IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Case No.

609/94

In the

matter between TROJAN EXPLORATION COMPANY

(PROPRIETARY) LIMITED First

Appellant

PYRAMID PLATINUM LIMITED Second

Appellant

and

RUSTENBURG PLATINUM MINES LIMITED First Respondent

LEBOWA PLATINUM MINES LIMITED Second Respondent

MINISTER OF MINERAL AND ENERGY

AFFAIRS Third Respondent

CORAM: BOTHA, VANHEERDEN, NESTADT,SCHUTZJJA

et PLEWMAN AJA

DATE HEARD: 2 and 3 MAY 1996 DATE

DELIVERED: 31 MAY 1996

SCHUTZJA

JUDGMENT

SCHUTZ JA:

The problems in this appeal arise out of the existence of a bounteous mixture of minerals, both precious and non-precious, in two associated reefs, whilst the rights to precious metals vest in one person and those to base metals and minerals vest in another.

The reefs are the Merensky reef and the UG-2 reef in the Bushveld Complex. The disputed sections underlie the farm Umkoanesstad 419, district of Lydenburg, once within the "homeland" of Lebowa.

The first appellant is Trojan Exploration Company (Pty) Ltd, ("Trojan"), the first applicant below. It holds a registered notarial

prospecting contract incorporating an option over Umkoanesstad in respect of all minerals save for precious metals. Associated to it is the second appellant, Pyramid Platinum Ltd ("Pyramid"), which joined in the litigation below at a late stage as the second applicant. It is the registered holder of the mineral rights in respect of which Trojan has a prospecting contract. AFC Investments Ltd, ("AFC") was the first respondent below, but is not a party to the appeal. It formerly held the rights now held by Pyramid, but during the litigation AFC sold and ceded those rights to Pyramid. The first respondent on appeal (second respondent below) is Rustenburg Platinum Mines Ltd, ("Rustenburg"), the registered holder of the rights to precious metals. Its subsidiary, Lebowa Platinum Mines Ltd, ("Lebowa"), is the second respondent (third

respondent below). Rustenburg acquired mining title in respect of precious metals by virtue of a registered mining lease issued by the then Lebowa government, which was ceded to Lebowa. The litigation started as an attempt by Trojan to protect its prospecting contract and option by obliging AFC to take steps against Rustenburg and Lebowa. But by the time of judgment the real issue was between Rustenburg and Lebowa on the one hand, they having the mineral rights and mining title in respect of precious metals, and Pyramid and Trojan on the other, as the holders between them, of all the other mineral fights, and the right to prospect for the same. The Minister of Mineral and Energy Affairs of Lebowa is the third respondent (fourth respondent below), but he has taken no active part in the litigation. Accordingly I shall refer to Rustenburg and

Lebowa collectively as the respondents.

A brief account of the genesis of the various rights, their nature and subsequent fate is needed, because of certain arguments which will be considered later. Prior to 1925 the Transvaal Land Company Ltd owned Umkoanesstad, its surface and what was beneath it, in all the fullness that the common law allows, although even by then, for about half a century there had been legislation which could affect its rights if payable minerals were present. In that year Willem Remmers acquired the farm, but simultaneously the mineral rights were separated and retained by Transvaal Land Company Ltd by means of a reservation in the transfer deed and the registration of a certificate of mineral rights in its favour. Those rights were defined as "all the mineral rights and all

minerals, oil, precious stones, precious or base minerals." Such a separate registration of mineral rights had come to be recognised in the Transvaal long before 1925: see Houtpoort Mining Estate Syndicate Ltd v Jacobs 1904 TS 105 at 110; also Nolte v Johannesburg Consolidated Investment Co Ltd 1943 AD 295 at 315.

Indeed an entire structure of mineral and mining law had been evolved in South Africa both by the courts and various legislatures. The need for such development arose out of the lack of such laws in the Roman-Dutch system. The reason for such lack is obliquely revealed by Groenewegen in his Tractatus De Legibus Abrogatis ad D 48.19.8.4. With book 47, book 48 is one of the libri terribiles of the Digest. Title 48.19 deals with punishments. One of the punishments, mentioned in the

passage under comment, is condemnation to the mines. Ulpian remarks, "Mines are numerous, some provinces possessing them and other not; those that have not send (their condemned criminals) to those that have" (Watson's translation). That delta land, the Netherlands, was no longer a Roman province, so that Groenewegen remarks, "The penalty of being sentenced to the mines is obsolete, because the provinces of lower Germany have no mines" (Beinart's translation).

The nature of rights to minerals which had been separated from the ownership of the land, as they had developed in South Africa, was described by Innes CJ in Van Vuren and Others v Registrar of Deeds 1907 TS 289 at 294 as being the entitlement "to go upon the property to which they relate to search for minerals, and, if he [the holder] finds any,

to sever them and carry them away." As these rights could not be fitted into the traditional classification of servitudes with exactness - they were not praedial as they were in favour of a person, not a dominant property - they were not personal as they were freely transferable - they had to be given another name, and the Chief Justice dubbed them quasi-servitudes, a label that has stuck. They are real rights. Their exercise may conflict with the interests of the landowner. In a case of irreconcilable conflict the interests of the latter are subordinated, for if it were otherwise the grant of mineral rights might be deprived of content: see eg Nolte's case, supra, at 315: Hudson v Mann and Another 1950(4) SA 485(T) at 488 E-F. For so long as minerals remain in the ground they continue to be the property of the landowner: only when the holder of the right to

minerals severs them do they become movables owned by him: Van Vuren's case, supra, at 295. Those are the main established common law principles that are relevant. It might be added that much of the argument in this appeal revolves around the relationship not between the landowner and the holder of the mineral rights, which is charted water both as regards competition between interests and ownership of the minerals; but the relationship between two holders of different mineral rights where their rights compete, and where the one in severing minerals to which he is entitled perforce severs those also of the other, without his consent. This is uncharted water. There are no South African decisions directly in point. It must be added that although much of the common law has survived, statutes dealing with the right to mine have in many

ways altered the effect of mineral rights, particularly where precious metals or stones are involved. The relevance of these changes will be discussed at a later stage.

To return to the history of the rights in this appeal. In 1957 a notarial cession of the entire mineral rights contained in the 1925 reservation was registered. The cession transferred those rights from Transvaal Land Company Ltd to North Vaal Mineral Company Ltd ("North Vaal"). Thereafter in 1966, in terms of a registered notarial cession "all rights to precious metals" were transferred by North Vaal to Rustenburg. It was at this time that the rights to minerals were split between two holders, as North Vaal retained all those rights which had not been ceded to Rustenburg. This residue included the rights to base

metals and minerals. When this cession took place the Precious and Base Metals Act 35 of 1908 ("the Gold Law") was still in force. On 18 September 1989 a notarial contract was concluded between Trojan and North Vaal in terms of which the latter conferred on the former the right to prospect for "all minerals (excluding precious metals) including base metals and precious stones", as also an option to purchase the rights to the same. This contract was registered some months later, on 30 November 1989. Later on the same day another cession was registered. This was a notarial cession dated 21 September 1989 in which North Vaal ceded to its holding company AFC the residual mineral rights which it still held, subject to Trojan's rights in respect of the same minerals under its prospecting contract. Shortly afterwards, on 23

October 1989, Trojan demanded of Lebowa that it desist from mining anything other than precious metals.

During 1990 and 1991 Lebowa extracted precious metal ores (I leave the exact meaning of that expression over) in terms of permissions given under s 21 of the Mining Rights Act 20 of 1967 ("the 1967 Act"), which had in the meantime superseded the Gold Law. Trojan's founding affidavit was signed in March 1991. At that stage it was the only applicant. In October 1991 in terms of the mining lease already mentioned the "exclusive rights of mining precious metals" (as defined in s 1 of the 1967 Act) was granted to Rustenburg on condition that it should cede its rights to Lebowa. The cession to Lebowa took effect on the registration of the lease on 15 October 1991. The lease had been

granted in terms of sections 25(l)(a) and 26 of the 1967 Act. Upon its registration, in terms of s 40 (2), the land became proclaimed land.

More than a year after the case had started Pyramid purchased the residual mining rights (including the base metal and mineral rights) from AFC and the cession of the same was registered in February 1993.

I turn to the ore-bearing reefs. Two have been mentioned so far. Three are mentioned in the papers, but only the two are the subject of any real dispute. The origin of all three is an event some two billion years ago, when apparently, successive injections of molten rock from the mantle of the earth forced their way into the higher rock of what is today the Bushveld Complex. When they cooled, these intrusions formed three distinct strata or reefs which lie one above the other. Uppermost

is the Merensky reef. Roughly 330 metres below is the UG-2 reef. Roughly another 600 metres further down is the LG-6 reef. These depths vary and have not been exactly plotted over the whole area of Umkoanesstad. Only the Merensky reef outcrops (surfaces) on the farm. The chemical constitution of the reefs differs markedly. The lowest, LG-6, bears relatively high grade chromite. Chrome is a base metal. The six platinum group metals ("PGMs" - being platinum, ruthenium, rhodium, palladium, osmium and iridium) are also found in small quantities. The reef may be regarded as a separate ore body. It is not economically exploitable for precious metals alone. Lebowa is not mining it and claims no right to or interest in it. It is quite content that Pyramid should mine for base minerals it if it can, provided that this

does not interfere with its own operations. The LG-6 reef may therefore be ignored.

The Merensky reef is a platiniferous reef. It is the only reef presently being mined by Lebowa. It consists mainly of feldspathic pyroxenite and contains very little chromitite. Various chemical compounds of base metals and minerals such as nickel, copper, cobalt, and sulphur are present.

The UG-2 is a relatively low grade chromite bearing reef, but it is platiniferous and also yields some gold. It contains the base metals and minerals to be found in the Merensky reef. At present Lebowa does not mine it, but there is every possibility that it will do so in the future. It asserts its right to do so.

Lebowa's Atok Mine has a central vertical shaft on the farm Middelpunt, through which is raised the mixed ore from four farms, Umkoanesstad, Middelpunt, Zeekoegat and Diamand. The ore blasted from the various stopes is transported underground and indiscriminately mixed before being raised. This mixing is one of the complaints of the appellants, who submit that Pyramid's co-ownership of the ore (for which it contends), or other rights in the ore, are lost by this act of commixtio. Lebowa justifies its conduct by pointing out that it was a condition of the mining lease that there should be conjoint working (which is no doubt economically sensible, at least from the government's and Lebowa's point of view). The appellants' counter is that this requirement does not oblige Lebowa to mix Umkoanesstad ores with other ores.

Lebowa's witness Knock further states:

> "It is not economically feasible or practicable to work under only one farm in order to obviate the inevitable intermixing of the ores from the various stopes. . . . [And later]. The precious metal ores are inevitably intermixed indistinguishably in the silo and it is not economically possible to load the silo at any one time and thereafter to empty the silo so that only precious metal ores from Umkoanesstad 419 KS are contained therein or processed thereafter."

The parties are agreed on one thing, that the ores in the Merensky and UG-2 reefs contain a mixture of precious metals and base metals and minerals in a variety of chemical and metalliferous combinations such that it is impossible to mine the one group without at the same time mining the other. This fact lies at the root of the problems in this case.

