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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 394/12

In the matter between:

MINISTER OF MINERAL RESOURCES OF THE REPUBLIC OF SOUTH AFRICA **FIRST APPELLANT**
DIRECTOR-GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES **SECOND APPELLANT**
DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION, DEPARTMENT OF MINERAL RESOURCES **THIRD APPELLANT**
REGIONAL MANAGER, NORTHERN CAPE REGION, DEPARTMENT OF MINERAL RESOURCES **FOURTH APPELLANT**
IMPERIAL CROWN TRADING 289 (PTY) LIMITED **FIFTH APPELLANT**

and

SISHEN IRON ORE COMPANY (PTY) LIMITED **FIRST RESPONDENT**
ARCELORMITTAL SOUTH AFRICA LIMITED **SECOND RESPONDENT**

Neutral citation: *Minister of Mineral Resources of the RSA v Sishen Iron Ore* (394/12) [2013] ZASCA 50 (28 March 2013)

Coram: BRAND, LEWIS, CACHALIA JJA, SOUTHWOOD AND SWAIN AJJA
Heard: 19 February 2013
Delivered: 28 March 2013
Updated:

Summary: **Effect of failure of one co-holder of an 'old order mining right' to convert that right in accordance with Item 7 of Schedule II to the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) is that on the expiry of the prescribed five year period that co-holder's undivided share in the 'old order mining right' ceases to exist as provided by Item 7 (8) of Schedule II and the co-holder whose undivided share in the right has been converted becomes the sole holder of the mining right in terms of the MPRDA. The Minister therefore cannot allocate the share of the 'old order mining right' that was not converted or any share of the mining right in terms of the MPRDA.**

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Zondo J sitting as court of first instance):

1 The first, second, third, fourth and fifth appellants' appeals are dismissed with costs, such costs to include the costs of three counsel.

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

'It is declared that as a result of the first applicant's (SIOC's) conversion of its 'old order mining right' in respect of iron ore and quartzite on the Table I properties (the properties described in Annexure "B" to SIOC's amended Notice of Motion) in accordance with Item 7(3) of Schedule II to the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the second applicant's failure to convert its old order right in respect of iron ore and quartzite on these properties, the first applicant became, with effect from midnight on 30 April 2009, the exclusive holder of a mining right (SIOC's converted mining right) in respect of iron ore and quartzite on the Table I properties.'

3 The first respondent's conditional cross-appeal is dismissed with costs, such costs to include the costs of three counsel, where employed.

JUDGMENT

SOUTHWOOD AJA (BRAND, LEWIS, CACHALIA JJA AND SWAIN AJA concurring):

[1] When the Mining and Petroleum Resources Development Act 28 of 2002 (MPRDA) and its Transitional Arrangements (set out in Schedule II to the Act) came into operation, the first respondent, Sishen Iron Ore Company (Pty) Ltd (SIOC), and the second respondent, ArcelorMittal South Africa Limited (AMSA), were co-holders of an 'old order mining right' in respect of iron ore and quartzite (to which I shall refer generally as iron ore only) on eight of the Sishen Mine properties[1] and were entitled to

1 There are 21 properties and SIOC held the sole old order mining right in respect of 13 of the properties

convert their 'old order right' in accordance with the Transitional Arrangements. The reasons for the co-holding by SIOC and AMSA of fractions of the undivided right to mine are discussed below. SIOC duly converted its old order mining right but AMSA failed to do so. After the five year period for conversion expired, the third appellant, the Deputy Director General: Mineral Regulation: Department of Mineral Resources (Deputy DG) purported to grant to the fifth appellant, Imperial Crown Trading 289 (Pty) Ltd (ICT) a prospecting right in respect of iron ore on seven of the eight properties to which AMSA's old order right related. He did so on the assumption that he was entitled to allocate such a right because AMSA had not converted its undivided 21.4 per cent share of the old order mining right.

[2] These simple facts gave rise to the litigation between the parties and the main questions to be answered in this appeal are, first, what happened to SIOC's 'old order mining right' (which included SIOC's undivided 78.6 per cent share of the right to iron ore on eight of the Sishen Mine properties) when SIOC converted its old order right in accordance with Item 7 of Schedule II of the MPRDA before the expiry of the five year period?; secondly, what was the status of that conversion if it was wrongly granted and was not timeously attacked by SIOC or the Minister or the relevant authorities?; and, thirdly, what happened to SIOC's mining right (in terms of the MPRDA) when AMSA, the other co-holder of the 'old order mining right' in respect of iron ore on those properties, failed to lodge its right for conversion within the five year period?

