot be gainsaid that the MPRDA, apart from creating new rights, regulates rights which constituted property of the affected parties. Therefore section 39(2) obliges us to adopt an interpretation of the MPRDA that promotes those rights.

[42] Another important principle relevant to the interpretation of the MPRDA flows from its provisions. Section 4 proclaims two rules, both of which are relevant to the interpretation of the statute. First, it declares that in the case of a conflict between the MPRDA and the common law, the MPRDA must prevail. Second, it directs that a

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> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[41] *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as* Amicus Curiae*)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 43.

[42] *Phumelela Gaming and Leisure Ltd v Grundlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

[43] Id at para 27.

reasonable interpretation that is consistent with the objects of the MPRDA must be preferred over any construction inconsistent with those objects.

[43] Section 2 of the MPRDA lists nine objects. Because of the importance of these objects to the interpretive process, I consider it necessary to quote the entire section. It provides:

> "The objects of this Act are to—
>
> (a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
>
> (b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
>
> (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
>
> (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
>
> (e) promote economic growth and mineral and petroleum resources development in the Republic;
>
> (f) promote employment and advance the social and economic welfare of all South Africans;
>
> (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;
>
> (h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
>
> (i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating."

[44] A few observations arise from the reading of section 2. The first is that transformation of the mining and petroleum industries could not be achieved without abolishing private ownership of mineral rights and vesting the resources in the nation as a whole, and giving the state a free hand in allocating rights to exploit those resources. If this were not done, any attempts to transform the industry would have failed. By placing the mineral wealth of the country in the hands of the state, Parliament acted in accordance with an internationally accepted practice.[44]

[45] The promotion of equitable access by all South Africans to mineral resources, the expansion of opportunities for historically disadvantaged persons to enter the mining and petroleum industries and the advancement of the social and economic welfare of all South Africans are cornerstones of that transformation. The state is obligated to advance the realisation of these goals. It is therefore vitally important to heed the provisions of section 4 when interpreting the MPRDA.

[46] This is not only because section 4 expressly says so, but also for the reason that the MPRDA was enacted to eradicate inequality embedded in all spheres of life under the apartheid order. Equality is at the heart of our constitutional architecture. It is not only entrenched as a right in the Bill of Rights, but it is also one of the values on which our democratic order has been founded.[45]

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[44] *Agri South Africa SCA* above n 8.

[45] Section 7(1) of the Constitution provides:

> "The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

[47] Interpreting similar remedial legislation in *Goedgelegen Tropical Fruits*,[46] this Court said:

> "It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing 'as a result of past racially discriminatory laws or practices' in its setting of section 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous."[47] (Footnote omitted.)

Item 7 of Schedule II

[48] It is now convenient to examine the provisions at the heart of the present dispute. Item 7 of Schedule II, as it then read, provided:

> "Continuation of old order mining right
>
> (1) Subject to subitems (2) and (8), any old order mining right in force immediately before this Act took effect continues in force for a period not exceeding five years from the date on which this Act took effect subject to

[46] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) (*Goedgelegen Tropical Fruits*).

[47] Id at para 53.

the terms and conditions under which it was granted or issued or was deemed to have been granted or issued.

(2) A holder of an old order mining right must lodge the right for conversion within the period referred to in subitem (1) at the office of the Regional Manager in whose region the land in question is situated together with—

(a) the prescribed particulars of the holder;

(b) a sketch plan or diagram depicting the mining area for which the conversion is required which area may not be larger than the area for which he or she holds the old order mining right;

(c) the name of the mineral or group of minerals for which he or she holds the old order mining right;

(d) an affidavit verifying that the holder is conducting mining operations on the area of the land to which the conversion relates and setting out the periods for which such mining operations conducted;

(e) a statement setting out the period for which the mining right is required substantiated by a mining work programme;

(f) a prescribed social and labour plan;

(g) information as to whether or not the old order mining right is encumbered by any mortgage bond or other right registered at the Deeds Office or Mining Titles Office;

(h) a statement setting out the terms and conditions which apply to the old order mining right;

(i) the original title deed in respect of the land to which the old order mining right relates, or a certified copy thereof;

(j) the original old order right and the approved environmental management programme or certified copies thereof; and

(k) an undertaking that, and the manner in which, the holder will give effect to the objects referred to in section 2(d) and 2(f).

(3) The Minister must convert the old order mining right into a mining right if the holder of the old order mining right—

(a) complies with the requirements of subitem (2);

(b) has conducted mining operations in respect of the right in question;

(c) indicates that he or she will continue to conduct such mining operations upon the conversion of such right;

(d) has an approved environmental management programme; and

(e) has paid the prescribed conversion fee.

(4) No terms and conditions applicable to the old order mining right remain in force if they are contrary to any provision of the Constitution or this Act.

(5) The holder must lodge the right converted under subitem (3) within 90 days from the date on which he or she received notice of conversion at the Mining Titles Offices for registration and simultaneously at the Deeds Office or the Mining Titles Office for deregistration of the old order mining right as the case may be.

(6) If a mortgage bond has been registered in terms of the Deeds Registries Act, 1937 (Act No 47 of 1937), or the Mining Titles Act, 1967 (Act No 16 of 1967), over the old order mining right, the mining right into which it is converted must be registered in terms of this Act subject to such mortgage bond, and the relevant registrar must make such endorsements on every relevant document and such entries in his or her registers as may be necessary in order to give effect to this subitem, without payment of transfer duty, stamp duty, registration fees or charges.

(7) Upon the conversion of the old order mining right and the registration of the mining right into which it was converted the old order mining right ceases to exist.

(8) If the holder fails to lodge the old order mining right for conversion before the expiry of the period referred to in subitem (1), the old order mining right ceases to exist."

[49] Before analysing the text of Item 7, it is important to record that the MPRDA does not recognise the existence of the mineral rights and the mining authorisations granted under its predecessor, except in the transitional provisions. The main aim of the transitional provisions was to avoid disruption of mining operations which were carried out at the time the MPRDA came into force.[48] The legislative regimes under

[48] *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (*Agri SA CC*) at paras 25-30. See also *Xstrata South Africa (Pty) Ltd and Others v SFF Association* [2012] ZASCA 210; 2012 (5) SA 60 (SCA) (*Xstrata*) at para 1 and *Holcim South Africa (Pty) Ltd v Prudent Investors (Pty) Ltd and Others* [2010] ZASCA 109; [2011] 1 All SA 364 (SCA) (*Holcim*) at para 26.

the Minerals Act and the MPRDA are mutually exclusive and common-law rights to minerals have been extinguished.[49]

[50] But this notwithstanding, the opening words of Item 7 seek to preserve rights which were in force immediately before the MPRDA came into operation. In its ordinary sense, subitem (1) kept alive all mining rights which were exercised when the MPRDA came into force, irrespective of whether they were of common-law or statutory origin. What changes the colour of the language of the subitem is the definition of old order mining right. I will consider the meaning of these words later. At the moment, I continue to set out the scheme of Item 7.