Thereafter the process of separating the various end-products is a

lengthy and complicated one. Apart from chrome, the separation of the precious and base metals occurs practically at the end of the process, which I shall describe briefly. Once finely crushed, the ore is pumped into flotation cells where it is mixed with reagents and chemicals. A cloud of bubbles is passed through the resulting slurry. The metals and minerals cling to these bubbles. The presence of sulphide in the ore is essential to the process. The bubbles froth over the lips to form an enriched slurry which is filtered through cloth and dried. The resulting concentrate is then taken from the mine to Rustenburg's smelter and refinery at the town of Rustenburg. There it is smelted, leading to the discarding of slag. After oxidisation of the remaining matte the sulphur is separated as sulphur dioxide, which is processed into sulphuric acid as

a by-product. What remains is allowed to crystallise, and, after fine grinding, a magnetic concentrator removes alloy containing the PGMs, which results in the bulk of the PGMs being extracted. Up to this stage they have remained associated with the base metals. Further processes are then used to extract the rest of the PGMs and also the base metals nickel, copper and cobalt. Ultimately all the metals, precious and base, are separately refined. At Rustenburg the products of the Atok mine become mixed with those from other mines, which means that the identity of the Umkoanesstad base minerals is even further effaced.

Rustenburg then sells on Lebowa's behalf not only the precious metals, but also the copper, nickel, cobalt and sulphuric acid, without any accounting to Pyramid. This is Pyramid's principal complaint - that the

base metals and minerals to which it has the rights are simply appropriated by another, who pockets the proceeds. Although the figures have not been revealed, it is clear that the proceeds of these "by-products" of mining for precious metals are considerable.

The amended relief sought by the appellants in the Court a quo was a declaration that their combined rights entailed that, in respect of ore extracted by the two respondents from Umkoanesstad by virtue of their rights to precious metals:

1. Pyramid was the co-owner of the ore.

2. Alternatively to 1, Pyramid retained "its rights" in respect of such ore.

3. Pyramid was entitled to prevent the respondents from

performing any act having the effect of preventing Pyramid from exercising its rights as co-owner of the ore, alternatively "its rights" referred to in para 2.

4. Pyramid was entitled to prevent the respondents from mixing the ore with ore from any other farm, or performing any act having the effect of the Umkoanesstad ore losing its identity, alternatively having the effect of the base metals or minerals from that farm being mixed with any other base metals or minerals.

5. Pyramid was entitled to prevent the respondents from appropriating the base metals and minerals and selling

them for their own account.

It should be noticed what the appellants do not claim: they do not claim that records should be kept for their benefit, nor a statement of account, nor the delivery of refined base metals or sulphuric acid, nor the payment of money.

As will be explained later in this judgment, in 1991 statutory provision was made for the exploitation of competing mineral rights. The statute came into force over the former Lebowa on 1 May 1995. I shall leave over the appellants' application to amend the relief on appeal in respect of the period after that date.

The Court a quo (Eloff JP sitting in the TPD) dismissed the appellants' application. The focus of the judgment was the cession to Rustenburg of the rights to precious metals in 1966. The questions were,

said the learned Judge, what was the intention of the parties as to the content of that cession; what necessary ancillary rights passed with the rights to precious minerals; and what residual rights remained with the cedent, North Vaal? Two arguments presented on behalf of the respondents, main and alternative, were accepted.

The first was based upon the definition of "precious metals" in s 3 of the Gold Law, as amended by the Mineral Law Amendment Act 36 of 1934 ("the 1934 Act"), which read at the time of the 1966 cession:

> " 'precious metals' shall mean -
>
> (a) gold, silver, platinum, iridium and all other metals of the platinum group and the ores of all the said metals" (own emphasis).

The learned Judge remarked that parties contracting over the rights to precious metals "move in a field hedged in by legislation." So much

is clearly true. But Eloff JP proceeded, "It is reasonable to suppose that the parties contemplated that the rights granted to Rustenburg in 1966 would be co-extensive with the rights which can be accorded by the State in a mineral lease." I doubt the soundness of this proposition. However, proceeding from this point the learned Judge held that Lebowa had the right to mine platinum-bearing ore even though it also contained base minerals. Next, that ore capable of being economically mined for platinum could not at the same time be a base mineral ore, reliance being placed ia on the contrast in the definitions between what was precious and what base, particularly with reference to ores. The argument of the appellants that the ores in the Merensky and UG-2 reefs are polymetallic (both precious and base) was rejected. The upshot was that the appellants lost all their rights to what was contained in ore mined by

Lebowa, because it contained precious metals worth mining for. Accordingly, the argument that Pyramid was the co-owner of this ore was rejected, as also the complaint that the respondents' construction of the Gold Law involved confiscation without compensation. It was held as a matter of construction that the effect of the 1966 cession was to curtail substantially North Vaal's residual rights, that is its rights to non-precious minerals. The resulting conclusion was that Lebowa was entitled to treat as its own and sell base by-products separated and refined by it.

In reaching these conclusions the learned Judge found little assistance in the decided cases.

He rejected an argument put forward by the respondents which was based on a suggestion by Franklin and Kaplan The Mining and

Mineral Law of SA 142 to provide the answer to the problem, namely that Rustenburg's title was first in time, and qui prior est tempore potior

The alternative argument for the respondents, also accepted, was that even without reference to statutory aids, a proper construction of the 1966 cession led to the same results. The appellants' case (so it was said) started with a claim to co-ownership of the ore. There was no express provision to that effect in the cession. Was it to be implied? Applying the bystander test, the answer was no. In what proportions would the ore be owned? Would the appellants have to contribute to expenses, and if so, how much? Such questions, incapable of immediate and inevitable answer were destructive of any argument based on an implied term that there was to be co-ownership.

The Issues

It seems to me that the issues before this Court are those set out below. Depending upon how some of them are answered others may not arise.

1. Was the Court a quo correct in holding that:

1.1 The Gold Law allowed the holder of rights to precious metals on proclaimed land to

1.1.1 Mine payable platiniferous ore notwithstanding that it contained base metals and minerals, the rights to which were held by another?

1.1.2 Retain base metals and minerals mined in these circumstances as his own and sell them for its own account?

1.2 If 1.1.2 be answered favourably to the respondents, the 1966 cession should be interpreted in conformity with the Gold Law, so that Rustenburg was entitled not only to mine the ore in question, but to retain for itself all base metals or minerals it extracted from or refined out of the ore?

1.3 The 1966 cession should in any event be interpreted to the same effect on another ground? In this Court

two main grounds were relied upon:

1.3.1 That to find that the cedent retained its rights to base metals and minerals would constitute a derogation from the grant of precious metals rights, which grant conceded the right to mine ores containing the former, provided only the latter were also present in payable quantities.

1.3.2 That the power to mine, refine and sell base metals and minerals was a power necessarily ancillary to the mining of precious metals.

2. Is the qui prior est principle applicable?

3. Could the authorities grant a mining lease to Rustenburg under the 1967 Act which deprived Pyramid of its rights to base minerals?

4. If the Court a quo erred in holding in the respondents' favour on the questions raised in para 1.1, 1.2 and 1.3 (which are concerned with the interpretation of the 1966 cession) what is the answer to the following questions?

4.1 In general, how are the two competing real rights to minerals in the same substance to be accommodated?

4.2 Did Pyramid become co-owner of ore severed by Lebowa in the course of its own mining, without it having acted as Pyramid's agent?

4.3 If it did become co-owner what was the effect of mixing that ore or its concentrates with other ore or

its concentrates?

4.4 If Pyramid did not become co-owner, did it have any other rights in or to the ore, its concentrates or its proceeds?

4.5 Could Pyramid prevent Lebowa from mining without its consent?

4.6 Could Pyramid prevent the mixing of Umkoanesstad ores or concentrates with other ores or concentrates?

4.7 Are the respondents entitled to sell the refined base mineral by-products for their own exclusive benefit?

5 To what relief, if any, are the appellants entitled in respect of events subsequent to 1 May 1995?

I turn to a consideration of the questions, not always in the order set out above. Those posed in paras 1.1 and 1.2 were not particularly pressed before us in argument, but as they form the main basis of the Court a quo's findings, it is nonetheless necessary to deal with them. The Effect Of The Gold Law (para 1.1 above)

As stated previously the Gold Law was still in force at the time of

the 1966 cession. The construction placed upon it by the Court a quo was that if a mining lease were to be granted to mine precious metals, then, because of the inclusion of ores in the definition of precious metals in the Gold Law, the lessee would be entitled to extract and keep not only precious metals in that ore, but also base metals and minerals, notwithstanding that the rights to base metals and minerals vested in another. That other, so the Court held, would lose its rights. The effect was to construe the Gold Law as allowing one holder to confiscate the minerals of another.

The appellants' argument is a simple one - that whatever rights to mine the Gold Law gave, it does not at all deal with the definition and scope of competing mineral rights, and that reference to the ores of precious metals in this connection is a red herring. The provisions of the

Gold Law are designed to regulate mining, not define mineral rights. Those rights are treated by the Gold Law as something priorly established, only the exercise of which is regulated. The process of regulation, so the argument proceeds, may detract from the worth of common law rights, but the Gold Law is not an instrument for the confiscation of the rights of one holder so that they may be bestowed upon another. The cession must be construed accordingly, supposing that the Gold Law has any bearing on its interpretation.

The central provision of the Gold Law is s 1, which reads:

> "The right of mining for and disposing of all precious metals is vested in the Crown; the ownership of, and the right of mining for and disposing of base metals on Crown or private land is vested in the owner of such land."

Several things are to be noticed about this section. As far as base

metals are concerned, it is plainly affirmed that they are owned by the landowner (who may separate the title to minerals from the land, as we have already seen.) This is a re-affirmation of the common law, and whatever further diminution may have been effected by the Base Minerals Amendment Act 39 of 1942, that position still prevailed in 1966. As far as precious metals were concerned, common law ownership remains, but there is a subtraction from full dominium because of the Crown's right to mine and dispose: Odendaalsrus Gold General Investment and Extensions Ltd v Registrar of Deeds 1953(1) SA 600 (0) at 604 C-E. As is pointed out by Nathan Golf and Base Metals Laws 6 ed 2 the section does "not mean that the Crown owns all such precious metals, or that it mines them." Indeed the Crown was not given a free hand to do as it chose. The Gold Law itself contained an elaborate

structure to regulate who could mine, what compensation had to be paid, and so forth. No point would be served by setting all of this out. It suffices to say that the holder of the mineral rights would be rewarded by the grant of a mynpacht. In later legislation provision was made for an additional leased area, and as mining took place at increasing depths and required more and more capital, the use of mining leases became general.

I turn to the narrower question whether the Gold Law had the particular confiscatory effect for which the respondents contend, and which the Court a quo accepted. The original (1908) definitions read (s 3):

> " 'base metals' shall mean quicksilver, iron, lead, copper, tin, zinc, cobalt, nickel, arsenic, manganese, antimony, bismuth, as well as (the ores of such metals, and sulphur, coal, graphite, or any other

mineral substance, for the exploitation of which no special provision is made by law":

" 'precious metals' shall mean

(a) gold and silver, and their ores and gold or silver found in combination with a base metal, where such gold or silver cannot be worked apart from such base metal, and the value of the gold or silver exceeds the cost of producing both such precious and base metal;

(b) any other metal (not being a base metal) declared by proclamation ... to be a precious metal. . ."

(own emphasis).

"Ores " were not defined. It will be seen that the definition of "precious metals" provides for two cases, one where gold and silver is not intermixed with a base metal, and the other where they are. The phrase "and their ores" relates only to the first case, which means that that phrase does not relate to the case where precious and base metals are fount in combination. Accordingly,

if the original 1908 definition is applied, the reasoning of the Court a quo cannot be correct, as it postulates that the ores do include base metals.

Where the value of the gold and silver exceeded the costs of producing all metals including base metals, the Governor could in terms of s 120 apply the provisions of Part II of the Act (sections 10 to 118) to the land. If that were done the rules relating to the mining of precious metals would apply. If the base metals could be mined separately, the proclamation would not affect the rights of the base metal holder. If they could not be worked separately there was no provision that the miner for precious metals could simply pocket the base minerals also mined by him. The Act was silent on that question.

