17-7-70

G.P.-S.33967—1968-69—1,000.

J. 219.

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE Provincial Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

CITY COUNCIL OF JOHANNESBURG *Appellant,*

versus

CROWN MINES LIMITED *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Davidson & Marais

Respondent's Attorney / *Prokureur vir Respondent* F. S. Webber & Son

Appellant's Advocate / *Advokaat vir Appellant* C. S Margo S.C B O'Donovan

Respondent's Advocate / *Advokaat vir Respondent* D Reuthman S.C and J C Kriegler

Set down for hearing on / *Op die rol geplaas vir verhoor op* 20 - 11 - 70

SB b. 7. 10. 11

Coram: Wessels, Jansen JJ.A, Smit, Corbett & Muller A.JJ.A.

(W.L.D.) 9.45 am —— 11.00 am
11.15 am —— 12.45 pm
2.15 pm —— 4.00 pm
4.15 pm —— 5.00 pm

C. a. V.

WESSELS J.A.:- Appeal allowed with costs, including the costs of two counsel, and the order of the Court a quo is altered to one dismissing the application with costs, including the costs of two counsel.

REGISTRAR.
14.12.1970

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

CITY COUNCIL OF JOHANNESBURG ..... APPELLANT.

AND

CROWN MINES LIMITED ..... RESPONDENT.

CORAM: WESSELS, JANSEN, JJ.A., SMIT, CORBETT et MULLER, A.JJ.A.

HEARD: 20 November 1970. DELIVERED: 14 - 12 - 1970

J U D G M E N T.

WESSELS, JA. :

The appeal by the City Council of Johannesburg comes direct to this Court, by consent, from the order of Ludorf, J., sitting in the Witwatersrand Local Division, declaring that "that portion of the Remaining Extent of the farm Vierfontein No. 321, Registration Division I.Q., district Johannesburg, in extent 4.15 morgen indicated by the letters A B C D E F on Sketch Plan R.M.T. No. 2596 is not and since 13th May, 1966, has never been rateable under the provisions of the Local Authorities Rating Ordinance No. 20 of 1933."

The respondent, at whose instance the above-

mentioned order was granted, is the registered owner of the land in question, and also the holder of mining title thereto by virtue of a registered mynpachtbrief originally issued during the year 1899 in terms of the provisions of Law No. 15 of 1898 (Tvl), and subsequently renewed from time to time in terms of the provisions of Act No. 35 of 1908 (Tvl), hereinafter referred to as the "Gold Law". The land in question was proclaimed land for the purposes of the Gold Law and retained its character as such for the purposes of the Mining Rights Act, 1967 (Act No. 20 of 1967). The latter Act, which came into operation on 1 October 1967, repealed the Gold Law, but it is common cause that all such rights as were held by respondent in terms of the provisions of the Gold Law were preserved in terms of section 188 of Act No. 20 of 1967. In terms of section 68 of the latter Act the abovementioned mynpachtbrief was deemed to have been granted for an indefinite period. For the sake of convenience I shall hereafter refer to the abovementioned portion of 4.15 morgen simply as "the land in question".

In order better to appreciate the significance of the opposing legal contentions of counsel in regard to the

issue whether or not the land in question is rateable property for the purposes of Ordinance No. 20 of 1933 (Tvl), it is necessary, firstly, to sketch in broad outline the factual background of the dispute between the parties which led to the institution of motion proceedings by the respondent. Where it appears to be appropriate to do so, reference will be made to certain relevant statutory provisions.

As I have already indicated above, respondent is not only the registered owner of the land in question, but also the holder of mining title thereto. It was, however, common cause between counsel that this coincidence is not of any legal significance in regard to the determination of the issue in question.

The abovementioned mynpachtbrief authorised respondent to undertake mining operations, inter alia, on the land in question in order to win precious metals therefrom. This right to mine included "all excavating necessary for the purpose, whether by underground working, open cutting, boring, or otherwise." (Section 3 of the Gold Law). In terms of section 67 of the Gold Law, the rights conferred by a mining title do not

include the right of disposal over the surface of the land, "which right of disposal is reserved to the Crown for the purposes of this Act or any other law." In terms of section 68, the surface of the land held under mining title may not, save as is specifically provided for in the Act, be used otherwise than for mining without the written permission of the Mining Commissioner. Such permission may only be granted "for purposes of mining or purposes incidental thereto." It is clear from further provisions in Chapter IX of the Gold Law that the surface of land held under mining title could, with the permission of either the Governor or the Mining Commissioner, be used for a variety of purposes unconnected with mining.