[51] Within five years from the date the MPRDA came into operation, a holder of an old order mining right could apply to the Minister for conversion of the right into a mining right envisaged in the MPRDA. Apart from complying with the formal administrative requirements, the application had to show that the exercise of the converted right would promote employment and advance the social and economic welfare of all South Africans as well as to—

> "substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the nation's mineral and petroleum resources".[50]

[49] *Holcim* above n 48 at para 23.

[50] Section 2(d) of the MPRDA.

[52] This illustrates that transformation of these industries and the equitable access to resources loomed large in each and every application for conversion. If these requirements were not met, the Minister or her delegate could decline to approve the conversion. If an old order mining right was not converted, it ceased to exist as from midnight on 30 April 2009.

[53] But where the requirements of both subitems (2) and (3) were satisfied, the Minster was obliged to convert. The terms and conditions of the old order mining right would continue to apply if they were not inconsistent with the Constitution and the MPRDA. Within 90 days of notice of conversion, the holder of the right was required to lodge it for registration at the Deeds Office. Upon registration the old order mining right ceased to exist because the holder would enjoy all entitlements flowing from the converted mining right.

[54] The fact that the MPRDA does not recognise common-law mineral rights has resulted in a special definition of an old order mining right. Unlike the MPRDA, the Minerals Act recognised and distinguished mining rights from the mineral rights to which they applied. Under that regime, mineral rights meant rights in the mineral itself, what were usually referred to as common-law rights. The mining right referred to the mining authorisations, licences and permits in terms of which the activity of mining could be carried out.[51] Mining rights could be granted to holders of mineral rights only or those to whom they had given consent.

[51] *Agri SA CC* above n 48 at paras 37-9 and *Agri South Africa SCA* above n 8 at para 85.

[55] The definition of old order mining right recognised as stand-alone rights mining authorisations, leases, licences and similar entitlements in terms of which the holder could carry out mining operations. Item 1 of Schedule II defined old order mining rights as—

> "any mining lease, consent to mine, permission to mine, claim licence, mining authorisation or right listed in Table 2 to this Schedule in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted".

[56] Table 2 in its unamended form[52] applies to this case and defines old order mining rights in six categories and for present purposes it is category 1 only that is relevant. It provides that an old order mining right means:

> "The common law mineral right, together with a mining authorisation obtained in connection therewith in terms of section 9(1) of the Minerals Act."

[57] It is important to note that in terms of Table 2, the old order mining right is defined as comprising two components, namely, the mineral right and the mining authorisation. In this regard the old order mining right consists of a package of the mineral right and the mining authorisation. Thus Table 2 alters the composition of the underlying common law right by putting it together with the mining authorisation that was issued to facilitate exploitation of the mineral right. The consequence is a new right created by statute.

[52] The current amended form came into force on 7 June 2013.

[58] In *Holcim* the Supreme Court of Appeal described the position in these terms:

> "As I have been at pains to emphasise, a common law mineral right is not preserved under the new statutory dispensation. It is not of itself an 'old order right' which can be converted under Item 7 of Schedule II. It survives only as a right underlying a mining authorisation. Nor can such a right properly be said to be a right 'in respect of which mining operations are being conducted'. Under the Minerals Act 1991 (and previous to that Act) it was the mining authorisation which conferred practical value on the mineral rights by authorising the exercise of those rights. In order to qualify under the definition of 'old order mining right' both the mineral right and the mining licence must have been in force immediately before the date on which the Act took effect, but it is the mining licence and not the mineral right 'in respect of which' operations are conducted."[53]

[59] What this means is that in the context of Item 7 read with Table 2, when we speak of an old order mining right we refer to both the underlying mineral right and the mining authorisation. It is that composite right that ceased to exist if not converted or when it was converted into a mining right under the MPRDA. This is so because we are obliged to give the phrase "old order mining right" its statutorily defined meaning unless that meaning would lead to an injustice or absurdity not contemplated by the MPRDA.[54]

[60] To sum up: the old order mining right as defined in Table 2 comprises two elements, namely, the common-law mineral right and the mining authorisation. It is a

[53] *Holcim* above n 48 at para 37. See also *Xstrata* above n 48.

[54] *Bertie Van Zyl (Pty) Ltd v Minister of Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 44; *Hoban v ABSA Bank Ltd t/a United Bank and Others* [1999] ZASCA 12; 1999 (2) SA 1036 (SCA); and *Canca v Mount Frere Municipality* 1984 (2) SA 830 (Tk) at 832F.

new right created by statute and which could be converted into a mining right. A failure to convert that old order mining right resulted in the right ceasing to exist.

Application of Item 7 to present facts

[61] None of the parties disputed that Item 7 of Schedule II applied to the rights that we are concerned with here. For a better understanding of how Item 7 applied, it is necessary to trace the rights in question to a period before the MPRDA came into operation. Having concluded an agreement in terms of which Sishen and AMSA's predecessor were to share the mineral rights to iron ore and quartzite on the relevant properties, these parties sought to have those rights divided by the Director-General, even though they would continue to be held in undivided shares of 78.6% and 21.4%, respectively.

[62] Following this division, each of these parties was a holder of mineral rights on the basis of which each applied for a mining licence in respect of its share in the mineral rights. Separate mining licences pertaining to the share held by each party were issued on 17 October 2002. These licences were numbered ML06/2002 and ML07/2002. Therefore when the MPRDA came into effect on 1 May 2004, Sishen and AMSA were holders of the common-law mineral rights and mining licences in terms of which mining was carried out.

[63] The private ownership of minerals by these companies could not continue because the MPRDA vested all minerals in the state. Instead, by operation of law,

their rights were replaced with a statutory right called an old order mining right which endured for a limited period of five years. However, this new right consisted of two elements: the common-law mineral right and the mining licence. Therefore, upon the coming into operation of the MPRDA, Sishen and AMSA became holders of the old order mining rights. Each company held an old order right separately. It will be recalled that the currency of the mining licence held by each company was 30 years, terminating on 16 October 2032. The old order mining rights that replaced those mining licences were to be valid for five years only.