It should further be noticed that as ores are mentioned in both

definitions, an ore of gold or silver is a precious metal and an ore of a base metal is a base metal. But where the same lump of ore contains both precious and base metals it could hardly be exclusively a precious or a base metal, an unacceptable result, because of the different regulations for the mining of the two classes of metals. Here again the 1908 definitions do not accord with the Court a quo's finding that an ore containing a combination of precious and base metals is a precious metal.

The 1934 Act, upon which the Court a quo particularly relied, inserted new definitions. "Base metal" was defined to mean:

> "any mineral substance other than precious metals or precious stones as defined in section 116 of the Precious Stones Act, 1927 (Act 44 of 1927) or water."

"Precious metals" were:

> "(a) gold, silver, platinum, iridium and all other metals of the

platinum group and the ores of all the said metals;

(b) any other metal declared ... by proclamation ... to be a precious metal . . .:

Provided that in the event of such metals being mined in combination with a base metal the provisions of S 120 shall apply." (own emphasis).

Again "ores" were not defined.

"Ores" were no longer mentioned in the definition of "base metal." The reason was no doubt the great width of the definition. It was so wide that it was thought necessary to exclude water expressly: Finbro 1985(4) SA 773(A) at 805 E. The ore of base metals would fall under that broad definition. But as the definition of "precious metals" was not as extended, it was necessary to make specific mention of ores containing those metals. However, despite some rewording, the two cases contained

in the 1908 definition were retained, precious metal ores not containing an admixture of base metal, and ores in which the same was present. The line of division between those combinations rich enough to be treated as precious metals and those which were not, was no longer contained in the definition, but in the proviso, which referred the determination to s 120. The line itself was changed, in s 120, it now being if "the gross value of the precious metals won or recovered exceeds that of the base metal won or recovered by twenty five per cent over a period of three successive years." But what is important for present purposes is that, as in 1908, the ores of the precious metals did not include those ores in which precious and base metal were found in combination.

Nor again was there any suggestion that where a combination ore

was worked the holder of precious metal rights might retain base metals won (where Part II of the Gold Law was made applicable by proclamation) or that the holder of base metal rights might retain * precious metals won (where Part II was not made applicable and he chose to mine): even though in each case the holder was entitled to work ores containing the other holder's metals.

I therefore conclude that the questions posed in para 1.1 earlier in this judgment should be answered as follows. The holder of precious metal rights referred in para 1.1.1 could mine ore containing base metals. However, in answer to para 1.1.2, he was not entitled to retain and sell the base metals won. Accordingly I am of the view that the Court a

quo erred in regard to the important para 1.1.2, Interpretation Of The 1966 Cession In Terms Of The Gold Law (para 1.2

above)

In the light of what I have just found the substratum of the Court a quo's first basis for interpreting the cession in Rustenburg's favour falls away. Even if the cession were to be interpreted not according to its own terms but so as to conform with the rights which the State could give in a mineral lease (which I very much doubt), the State could not give the rights of the base metal holder to the holder of the precious metal rights.

Indeed, if the cession is interpreted according to the usual principles, even if against the background of the Gold Law, it seems most unlikely that the construction found by the Court a quo was intended. One has only to take the case where the value of copper and gold in an ore is equal and ask whether either the cedent or the

cessionary could have intended that the latter would be entitled not only to the gold but the copper as well, where the two were found in intimate association. The answer is to my mind obvious.

A primary rule of construction is that words are to be given their ordinary and natural meaning. The qualification to the rule is that if the ordinary meaning leads to an absurdity, or to something which, from the instrument as a whole it can clearly be gathered that the parties could not have intended, a Court is justified in departing 6om the literal meaning: Gravenor v Dunswart Iron Works 1929 AD 299 at 303. Giving their ordinary meaning to the words "the rights to precious metals," they do not mean that there is to be added "and the rights to such base minerals as are present in the ore containing precious metals," which is really the respondents' case. Nor is there anything else in the cession to indicate

that the parties intended to include those words, never mind a clear indication to that effect.

Accordingly I consider that the Court a quo erred in regard to para 1.2 as well.

Interpretation Of The 1966 Cession In The Respondents' Favour Without Resort To The Gold Law (para 1.3 above).

The Court a quo held that in the absence of an express term in their favour the appellants had to rely on an implied term that the holder of the base mineral rights co-owned ore severed by the holder of the precious metal rights, and that they had failed to prove such a term. In this I think the Court erred. The appellants did not need a term at all. Their rights stem from the rights of the original landowner, and after 1925 from the separated right to minerals, to which Pyramid is the

successor, minus only what passed to Rustenburg in 1966. The cession in that year did not even purport to affect the residual mineral rights. It dealt only with the rights to precious metals. Rather it is incumbent on Rustenburg to prove an implied term (if it were conceivable) or establish a construction to the effect that in the course of acquiring the precious metal rights it succeeded also in confiscating the base metals.

In this Court the respondents placed their emphasis on the two arguments which I have listed as 1.3.1 and 1.3.2. I shall deal with each of them in turn.

Derogation from the precious metals grant (para 1.3.1 above) Although in this Court Mr Shaw, for the respondents, disavowed a reliance upon the principle qui prior est tempore potior est jure (I shall deal with it briefly below), this part of the argument still resonates what

has been relinquished. The argument is that because "the rights to precious metals" entitles the respondents to mine platiniferous ore also containing base minerals it would constitute a diminution or reduction of the right if the respondents were to be prevented from extracting and refining for their own benefit the base minerals which they have mined. For some reason the precious metal rights have a superiority over all others. I have difficulty with this argument. The two sets of rights were created simultaneously when the 1925 rights were split, and there is no reason why the substraction should have a paramountcy over the remainder, why one slice of the cake should contain all the cherries.

So much for the argument on principle. That the regime contended for by the respondents cannot be the correct one is indicated by the near-absurd results to which it leads, results which it was accepted

in argument would ensue. In the examples following it is postulated that the metals cannot be mined separately. Suppose that only platinum rights had been ceded in 1966, and gold was also present. The cedent would be prevented from mining the gold, and the cessionary would be entitled to mine it and take it. Or suppose that the copper in the ore was worth R8m and the platinum worth only R2m, and that there had been a cession of precious metals rights in 1966, as in this case. The cessionary could prevent the cedent from mining the copper and could, indeed, appropriate it for himself. I do not suggest that the latter example is illustrative of the facts in this case, but it may be legitimately considered in testing the principle.

The respondents sought to bolster their argument by reference to Coronation Collieries Ltd v Malan 1911 AD 586 which is authority for

the proposition that a grantor may not derogate from his grant (see Innes J at 598-9). But the circumstances were wholly distinguishable. A right to mine coal had been granted to Witbank Colliery, and subsequently the right to run a tramline over the surface was given to another. The consequence was that the authorities prohibited coal mining in areas beneath the tramline and adjacent strips. The Court held that the later grant was an actionable derogation from the coal mining grant. This is in reality an application of the qui prior est tempore principle, and is of no assistance in this case, which is not concerned with a subsequent attempt to detract from a right conferred, but with the content of rights simultaneously defined upon the splitting into two of a pre-existing right. The question is one of construction of the act of splitting, and no derogation from a grant is involved.

Accordingly I do not think that there is substance in the first argument, referred to in para 1.3.1.

Ancillary right necessarily implied (para 1.3.2 above)

A reservation or grant of mineral rights by implication includes all ancillary rights incident to the grant, being those that are directly necessary to the enjoyment of the thing granted: West Witwatesrand Araes Ltd v Roos 1936 AD 62 at 72: Hudson v Mann and Another, supra, at 488 C-D. What the respondents' argument amounts to is that to give full effect to their right to precious metals it is necessarily ancillary that they be allowed the confiscation of the base minerals. That is not how the argument was put forward, but that is what it amounts to. It is a novel proposition not supported by any authority of which I am aware. Such authority as there is is to contrary effect.

What is necessarily ancillary must depend on the facts of each case. An interesting example is provided by Borya v Canadian Pacific Railway Co and Another [1953 [1953] AC 217 (PC). The right to "ail

coal, petroleum and valuable stone" had been severed. Overlying a petroleum deposit was a pocket of natural gas which had remained in the ownership of the landowner. He claimed an injunction restraining the working of the petroleum deposit in such a way as to waste or interfere with his natural gas. Although no express power to mine the petroleum had been given Lord Porter held (at 232).

> "A reservation by a landowner of the mines and minerals or, indeed, in specific terms, of petroleum, is meaningless unless it is accompanied by the right to work and to recover the substance reserved. . . . Under these conditions, ... the reservation must imply a right to work."

Further (at 230) his lordship held that even if the position were

that the landowner was entitled to work for and recover the gas, and the petroleum rights holder separately the petroleum (I do not propose going into why there was said to be a doubt about this): "it does not follow that neither can act without the consent of the other and that only by mutual agreement can they work at all." The injunction was refused. It should be noticed that the petroleum rights holder allowed the gas to escape to waste and made no claim to appropriate or sell it, so that this case is authority for the proposition that one is entitled to mine one's own even if that may adversely affect the position of a another rights-holder. This entails, in my view, that if mining reasonably conducted leads to the loss or destruction of minerals to which another has a claim, that other may have to accept the position. But the case is not authority for the proposition that a person entitled to one set of minerals may appropriate,

in the course of his mining, minerals to which another has a claim.

An instructive South African case, which was not referred to below or in the heads in this Court, is Geduld Proprietary Mines Ltd v New Springs Collieries Ltd 1934 TPD 104, a decision by Tindall AJP and Greenberg J. The plaintiff owned land which was leased to the defendant for coal mining. Underground water which seeped into the workings had remained the property of the plaintiff. In terms of the mining lease the defendant was entitled, "to pump out the water that may be found in the coal mines and to let it flow away." The Court held that it was a necessary implication of the lease that the defendant was entitled to use so much of the water as it needed for mining purposes. But in addition the defendant was pumping more water than was necessary for its mining, and leading it off the property, after which it was sold for the

defendant's benefit. The Court further held that the lease was not to be construed so that the plaintiff had abandoned ownership of this water to the defendant. This case is a clear illustration of the principle that a mineral rights holder is not entitled to remove from the ground more than is granted to him. I do not think that the fact the lease made express mention of letting the water flow away affects the position, nor the fact that the decision to some extent turned upon the meaning of the relevant clause. As it happened the further stuff that the defendant removed was water, which is not ordinarily classified as a mineral, but in my opinion that makes no difference. If he may not remove water because that is not a necessary incident to his coal mining rights, he also cannot remove other minerals which are not the subject of that right.

The only case of which I know (long since delved up by my then

leader Rex Welsh QC) which deals expressly with the extraction of a mineral not falling within the terms of a mining right is the old English case of Rogers v Breaton (1847) 10 QB 26 at 56: 116 ER 10 at 22: 17 LJQB 34 at 42. It has to us an exotic tone, being concerned with the laws and customs in Cornwall, where mining has been carried on since ancient times. Nevertheless it can be rendered comprehensible, and is in my opinion relevant to our problem. For some background I refer to Halsbury 4 ed vol 31 para 821, which reads in part:

> "In Cornwall, as elsewhere in England, prima facie, the ownership of a mine is vested in the owner of the freehold. This right of ownership is, however, modified by the custom of tin-bounding. Under this custom, if a tin mine lies within waste land or inclosed land in which the custom was exercised before inclosure and either is the property of an individual or forms part of one of the seventeen ancient assessionable manors, and is not worked by the the owner of the surface, a tinner may give three

> months' notice to the lord of his intention to cut tin-bounds. During the three months the owner may himself cut the bounds for his own use. If he does not do so, the tinner may, at three successive Stannaries Courts, cause proclamation to be made of the limits of the bounds . . ., and, if no objection is successfully made, the court awards a writ to the bailiff of the court to deliver possession of the tin-bounds to the tin-bounder, who thereupon has the exclusive right to search for and work all tin and tin ore within the bounds on paying to the owner of the soil one-fifteenth of the mineral worked, except in places where by special custom a different share is payable."