The land in question has in the past been undermined by the respondent but those mining operations have ceased, although mining is still being carried on in the vicinity thereof. In so far as the land in question is concerned, it would appear that mining operations were carried on at a depth which did not involve the surface thereof. It is alleged in an affidavit filed in support of the notice of motion that the surface of the land in question "has never been and is not used at all by the Applicant,

or any
another person, and is and has at all material times been held by the Applicant exclusively for the exercise of the right to dig for precious metals." During the years 1910 and 1928, respondent applied for and was granted, in terms of the provisions of sections 68 and 70 of the Gold Law, certain surface right permits in respect of land which included the land in question. These permits related to the erection of dwellings for respondent's employees, fencing off of certain land and the laying out of a golf course. No portion of the land in question was, however, used for any of the purposes referred to in the permits concerned, which were cancelled on 2 November 1966, in so far as they related to the land in question.

It appears that respondent is a wholly-owned subsidiary of Rand Mines Properties Limited, a company which was incorporated on 8 February 1968 for the purpose, inter alia, of developing land as townships for industrial and other purposes unconnected with mining. A prospectus, dated 9 April 1968, which was issued by the company, forms part of the record. It was the intention of this company, inter alia, to acquire shares in respondent and certain other companies of the Corner House

Group who, as appears from the prospectus, together owned about 13,800 acres of undeveloped land in and around Johannesburg, much of which was ideally situated for industrial, commercial and residential purposes. Of this total area, some 7,820 acres are situated in the Johannesburg municipal area and constitute approximately 13% of the total municipal area. Paragraphs 3 - 5 of the introduction ~~in~~ of the prospectus read as follows:

> "3 The reclamation of large areas of the land which have been affected by its use for many years for mining purposes and the development of the land within the framework of national, provincial and municipal planning and control will be of a long term nature requiring a high degree of skill, flexibility of action and financial resources which no one of the offeree companies could muster individually.
>
> 4 To develop this land for its most rewarding use and to secure the best interests of the shareholders and the community, it will be essential to co-ordinate the development of the land of the companies under a unified control.
>
> 5 R.M. Props. has been incorporated for the purpose of achieving the object set out in paragraph 4."

On 13 May 1966, i.e., prior to the incorporation of Rand Mines Properties Limited, the State President, acting in terms of the provisions of section 5 of Act No. 34 of 1908 (Tvl) - as amended by section 48 of Act No. 36 of 1934 - reserved the land in question for the establishment thereon of

a township. A Government Notice to that effect was published in the Government Gazette dated 13 May 1966. In this connection it is to be noted that section 5(1) of the 1908 Act (as Substituted by section 48 of the 1934 Act) empowers the State President, nothwithstanding anything in any other law contained, to permit a township to be established on any proclaimed land or land held under any form of mining title, whenever he considers it expedient to do so.

In a letter dated 2 January 1968, the Director of Local Government informed respondent that the establishment of a township (referred to as Theta Extension No. 1) on the land in question had been approved by the Administrator in terms of section 16 of Ordinance No.11 of 1931(Tvl), "subject to compliance with the conditions set forth in the attached statement." The aforesaid approval was granted pursuant to an application made by respondent on 11 June 1965 for permission to establish a township on the land in question. It appears that as at the date on which these proceedings were instituted, the township had not yet been proclaimed. No erven therein have been sold; nor are any of them occupied by any person. In accordance with the

proposed conditions of establishment of the township, the erven and the buildings to be erected thereon are to be used solely for industrial and commercial purposes. It is clear from the papers that, as at the date on which these proceedings were instituted, the land in question was still land reserved for township purposes, and that the approval granted to respondent in regard to the establishment of a township thereon was still extant.