[64] But during the period of five years each company had the option of converting its old order mining right into a mining right under the MPRDA so as to continue to exploit the relevant mineral beyond the five-year period. Upon the expiry of that period, the old order mining right ceased to exist. Consistent with Item 7, Sishen converted its old order mining right before the period expired. As we know, AMSA did not. This means that AMSA's old order mining right ceased to exist at midnight on 30 April 2009. It follows that both the High Court and the Supreme Court of Appeal erred in holding that Sishen converted its right together with that of AMSA.

[65] The error lies in approaching the matter on the footing that what was converted by Sishen were the mineral rights held in undivided shares of 78.6% and 21.4%. This was incorrect. As Item 7(2) clearly states, what was converted was the old order mining right, a statutory right which replaced the mineral right and the licence. An interpretation that says the conversion was of a mineral right is not only at odds with

the text of Item 7 but is also inimical to the MPRDA which abolished private ownership of mineral rights and vested all minerals in the nation. To compensate for the loss of mineral rights, the MPRDA granted statutory rights that entitled the holders of mineral rights to continue to exploit the minerals for the five-year transitional period.

[66] But Sishen's old order mining right ceased when it lodged its converted right for registration. This happened within 90 days from 5 May 2008. This means that Sishen's old order mining right must have ceased to exist in August 2008, some seven months before AMSA's old order mining right terminated on 30 April 2009. This accords with the stipulations in Item 7.

[67] Therefore, on a correct interpretation of Item 7, Sishen did not and could not have applied for conversion of something more than its own old order mining right, comprising its common-law mineral rights (78.6% undivided share) and its licence numbered ML07/2002. And when the request for conversion was approved, it related to its old order mining right as described here. The grant of a sole and exclusive right to mine which was issued to Sishen related to its limited old order mining right. The High Court erred in concluding that the inclusion of the words "sole and exclusive right" in the converted right meant that Sishen was the sole holder of the 100% mineral right. This interpretation does not accord with the language of Item 7 read with the definition of old order mining right in Table 2.

[68] It is apparent from the High Court judgment that it was influenced by the position at common law in coming to the conclusion that because the mineral rights held by Sishen and AMSA were in the form of undivided shares, the conversion by Sishen extended to the entire 100% mineral rights in iron ore and quartzite. I have already pointed out that the Court proceeded from a mistaken premise. It was not the mineral right that was converted, but Sishen's old order mining right as defined in Item 7. Moreover, the common-law principle relied on is inconsistent with the provisions of Item 7. In terms of section 4 of the MPRDA, if there is conflict between it and the common law, the MPRDA prevails.

[69] The interpretation favoured by the High Court and the Supreme Court of Appeal would lead to Sishen acquiring AMSA's old order mining right in circumstances not sanctioned by Item 7 of the MPRDA or any of its provisions. As statutorily created rights, old order mining rights are not governed by the common law but by the MPRDA itself.

[70] To conclude on this aspect of the case, the old order mining rights offered to Sishen and AMSA when the MPRDA came into force ceased to exist. Their termination was triggered by different events at different times. Sishen's right was the first to cease to exist when it was lodged for registration. Item 7(7) stipulated that an old order mining right ceased to exist upon registration. AMSA's old order mining right ceased to exist at midnight on 30 April 2009 due to its failure to convert within the period of five years. There is no legal basis for concluding that AMSA's loss

became Sishen's gain. The language of Item 7 is not capable of that interpretation and this construction would be inconsistent with the objects of the MPRDA, including equitable access to the nation's mineral resources.

[71] AMSA's counsel contended that because, at a level of fact, Sishen was granted the sole and exclusive right on conversion, the state is precluded from reallocating the mining right lost by AMSA for as long as the decision to grant Sishen 100% shares in the minerals stands, even if in law the decision is invalid. For this proposition, reliance was placed on *Oudekraal*.[55] There is no merit in this argument. It is based on a wrong assumption. It is based on the assumption that Sishen converted the mineral right in its undivided shares of 100%. The facts do not support that assertion. On the facts, Sishen converted its old order mining right which comprised its share of the mineral right and mining licence.

[72] In these circumstances, reliance on *Oudekraal* was misplaced.

[73] It follows that with regard to whether Sishen's conversion resulted in it acquiring AMSA's old order mining right, the appeal must succeed. However, as stated in the judgment by the Deputy Chief Justice, this is not the end of the matter. I agree that the reversal of the High Court's finding to the effect that upon conversion Sishen acquired AMSA's old order mining right means that this Court must consider Sishen's review application. Applications such as the one submitted by Sishen to the

[55] Above n 33.

Director-General are governed mainly by sections 22 and 23 of the MPRDA. Of importance for present purposes are the provisions of section 22(2)(b).[56] This section precludes a Regional Manager, to whom an application for a mining right must be submitted, from accepting an application if it relates to a mineral and land in respect of which another person already holds a mining right or a mining permit. This prohibition does not apply to Sishen's application because the mining right in respect of the land in question is held by Sishen itself.

[74] What remains for consideration is whether Sishen's review challenge should have succeeded. In this regard I agree with the Deputy Chief Justice that the refusal by the Director-General must be set aside and I concur in the order made by him.

MOSENEKE DCJ (Mogoeng CJ, Cameron J, Jafta J, Froneman J, Madlanga J, Mhlantla AJ, Nkabinde J, Skweyiya J and Van der Westhuizen J concurring):

Introduction

[75] I have had the benefit of reading the meticulously reasoned judgment of my colleague, Jafta J (main judgment). I am indebted to him for his account of the factual background and history of the litigation, which I support. I am also in agreement with

[56] Section 22(2) provides:

> "The Regional Manager must, within 14 days of receipt of the application, accept an application for a mining right if—
>
> (a) the requirements contemplated in subsection (1) are met;
> (b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land; and
> (c) no prior application for a prospecting right, mining right or mining permit or retention permit, has been accepted for the same mineral and land and which remains to be granted or refused."

his interpretation of the transitional provisions of the Mineral and Petroleum Resources Development Act[57] (MPRDA).

[76] I embrace the conclusion of the main judgment that—

> "on a correct interpretation of Item 7, Sishen did not and could not have applied for conversion of something more than its own old order mining right, comprising its 'common law' mineral rights (78.6% undivided shares) and its licence numbered ML07/2002. And when the request for conversion was approved, it related to its old order mining right as described here."[58]

[77] I accordingly accept, as the main judgment does, that the conversion of the old order mining right of Sishen Iron Ore Company (Pty) Limited (Sishen) did not include the old order mining right of ArcelorMittal South Africa Limited (AMSA). It follows that Sishen's conversion did not result in it acquiring AMSA's old order mining right. I accordingly support the conclusion of the main judgment that the appeal by the first to the fourth applicants against the order of the Supreme Court of Appeal must succeed.

[78] However, this is not the end of the matter. This judgment goes further than the main judgment in order to resolve the remaining issues.