Contrary to the popular usage a "bounder" is "one who occupies a bound of tin-ore ground" (Shorter OED). According to the same dictionary "stannary" means "the districts comprising the tin mines and smelting works of Cornwall and Devon formerly under the jurisdiction of the Stannary courts; also, the customs and privileges attached to the mines." The Latin for tin is stannum.

Lord Denman CJ, in the course of considering the reasonableness of a stannary custom in Rogers case, remarked (at 49-50 of the original report) that according to the law of England the landowner owned a tin or copper mine in England, but that the custom of bounding had been engrafted on this ownership (the nature of the custom appearing from the passage quoted from Halsbury). Later, while still dealing with the same issue his lordship remarked (at 56-7):

> "This [a writ of possession issued by a Stannary Court], therefore, throws no light on the legal character of the bounds, nor proves that any possession of the land passes. One test perhaps may usefully be applied. It is well known that the stannary customs, as the name imports, were confined to tin only; copper mining is of comparatively modem introduction into Cornwall; it is now discovered that the two metals are frequently found within the limits of the same work: but we apprehend that it never has been contended that the bounder merely as such, working a tin mine and extracting copper from it with the tin , has any

> right to the copper. If not to the copper, how can it be argued that he has any right except to the tin which he does extract, and to that which he may extract so long as he remains bound-owner, ..." (own emphasis).

Mutatis mutandis I think that this case provides clear authority that a right to mine one mineral does not authorize the taking of another with which it is found in association. It is also of interest to read that the problem facing this Court was already well known in England a century and a half ago, as is evidenced by the editorial note to the case, prepared with the assistance of Mr Edward Smirke (one of the counsel) at 67-8 of the original report:

> "The custom nowhere provides for the occurrence of veins of mixed metals, but is evidently adapted only to the superficial tinworks, formerly [68] very productive, called stream works. Mines are now worked indiscriminately for tin, copper, and such other metals as may be, and often are,

> combined in the same lode. The separation of them is a process of some nicety; and one mineral is sometimes sacrificed for the sake of the other. The adventurer avoids any question by taking a lease or licence from all parties interested in the different minerals: but the bounder, who relies upon the custom alone, must either claim, under that custom, a right to deal with, and, if need be, destroy the property of another, or must work at the peril of becoming an involuntary wrongdoer by detaching from the vein a metal which does not belong to him, and which was not the object of his search."

I do not think that the suggestion that another's mineral may not be touched is in all cases consonant with our law, but the apparently established rule against appropriating the same is.

The relevant aspect of the English law regarding the implication of ancillary powers is summed up by Halsbury (op cit) para 183 as follows:

> "To an express right of working is probably incidental

> the right to deposit minerals and spoil on the surface, or, in the case of a quarry, to deposit spoil upon the grantor's adjoining land; and an express right to work implies a power, so far as it necessary for winning and getting the minerals, to remove overlying strata and intermixed minerals (footnote 7 - Robinson v Milne(1884) 53 LJ Ch 1070 at 1074 per North J), but not to appropriate intermixed minerals or minerals in overlying strata (footnote 8 - Rogers v Brenton (1847) 10 QB 26 at 56, per Lord Denman CJ (intermixed minerals); Goold v Greaf Westerm Deep Coal Co 1865) 2 De GJ & Sm 600 at 608, per Lord Westbury (overlying strata) unless they are of the nature of spoil."

This passage offers sound guidance. Unlike the Netherlands, England has been engaged in mining from a time before the Roman occupation. Much experience of mining problems and their solution has been gained, and it is not surprising, therefore, that we have copied copiously from English mining law in the past. Not that we would not reach similar conclusions on our own, in time. But timely borrowing

may shorten the process.

I conclude that on a true construction of the 1966 cession, its expressed and ancillary powers, the respondents are entitled in the course of their mining of precious metals in a reasonable manner, to extract ore also containing base metals and minerals: but that they are not entitled to appropriate base minerals and metals later separated or refined for themselves.

That deals with para 1.3 above.

Insofar as anything I have said may conflict with what is stated in the Borys case, supra, at 229-230, I disagree with the decision.

It remains to add that on the evidence it is necessary, at least to a large extent, for the respondents to extract minerals to which the appellants are entitled in the course of legitimate mining of ores that are

polymetallic to their core.

Qui Prior Est Tempore Potior Est Jure (para 2 above).

As stated above, Franklin and Kaplan (op cit) 142 suggest that the problem can be solved by the application of this principle. Because Rustenburg acquired its rights before the appellants acquired theirs, Rustenburg is supposed to have priority. This argument did not find favour with the Court a quo, does not find favour with me and was not overtly persisted in in this Court.

The appellants' rights were not created when they acquired them in 1989 and 1992 respectively. They were created when mineral rights were reserved in 1925 and split in 1966. In this respect the case differs from that of double sales where the rights are created by the very sales which are in competition, and which succeed the one the other: or

mortgage bonds registered against the same property at different times. What happened in 1966 was not the creation of a right, merely the division of an existing right, as I have already sought to explain. Could The Grant Of The Mining Lease To Rustenburg Deprive The Appellants Of Their Rights? (para 3 above).

This point was at best faintly argued in this Court. As the lease was granted in 1991 we are concerned no longer with the Gold Law but with the 1967 Act. Much has changed, but in my opinion no fundamental affecting this case. The argument based on the phrase "and the ores of any such metals" in the definition of "precious metals" in s 1 is revived to obtain the same goal by a different path, but with no more success. Particularly given the history of the definition I do not for a moment think that it contains, while concealing, an implied confiscation

of base metal and mineral rights. The Act nowhere else provides for the confiscation of those rights in favour of the precious metals grantee. Expropriation is provided for in s 183, but that section has nothing to do with this case.

The argument of the respondents is again that they are entitled not only to mine but also to retain base metals and minerals, this time by virtue of a lease to that effect granted by the Minister. The simple answer to the argument is that the Minister is not entitled to take from one holder to give to another. For instance, if one holder is entitled to gold and another to silver, the Minister is not entitled to confer on the former the right to mine and retain both metals. The respondents argue that under the Act the appellants may not even use the surface without the necessary permission, may not prospect without satisfying the

prerequisites therefor, and may not mine without a permit or lease. All that may be, but I fail to see what is has to do with the matter.

In one respect I consider that the appellants' argument goes too far - that the Minister was not entitled to grant the lease at all, as the ore which was its subject included base ore. For reasons already given and which I am about to give I do not think that the appellants are entitled to insist on the sterilisation of the ore.

I would answer the question in para 3 adversely to the respondents.

<u>If The 1966 Cession Means That There Are Competing Rights, How Are The Problems Arising Out Of Such Competition To Be Resolved?</u> (para 4 above)

After a lengthy discursus we have now arrived at the real problems in the case. They are novel and they are not easy. In 1966 Rustenburg

became the holder of "all rights to precious metals". Pyramid is the holder of all other mineral rights. From these simple facts have to be derived the answers to the various practical and theoretical questions that do arise. Not that I propose giving definite answers to questions, either practical or theoretical, which do not arise. It is in no punning sense that I observe that one here moves in a minefield. For that reason it would be particularly undesirable to attempt to resolve matters which have not been squarely raised, and which have not been fully argued.

We are concerned with two real rights in the same land, neither of which, as I have sought to demonstrate, is in its nature prior or superior to the other. Whatever difference of formulation there may be in English law, that is also the unstated premise in Rogers' case, supra, more narrowly exemplified by the proposition that the person entitled to the

copper retains his rights, despite what may be a legitimate disturbance of the intermixed ore by the bounder.

The problems start when the ore is separated from the earth so that it becomes susceptible for the first time of separate ownership as a corporeal movable. Such separation may be effected by one or both of the mineral rights holders acting in concert (which creates no problems), or by either without the consent of the other, or by the landowner or a stranger acting without their consent, or even by natural forces of tempest, earthquake and the like. Conceivably the legal consequences of separation may depend upon how it takes place and by whom. In this case we are concerned with one mineral rights holder effecting the removal without the consent of the other. When this happens it seems to me that any separate new rights that arise are to be stamped with their

common origin. That is the full ownership of the land that once vested in one person , and the subsequent separation of the rights to minerals by one and the same act, nascent within which was the prospect that there might yet be severance of ore and competition as to its utilization.

I should make it clear that I am addressing only the case where the minerals cannot be mined apart, the impossibility of doing which creates the problems in this case. Where the separate ores of different minerals are extracted by a miner who is entitled to only one or some of them, I take it to be clear that he must set aside those to which he is not entitled.

When one casts about for a figure of our law which solves the problems of who is entitled to what, several possibilities present themselves, but none is an immediate and inevitable choice. They are,

some sort of co-ownership, a jus in re aliena, a right supra genenris, a personal right fortified by Aquilian liability, unjust enrichment and exclusive ownership on the part of the mineral rights holder who severs. The Court a quo opted for the last alternative. Before trying to force the facts into any of these boxes it may be apposite to seek to derive some guidance from the nature of the subject under investigation.

First, with regard to the right to mine and refine. I agree with the statements in the Borys case, supra, that a right to a mineral is rendered worthless if it does not carry with it the right to extract, and that where the exercise of that right leads to the loss of a mineral to which another is entitled, this is to be countenanced if it is necessary (and, I would add, reasonable in the circumstances). Nor do I think that our law has particular sympathy for the dog in the manger. So that in a case such as

is before us, where one set of minerals can be profitably extracted, and the other not (at least not on its own), I think the answer is plain: Lebowa is entitled to mine and refine. (That answers the question in para 4.5 above). What should happen when both sets of ores are economically exploitable and both holders wish to mine does not arise in this case.

Secondly, it seems to me to flow inevitably from the circumstances in which the competing rights originated that each must be exercised civiliter modo, broadly in the sense that the phrase is understood in the law of servitudes. Each party should exercise his rights in a civil fashion. His object should be to use his own rights so as to obtain a profit, but in manner least likely to harm his "neighbour." This does not mean, however, that he must always choose the least injurious course.

That course may be impractical or too costly, so costly even as to render exploitation unprofitable. He should never act so as simply to harm or spite his neighbour. He, on his part, should be prepared to suffer those disruptions of his rights, even damage to or the destruction of them, which it is reasonable that the other party should impose.

The particular physical and geological conditions in any case, grades and depths of ores, the nature and degree of mixing of minerals, available extraction and refinement technology, the state of markets from time to time and the discovery of new ore-bearing deposits may be relevant to what behaviour is civil and what is not. For instances where the other man's ore can be set aside, that should be done, as I have indicated already. Where separation can be achieved only at a later stage, as is largely so in this case, then separation must await that later

stage. If mixing of ores from different sources is necessary, as on the evidence it is in this case, then there may be mixing. (That answers the first part of the question in para 4.6 above, in relation to ores. As regards the second, the appellants have not established that the mixing of concentrates at Rustenburg is unreasonable, so that that part of the question must also be answered favourably to the respondents).

Thirdly, the very fact of the opposed parties having rights to different minerals means that the crucial question in para 4.7 above must be answered adversely to the respondents. They may not, without more, sell the refined base mineral by-products for their own exclusive benefit. Rogers,case and the Geduld case, both support that conclusion. To what, if anything, the appellants may be entitled is not a matter raised in this case, which Mr Grobler, for the appellants, says is intended to be

used as a springboard for a claim for money or metals, if success should attend the appeal.