[3] The court a quo (Zondo J sitting in the North Gauteng High Court, Pretoria) held that the co-holder of the old order mining right, SIOC, which converted its right, had, as a result of the conversion, become the sole holder of the mining right created by the MPRDA. Consequently the first appellant, the Minister of Mineral Resources (the Minister), could not competently grant any right in terms of the MPRDA to any other party in respect of the same mineral and the same property. Accordingly, the court a quo granted declaratory orders at the instance of AMSA: (1) that SIOC had become the exclusive holder of a converted mining right in terms of Item 7(3) of Schedule II to the MPRDA for iron ore in respect of the properties comprising the Sishen Mine and (2), that, in consequence of that order, any decision to accept or to grant any application for

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while AMSA held the old order mining right, together with SIOC, in respect of only eight of the properties.

a prospecting or mining right in respect of a so-called 21.4 per cent share (or any other share or shares) in respect of iron ore on any of the Sishen Mine properties, lodged after SIOC became the exclusive holder of that converted mining right, by any person (including SIOC and ICT), as well as any execution and registration of any such right pursuant to such grant, was void ab initio.

[4] For the same reasons the court a quo granted orders in favour of SIOC (a) setting aside the decision to grant ICT a prospecting right for iron ore as to a 21.4 per cent share in respect of the Sishen Mine properties; (b) setting aside the notarially executed prospecting right in favour of ICT and (c) setting aside any registration of such right in the Mineral and Petroleum Titles registration office. The court a quo also ordered SIOC and all the appellants, jointly and severally, to pay AMSA's costs and all the appellants, jointly and severally, to pay SIOC's costs. In each case, the costs were to include the costs of three counsel.

[5] With the leave of the court a quo, the appellants appealed against the grant of this relief and SIOC, conditionally (in the event of the appeal against the orders granted in favour of AMSA succeeding) cross-appealed against the refusal of the court a quo to grant a declaratory order that as the holder of a converted mining right for iron ore as to a 78.6 per cent share in respect of the SIOC properties, SIOC is the sole competent applicant for, alternatively, the only person which can be granted a mining right or a prospecting right for iron ore as to the remaining 21.4 per cent undivided share in those minerals on the SIOC properties.

[6] At the conclusion of the argument the only issue to be decided is what the effect was of AMSA's failure to lodge its old order mining right for conversion – whether (a) on 5 May 2008 or 18 June 2008, as a matter of fact (as contended by AMSA's counsel) or (b) on 30 April 2009, by operation of law (as contended by SIOC's counsel), SIOC became the sole holder of the mining right in terms of the MPRDA in respect of iron ore in, on or under the relevant properties, or whether (c) the share of the old order mining right not converted by AMSA, became available for allocation by the State to either ICT or SIOC (as contended by ICT's and the State's counsel).[2] SIOC's counsel therefore

2 During the hearing, SIOC's counsel associated his client with the argument of AMSA's counsel, save

did not argue that SIOC had not become the sole holder of the mining right resulting from the conversion

that he contended that the crucial time was 30 April 2009, when the time for AMSA to lodge its old order mining right for conversion expired.

or present any argument in support of SIOC's conditional cross-appeal. Since ICT made it clear that it did not intend to exercise the prospecting right purportedly granted to it, ICT's appeal against the grant of orders 2.1 and 2.2 (which had been sought by SIOC against ICT) has become academic and must be dismissed in terms of s 21A(1) of the Supreme Court Act 59 of 1959.[3] Furthermore, ICT did not advance any argument in respect of the costs order made in favour of SIOC. This is correct as usually this court will not entertain an appeal against a costs order only. I now turn to consider the remaining issue.

[7] The right to prospect and mine for minerals is now governed by the MPRDA, which must be read with the Transitional Arrangements set out in Schedule II to the Act. While the MPRDA transformed the legal landscape in respect of minerals and mining, its effect was mitigated by the Transitional Arrangements in respect of the matters provided for in those arrangements, particularly mining operations being conducted in accordance with existing rights ('old order mining rights'). It is the role of the Transitional Arrangements in relation to the iron ore mining operations conducted by SIOC and AMSA at SIOC's Sishen Iron Ore Mine (Sishen Mine) in the Northern Cape Province which must be considered. These mining operations were being conducted by SIOC pursuant to SIOC's and AMSA's jointly-held right to the iron ore on the properties and the mining authorisations which they held. As already mentioned the disputes involved in this litigation arose because SIOC and AMSA jointly held the mineral right to iron ore on the properties and SIOC converted its rights in accordance with the Transitional Arrangements. AMSA, however, failed to do so.