Appellant, purporting to act in terms of the provisions of the Local Authorities Rating Ordinance, No. 20 of 1933 (Tvl), placed the land in question (or respondent's interest therein) on the valuation roll of the City of Johannesburg for the period July 1967 to June 1970 as rateable property. The rates levied upon the property were from time to time paid under protest by respondent. It appears from the affidavit of one Marshall (the clerk of the appellant Council), that the "interest in land" belonging to respondent which has been rated "is the dominium of the reserved land." In the affidavit it is stated, furthermore, that appellant denies that respondent holds or occupies the land in question "exclusively for the exercise of

the right to dig for precious stones or metals." On the contrary, so it is stated, "the purpose for which the surface of" the land in question is held by respondent "as the Freehold Owner thereof is the development of a Township for industrial or commercial purposes." In the respondent's replying affidavit it is contended that, dominium (as an interest in the land in question) is not rateable property, being exempted "by reason of the fact that it" (the land in question)" is presently held and at all times was held ..... exclusively for the right to dig for precious metals", and, moreover, that the intended future use of the land in question is an irrelevant consideration. It was contended, further, that only if and when the land in question "is actually used for residential purposes or for purposes not incidental to mining will it become rateable" in terms of the Ordinance concerned. The replying affidavit concludes as follows (the "Applicant" referred to is the respondent in the appeal):

> "Although the reserved land has been stripped of all surface right permits there is nothing in law to prevent the Applicant, if it now decided to prospect and mine the reserved land for precious metals, from doing so. The reservation for township purposes can be cancelled at any time by the Applicant before the proclamation of the township should it prove necessary to apply for surface right permits. I admit that the

> reserved land is presently not being used by the Applicant for the purpose of mining for precious stones or precious metals or purposes incidental thereto, but I respectfully submit to this Honourable Court that this aspect is entirely irrelevant. The relevant aspect is that the Applicant holds a right to dig on the reserved land for precious metals and that the same is not being used for residential purposes or for purposes not incidental to mining operations."

It is a convenient stage to set out certain provisions of the Local Authorities Rating Ordinance No. 20 of 1933 (as amended), which, according to its long title, was enacted to consolidate and amend the law relating to the levying of rates by local authorities. In so far as they are material hereto, the following definitions are contained in section 4 of the Ordinance:

> (a) " 'Interest in land' shall mean and include -
> (1) the dominium in land or the usufruct thereof;
> (5) (i) any user of land held under mining title or of proclaimed land not held under mining title for residential purposes or for purposes not incidental to mining operations whether by persons engaged in mining operations or otherwise;
> (8) any freeholders licence interests;"

(I omit paragraphs (2),(3),(4),(5)(ii), (6),(7) and (9) of the definition, because they are not material for the purposes of this judgment).

11/.....(b)

(b) " 'Open proclaimed land' shall mean and include all proclaimed land (that is to say land proclaimed a public digging under the Gold Law or Law No. 15 of 1898 or any prior law provided such land has not been lawfully deproclaimed) which is not held under mining title or surface right and which has not been reserved or granted for any purpose under the Gold Law."

(c) " 'Owner' shall mean and include -
(1) the person or persons in whose name shall be registered the legal title to any rateable property as herein defined.....
(2) in the case of any land held under.....mining title....the registered holder of such....title."

(d) " 'Rateable property' shall mean and include -
I. land including open proclaimed land and including the whole of any land wholly or partly used for or in connection with any racing in respect of which betting is carried on by means of a totalisator or otherwise.
II. every interest in land as hereinbefore defined with the following exceptions:
(a) Any land or interest in land the property of the Crown; provided that all railway property, as defined in section one of the Rating of Railway Property Act, 1959 (Act No. 25 of 1959), shall be deemed to be rateable property for so long as and to the extent that it is not exempt from rating in terms of the provisions of the said Act;
(b) any licence or right to dig for or prospect for precious stones or metals on any portion of land assigned for that purpose and any portion of land held or occupied

11(a)/.....exclusively

exclusively for the exercise of such rights; provided that no land or buildings used for residential purposes or for purposes not incidental to mining operations whether by persons engaged in mining operations or otherwise shall be deemed to come within the exception;"

In terms of section 31, the person who is the owner of any rateable property at the date when a rate becomes due and payable in respect of such property shall be liable for payment of the amount thereof.