At this stage already it becomes apparent that what I regard as the practical questions in the appeal have been answered without elevated jurisprudence or compressive classification. What remains of para 4 is sub-paras 4.1, 4.2, 4.3 and 4.4. One of them, 4.3 can be disposed of without ado. If the Umkoanesstad ores are mixed with other ores, any co-ownership with the respondents which the appellants may have had was lost by commixtio, which loss was exacerbated, if that were possible, by the later mixing of the concentrates at Rustenburg. A new co-ownership may arise out of the commixtio (see Lee and Honore Family, Things and Succession 2ed para 325) but that subject was not explored in the appeal. Question 4.4 was never given content or definition,

despite invitations in argument to do so. Insofar as it begs an answer I think I have already provided one in describing the content of the parties' competing rights. In so doing I have also answered question 4.1. What I have not done, so far, is to give anything a name. There remains only question 4.2, whether Pyramid became co-owner of the ore severed by Lebowa before it was mixed. As things stand now it seems to me to be suspect as an academic question. Not that it was intended to be academic. The main thrust of the appellants' case appears to have been that if they could establish co-ownership in the classic sense they could as a consequence halt mixing of ores, their subsequent treatment and the subsequent sale of their proceeds: a true thrust at the jugular. I have demonstrated, I believe, that the appellants cannot stop mixing. As far as sale is concerned I have further demonstrated, I believe, that there

cannot be sale without accounting. Non constat that there cannot be sale with accounting in some form or another. I shall return to this subject. All of this leads me to the conclusion that even if co-ownership of a kind be established, one should beware of the error against which Van den Heever J warned intermittently, for instance in Van der Westhuizen v Engelbrecht and Souse . Engelbrech v Engelbrecht 1942 OPD 191, where he said (at 200), "(to) deduce the legal results of a juristic act from a notion used as a label roughly to express its degree or direction of effectiveness, is a logical perversion."

Whilst continuing to bear this warning in mind I address categorisation in order to answer the question in para 4.2. Earlier in this judgment I have listed what seem to be the theoretical possibilities. As regards the last, exclusive ownership by Lebowa, it was adopted by the

Court a quo because of the construction it placed on the 1966 cession, not because of any common law right. Approaching the matter as one of common law, it seems to me that there is no basis for such exclusive ownership. It would involve that merely because the one rights-holder moved first in severing ore he could extinguish the other holder's rights and acquire them for himself. This smacks of the acquisition of ownership by seizure, a mode of acquisition not previously recognised. In this respect I differ from my Brother Plewman, who regards this as a by-products case. The respondents cannot simply ignore the appellants' rights.

Nor do I think that the solution is to be found in unjust enrichment, a basis of liability not advanced at all by the appellants. Unjust enrichment must be about the last arrow in the quiver of

remedies, and I do not think that it provides the answer here. There is a better and more specific answer.

A personal right against Lebowa to prevent certain actions and obtain some part of the proceeds would go some part of the way towards attaining equity, but it would exclude remedies against a third party, for instance one without permission removing ore already mined.

A just re aliena would cope with this problem. The theoretical basis for it is that upon severance by Lebowa, Pyramid's real right in the landowner's immovable becomes converted into a new real right, now in Lebowa's movable. But it would be a strange form of jus in re aliena, a real right in another's movable which one does not possess. Apart from statute and some long-discarded hypothecs such a thing is not known to our law. I do not think that this is the solution.

That leaves a form of co-ownership, or a right sui generis. It must be said at once that if the result of severance by one of the rights-holders is co-ownership of the ore, it is an unusual, even atypical manifestation of that institution (pace van den Heever J). I say that for the following apparent reasons (which may not stand up to analysis). First, co-owners have the same rights in the same thing, even if each is entitled only to a share: van Warmelo Die Geskiedkundige Ontwikkeling van Mede-Eiendom in die Romeinse en Romeinse-Hollandse Reg(1950) 13 THR-HR 205 at 208: Silberberg and Schoeman The Law of Property 3 ed 310. Here, it may be contended, the two parties do not have interests in the same thing, but in different things, precious metals, and base metals and minerals. However this distinction does not stand up to analysis. The parties can as little take delivery of and acquire ownership of their

separate entitlements as they could when the ore was still in the ground. It is only when the ore has been reduced to its constituents that delivery can be taken. So that while the ore remains ore co-ownership is compelled. This point of distinction therefore becomes a point of identification. Secondly, whereas the shares of co-owners are ordinarily determined in advance, whether by agreement, contribution, or act of testation, the shares of the parties can be determined only after the constituents of the ore have been refined. This is an apparent point of distinction, but I suppose it can be abated by recognition that spouses married in community of property may by contract regulate their sharing of profits in a way that can only be determined in the future: so that one must not be too dogmatic about what the law recognizes as co-ownership and what not. Thirdly, a co-owner does not normally have the jus

abutendi. Thus he may not sell a forest or the saleable stone on the joint property. But here again such acts would be permissible with consent. The act of separation in 1966 impliedly contained just such a consent - to mine. Fourthly, a co-owner usually has a right of veto when another wishes to alter the nature of the property, whereas I have concluded that the one party cannot stop the other mining if it is reasonable to mine. But here also I do not see why co-owners should not agree to government by the majority or even by an autocrat. The remedy if one does not like it is to sell.

Further examples of atypicality may be given, but as the points are analysed one by one it becomes apparent that none of them, nor all of them together, necessarily contradict the existence of ownership in common, which is the possibility under investigation.

The respondents have emphasized another reason why they say co-ownership could not have arisen - that ownership can only be acquired by that mineral rights-holder who severs ore intending to become its owner. The holder who does not sever, himself or through another, even though he is entitled to do so, acquires no rights, so the argument runs.

As I have indicated before I do not propose to deal with severance effected by third parties or caused by forces of nature. It thus becomes unnecessary to consider the nice distinctions drawn by Voet 7.1.28 between the usufructuary and the bona fide possessor, concerning entitlement to fruits not gathered by or for him. Nor do I find helpful Voet's statement that the usufructuary who does not himself gather (or through another) has no entitlement to fruits.

In the act of separation in 1966 there was a contemplation by each

party that the other might mine or mine first. There is no reason to think that either intended that upon that event he abandoned his rights in advance. Rather the intention must have been that upon severance his rights in the land would be converted into rights in the ore. It has been argued, and I think that the argument is correct, that in 1966 already,

> contingent intentions were formed, by the landowner to transfer ownership of severed ore to the holders of the mineral rights, and by each of the latter to receive such ownership. The contingency was severance. There was no intention thereby to create a res nullius inviting appropriation by the first comer. In principle the case is little different to A and B agreeing on the telephone that B will buy a table yet to be made from A, and will call to collect it in A's absence in a weeks time, after its manufacturer has placed it in A's house also in his

absence. Upon B's collecting the table ownership will pass.

Accordingly I conclude that Pyramid and Lebowa become co-owners upon severance. Even although this is an unusual manifestation of co-ownership, it is co-ownership nonetheless, so that it become unnecessary to consider the last possibility postulated, a right sui generis.

To what relief this leads we have not been asked to decide. Nor in consequence has the subject been properly explored in evidence or argument. For those reasons, as also for the reason that statutory change may render a result in this case academic in the future, I intend giving only the most general (and non-binding) indication of how the problems might be solved so that the matter may be somewhat rounded off.

Where co-owners cannot agree on the manner of partition, a court has a wide discretion in ordering the form of partition (Robson v Theron

1978(1) SA 841 (A) at 855- C-D: Lee and Honore Family, Things and Succession 2 ed para 363). As ore that is mined is not replaced, its mining does amount to a distribution of the capital asset which is co-owned. It seems to me that the discretion should be exercised in an unusual manner to meet this unusual circumstance. I have held that Lebowa may mine, mix, concentrate and refine. May it also sell the base products? I think it may. The circumstances of the case are such that Lebowa has assumed the task of exploitation, and as things stand now it is the only one who will do so. It would be unreasonable to allow Pyramid to prevent it: cf Erasmus v Afrikaner Propietary Mines Ltd 1976(1) SA 950 (W) at 958-9. To cut off the last stage of exploitation, sale, would be unrealistic. Moreover, to require all the copper, nickel, sulphuric acid and so forth to be handed to Pyramid after refinement

would complicate matters even more; because of one thing I am sure, and that is that Pyramid can as little appropriate the refined base products, refined at the expense of the respondents, as the respondents can appropriate the same without any recognition of the appellants' rights. Pyramid would have to account to the respondents in minerals or money for their beneficiation of the ore.

The practical answer appears to be to allow the respondents to sell, subject to rendering an account to Pyramid. Such an account might include on the debit side at least direct costs, overheads properly apportioned, and capital, prospecting and development costs, the latter suitably amortised. Not that that is necessarily the end. Leonine partnerships constituted by agreement occur more frequently in the old books than in present day practice, and I see no reason why the law

should impose a relationship in Pyramid's favour of all profit and no loss. Put in a rather different way, the entrepeneur's way is fraught with uncertainty. He has to take risks. It is not necessarily all profit and no loss. Mining is no exception. In some manner these realities must also be taken into account. The result in this case may be that Pyramid gets little or even nothing. My Brother Plewman may turn out to be correct in his ultimate conclusion, but I do not agree with the route by which he reaches that conclusion.

If there is to be an accounting in this form, then a necessary prior step may be an account of quantities being mixed at various stages, without which it would not be possible for Pyramid to establish its rights. Records reflecting figures have not been demanded, so that there is no need to deal with this question in the relief.

It may be that the whole basis that I have outlined is inappropriate, and that even at common law the matter should be approached on a market value basis, such as is contemplated in s 5(3) of the Minerals Act 50 of 1991, ("the 1991 Act"), which applies in what was Lebowa from 1 May 1995 by virtue of the Mineral and Energy Law Rationalisation Act 47 of 1994 and Proclamation R 46 of 1995 (GG 5498 of 28 April 1995). The subsection reads:

> "Any person mining any mineral under a mining authorization may, while mining such mineral, also mine and dispose of any other mineral in respect of which he is not the holder of the right thereto, but which must of necessity be mined together with the first-mentioned mineral: Provided that such person shall compensate the holder of the right to such other mineral for his mineral to an amount mutually agreed upon or, if no agreement can be reached, to an amount determined by arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965), or by any competent court if the last-mentioned person prefers the last-mentioned procedure: Provided further that

> in determining the last-mentioned amount, section 12 of the Expropriation Act, 1975 (Act No. 63 of 1975), shall mutatis mutandis apply as if an expropriation of property or the taking of a right has taken place in terms of the last-mentioned Act."

Dale and Kaplan A Guide To The Minerals Act 1991 express the view in paras 6.12.3.1 and 2 that if the "secondary mineral" is not worth exploiting on it own it has no market value, even though it has a value to one exploiting the "primary mineral." It is not necessary for me to decide this question (I shall explain why later) but I am not sure that this opinion is correct, because the rights to the secondary mineral may have a value nonetheless, based on a right to an account and payment, in the form that I have suggested above. The Position After 1 May 1995 (Para 5 above)

On appeal before this Court the appellants have sought to amend

their notice of motion to include relief based on the 1991 Act from 1 May 1995. It is not competent to grant such relief, by virtue of the rule that a statute passed while a case is pending, does not, whether or not it be retrospective, affect that case, which must be decided according to the law as it was when the case commenced, all this unless the statute evinces a clear contrary intent: Bell v Voorsitter van die Rasklassifikasieraad en Andere 1968(2) SA 678(A) at 684 E. In this case no such intent is expressed. Accordingly this part of the amendment cannot be granted. The Relief

The application to amend mentioned provides also for a reformulation of the original relief. The effect is to cut it down. There is no opposition to this amendment.

In the result:

1. The application to amend the notice of motion by replacing the existing prayers with paragraphs 1 and 3 of the "Konsep Hofbevel" attached to the appellants' heads of argument is granted. Any wasted costs caused are to be paid by the appellants.