The Sishen mine and the contractual arrangements in respect of it between SIOC and AMSA

[8] The rights involved relate to eight[4] of the 21[5] properties near the town of

3 At the commencement of the hearing before the court a quo, Mr Puckrin SC on behalf of ICT, formally placed on record that his client did not intend to proceed with prospecting in accordance with its prospecting right and that ICT waived any preference to apply for a mining right which arose out of the prospecting right. In any event, ICT's prospecting right lapsed on its own terms in March 2012.

4 The contentious properties are: the remaining extent of Portions 3 and 4 of the farm Gamagara; the remaining extent and the remaining extent of Portions 2 and 3 of the farm Sacha; the remaining extent of Portion 1 of the farm Sims and the remaining extent and Portion 1 of the farm Sishen.

5 The remaining 13 properties are: the remaining extent of the farm Sims; Portion 3 of the farm Bishops Wood; the remaining extent and the remaining extent of Portion 1 of the farm Gamagara; the farm Kathu; the farm Marsh; the remaining extent of the farm Sekgame; the remaining extent of the farm Lylyveld; Portions 1 and 5 from the farm Fritz; the remaining extent of the farm Woon; Portion 1 of the farm Bruce and the remaining extent of Portion 1 of the farm Sacha.

Kuruman,

in the Northern Cape Province, on which the Sishen Mine is situated. This is a vast operation, said to be one of the largest open cast mines in the world. When these proceedings commenced in 2010, the mining operations covered 1417,767 hectares. They were conducted in a pit, 10-11 kilometres long, two to three kilometres wide and with an average depth of 250 metres. The mining activities were conducted 24 hours a day, seven days a week, and each day produced about 460 000 metric tons of run of mine and waste rock. There was an extensive mining infrastructure which included beneficiation plant buildings and equipment; office buildings; mining , access and service roads; conveyor belts; power lines; railway lines; rock crushers; material stockpiles; maintenance workshops and storage areas. The total area subject to SIOC's mining rights was approximately 36 000 hectares. Enormous quantities of iron ore had been mined at the Sishen Mine from the early 1950s. So it was with good reason that SIOC launched its application to set aside the right granted to ICT to prospect (search) for iron ore on the 8 properties.[6] The irrationality of granting a prospecting right to search for iron ore on properties on which one of the biggest iron ore mines in the world is situated is manifest. The only plausible inference is that this was done to give ICT a preferential right to apply for a mining right in that area.[7] I shall refer to the contentious eight properties collectively as the 'Table I properties' and the other 13 properties collectively as the 'Table II properties'.

[9] The contractual arrangements of SIOC and AMSA explain the way in which they came to have undivided shares in the right to iron ore on the Table 1 properties. AMSA, formerly called Iscor Ltd (Iscor), has conducted mining operations at the Sishen mine since the early 1950s. From then until 2002 Iscor was a vertically integrated iron ore mining and steel manufacturing company. It mined iron ore and quartzite at its mines at Sishen and Thabazimbi and manufactured steel at its plants at Vanderbijlpark, Vereeniging, Newcastle and Saldanha. Over the years the mining business prospered but the steel manufacturing business suffered as a result of depressed international steel prices. In 2001 Iscor's Board and shareholders decided to unbundle the business into a mining business which would be conducted by SIOC, and a steel manufacturing business

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6'Prospecting' means intentionally searching for any mineral by means of any method which disturbs the surface or subsurface of the earth. See the definition in Section 1 of the MPRDA.
7See s 19(1)(b) of the MPRDA.

which would be conducted by Iscor. To achieve this, it was necessary for Iscor to transfer to SIOC all the properties on which Iscor conducted mining operations together with the relevant mining authorisations. However, to safeguard Iscor's supply of iron ore for its steel manufacturing business, Iscor would retain some of its rights. In particular Iscor wished to ensure that it received up to 6.25 million tons per annum (mtpa) of iron ore from the Sishen mine at a price determined for the duration of the mine. That price was the cost of extracting the required amount of iron ore plus three per cent.