12/.....In

In seeking to "consolidate and amend" the law relating to the levying of rates by local authorities, the draftsman of Ordinance No. 20 of 1933 neglected the opportunity of compiling a logically arranged catalogue of rateable property. The definitions in section 4 of "rateable property" and "interest in land", which are in the main composed of snippets from earlier legislation, have produced a somewhat confusing overlapping in paragraphs I and II of the firstmentioned definition. A brief survey of the historical background of the legislation relating to the levying of rates reveals the origin of some of the phraseology in the 1933 Ordinance, but does not necessarily lead to any greater clarity as to what the draftsman had in mind when he composed the definitions in question.

In legislation enacted prior to the 1933 Ordinance, "rateable property" was differently defined with reference to particular areas which, broadly speaking, fell into two categories, namely, mining and non-mining areas. Originally there were two separate rating enactments for the Pretoria and Johannesburg municipal areas. (Transvaal Proclamations Nos. 7 and 38 of 1902). In so far as Pretoria was concerned, land

(subject to certain exceptions) was the only item of rateable property. In so far as Johannesburg was concerned, "rateable property" meant and included "every interest in land", as defined, with certain exceptions (one of which related to "Any licence or right to dig or prospect for precious stones and minerals on any portion of land assigned for that purpose; and any portion of land held or occupied exclusively for the exercise of such rights," - Vide para (b) of the exceptions to "interest in land" in the above-quoted definition of "rateable property" in the 1933 Ordinance). By definition, in Proclamation No 38 of 1902, "interest in land" included "Land or the usufruct thereof" as well as, inter alia, "Any user of land under a claim licence, or other mining title, for residential purposes or for purposes not incidental to mining operations." During the year 1903, Ordinance No. 43 was enacted in order to bring about uniformity throughout the Transvaal in the "mode of making valuations of rateable property." The abovementioned two Proclamations were repealed. The definition of "rateable property" was, however, differently defined for non-mining and mining areas. As to the former, "all land" (with certain exceptions) constituted rateable property. As

14/.....to

to the latter, "every interest in land" (with certain exceptions) constituted rateable property. By definition, "interest in land", included, inter alia, "land or the usufruct thereof." In Klipriviersberg Estate and Gold Mining Co. Ltd. v. Municipal Council of Johannesburg, 1905 T.S. 660, the Court had occasion to consider the interpretation of the definition of "rateable property" in section 3 of Ordinance No. 43 of 1903. The Court (per Solomon, J., at p. 663) concluded that "land or the usufruct thereof", as an "interest in land", referred to the "dominium or usufruct of land." (The draftsman of the 1933 Ordinance may have had this judgment in mind in framing the definition of "interest in land" in section 4 thereof).

The same general approach to the definitions of "rateable property" and "interest in land" was adopted in Ordinance No. 6 of 1912. In terms of section 3 of Ordinance No. 1 of 1916, "any right of the owner of proclaimed land to receive a portion of the claim licences payable in respect of such land and further such owner's present and reversionary rights to the surface of such land" were included in the definition of "interest in land" in the 1912 Ordinance. The refe-

rence to "present and reversionary rights" was, however, deleted by section 1 of Ordinance No. 12 of 1918. The following year, by section 1 of Ordinance No. 9 of 1919, the owner's "present rights" to the surface of "proclaimed land" was, with retrospective effect, restored in the definition of "interest in land." Further amendments, involving the definitions of "rateable property" and "interest in land" in the 1912 Ordinance, were introduced by Ordinance No. 16 of 1927. I do not propose making any detailed reference to the various amendments, beyond mentioning that concepts such as "freeholders licence interest" and "open proclaimed land" were introduced into the 1912 Ordinance. In the year 1928 a consolidating Ordinance (No. 13 of 1928) was introduced, resulting in a new formulation of the definition of "rateable property". The distinction between "mining" and "non-mining" areas was maintained. In so far as the former were concerned, "rateable property" was so defined as to mean and include, inter alia, (1) open proclaimed land (without any reference to exceptions) and, (2) every interest in land (subject to various exceptions). In so far as the latter areas were concerned, the definition did not specifically refer to "land" as an item of

"rateable

"rateable property", but to "every interest in land" (subject to certain exceptions). Items II, III and IV included in the definition, were common to both areas. By definition, "interest in land" included, as before, "land or the usufruct thereof." This Ordinance survived, apparently without amendment, until the Ordinance with which this Court is now concerned (i.e., No. 20 of 1933) was enacted for the purposes of consolidation and amendment of prior Ordinances. For the first time the distinction between "mining" and "non-mining" areas was disregarded, and the new definition of "rateable property" was applied to all local authorities throughout the Transvaal.