2. The application to amend by inserting paragraph 2 of the said draft order is refused. The appellants are to pay the wasted costs (if any) of the application on an opposed basis.

3. The appeal is allowed with costs.

4. The costs referred to in paras 1, 2 and 3 are to include those consequent upon the employment of two counsel.

5. The order of the Court a quo is replaced with the following:

"Dit word verklaar dat -

1. die mineraalregte vermeld in die notariële prospekteerkontrak K4439/89PC en die mineraalregte verkry deur die tweede applikant uit hoofde van die notariële sessie van mineraleregte K557/93RM, aangegaan tussen tweede applikant en eerste respondent (hierinlater na verwys as 'die regte op onedele minerale/metale') ten aansien van erts wat deur die houer van regte op edele metale en/of die derde respondent in, op of onder die plaas Umkoanesstad, 419, registrasie afdeling KS, Transvaal losgemaak en gemyn was omvat het dat:

1.1 Die tweede applikant die mede-eienaar van sodanige erts was maar sonder dat al die gewone gevolge van mede-eienaarskap noodwendig daaruit afgelei moet word;

1.2 Die tweede en/of derde respondente nie geregtig is om vir homself/hulself die onedele minerale/metale afkomstig uit sodanige erts, toe te eien en vir eie voordeel of rekening te verkoop nie, sonder inagneming van die applikante se regte met betrekking tot die erts;

2. Die tweede en derde respondente word gelas gesamentlik en afsonderlik die applikante se koste te betaal, insluitende die koste van twee advokate."

W P SCHUTZ

JUDGE OF APPEAL

Case No 609/94

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION) In the matter between: TROJAN EXPLORATION COMPANY
(PTY) LTD First Appellant
PYRAMID PLATINUM LTD Second Appellant
and
RUSTENBURG PLATINUM MINES LTD First Respondent
LEBOWA PLATINUM MINES LTD Second Respondent
MINISTER OF MINERAL AND ENERGY

AFFAIRS Third Respondent

Coram: BOTHA, VAN HEERDEN, NESTADT, SCHUTZ JJA et
PLEWMAN AJA

Date Heard: 2 and 3 May 1996

Date Delivered: 31 May 1996

JUDGMENT

NESTADT. JA:

The basis on which it was held in Bezuidenhout v

Worcester Gold Mining Company 1 OR 249 (referred to by
Van

Heerden JA) that the defendant had the right to sell the non-gold-bearing stones was the plaintiffs implied consent so to do. It is interesting to note that at 252 the following is said:

> "There may be cases in which the claim-holder does something inconsistent with the rights of the owner, so that it can fairly be maintained that the owner must not be considered to have given up his rights where something out of the common, something that cannot reasonably be presumed to have been contemplated, has happened - for instance, where the claim-holder finds petroleum in payable quantities deep down in the earth. But that would be an entirely different case."

Nor do I think that Roodekop Gold Extraction Syndicate Ltd v New Minerva Syndicate Ltd 1910 WLD 63 is of assistance to the respondents. The relevant right of the lessee was to "treat, remove and recover gold and other minerals from the slimes and tailings". It was held (at 68-69) that the intention of the parties was not to invest the property in these slimes and tailings in the respondents but

to give them the right to extract only the gold from them; but the tailings and slimes themselves could not be removed.

I agree generally with the judgment of Schutz, JA. In particular, I am of the view, for the reasons given by him, that the ores which the respondents mine are not properly to be regarded as exclusively those of precious metals. In any event, and for the reasons given by Botha JA, I do not think that the classification by the witnesses of those ores as precious metal ores is the answer to the problem.

I agree therefore that the appeal succeeds in the terms proposed by Schutz JA.

H H Nestadt

Judge of Appeal

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

TROJAN EXPLORATION COMPANY (PROPRIETARY) LIMITED First Appellant

PYRAMID PLATINUM LIMITED Second Appellant

and

RUSTENBURG PLATINUM MINES LTD First Respondent

LEBOWA PLATINUM MINES LTD Second Respondent

MINISTER OF MINERAL AND ENERGY AFFAIRS Third Respondent

CORAM: Botha, Van Heerden, Nestadt, Schutz JJA et Plewman AJA

HEARD: 2 and 3 May 1996

DELIVERED ON: 31 May 1996

JUDGMENT

BOTHA JA

I have had die advantage of reading the judgments of my Colleagues SCHUTZ and PLEWMAN. For ease of reference I shall refer to the judgment of SCHUTZ JA as "the majority judgment" and to the judgment of PLEWMAN AJA as "the minority judgment".

I agree with the conclusions arrived at in the majority judgment and, in general, with the reasoning leading to those conclusions. I respectfully disagree with the conclusions reached in the minority judgment and with the reasoning underlying such conclusions. That being my position, this judgment will be focused on explaining my dissent from the views expressed in the minority judgment.

At the heart of the reasoning in the minority judgment, it seems to me, lies the notion that the rights to the base metals on the farm are "rights in name only" and that these rights "have no content". It

is said that "this fact" has been overlooked in the majority judgment. In my opinion this notion, to which I shall for brevity refer as the "no content" notion, is logically flawed and unsound in law, for the reasons following.

The "no content" notion seems to me to have its origin in what is posed in the minority judgment as being the crucial question, namely the nature of the ore to which the appellants lay claim. In discussing this question I shall, as was done in the minority judgment, at first leave aside the definitions of the Gold Law, to return to them later. On this footing I consider that the question as posed obfuscates the true issue at stake. It does so by focusing the attention on the ore, while the real issue in the present context relates to the base metals which are contained in the ore and which constitute the object of the rights which are said to have "no content". Of course, while the

metals are contained in the ore they have no separate existence as such; they acquire their ascertainable identity as such only when the ore has been subjected to the processes described in the majority judgment. But in my view this does not detract from the fundamental principle that the rights which vest in Pyramid have as their object the base metals, as and when they are severed from the land and (eventually) come into existence as such. Nor does it matter in the present context that the appellants "lay claim" to the ore which has been extracted by the second respondent. Their claim in this regard arises from the practical exigencies of the factual situation and it raises the question of the ownership or co-ownership of the ore. But that is a different issue, with which I shall deal later. At the moment I am concerned only with the "no content" notion. In this context I consider that the emphasis must fall on Pyramid's entitlement to the

base metals contained in the ore, and that it is inappropriate to place the nature of the ore in the forefront of the enquiry. I say this because the impact of the "no content" notion is not only to deny Pyramid any kind of claim to the ore, but also to deny it any entitlement of any kind to the base metals which are contained in the ore. The sting of the notion lies in its tail, for the plain effect of it is that the entitlement to the base metals, which is the essence of Pyramid's holding of its mineral rights, is to be regarded as totally extinguished for all purposes. The crucial question, in my view, is whether there is any principle of law which can operate to produce such a result.

In the minority judgment the justification for holding that Pyramid's entitlement to the base metals is extinct (via the "no content" notion) is founded, in consonance with the point of departure

that the nature of the ore is the crucial question, upon the classification of ores. It is said that the evidence shows and common sense dictates that ores are classified with reference to the content of this ores which has the most significant economic importance, and not by reference to the by-products of the refining process. This method of classification is the vital link in the reasoning of the minority judgment, for it leads directly to the statement of the "no content" notion. There need be no quarrel with the classification as such, which may be useful for some purposes. However, I am unable to agree with the use; of that classification as a springboard from which to jump to the conclusion that Pyramid's base metal rights have "no content", signifying, as it does, their demise. For this leap in the reasoning I find no explanation in the minority judgment. In my opinion there is no warrant for it.

The linking of the method of classification in the minority judgment to what the evidence shows and what common sense dictates is related to the classification as such. But to illustrate my objections to the jump in the reasoning it may be useful to relate the evidence and common sense to the ultimate result of the whole exercise, which is that Pyramid's entitlement to the base metals has disappeared into thin air. Let me take common sense first. In legal terminology the precious metals and the base metals were owned by the landowner before severance of the ore, and after severance, according to the view taken in the minority judgment, the ore was owned by the respondents, including as it does both the precious and the base metals. But when one is talking common sense it is legitimate to use common parlance. In layman's language there can be no doubt, as a matter of common sense, that before severance the precious metals "belonged" to the

respondents and the base metals "belonged" to Pyramid; yet after severance, on the view taken in the minority judgment, the base metals no longer "belonged" to Pyramid, but to the respondents. To my mind this does not accord with common sense. On the contrary, it offends against my sense of fairness and justice.

Let me turn to die evidence then. In the minority judgment great store is set by the fact that the witnesses classified the ores of the reefs in question as "precious metal ores" or "platiniferous ores" and that they described the base metals as "by-products". In my opinion both the classification and the phraseology are unhelpful as a means to resolve the legal issue of Pyramid's entitlement to the base metals. The descriptive statements by the witnesses are based on the fact that the precious metals are capable of being mined economically whereas the base metals are separately not so capable. The witnesses

were giving expression to a factual situation in a manner which, it may be accepted, is customary within their field of expertise. But it is necessary to state the obvious: the witnesses are not lawyers and they were not purporting to lay down principles of law. And yet it appears to me that in the minority judgment the witnesses' statements have in effect been used as pegs upon which to hang conclusions of law without any further ado. Take the description of the ore as a "precious metal ore". The description does not deny the existence in the ore of base metals as well, nor does it purport to say anything about the rights of the holder of the base mineral rights. But in the minority judgment die description forms the basis of a conclusion of law that Pyramid's entitlement to the base metals is to be ignored. In my view the conclusion is a non sequitur and is one which is not warranted by legal principle. Similar considerations apply to the description of the

base metals as "by-products".

In regard to the description of the base metals as "by-products" I would add some further observations. It appears from the evidence that their value is substantial. Even if the evidence were to be considered as not being very explicit on the point, the principle at stake may legitimately be tested by postulating a situation where that is the case. However, in the minority judgment it is argued in support of the "no content" notion that in the event of an expropriation of the farm and the mineral rights, only a "nominal value" (at best) would be placed on the base metal rights, because it was known that there were no "mineable" base metals present. The validity of this view is questionable, but I do not pause to investigate it, because the argument itself seems to me to be irrelevant. The issues to be resolved in this appeal do not concern the value of the rights to the base metals while

they are in situ. The appeal is concerned with Pyramid's entitlement to the base metals when once the ore containing them has been severed from the land. In that situation the "by-products" may yield very considerable income, but yet the minority judgment would allow the respondents to appropriate all of it for themselves to the total exclusion of any claim or say by Pyramid. In my opinion the law cannot countenance such a result .

The view that the respondents have been confiscating Pyramid's rights is sought to be countered in the minority judgment by saying that its quasi-servitudinal rights remain; although they have, as yet, "no content", they continue to exist "as a pure question of law"; should the situation change at some future time, the ore would have to be reclassified, but not, mark you, retrospectively. I am bound to say that I find this an incorrect line of reasoning, which does not

2 provide an explanation in law for the conclusion that the respondents are allowed to reap the full yield of the base metals without the need of any accounting to Pyramid and in defiance of the latter's entitlement to the base metals.

In my judgment the legal principles by which the issues are to be resolved can be briefly stated as follows. In general, when a cession of mineral rights is effected, both the cedent and the cessionary intend that the transfer of the rights will ultimately result in the transfer of the ownership in the minerals to the cessionary, if and when the minerals are severed from the land. The immediate transfer of the ownership of the minerals is impeded only by the fact that they still form part of the land. That impediment is removed as soon as the ore containing the minerals is severed from the land. A new movable res is then created which is the object of separate

3 ownership. At that moment, in my opinion, the ownership of the ore

vests in the cessionary, as was envisaged in the act of the cession, and this vesting takes place automatically, by operation of law, and by virtue of the act of severance. It does not matter, in my opinion, how or by whom the act of severance is effected, whether by natural forces, or by the holder of the rights, or by the landowner, or by a thief. This is the only way of which I can conceive in which the law can give proper effect to the unique features of the reservation of mineral rights and their transfer as recognized in this country. If this manner of the passing or the acquisition of ownership does not fit into any hitherto recognized niche, a new one will have to be found to cater for it.