[79] It will be recalled that Sishen had instituted a review application in the North Gauteng High Court, Pretoria (High Court), seeking, among other remedies, the

[57] 28 of 2002.

[58] Main judgment [67].

setting aside of the decision by the Director-General of the Department of Mineral Resources (Director-General) refusing to grant it a mining right in respect of minerals which were the subject-matter of AMSA's old order mining right. Owing to the view it held on the issue of conversion, the High Court did not decide this issue.

[80] The overturning of the High Court's finding that, upon conversion, Sishen acquired AMSA's old order mining right means that this Court is at large to consider Sishen's review application. What remains for consideration is whether Sishen's review challenge should have succeeded. To resolve that issue we must consider whether AMSA's old order right survived in any form beyond its demise on 30 April 2009 and, if so, whether the Minister of Mineral Resources (Minister) was entitled to allocate the lapsed old order right which AMSA lost to a third party who held no mining right in respect of the same mineral and the same land.

[81] The transitional arrangements of the MPRDA are silent on the fate of an undivided share in an old order mining right which has not been converted and has lapsed. Equally telling is that the MPRDA does not make any provision whatsoever for granting prospecting or mining rights in undivided shares. Even if the lapsed undivided share continued to exist beyond its expiry date, in my view, the Minister was not entitled to allocate it to a third party. Once (a) the old order right of Sishen had been converted; (b) the old order right of AMSA had lapsed; and (c) the Minister had granted a mining right to Sishen under the MPRDA in respect of the minerals on

the land, it was not open to the Minister to grant a prospecting or mining right in respect of the same mineral and the same land to a third party.

[82] The reasons for these outcomes are set out below. I deal first with the applicable transitional arrangements of the MPRDA. Thereafter, I confront the question, whether AMSA's old order right survived its demise on 30 April 2009 and, if so, whether the Minister was entitled to allocate AMSA's old order right which had lapsed. I then examine whether the construction of the transitional arrangements I favour accords with the transformative design of the MPRDA. In the last instance, I consider the order.

Transitional arrangements

[83] The main judgment rightly observes that the scheme of the MPRDA aims to bring about a fundamental transformation of the mining and petroleum industry in our country. It was enacted to achieve a number of transformative objects.[59] These include: promoting equitable access to the mining and petroleum resources to all people of the country,[60] eradicating all forms of discriminatory practices in the mining and petroleum industries, and redressing the inequalities of past race and gender discrimination.[61] The MPRDA also aims to promote the employment and social welfare of all South Africans,[62] and to advance economic growth in an ecologically

[59] Section 2 of the MPRDA.

[60] Id section 2(c).

[61] Id section 2(d).

[62] Id section 2(f).

sustainable manner.[63] The MPRDA also seeks to provide for security of tenure in respect of prospecting, exploration, mining and production operations.[64]

[84] At the centre of this transformative design is the provision that the state is the custodian of all mineral resources on behalf of the nation. In effect, the MPRDA did away with mineral rights or rights to minerals which, before its coming into operation, were drawn from the common law, were privately held and were exploited only if so authorised by the state.[65] Under the aegis of the MPRDA no rights related to mining and petroleum resources may be allocated purely on private law. Only their custodian, the state, may (subject to the requirements of the MPRDA) grant exploration rights; prospecting rights; mining rights and production rights.[66]

[85] The forerunner to the MPRDA was the Minerals Act. Its scheme of mineral rights was premised on the notion of the right-holder of a mineral to which the right applied.[67] Only a right-holder or a person who had been authorised by the owner could be issued with a prospecting permit or mining authorisation. Ordinarily, the right-holder was the owner of the land on which the mineral was located. If the mineral had been extracted and removed from the land, the right-holder was the person in whose name the right to that mineral had been registered or a person who had acquired the right. The right-holder with the requisite authorisation could enter

[63] Id section 2(h).

[64] Id section 2(g).

[65] Section 5 of the Minerals Act 50 of 1991 (Minerals Act). The date of commencement of the MPRDA was 1 May 2004.

[66] Section 3(2) of the MPRDA. Compare sections 6 and 9 of the Minerals Act.

[67] Section 1(ix) of the Minerals Act.

the land bearing the mineral for the purpose of prospecting or mining and could dispose of the mineral found on the land.[68] As the main judgment correctly concludes, the authorisation enhanced the value of the mineral because it could be extracted from the land.[69]

[86] The MPRDA, as we have seen, rang in deep changes to the law that regulated mining and petroleum resources. And yet, when it came into operation, it preserved old order rights for a finite transitional period. These transitional arrangements are found in Schedule II of the MPRDA. Their express objects are: to ensure security of tenure in relation to ongoing prospecting, mining or production; to promote equitable access to mining and petroleum resources; and to give the holder of an old order right the opportunity to comply with the new statutory requirements.[70] Thus, the statute was, for plain reasons, intent on not bringing to a halt ongoing mining activity as it extended its new legislative regulation and attempted to render the mining industry equitable, accessible to all and a more meaningful contributor to our economy.

[87] This case calls us to construe these transitional provisions. Those applicable to the present dispute are found in Item 7. It, in turn, has eight subitems that regulate the continuation of old order mining rights. An old order mining right continues in force for a period not exceeding five years, subject to the terms and conditions under which

[68] Id section 5(1).

[69] See main judgment at [14].

[70] Item 2 of Schedule II to the MPRDA.

it was granted.[71] The holder of an old order mining right must apply for conversion within five years.[72] The application must not only depict the mining area but must also, under oath, verify that the holder "is conducting mine operations on the area of land to which the conversion relates".[73] The holder must also submit a mining work programme and a social and labour plan.[74] The Minister must convert an "old order mining right into a mining right" if the holder has conducted, and indicates that she or he will continue to conduct, mining operations upon the conversion of the right.[75] No terms and conditions of the old order mining right remain in force if they are contrary to any provision of the Constitution or the MPRDA.[76] Upon conversion and registration of the mining right, the old order mining right ceases to exist.[77] If the holder fails to apply for conversion before the expiry period then the old order mining right ceases to exist.[78]

[88] At the inception of the MPRDA, on 1 May 2004, Sishen and AMSA's predecessors were, pursuant to a prior long-term agreement, holders of mineral rights to iron ore in undivided shares of 78.6% and 21.4%, respectively. Each held a separately numbered mining licence, issued on 17 October 2002. This meant that, upon the coming into operation of the MPRDA, Sishen and AMSA became holders of

[71] Item 7(1) of Schedule II.

[72] Item 7(2.

[73] Item 7(2)(d).

[74] Item 7(2)(e) and (f).

[75] Item 7(3).

[76] Item 7(4).