When the 1933 Ordinance was enacted the definition of "rateable property" included, inter alia, I, land including open proclaimed land (without reference to any exceptions whatsoever); II, every interest in land "as hereinbefore defined" (subject to certain exceptions). It is a curious feature of the exceptions referred to that in certain instances both "land" and an "interest in land" are excluded from the item "every interest in land". See paragraphs (a) and (b) of item II of the definition of "rateable property". My impression is

that the draftsman probably overlooked that in the definition of "interest in land", land as such was not included as an "interest in land", the words "the dominium in land or the usufruct thereof" having been substituted for "land or the usufruct thereof" - the words previously appearing in definitions of "interest in land". (My italics). The context in which the various exceptions appear, tend to negative the possibility that they were intended to apply, where appropriate, to both items I and II of the definition. It appears that the reference to "land" in the abovementioned two paragraphs (a) and (b) of item II in the definition of "rateable property" may very well have to be construed as a reference to "the dominium" in the land in question. It is, however, not necessary for the purposes of this judgment to resolve the question.

What does emerge from a consideration of the various Ordinances above referred to is the clear intention "not to tax a right to mine or any portion of land held or occupied exclusively for mining purposes." (Victoria Falls and Transvaal Power Co. Ltd. and Ano. v. City Council of Johannesburg, 1930 T.P.D. 295, per Solomon, J., at p. 300). But as Solomon, J.,

pointed out, "this protection is evidently intended to benefit only persons engaged in mining operations and only in so far as their actual work of mining is concerned." What also emerges is that for rating purposes more than one interest in the same land may be held concurrently by different persons. Whether any one or more of those interests would be "rateable property", would depend upon the facts of each case and the law applicable thereto.

To sum up. In the present case respondent is the registered owner of the land in question, which is proclaimed land under the Gold Law. In terms of section 1 of the Gold Law the right of mining and disposing of all precious metals is vested "in the Crown." A mynpachtbrief was issued, granting the right to mine for precious metals on land which included the land in question, and respondent is, and was at all material times, the registered holder thereof. The rights conferred by the mining title in question did not include the right of disposal over the surface of the land in question, such right of disposal being, in terms of section 67 of the Gold Law, "reserved to the Crown for the purposes of this Act or any other law." Although certain surface right permits had been issued, they

were cancelled in so far as they related to the land in question, which has been reserved for township purposes in terms of section 5 of Act No. 34 of 1908 (Tvl). Respondent's application in terms of the provisions of Ordinance No. 11 of 1931 for permission to establish a township on the land in question has been conditionally approved, but proclamation thereof has not yet occurred. The land in question has been undermined, and mining operations are being carried on in the vicinity thereof, although they have ceased in so far as the land in question is concerned. The surface of the land in question has never been, and is not now, used by respondent or any other person.

The first question which requires consideration is whether the land in question is "rateable property" within the meaning of item I of the definition. If regard is had not only to the context in which "land" appears in that item, but also in the context of the definition as a whole, I am of the opinion that the term "land" cannot be construed as including proclaimed land held under mining title. If the draftsman were to have intended including in item I of the definition of "rateable property", open proclaimed land, proclaimed land held under mining title and land which has not been proclaimed

at all, it would have been simpler to have referred to "all land" or to "all land, including proclaimed land, whether held under mining title or not." Moreover, if "land" in item I were to have been intended to include proclaimed land held under mining title, it would have been necessary to provide for the necessary exceptions in regard to proclaimed land held under mining title, so as to give effect to the scheme embodied in the Ordinance, namely, that land held or occupied exclusively for mining purposes is not to be taxed. The draftsman no doubt appreciated what effect the grant of a mining title had upon the value of the land as such for rating purposes, where such land might be used exclusively for mining purposes. If there is, contrary to what I have stated above, any element of ambiguity in the language employed, I am of the opinion that the specific reference to "open proclaimed land" in the particular context makes this a suitable case for the application of the maxim expressio unius est exclusio alterius. (Steyn, Die Uitleg van Wette (3rd Ed.) p. 50). The land in question is, therefore, not "rateable property" within the meaning of item I of the definition.