On this basis, having regard to the mineral rights in respect of the same ore held by the respondents, my view is that Pyramid became

the co-owner of the ore when it was severed from the land by Lebowa. Thus I arrive at the same result as has been reached in the majority judgment. For the sake of completeness I would add that I agree that Pyramid's rights as co-owner of this ore are attenuated by the fact that the respondents' mixing of the ores and their subsequent processing and ultimate sale of the products constitute, in the particular circumstances of this case, a reasonable exercise of the respondents' rights of co-ownership, to which Pyramid cannot object. But Pyramid's right as co-owner to claim a statement and debatement of an account from its co-owner remains alive and well, even though its enforcement may be attended by the problems referred to in the majority judgment.

Finally, I indicated earlier that I would return to the definitions of the Gold Law, on which reliance is placed in the minority judgment

for the proposition that the ores which the respondents mine are precious metal ores. I do not consider that this aspect of the matter requires any further discussion, in view of what has already been stated above, and in view of the analysis of the effect of the legislation which is contained in the majority judgment.

In the result I concur in the orders set out in the majority judgment.

AS BOTHA JUDGE OF APPEAL

Case number:
609/94

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

TROJAN EXPLORATION COMPANY (PROPRIETARY) LIMITED — First Appellant

PYRAMID PLATINUM LIMITED — Second Appellant

and

RUSTENBURG PLATINUM MINES LTD — First Respondent

LEBOWA PLATINUM MINES LTD — Second Respondent

MINISTER OF MINERAL AND ENERGY AFFAIRS — Third Respondent

CORAM: Botha, Van Heerden, Nestadt, Schutz JJA
et Plewman AJA

HEARD: 2 and 3 May 1996

DELIVERED ON: 31 May 1996

J U D G M E N T

VAN HEERDEN JA :

Save that I do not find it necessary to consider the Gold Law (as amended), I agree with the judgment of Plewman AJA.

In a case such as this the metals - both precious and base - are inextricably commixed with their ores whilst in situ. This situation also obtains when the ore body is separated from the earth and brought to the surface. Indeed, separation only takes place at a later stage during what may be called a refining process.

It seems to me, therefore, that the rights of a person entitled to mine for, say, platinum, cannot realistically be confined to rights to platinum as such. Of necessity they must be rights to the ores containing that metal. The same is, of course, true of a right to, say, copper: the holder's rights extend to the ore body in which copper occurs. It was for this reason, I apprehend, that in s 2 of the Gold Law, as originally enacted, both precious and base metals were defined as inclusive of their

ores.

By way of analogy reference may be made to two cases. In Bezuidenhout v Worcester Gold Mining Company 1 OR 249, the defendant, as a holder of claims, had the right to dig for gold on the plaintiffs property. In the process of mining for gold the defendant unearthed, and later sold, a quantity of non-gold-bearing stones. Kotzé CJ held that he was entitled to do so because (at p 251) :

> "[t]hat which he, at great expense and much trouble, digs out of the earth in mining for gold, cannot be considered, simply because it is not gold-bearing, to be the property of the owner of the farm."

Whether the actual decision is right or wrong need not detain us. For it seems clear that it would have been an a foritiori case had the defendant dug up only gold-bearing stone and, after a refining process, during which gold had been extracted, had disposed of the remainder. The answer to the owner's claim in the postulated case would have been

that the defendant was doing no more than disposing of the ores of gold.

In Roodekop Gold Extraction Syndicate Ltd v New Minerva Syndicate Ltd 1910 WLD 63 the lessees (the respondents) of claims had the sole right to inter alia mine for and remove from the claims gold and

all other kinds of metals and minerals as their absolute property. In the course of his judgment Smith J said (at pp 67-8) :

> "Under their lease of the claims the respondents acquired the right of mining for and removing gold, silver, precious stones and all other kinds of metals and minerals. I think I am entitled to take cognisance of the fact that gold is not found on these Gelds in a pure state, and is not susceptible of being mined and removed as, for instance, coal is. It exists in minute particles in rock, from which it has to be dissolved and subsequently recovered by an elaborate process. In my opinion, therefore, when the parties spoke of, 'mining for and removing gold; they were not contemplating pure or refined gold, but gold in the form in which it is found in the mine, viz., as it exists in the ore, and it is this which in the words of the lease became 'the absolute property of the lessees.' In the absence of any restrictive provisions in the lease the respondents had in my opinion the right to remove the gold they mined for, i.e.

gold in the rock."

The rights of the lessees were in essence the same as those of a holder of rights to gold, and there is hence little doubt that in the view of Smith J the latter rights would have extended to the ores containing gold.

It is hardly necessary to say that in the present case the cause of the disputes between the parties is to be traced to the fact that the ores mined by the second respondent contains both precious and base metals. It appears to me, however, that the question whether the ores are to be classified as those of precious metals, or base metals, or both is essentially one of fact. Now we know that those ores cannot profitably be mined for base metals, but can be, and are indeed, so mined for platinum. On a pragmatic approach this datum leads to a well-nigh inescapable conclusion; i.e. that the ore body is that of precious, and not

base, metals. Hence the first respondent becomes the sole owner of the ores mined by it.

Superficially this conclusion, which entails that the respondents may retain the base metals extracted from the ore body for their own account, may appear to offend against one's sense of justice. Another approach would, however, lead to an even more incongruous result. It would mean that, in principle at any rate, the appellants, or one of them, would be entitled to claim compensation from the respondents in respect of base metals for which they would not, and could not, have mined, and which in the end were extracted from the ore body solely through the efforts of the respondents. In sum, on the above conclusion the appellants lose nothing which they otherwise might have gained, whilst the postulated approach smacks very much of affording the appellants an

opportunity of hitching a free ride.

H J O VAN HEERDEN

Case number: 609/94

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the matter between:

TROJAN EXPLORATION COMPANY (PROPRIETARY) LIMITED — First Appellant

PYRAMID PLATINUM LIMITED — Second Appellant

and

RUSTENBURG PLATINUM MINES LTD — First Respondent

LEBOWA PLATINUM MINES LTD — Second Respondent

MINISTER OF MINERAL AND ENERGY AFFAIRS — Third Respondent

CORAM: Botha, Van Heerden, Nestadt, Schutz JJA
et Plewman AJA

HEARD: 2 and 3 May 1996
DELIVERED ON: 31 May 1996

J U D G M E N T

VAN HEERDEN JA :
2

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In a case such as this the metals - both precious and base - are inextricably commixed with their ores whilst in situ. This situation also obtains when the ore body is separated from the earth and brought to the surface. Indeed, separation only takes place at a later stage during what may be called a refining process.

It seems to me, therefore, that the rights of a person entitled to mine for, say, platinum, cannot realistically be confined to rights to platinum as such. Of necessity they must be rights to the ores containing that metal. The same is, of course, true of a right to, say, copper: the

holder's rights extend to the ore body in which copper occurs. It was for this reason, I apprehend, that in s 2 of the Gold Law, as originally enacted, both precious and base metals were defined as inclusive of their ores. [3]

By way of analogy reference may be made to two cases. In Bezuidenhout v Worcester Gold Mining Company 1 OR 249, the defendant, as a holder of claims, had the right to dig for gold on the plaintiffs property. In the process of mining for gold the defendant unearthed, and later sold, a quantity of non-gold-bearing stones. Kotzé CJ held that he was entitled to do so because (at p 251) :

> "[t]hat which he, at great expense and much trouble, digs out of the earth in mining for gold, cannot be considered, simply because it is not gold-bearing, to be the property of the owner of the farm."

Whether the actual decision is right or wrong need not detain us. For it seems clear that it would have been an a foritiori case had the

defendant dug up only gold-bearing stone and, after a refining process, during which gold had been extracted, had disposed of the remainder. The answer to the owner's claim in the postulated case would have been

that the defendant was doing no more than disposing of the ores of gold.

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> contemplating pure or refined gold, but gold in the form in which it is found in the mine, viz., as it exists in the ore, and it is this which in the words of the lease became 'the absolute property of the lessees.' In the absence of any restrictive provisions in the lease the respondents had in my opinion the right to remove the gold they mined for, i.e.

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platinum. On a pragmatic approach this datum leads to a well-nigh inescapable conclusion; i.e. that the ore body is that of precious, and not

base, metals. Hence the first respondent becomes the sole owner of the ores mined by it.

Superficially this conclusion, which entails that the respondents may retain the base metals extracted from the ore body for their own account, may appear to offend against one's sense of justice. Another approach would, however, lead to an even more incongruous result. It would mean that, in principle at any rate, the appellants, or one of them, would be entitled to claim compensation from the respondents in respect of base metals for which they would not, and could not, have mined, and which in the end were extracted from the ore body solely through the efforts of the respondents. In sum, on the above conclusion the appellants lose nothing which they otherwise might have gained, whilst the postulated approach smacks very much of affording the appellants an

opportunity of hitching a free ride.

H J O VAN HEERDEN

CASE NUMBER: 609/94

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

TROJAN EXPLORATION COMPANY (PROPRIETARY) LIMITED First Appellant

PYRAMID PLATINUM LIMITED Second Appellant

and

RUSTENBURG PLATINUM MINES LIMITED First Respondent

LEBOWA PLATINUM MINES LIMITED Second Respondent

MINISTER OF MINERAL AND ENERGY AFFAIRS Third Respondent

CORAM: BOTHA, VAN HEERDEN, NESTADT, SCHUTZ JJA et PLEWMAN AJA

HEARD ON: 2 and 3 MAY 1996

DELIVERED ON: 31 MAY 1996

JUDGMENT

PLEWMAN AJA

I have read the judgment prepared by Schutz JA. I, however, respectfully take a different view of the matter. The extent of my dissent will appear from the reasons I now give.

In the judgment of Schutz JA the history of the matter and the relevant statutory provisions are discussed. It is therefore unnecessary for me to set out the facts or to refer in detail to all the legislation. However, in order to explain my reasoning I will, even though it be at the cost of a measure of repetition, refer briefly to certain of the factual evidence and to what I regard as the important statutory provisions. The crucial question, in my view, is the nature of the ore to which the appellants lay claim. I will refer to the parties and to the various other entities involved in the manner adopted by my Brother Schutz.

The order which the appellants seek in their main prayer as reformulated for the purposes of this appeal is in the following terms

(bearing in mind that the former, first respondent, is no longer a party and the second respondent and the third respondent are now first respondent and second respondent):

"Dit word verklaar dat -

1. die mineraalregte vermeld in die Notariële Prospekteerkontrak K4439/89PC en die mineraalregte verkry deur die Tweede Applikant uit hoofde van die Notariële Sessie van Mineraleregte K557/93RM, aangegaan tussen Tweede Applikant en Eerste Respondent (hierinlater na verwys as 'die regte op onedele minerale/metale') ten aansien van erts wat deur die houer van regte op edele metale en/of die Derde Respondent in, op of onder die plaas UMKOANESSTAD, 419, Registrasie Afdeling KS, Transvaal losgemaak en gemyn was voor 1 Mei 1995 omvat het dat:

1.1 Die Tweede Applikant die mede-eienaar van sodanige erts was

1.2 Die houer van die regte op edel metale en/of die Derde Respondent geen handeling ten aansien van sodanige erts mag verrig, wat tot

gevolg het dat die Tweede Applikant verhoed word om sy mede-eiendomsreg uit te oefen nie;

1.3 Die houer van die regte op edel metale en/of die Derde Respondent nie geregtig is om sodanige erts met enige ander erts afkomstig van enige ander plaas vermeng of enige handeling ten aansien van sodanige erts verrig wat tot gevolg het dat die identiteit van sodanige erts verlore gaan nie;

1.4 Die houer van die regte op edel metale en/of die Derde Respondent nie geregtig is om vir homself die onedele minerale/metale afkomstig uit sodanige erts, toe te eien en vir eie voordeel of rekening te verkoop nie."