[77] Item 7(7).

[78] Item 7(8).

the old order mining rights, to the extent of their undivided shares, and that each company held an old order right separately.

[89] The reasoning of the main judgment is indeed compelling. It holds that the rights held by Sishen and AMSA were replaced with a statutory right, called an old order mining right, which endured for a limited period of five years. The statutory right had two components: the common law mineral right and the mining licence.[79]

[90] The old order mining rights that replaced the mining licences were to be valid for five years only. Upon the expiry of that period, the old order mining right ended. As required by Item 7, Sishen converted its old order mining right well before the five year window expired. For reasons which are irrelevant, AMSA did not. AMSA's old order mining right ceased to exist at midnight on 30 April 2009.

[91] Upon the expiry of the transitional period, Sishen applied for a mining right in respect of the right previously held by AMSA, namely the remaining 21.4% of the undivided share. Around the same time, Imperial Crown Trading 289 (Pty) Ltd (Imperial Crown) also applied for a prospecting right in respect of iron ore and manganese on the same properties. Sishen lodged an objection to the application by Imperial Crown. However, on 20 November 2009 the Deputy Director General: Mineral Regulation, Department of Mineral Resources (Deputy Director-General) informed Imperial Crown that its application for a prospecting right in respect of iron

[79] Main judgment at [63].

ore and manganese ore on seven of the eight properties – to which AMSA's old order right related – had been granted by the Minister.

[92] Sishen appealed to the Minister against the grant of the prospecting right to Imperial Crown. The Minister dismissed Sishen's appeal. Sishen then approached the High Court on the basis of several claimed reviewable irregularities and sought relief that would have vitiated the state's decision to award a prospecting right to Imperial Crown, even if Sishen had not become the holder of 100% of the converted mining right in respect of the Sishen Mine. The proceedings in the High Court were launched before Sishen's application for a mining right had been finalised.

[93] In the High Court, Sishen sought an order directing the Minister to take a decision in terms of section 23 in relation to its application for a mining right. The Director-General stated that Sishen's application for a mining right, in relation to what was previously AMSA's undivided share, was in no way affected by the granting of a prospecting right to Imperial Crown in relation to those rights.

[94] On 24 January 2011, the Director-General refused Sishen's application in terms of section 23, for various reasons which he stated had nothing to do with Imperial Crown's prospecting right. The Director-General did so trusting that he was entitled to allocate the right to a third party because AMSA had not converted its undivided 21.4% share of the old order mining right. He believed that the unconverted

undivided share in the right reverted to the state which was free to grant it to whomever it chose.

[95] The Director-General stated that there were a number of considerations that militated against the granting of the remaining undivided share to Sishen. These included that granting Sishen what would in effect be a monopoly over the remaining iron ore reserves on the Sishen Mine would not further the objects of section 2(d) of the MPRDA.

[96] It is accepted by all parties that the demand for steel, internationally, outstrips the supply. The prevailing price of steel in the international market has in the past risen to the region of 158 USD per ton. Sishen is able to supply at this range to the international export market. This is in drastic contrast to the supply agreement and interim price agreement Sishen had concluded with AMSA, which was 50 to 70 USD per ton. The Director-General stated that the danger that Sishen, having been granted the remaining undivided share, would choose to dispose of its entire production on an export basis, to the detriment of the local steel market, is a real one.

Litigation

[97] The High Court (Zondo J) held that when Sishen, as co-holder of the old order mining right, converted its right, it became the sole holder of the mining right created by the MPRDA.[80] For that reason, the Minister could not competently grant any right

[80] *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Others* [2011] ZAGPPHC 220 (High Court judgment) at para 109.

in terms of the MPRDA to any other party in respect of the same mineral and the same property. The High Court granted two review orders: (a) that Sishen had become the exclusive holder of a converted mining right, in terms of Item 7(3), for iron ore in respect of the properties comprising the Sishen Mine; and (b) that any decision to grant or register a prospecting or mining right in respect of AMSA's old order rights after Sishen had become the exclusive holder of the converted mining right was void and had no legal effect.[81]

[98] On appeal, the Supreme Court of Appeal[82] saw its task much in the same way as the High Court:

> "[T]he main questions to be answered in this appeal are, first, what happened to [Sishen's] 'old order mining right' (which included [Sishen's] undivided 78.6% share of the right to iron ore on eight of the Sishen mine properties) when [Sishen] converted its old order right in accordance with item 7 of Schedule II of the MPRDA before the expiry of the five year period; secondly, what was the status of that conversion if it was wrongly granted and was not timeously attacked by [AMSA] or the Minister or the relevant authorities; and, thirdly, what happened to [Sishen's] mining right (in terms of the MPRDA) when AMSA, the other co-holder of the 'old order mining right' in respect of iron ore on those properties, failed to lodge its right for conversion within the five year period?"[83]

[99] The Supreme Court of Appeal made, in relevant part, the following order:

> "Subject to the amendment of order 1.1 all the orders of the court a quo are confirmed. Order 1.1 is replaced by the following order:

[81] Id.

[82] *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Others* [2013] ZASCA 50; 2013 (4) SA 461 (SCA) (Supreme Court of Appeal judgment).

[83] Id at para 2.

> It is declared that as a result of the first applicant's [Sishen's] conversion of its 'old order mining right' in respect of iron ore and quartzite on the Table I properties (the properties described in Annexure 'B' to [Sishen's] amended Notice of Motion) in accordance with Item 7(3) of Schedule II to the [MPRDA] and the second applicant's failure to convert its old order right in respect of iron ore and quartzite on these properties, the first applicant became, with effect from midnight on 30 April 2009, the exclusive holder of a mining right ([Sishen's] converted mining right) in respect of iron ore and quartzite on the Table I properties."[84]

[100] The High Court and Supreme Court of Appeal both reached the conclusion that Sishen obtained conversion of its own and AMSA's old order mining right and that Sishen was granted the full right on conversion as the sole and exclusive holder of the converted mining right. I have difficulty with the conclusion arrived at by both courts.

[101] In this regard the main judgment holds:

> "But Sishen's old order mining right must have ceased when it lodged its converted right for registration. This must have happened within 90 days from 5 May 2008. This means that Sishen's old order mining right must have ceased to exist in August 2008, some seven months before AMSA's old order mining right terminated on 30 April 2009. This accords with the stipulations in Item 7.
>
> Therefore, on a correct interpretation of Item 7, Sishen did not and could not have applied for conversion of something more than its own old order mining right, comprising its common law mineral rights (78.6% undivided share) and its licence numbered ML07/2002. And when the request for conversion was approved, it related to its old order mining right as described here."[85]

[84] Id at para 61.