21/.....Next

Next to be considered, is whether respondent is the owner of any interest in the land in question which is "rateable property" within the meaning of item II of the definition. The first leg of the enquiry does not, in my opinion, present any real difficulty. The fact that the land in question, being proclaimed land held under mining title, is as such not rateable property in terms of item I of the definition, is not of any real significance in this part of the enquiry. The legislature saw fit, in the definition of "interest in land", to constitute "the dominium in land" an item of rateable property for the purpose of the Ordinance. The respondent is the registered owner of the land in question which is, as such, not rateable in terms of item I of the definition. By virtue of the fact of registration it is the dominus thereof, and, therefore, for the purposes of the Ordinance, the "owner" of the dominium thereof. As a matter of language, it may, no doubt, sound somewhat odd to speak of the owner of the right of ownership (Afrikaans: "eiendomsreg") of land, but that is the language employed by the draftsman, and the meaning of the somewhat inelegant phraseology is clear. If regard is had to the definition

of "owner", it will be observed that similar odd language is employed in regard, e.g. to a person who holds land under a lease or is the assignee of the whole or portion of a free-holders' licence interest.

For the purposes of this judgment, I find it unnecessary to make more than a cursory reference to the "legal metamorphosis" in the ordinary proprietary rights relating to land resulting from its proclamation under the Gold Law. As to this, reference may be had, inter alia, to the judgment of Trollip, J., in West Driefontein Gold Mining Co. Ltd., v. Brink and Others, 1963(1) S.A. 304 (W) at p. 307F. As an addendum to this judgment, there is published (at p. 311) an extract from the unreported judgment of Curlewis, J.P., in Witwatersrand Gold Mining Co. Ltd., v. Municipality of Germiston, (T.P.D., 4 March 1926), which deals with the position of the owner of land that has been proclaimed under the Gold Law. It is, in my opinion, clear from these judgments, as well as others referred to by counsel during the hearing of the appeal, that, although proclamation makes far-reaching inroads upon the proprietary rights of the freehold owner, its effect never-

23/.....theless

theless falls short of expropriation or confiscation of his totality of rights as such. Although his ordinary proprietary rights are suspended while the land retains its character as proclaimed land, he remains in law the registered owner thereof and, as such, the person in whom the dominium in the land remains vested. By virtue thereof he has a reversionary interest in the land, which, depending upon the circumstances, may give his right as dominus a greater or lesser value. In addition, as was pointed out by Curlewis, J.P., in the case cited above, the registered owner of proclaimed land held under a mining title, has a right, just as any member of the public has, to apply for permission to occupy a portion of the surface of that land for non-mining purposes. Pending the grant of such permission, the "right" to apply therefor, is, however, no more than a "hope or expectation." Upon the grant of the permission to the owner, however, the hope or expectation is realised, and becomes a right in the ordinary sense of that term, adding value to the right of dominium of the owner. The legislature probably had this consideration in mind in defining an "Interest in land" in a manner having the effect of including "the dominium"

in proclaimed land held under mining title. In my opinion the respondent, as the registered owner of the land in question and, therefore, the owner of the dominium thereof, has an "interest" in that land within the meaning of the definition of "interest in land".

Whether or not this "interest in land" is "rateable property" depends upon the question whether or not it falls within the exception referred to in paragraph (b) of item II of the latter definition. In so far as it is material hereto, the paragraph is in the following terms:

> "any licence or right to dig for or prospect for precious stones or metals on any portion of land assigned for that purpose; and any portion of land held or occupied exclusively for the exercise of such rights.....".