The contention of the appellants thus clearly is that they enjoy joint ownership or, according to the arguments of appellants' counsel, a form of ownership in the ore being mined by the respondents. The basis for this contention is the fact that the appellants are the holders of the right to minerals other than "precious metals" - in summary the base metal

rights. The respondents on the other hand are the owners of the right to precious metals. Platinum is a precious metal.

The mineral rights over the farm Umkoanesstad were separated from the title to the land in 1925, by CertiGcate of Mineral Rights 549/1925 S, when these rights were acquired by Transvaal Lands. On 4 April 1957 Transvaal Lands ceded the mineral rights to Northvaal which, on 20 April 1966, ceded the rights to precious metals to Rustenburg, reserving to itself the remaining mineral rights which have now come down to the appellants.

It must, I think, be accepted that what was granted to Rustenburg was the rights to precious metals as these words were to be understood in Act 35 of 1908 ("Gold Law"). But one must start at a slightly earlier point. I will deal later with the legislation. I start with the observation that South African law does not recognize the separate ownership of

different strata in the land or of different parts of the land on the principle cuius est solum eius est usque ad coelum et ad inferos.The result is that so long as the minerals remain unseparated from the land, ownership thereof remains vested in the owner of the land.

The grantee of a mineral rights certificate obtains no more than the right to enter upon the land, to search for the minerals, and if he finds any, to sever them and carry them away. Van Vuren and Others v Registrar of Deeds 1907 TS 289 at 294/5. At page 295 Innes CJ said, referring to an example given by him where A has sold his farm to B reserving the mineral rights to himself, as follows:

> "The Registrar seemed to think that A under such circumstances transfers only portion of the dominium and retains the mineral rights as part of realty upon his old title. In truth that is not so. The old title deed is of no further effect, the dominium goes to B on terms that he at one and the same time grants a servitude to the former owner. Subject to that reservation, B is absolute dominus of the

> entire property. There may be no minerals there; but even if minerals do exist, the dominium in them vests in the registered owner. The grantee may enter upon the land and take them, but till they are severed they do not belong to him; see Le Roux and Others v Loewenthal (1905) TS 742/

One must then consider the facts. The respondent (or the parties from whom it derived its title) searched for precious metals on the farm and found in the Merensky Reef and the UG-2 Reef ore bodies containing platinum in sufficient quantities and of sufficient value to enable them to be mined. The same search (not carried out by appellants but accepted by them as establishing the facts) revealed that the ores so found are not mineable for base metals.

The evidence of Humphriss, a well qualified and experienced consulting metallurgist, is the following:

> "3.1 ... It is only the Merensky Reef which is mined ...

(and this will apply to the UG2 Reef if and when it is mined) the ore extracted by the Third Respondent from the Merensky Reef is a precious metal ore because it is only the platinum group minerals and not the base minerals which make it possible to mine it economically and profitably. ..." (Own emphasis.)

"3.2 ... Nor would it be economically possible to extract and process the base metals and minerals for their own sake alone, without reference to the value of the precious metals which must be extracted and co-precessed together. The converse is not true. It would be economically possible to extract and process the precious metals without reference to the value of the base metals and minerals which must be extracted and co-processed together. ..."

The evidence of Peyerl, a qualified mineralogist of considerable experience who claims to be one of the leading experts in the Geld of mineralogy relating to the Merensky Reef and UG-2 chromitite in the Bushveld complex, is the following:

"4.7 ... The recovery of the base metal sulphides is an

integral part of the refining process and is inextricably linked to the recovery of the precious metals.

4.8 The value of the base metals recovered as by-products from the sulphides of the Merensky Reef in comparison to the value of the precious metals that are recovered is so small that there is no question but that the Merensky Reef is a precious metal reef and that the ore thereof is precious metal ore and is so regarded in all of the accepted literature on the subject. ..." (Own emphasis.)

Knock, a consulting mining engineer, points to the fact that in these reefs the base minerals are not present in an independently exploitable form or in an exploitable quantity.

Humphriss, Peyerl and Knock are deponents to affidavits filed in support of the respondents' case (and it would be the answering evidence to which this Court would look) but in fact appellants' evidence is to the same effect.

Schoon, the appellants' expert, said as follows -

> "6.5 ... the base metals and precious metals are inimitably related in the orebody and certain of them are also metallurgical inextricably inter-related. This metallurgical inter-dependence is such that it is necessary to extract and refine both the precious metals and the nickel, copper and cobalt from the concentrate together. ...
>
> 6.8 ... Again, in order to refine the PGM's [i.e. Platinum Group Metals], it is necessary also to refine as by-products the nickel, copper and cobalt contained in the ore mined from the Merensky reef." (Own emphasis.)

The evidence in the answering affidavits shows that of the reefs discussed the LG-6 reef is quite separate from the Merensky reef which respondents presently mine and from the UG-2 reef which they contemplate mining. The notice of motion covers only the ores actually being mined. The LG-6 reef can be disregarded. Strictly the UG-2 reef is also irrelevant but for the purpose of this judgment I do not propose

to distinguish between the Merensky reef and the UG-2 reef.

What this evidence shows and what common sense dictates is that ores are classified with reference to the content of the ores which has the most significant economic importance. Ores are not classified by reference to the by-products of the refining process.

The ores being mined by respondents are precious metal ores and not base metal ores and indeed this is common cause because appellants' witness themselves assert that the ores being mined are platiniferous ores of a complex geological structure.

This evidence demonstrates that, at least in so far as these reefs are concerned, the rights to the base metals over the farm are, not as a legal metamorphosis but as a factual reality, rights in name only - that is that the base metal rights have no content.

It is this fact, which in my respectful view, has been overlooked

in the judgment of my Brother Schutz. The scheme of the law in 1966 (as it had for many years before) gave recognition to the fact that even where a mineral right's certificate has been granted there may indeed be no minerals in the land.

That the base metal rights have no content can also be demonstrated in another way. For example, if the State were to have expropriated the farm, including an expropriation of the mineral rights, at a time after respondents had completed their prospecting, a value would have had to be placed on the base minerals rights in order to determine the compensation to be paid. Since the search had been conducted and revealed no mineable base metals only a nominal value, at best, would be placed on the base metal rights and, in that sense, they would have no content.

The conclusion that the ores are precious metal ores also follows

from a consideration of the legislation. Although the Gold Law was still in force in 1966 the definitions therein had (as my Brother Schutz points out) been amended by Mineral Law Amendment Act 36 of 1934. The then current definition was that substituted for the earlier definition by the 1934 Act and (so far as is material) it read -

> '"precious metals' shall mean-
>
> a) gold, silver, platinum, iridium and all other metals of the platinum group and the ores of all the said metals.
>
> b) ....."

This leads to the short point that the ores which respondents mine are precious metal ores. Although respondents' mining activity commenced only in 1991 the rights which respondents obtained flow from a grant which is to be construed in accordance with that definition. Later legislation may have modified the parties rights in various ways but could not for present purposes be relevant to an interpretation of the

grant made in 1966. In as much as the applicable definition includes as precious metals, the ores of precious metals, the grant covers the ore being mined.

The ores do, as a physical body, contain certain base minerals inextricably intermixed with platinum metals but that does not constitute them the ore of base metals and appellants would not be entitled to sever these ores from the land. As the ores are precious metals the right to sever the ores is that of the respondents. The effect of severance is to constitute the ores movables and they then become the property of respondents.

There has, contrary to the view expressed by my Brother Schutz, been no appropriation or expropriation or confiscation of the appellants' minerals rights. Indeed their quasi servitudinal rights remain. That they have, as yet, no content because the ores in question are not base metal

ores is a different matter. While it is unlikely that any attempt will be made in the future to exercise the base metal rights in order to search for base metals, as a pure question of law, the rights of the appellant continue to exist.

It was also argued that various postulates, such as a situation where the ore mined consisted of precisely 50% of precious metals and 50% of base metals (one must assume properly classified), could be considered in discussing the principles which should govern this appeal. These postulates appear to me to be an invitation to the court to speculate on possibilities which are not necessarily realistic. Whether an ore is, because of its make up, a precious metal ore or a base metal ore is a matter for evidence by persons competent to asses and properly categorise ores. There is no evidence on record to suggest that such a uniquely balanced ore as a 50 % division exists or can exist. The ores

in the present case bear no resemblance to ores having such a division. If, as was also suggested, one were to postulate an example where the ratio was 80% base metals and 20% precious metal the answer would seem to me to be that an 80% base metal content would, in general, dictate that the ore is a base metal ore. But again the percentages are purely speculative and the economic value undetermined. It would, in all cases, depend upon evidence.

A further possibility was raised in argument namely the suggestion that technology may at some future time be discovered which would either render the base mineral content of the ore separately mineable or, possibly, significantly vary the ratios of recovery. I do not agree that one may have regard to such a speculative possibility when one is determing existing rights. I would add, however, that if such a technological advance did take place, at best for the appellant, the ore

then remaining in the land would have to be reclassified. The ore which has already been severed will in fact no longer exist and it could, in any event, not be retrospectively reclassified.

The final observation to be made is that, even if such delicately balanced ores, as the 50% ratio would represent, do exist, creating a factual grey area, this would be a matter for the legislature and not for judicial innovation. The scheme upon which the mineral laws of South Africa has been framed is the assumption that it is possible to categorize mineral ores in this country within the frame-work of the definitions in the legislation. It may well be that the complex geology of the Bushveld Igneous Complex poses, or will in the future pose, difficulties in the application of the existing legal structure. If so, no doubt Parliament will (and perhaps already has by the provisions of the present Minerals Act) give attention to this. The present case presents no such difficulty and

the conclusion that the law must necessarily offer a solution to such problems is in my view misplaced.

In my Brother Schutz's judgment there is also a reference to certain English cases and to the case of Geduld Proprietary Mines Ltd v New Springs Collieries Ltd 1934 TPD 104. I, with respect, do not derive any assistance from the English cases (though they certainly are of considerable interest) for two reasons. The first is that the English law, as I understand it, differs from South African law in that it does recognize ownership of separate strata. But over and above that there is nothing in the judgments to suggest that the cases concerned intermingled or inextricably mixed ore, as opposed to discrete deposits. The situation in this case relates to intermingled or intermixed ores not discrete deposits. Such deposits (i.e. discrete deposits) probably are more concerned with technical problems than legal problems but even as a

legal problem they do not assist in the solution to the present case. In so far as the Geduld case is concerned it also seems to be concerned with rights to discrete (as opposed to intermixed) products of the mining process.

The learned judge in the court below imported into the matrix of surrounding circumstances which could assist in the interpretation of the grant, certain later legislation. I share my Brother's view that this is not appropriate. What is true, however, is that the legislation providing for the grant of a mining lease; the proclamation of the land and all the other consequences which restrict and limit the right of individuals to mine for precious metals precludes any argument that appellants could obtain rights to the ore at any time after its severance by the respondents.

The evidence is then, in my view, incontestable. The ore body being mined is a precious metal ore. The base metal recovered from the

sulphides is a mere by-product.

As far as prayer 2 of the draft order setting out the relief sought is concerned, I share the view that it cannot be entertained.

For these reasons I would dismiss the appeal with costs, such costs to include the costs of two counsel.

C PLEWMAN AJA