[85] Main judgment [66]-[67].

[102] I agree with this conclusion. It follows that in my view too, the conversion of the old order mining right of Sishen did not include the old order mining right of AMSA.[86] The unconverted old order right of AMSA did not accrue to Sishen. It lapsed. The conclusion reached by the High Court and Supreme Court of Appeal is inconsistent with the object and scheme of the MPRDA. However, this tale does not end there. The question remains whether the Minister was entitled to grant the old order mining right of AMSA to a third party. Before dealing with this question, I pause to deal with Imperial Crown's waiver of the prospecting right purportedly granted to it.

[103] In the High Court, Imperial Crown's counsel placed on record that Imperial Crown did not intend to proceed with prospecting under its prospecting right and that it waived any preference to apply for a mining right on the strength of the prospecting right.[87] In any event, Imperial Crown's prospecting right lapsed in March 2012.[88] In the Supreme Court of Appeal, and in this Court, the state applicants accepted that the review orders the High Court granted are "of no further practical relevance". And Imperial Crown accepted that the review orders had become moot. The Supreme Court of Appeal correctly dismissed the appeal against the review orders as moot and of no practical effect.[89]

[86] Main judgment [70].

[87] Supreme Court of Appeal judgment above n 82 at para 6.

[88] Id.

[89] Id.

[104] Even so, the state applicants and Imperial Crown continued to seek leave to appeal to this Court against the review orders, which had become moot. This Court has made it clear that, when it is in the interests of justice to do so, it may hear and determine a dispute that has become moot.[90] It may be so, if the parties agree that a court must resolve the dispute although it may not have a practical effect; or when the resolution of the dispute is in the public interest; or when the failure to decide the matter may spawn further prolonged and costly litigation. This is not that kind of dispute. Imperial Crown's prospecting licence in respect of Sishen Mine lapsed after the review orders were made by the High Court. No useful purpose will be served by hearing an appeal against the review orders. The Imperial Crown appeal against the review orders failed in the Supreme Court of Appeal. It must also fail in this Court.

[105] What then remains to be decided on appeal to this Court? The applications for leave to appeal and written argument of the state applicants and Imperial Crown reveal that, beyond the review orders, they are unhappy about the decision of the High Court and Supreme Court of Appeal that the Minister is not entitled to grant the unconverted old order mining right of AMSA to a third party. They contend that it is in the public interest and the interests of justice that this important matter related to

[90] *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) at para 31; *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 32; *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11; and *President of the Ordinary Court Martial and Others v Freedom of Expression Institute and Others* [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) at para 16.

transformation of the mining industry be resolved by this Court.[91] Unsurprisingly, the two respondents have made the same issue their stomping ground.

Was the Minister entitled to grant AMSA's old order mining right to a third party?

[106] At the outset, I accept, as the Supreme Court of Appeal did, that if AMSA had renewed its undivided share of 21.4% in the old order right timeously, it would have been entitled to be a co-holder of the mining right under the MPRDA, issued in respect of the Sishen mine, to the extent of its undivided share.[92] As will appear more clearly in a moment, only one mining right in respect of the Sishen Mine could have been allocated to Sishen and AMSA in terms of section 23 of MPRDA. The grant of the mining right would have been subject to prescribed terms and conditions set by the Minister.[93] The terms could have prescribed how Sishen and AMSA, as former holders of undivided shares in an old order right, must relate to the mining right in respect of the Sishen Mine. The conditions the Minister sets must be directed at

[91] The state applicants submitted that—

> "the interests of justice clearly require that a fundamental legal question – which the Supreme Court of Appeal considered dispositive – be resolved by this Court. The question is, what happens to lapsed shares in mineral rights: whether they inure, felicitously, to the benefit of incumbents (eg Sishen) or entrants (eg Imperial Crown, or any other entity) in the mining sector."

Imperial Crown also contended that—

> "the crucial question for determination is whether, pursuant to the lapsing of an old order mining right in respect of an undivided share in a right to mine the mineral in or upon a property in accordance with the provisions of item 7(8) of the [MPRDA], that unconverted undivided share in a right to mine the mineral accrues without further ado, by operation of law, to the remaining undivided share in the right to mine the mineral into which the remaining co-shareholder's old order mining right was converted, or whether it becomes available for redistribution by the state in whom the custodianship in respect of all the mineral resources of the nation vests since inception of the MPRDA on 1 May 2004."

[92] Compare *Norgold Investments (Pty) Ltd v The Minister of Minerals and Energy of the Republic of South Africa and Others* [2011] ZASCA 49; [2011] 3 All SA 610 (SCA) at para 18.

[93] Section 23(7) of the MPRDA.

giving effect to the transitional arrangements that permit a conversion of an undivided share in an old order mining right without breaching the statutory scheme.

[107] The question we have to confront is whether an unconverted old order mining right lives beyond the transition. Does it cease to exist only in relation to its holder but continue to exist in relation to the state, to which it reverts for further allocation? The plain text of Item 7(8) seems to mean that an old order mining right that is unconverted ends without more upon the expiry of the prescribed time limit. The transitional provisions are silent on the fate of the old order right once it has ceased to exist.

[108] A view that is consistent with the objects and scheme of the MPRDA is that unconverted old order mining rights cease to exist in relation to their holder. The transitional arrangements in the MPRDA regulate the conversion of old order rights. Once the period for conversion of an old order right has expired, the transitional arrangements no longer apply. The mineral and the land which was the subject of the unconverted and expired old order right revert to the state because it is the custodian of all mineral and petroleum resources. Subject to the requirements of sections 16 and 22, the state is, and would be, entitled to grant a 'new' prospecting or mining right in respect of the mineral and land in terms of sections 17 and 23 of the MPRDA.

[109] An instructive example is to be found in *Agri SA*.[94] In that case, Sebenza[95] had failed to apply for a prospecting or mining right in respect of its unused old order mining right.[96] Its right, which was entire and undivided, ceased to exist in terms of Item 8(4) of Schedule II. There was no provision of the MPRDA that precluded the state from assuming its custodial role and allocating a new mining right. Under sections 16(2)(b) and 22(2)(b) the Regional Manager had the authority to accept an application for the allocation of a prospecting or mining right in respect of the mineral and land over which Sebenza once had unused old order rights, provided the applicant proposed a mine works programme[97] that showed an optimal exploitation[98] of the coal and complied with the environmental,[99] social and labour[100] requirements of the MPRDA.

[110] This simply means that when an old order right ceases to exist, the only prospecting and mining rights which the state may grant are the 'new' rights under sections 17 and 23. This is because no person may mine for any mineral without a

[94] *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (*Agri SA*).