In so far as the reference to "....any portion of land held or occupied exclusively for the exercise of such rights" is concerned, I have already suggested above that it should probably be read as a reference to "(the dominium in) any portion of land held or occupied exclusively for the exercise of such rights". The practical effect of the exception is that if the land concerned is held or occupied "exclusively" for the exercise of "such rights", the dominium in that land

will not be "rateable property" for the purposes of the Ordinance. The "exercise" of the rights referred to can, of course, only take place by or with the permission of the holder thereof. The question is, however, not whether the holder of those rights "holds or occupies" the land for that exclusive purpose or for some other purpose or both; but rather for what purpose or purposes is the land both in fact and in law being held or occupied, whether by the owner of "such rights" or some other person. It is abundantly clear from the provisions of the Gold Law itself that proclaimed land held under mining title may be concurrently held or occupied both for purposes of, and other than, mining. The right of disposal over the surface of land held under mining title is reserved to the State, which may dispose thereof for the purposes of the Gold Law "or any other law" (cf. section 90 of Act No. 20 of 1967). Section 5 of the Townships Amendment Act, No. 34 of 1908 (Tvl), as amended by section 48 of Act No. 36 of 1934, contemplates the disposal of the surface of proclaimed land held under mining title for the purpose of establishing a township thereon. In terms of section 5(1) of Ordinance No. 34 of 1908 (as amended) the State President

may, whenever he considers it expedient to do so, "permit a township to be established on any proclaimed land or land held under any form of mining title". In terms of section 5(2), any "such land required for a township" shall be reserved by the State President. "for a township by notice in the Gazette." (Cf. section 184 of Act No. 20 of 1967). In this case respondent is the registered owner both of the land in question and also of the mining title thereto, and its left hand was, no doubt, at all times aware of what its right hand was doing. Where the two titles are separately held, the owner of the mining title would have been consulted prior to the grant of the permission to establish a township and the reservation of the land required therefor. After having ascertained the facts, the State President will consider whether it is or is not expedient to grant permission for the establishment of a township. A factor which will no doubt arise for consideration is the extent to which the establishment of a township might affect the exercise of rights under a mining title. It is, however, the function of the State President to decide, in his discretion, whether surface user for township purposes of land held under mining

title is to be permitted. If he decides to grant permission, he is bound to reserve such land as is required for the establishment of the township in question. In my opinion the grant of such permission, and the consequential reservation of the land in question for township purposes, constitute an exercise of the State's right of disposal over the surface of land held under mining title. The grant of the permission vests in the grantee an exclusive right to use the land in question for the purpose of establishing a township thereon. In availing himself of this right of user, the grantee must of necessity comply with the provisions of the Transvaal Ordinance governing the establishment of townships. In my opinion the effect in law of the grant of the permission and the reservation for township purposes of land held under mining title is to vest in the grantee a right to hold and occupy the land concerned for the purposes of establishing a township concurrently with that of the owner of the mining title to hold and to occupy the same land for mining purposes. The exercise of the right of user of the surface of the land concerned for township purposes may of course affect the exercise of the right to mine,

but that possible consequence is of no further moment after the grant of permission to establish a township and the reservation of the land required for that purpose. The grant of the right of surface user of the land for township purposes necessarily curtails the right of surface user of the land for mining purposes or purposes incidental thereto, even though it might not affect the rights of the holder of the mining title in regard to the rest of the land concerned. In so far as it may be necessary to do so, the grant of permission may be made subject to conditions considered desirable in the interests of mining.

It was contended on respondent's behalf that the exclusive holding and occupation of the land in question for mining purposes would endure until the proclamation of the township in terms of the Ordinance concerned. It was contended, further, that notwithstanding the remoteness thereof, the possibility exists that respondent, as the holder of the mining title, might resume mining operations on the land in question, and decide not to proceed with the establishment of the township in pursuance of the permission granted it to do so. In my

opinion these possibilities, dependent as they are on possible future intentions, are entirely irrelevant considerations. The Court is concerned with the factual position as at the time the motion proceedings were instituted by respondent. Having regard to what I stated above, it would be a misuse of language to say that as at that time the land in question was "held or occupied exclusively for the exercise" by the respondent of its rights under the mining title. The land in question, having been reserved as aforementioned, was at that time also being held by the respondent as owner of the dominium thereof, for the purpose of availing itself of the grant to it of permission to establish a township thereon.

The appeal is accordingly allowed with costs, including the costs of two counsel, and the order of the Court a quo is altered to one dismissing the application with costs, including the costs of two counsel.

JANSEN, J.A.
SMIT, A.J.A.
CORBETT, A.J.A.
MULLER, A.J.A.) Concur.