[10] The unbundling was achieved by means of a series of written agreements which had to provide for the following:

(1) Iscor would retain its steel manufacturing business and transfer its mining assets to SIOC;

(2) Iscor would continue to receive for its steel manufacturing business some 8.5 mtpa of iron ore from the mines which were transferred to Sishen: 2.25 mtpa from the Thabazimbi mine on a cost-related basis over the projected lifetime of the mine and 6.25 mtpa of iron ore from the Sishen mine at cost plus 3 per cent over the projected lifetime of the mine;

(3) Iscor would absorb, on unbundling, a greater proportion of its existing debt than it otherwise would have done because, on listing, the supply price of the iron ore from the Sishen mine would reduce the value of the mining business. The additional debt attributable to Iscor to compensate SIOC for the preferential procurement arrangement was about R2.1 billion, which was roughly the difference between the market value of 6.25 mtpa of iron ore and the cost-related basis upon which Iscor would acquire the iron ore over the life of the Sishen mine. In effect, this R2.1 billion represented payment to SIOC in advance for the profit component in respect of the 6.25 mtpa over the life of the Sishen mine.

[11] In 2001 Iscor and SIOC estimated that 6.25 mpta was roughly equal to 21.4 per cent of the then output of the Sishen mine. Accordingly, the Iscor shareholders, the State and the Industrial Development Corporation, insisted that Iscor retain 21.4 per cent of the rights to iron ore at the Sishen mine to ensure the supply of 6.25 mtpa of iron ore in the event of SIOC disposing of its interest in the Sishen mine.

[12] On 10 April 2001, Iscor sold to SIOC, with effect from 1 July 2001, Iscor's entire operation in relation to the business of prospecting for, mining and processing of iron ore (I shall refer to this agreement as the 'Acquisition Agreement'). The assets sold included the Table I and Table II properties. At that time Iscor held all the mineral rights in respect of these properties.

[13] On 22 October 2001 Iscor and SIOC entered into a notarial amendment to the Acquisition Agreement in terms of which they agreed to continue to implement the acquisition of the properties by SIOC but to exclude from the assets sold a 21.4 per cent undivided share in the right to iron ore in respect of the Table I properties. This meant that SIOC would receive a 78.6 per cent undivided share in the right to iron ore in respect of those properties. The amendment to the Acquisition Agreement was conditional on the DG approving, in terms of s 20(3) of the Minerals Act, the division of the right to iron ore and quartzite in respect of the Table I properties.

[14] On 22 October 2001 Iscor and SIOC applied to the DG for his approval in terms of s 20(3) of the Minerals Act for the division of the right to iron ore in and upon the Table I properties about to be held by Iscor under a Certificate of Rights to Minerals:

'Between:

Iscor as to a 0,214000 (NOUGHT comma TWO ONE FOUR NOUGHT NOUGHT NOUGHT) undivided share to be retained by Iscor in terms of the above Certificate of Rights to Minerals about to be registered in its favour.

Sishen as to a 0,786000 (NOUGHT comma SEVEN EIGHT SIX NOUGHT NOUGHT NOUGHT) undivided share to be ceded by Iscor to Sishen by way of a Notarial Deed of Cession of Mineral Rights about to be registered in favour of Sishen.'

On 13 November 2001 the DG granted approval for the right to the iron ore in respect of the Table I properties to be divided into undivided shares: a 21,4 per cent undivided share to be held by Iscor and a 78,6 per cent undivided share to be held by SIOC.

[15] On 23 October 2001 Iscor and SIOC entered into a further agreement (which I shall refer to as the 'Supply Agreement') in terms of which Iscor would appoint SIOC to mine Iscor's iron ore on the Table I properties in accordance with Iscor's undivided share of the right to the minerals. They also agreed that the Supply Agreement would

govern their relationship in the future and supersede and cancel all prior agreements, arrangements, letters of intent and letters of acceptance. At that stage, Iscor still held 100 per cent of the mineral rights in respect of the Table I properties but the preamble recorded that Iscor was in the process of transferring 78.6 per cent of the iron ore or mineral rights in the Table I properties to SIOC together with 100 per cent of all the other mineral rights and thus would retain a 21.4 per cent undivided share in the mineral right pertaining to iron ore in and upon the Table I properties.