[95] Sebenza (Pty) Ltd had bought coal rights from the liquidators of Kwa-Zulu Colliers (Pty) Ltd and registered them in its name before the coming into operation of the MPRDA. When the MPRDA came into effect on 1 May 2004 Sebenza became the holder of and unused old order right in terms of Item 8 of Schedule II. Sebenza did not apply for prospecting or mining rights, in terms of the Act. They were liquidated and by the time their liquidators sought to sell their rights they had already lapsed as they had failed to exercise them within a year.

[96] *Agri SA* above n 94 at para 72.

[97] Sections 17(1)(b) and 23(1)(a) of the MPRDA.

[98] Id.

[99] Id section 23(1)(f).

[100] Id section 23(1)(h).

mining right granted in terms of section 23(1).[101] The same prohibition applies to prospecting without a prospecting right.[102]

[111] On this approach, unconverted old order rights cease to exist. The state is entitled to grant "new" rights under the scheme of the MPRDA, provided nobody else has already been granted the same right under the MPRDA. The very requirement of conversion of old order rights within a fixed period anticipates a failure to convert rights. When that happens the state assumes its custodial responsibility. It may exercise its authority to issue a 'new' prospecting or mining right provided the requirements of the MPRDA are met. An understanding of the transitional arrangements together with the scheme of the MPRDA in this way means unconverted old order rights would be available to be distributed as new rights under it. That plainly advances the primary objects[103] of the MPRDA, which include the need to mine minerals optimally; to preserve existing jobs and create new ones; and to transform the mining industry by making it more equitable and inclusive as to race, gender and class.

[112] Once again this conclusion is a forerunner to, but does not dispose of the core question. The facts in this case present an additional dimension of considerable complexity. The question is, whether the Minister was entitled to grant the undivided

[101] See the repealed section 5(4)(b) and the new section 5A(b), read with the section 1 definition of a "mining right".

[102] See the repealed section 5(4)(b) and the new section 5A(b), read with the section 1 definition of a "prospecting right" now replaced by section 5A(b) with effect from 7 June 2013.

[103] See the Preamble, sections 3, 22 to 24 and 26.

share of AMSA's old order mining right, that has since lapsed, to a third party, where a mining right had already been issued to Sishen in respect of Sishen Mine.

[113] Here, the difficulty is, first, that Sishen and AMSA held their old order rights in undivided shares. Second, Sishen has been, and still is, conducting vast mining operations. And, third, it has been granted a mining right in terms of the MPRDA. None of these three factors arose in *Agri SA*. The state applicants have themselves described the transitional issues related to the Sishen Mine as "plainly singular". During the hearing in this Court, despite being invited to do so, none of the parties, including the state applicants, who should know, pointed to any other case in which two or more holders of undivided shares in a mining right had converted the right. Added to this, the window period for the conversion of an old order right expired on 30 April 2009. It is not facile to conclude that this case is unlikely to establish a precedent for other, similar cases.

[114] The state's power to grant prospecting rights and mining rights does not derive from the transitional arrangements but exclusively from sections 17 and 23 of the MPRDA. In my judgement, where an old order right was formerly held by X and Y in undivided shares, and X has converted its old order right but Y has failed to do so, the State may not grant Y's undivided share to Z. This conclusion is fortified by sections 16 and 22 dealing with the grant of prospecting and mining rights, as well as other provisions of the MPRDA that are aimed at the optimal mining of the mineral

resources of the country and which impose obligations on the holder of a mining right to comply with the environmental, social and labour requirements of the MPRDA.

[115] The provisions of sections 16(2)(b) and 22(2)(b) are not obscure. The Regional Manager must accept an application for a prospecting right or a mining right if no person "other" than the applicant holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land. In addition, sections 16(3) and 22(3) make it clear that, should the application not comply with the requirements of the section, one of which is that no person already holds a right or permit over the same minerals and land, the Regional Manager must notify the applicant accordingly.[104] Where a right already exists in relation to the same mineral on the land in question, the state may not grant a right to anyone other than the existing right-holder. In other words, there is only one applicant for rights in the Sishen mine who would not be hit by the prohibition contained in sections 16(2)(b) and 22(2)(b). That applicant is Sishen, the existing right-holder.

[104] Compare Dale et al *South African Mineral and Petroleum Law* (service issue 10) at para 132.3.3, where the following is stated:

> "Although the wording of subsection (2)(b) in most of the above-mentioned sections of the MPRDA provides that the Regional Manager or designated agency must accept an application if no person holds a stipulated form of right or permit for the same mineral or petroleum and land but does not provide that the Regional Manager must reject an application if another person does hold such a right or permit, it is clear from subsection (3) that, should the application not comply with the requirements of the section, one of which is that no person hold such right or permit, the Regional Manager must notify the applicant accordingly. Subsection (2)(b) thus prohibits the acceptance of an application in respect of an undivided share, seam, mineralised body or stratum when another person already holds a permit or right in respect of another undivided share, seam, mineralised body or stratum in respect of the same land and mineral"

[116] Another powerful consideration is that the requirements stated in section 23 for the grant of a mining right, and the obligations imposed on rights-holders stated in section 25, do not seem compatible with having two (or more) joint holders of a single mining right.[105] Section 23 refers, in the singular, to "the mining work programme" and "the prescribed social and labour plan" which any successful applicant for a mining right must have.

[117] No provision is made for the case where the applicant's mining work programme or social and labour plan must be reconciled with an existing right-holder's programme or plan in respect of the same mine. Section 23 also requires that any successful applicant, in order to be successful, has the ability to comply with the Mine Health and Safety Act,[106] section 3 of which refers, in the singular, to "the employer" of any mine. Again, no provision is made for more than one employer in a given mining area. Finally, section 25 imposes an obligation upon all right-holders to comply with "the approved environmental management programme" they submitted upon application in terms of section 39.[107] No provision is made to reconcile the environmental management programme submitted by an applicant with the existing programme of an existing right-holder.

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[105] Id at para 112.2.2:

> "On the face of it, it is unlikely that [an applicant for an undivided share of an existing mining right] will be able to comply with the provisions of section 23. Consequently, although in principle section 9 would apply to each application for the same undivided share of a mining right, in practice competent competing applications for the same undivided share are unlikely to occur. The fact that an applicant for an undivided share in a prospecting right would not in any future application for a mining right be able to meet the requirements of section 23, may preclude the grant of the former application."

[106] 29 of 1996.

[107] In terms of section 39, any applicant for a mining right under section 22 must submit an environmental management programme for approval by the Minister.

[118] For these reasons, the MPRDA simply does not contemplate two right-holders in respect of the same mineral and land. The only case where an applicant's programmes and plans will be automatically consonant with those of the existing right-holder is where they are one and the same: in other words, where the applicant *is* the existing right-holder.

[119] It is not hard to see why the drafters of the MPRDA would have thought it practically untenable to allow a newcomer to acquire a right in respect of land where there is an existing right-holder. The Sishen Mine provides a vivid illustration. Sishen has conducted mining operations on the Sishen Mine properties since 2001. This is a vast operation, said to be one of the largest open cast mines in the world. When these proceedings commenced in 2010, the mining operations covered 1 417 767 hectares. They were conducted in a pit, 10 to 11 kilometres long and two to three kilometres wide, and with an average depth of 250 metres. The mining activities were conducted 24 hours a day, seven days a week, and each day produced about 460 000 metric tons of run of mine and waste rock. There was an extensive mining infrastructure, which included beneficiation plant buildings and equipment; office buildings; mining, access and service roads; conveyor belts; power lines; railway lines; rock crushers; material stockpiles; maintenance workshops; and storage areas. The total area subject to Sishen's mining rights was approximately 36 000 hectares. Enormous quantities of iron ore has been mined at the Sishen Mine from the early

1950s.[108] Sishen Mine employs 4 412 permanent employees and 3 865 permanent contractor employees; their total investment in social and community projects in 2011 amounted to R73.6 million.[109]

[120] Before the Minister approved conversion of Sishen's old order rights, it had to meet the MPRDA's stringent requirements for conversion.[110] It is difficult to visualise how a third party, who holds an undivided share of 21.4%, will go about implementing its mining work programme alongside with Sishen's mining work programme,[111] or its social and labour plan,[112] or its already approved environmental management programme.[113] The grant by the Minister of a prospecting or mining right to another person in respect of iron ore over the Sishen Mine would necessarily interfere with Sishen's ability to perform in terms of its mining work programme, its environmental management programme and its social and labour plan.

[121] Evidently, this scenario would not ensue were Sishen, and not an obscure third party, granted the remainder of the mining right. For in that case the successful applicant would be the existing right-holder and none of the practical difficulties alluded to above would result. Moreover, the environmental, social and labour

[108] See Supreme Court of Appeal judgment above n 82 at para 8.

[109] Anglo American *Sishen Mines*, http://www.kumba.co.za/ob_sishen.php, accessed on 6 December 2013.

[110] See above n 100, n 101 and n 102.

[111] Required by Item 7(2)(e) of Schedule II when applying for a conversion of old order rights.

[112] Item 7(2)(f) of Schedule II.

[113] Item 7(2)(j) of Schedule II, and which in terms of item 10(1) in Schedule II had continued to remain in force.

requirements of the MPRDA would not be upset if the remaining portion of the Sishen Mine were to be allocated to Sishen.

[122] Sishen is entitled to formally apply again for, and be granted, the residual 21.4% undivided share of AMSA's unconverted old order mining right in the Sishen Mine, subject to whatever conditions the Minister deems appropriate, provided they are permissible under the MPRDA. For instance, the conditions may adequately deal with the concerns raised by the Director-General, particularly in relation to the possible detrimental effect a monopoly by Sishen could have on the local steel market's access to Sishen's output.

Conclusion

[123] For all of these reasons, I conclude that Sishen is the only party competent to apply for and be granted the mining right in terms of section 23 of the MPRDA.

Costs

[124] The state applicants and Sishen have both been partially successful. However, Imperial Crown and AMSA are on a different footing. The contentions advanced by AMSA in this Court have been unsuccessful in relation to the two core questions that had to be resolved. AMSA is liable to pay 50% of the costs of the state applicants and 50% of the costs of Sishen. Imperial Crown has been unsuccessful in its application for leave to appeal and its contention that the Minister is entitled to grant the

remaining 21.4% undivided share of the Sishen Mine to a third party. It is liable to pay 50% of the costs of Sishen.

Order

[125] In the result, the following order is made:

1. Leave to appeal is granted to the Minister of Mineral Resources, the Director-General of the Department of Mineral Resources, the Deputy Director-General: Mineral Regulation, Department of Mineral Resources and the Regional Manager, Northern Cape Region, Department of Mineral Resources.
2. The application for leave to appeal by Imperial Crown Trading 289 (Pty) Ltd is refused.
3. The appeal succeeds to the extent set out below.
4. The orders of the North Gauteng High Court, Pretoria and the Supreme Court of Appeal are set aside and replaced with the following order:

   "(a) It is declared that the conversion of Sishen Iron Ore Company (Pty) Limited's old order mining right did not include the old order mining right of ArcelorMittal South Africa Limited.

   (b) It is further declared that the old order mining right of ArcelorMittal South Africa Limited ceased to exist in terms of Item 7 of Schedule II of the Mineral and Petroleum Resources Development Act 28 of 2002 on 30 April 2009. The old order

mining right reverted to the state, as custodian of the right, in terms of the Act.

(c) The refusal of the Director-General of the Department of Mineral Resources to grant Sishen Iron Ore Company (Pty) Limited a mining right in respect of minerals which were the subject-matter of ArcelorMittal South Africa Limited's old order mining right is set aside.

(d) Sishen Iron Ore Company (Pty) Limited is the only party competent to apply for and be granted the mining right in terms of section 23 of the Act.

(e) The Director-General of the Department of Mineral Resources is directed to allow Sishen Iron Ore Company (Pty) Limited to apply again within three months from the date of this order for the remaining 21.4% undivided share in the right to iron ore and quartzite on the Sishen Mine properties."

5. The following order as to costs is made:

(a) ArcelorMittal South Africa Limited must pay 50% of the costs of the state applicants and 50% of the costs of Sishen Iron Ore Company (Pty) Limited, including, in each case, costs of three counsel where applicable.

(b) Imperial Crown Trading 289 (Pty) Limited is ordered to pay 50% of Sishen Iron Ore Company (Pty) Limited's costs, including costs of two counsel where applicable.

For the First to Fourth Applicants:	Advocate J Gauntlett SC, Advocate W Vermeulen SC, Advocate T Khatri and Advocate F Pelser instructed by the State Attorney.
For the Fifth Applicant:	Advocate E Wessels, Advocate C van Heerden, Advocate K Mhango and Advocate B Lekokotla instructed by Mendelow-Jacobs Inc.
For the First Respondent:	Advocate C Loxton SC, Advocate M Antrobus SC, Advocate A Cockrell SC and Advocate K Hofmeyr instructed by Norton Rose South Africa.
For the Second Respondent:	Advocate M Kuper SC, Advocate A Subel SC, Advocate S Symon SC, Advocate M Chaskalson SC and Advocate J Gildenhuys instructed by Werksmans Attorneys.