[16] The essential terms of the Supply Agreement may be briefly summarised –

(1) the parties agreed that their intended long term business relationship in respect of the mining of iron ore at the Sishen mine would be regulated only by the agreement;

(2) SIOC would mine the iron ore at the Sishen mine on behalf of Iscor and would continue to supply Iscor with iron ore for a period of not less than 25 years from 1 July 2001;

(3) Iscor would pay SIOC for the iron ore delivered by SIOC to Iscor, the cost of mining and producing the iron ore plus 3 per cent of that cost, which was SIOC's remuneration for services rendered in terms of the agreement;

(4) Iscor and SIOC acknowledged that because they held undivided shares in the iron ore on the properties, ownership of the iron ore would be determined only when the iron ore had been loaded onto the rail wagons;

(5) Iscor and SIOC acknowledged that the Minerals Act would be repealed and replaced by the MPRDA, that the concept of the common law ownership of mineral rights would be extinguished and replaced by a mineral rights regime premised on the vesting in the State of the right to prospect and mine for all minerals and the parties reciprocally undertook towards each other-

'. . . that they shall, from the date of the promulgation of the Bill as binding legislation, take all such steps, do all such things and sign all such documentation as may be necessary to give effect to and implement the provisions of this Agreement in the context of the mineral rights regime and the administrative requirements of the new legislation.'

The Supply Agreement was conditional on the Iscor shareholders approving the unbundling of Iscor before 30 November 2001, which the shareholders did.

[17] Pursuant to these agreements and the DG's approval of the division of the right

to iron ore in respect of the Table I properties the following deeds were registered in the Deeds Registry on 5 December 2001:

(1) Certificate of Rights to Minerals K47/2001 RM in terms of which the rights to all minerals (excluding gold, silver and precious stones) in respect of the Table I properties were severed from the ownership of the land and henceforth held by Iscor under separate title;

(2) Deed of Transfer No 3280/2001 in terms of which Iscor transferred ownership of the Table I and Table II properties to SIOC, together with the mineral rights (excluding gold, silver and precious stones) in the Table II properties but retained all rights to minerals (excluding gold, silver and precious stones) in the Table I properties;

(3) Notarial Deed of Cession of Mineral Rights K48/2001 RM in terms of which Iscor ceded to SIOC a 78,6 per cent share of the right to iron ore in and upon the Table I properties and the rights to all other minerals (excluding gold, silver and precious stones) in the Table I properties.

[18] Accordingly, by December 2001 SIOC and Iscor (now called AMSA) had become joint holders, in undivided shares, of 78,6 per cent and 21.4 per cent respectively, of the common law right to iron ore in respect of the Table I properties; SIOC had become the sole owner of the mineral rights in respect of the Table II properties and SIOC and AMSA had entered into an agreement governing their relationship in respect of the mining of iron ore in, on or upon the Table I properties.

[19] On 17 October 2002 the Department of Minerals and Energy issued Permit ML07/2002 in terms of which SIOC was authorised to mine for iron ore on the Table I and Table II properties and on the same date the Department issued Permit ML06/2002 in terms of which AMSA was authorised to mine for iron ore on the Table I properties. Each permit reflects that the holders of the mineral rights are SIOC and AMSA and that the licence shall be valid from the date of issue until 16 October 2032. The part of the annexure to the permit issued to SIOC which lists the Table I properties is headed ‘A 0,786000 (NOUGHT comma SEVEN EIGHT NOUGHT (sic) NOUGHT NOUGHT NOUGHT) share of the rights to iron ore in and upon:’. The heading of the annexure to the permit issued to AMSA is the same save that the heading to the list is ‘[A] 0,214000 (NOUGHT comma TWO ONE FOUR NOUGHT NOUGHT NOUGHT) share of the

rights to iron ore in and upon:' Except for these differences and the properties to which they related, the permits were identical.

[20] Thereafter SIOC conducted the mining operations at the Sishen mine and delivered iron ore to AMSA in accordance with the Supply Agreement. AMSA had ceased to be a mining company and it now manufactured steel. The Supply Agreement imposed a multiplicity of obligations on SIOC in connection with the mining operations at the Sishen mine.

The changes to the law

[21] Against that background I shall consider first how the MPRDA changed the law. Under the common law the holder of the rights to minerals which had been separated from the ownership of land was entitled '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'.[8] Because these rights could not be fitted into the traditional classification of servitudes with exactness, they became known as quasi servitudes. They were real rights and their exercise could conflict with the rights of the landowner. Where there was an irreconcilable conflict the interests of the landowner were subordinated in order to preserve the content of the mineral right. While the minerals remained in the ground they were the property of the landowner. Only after the holder of the right to minerals severed them did they become movables owned by him.[9]

[22] The provisions of the Minerals Act 50 of 1991 (which applied from 1 January 1992 until it was repealed by the MPRDA) were to the same effect. Section 5(1) provided that -

'the holder of the right to any mineral in respect of land or tailings, as the case may be, or any person who has acquired the consent of such holder in accordance with section 6(1)(*b*) or 9(1)(*b*), shall have the right to enter upon such land or the land on which such tailings are situated, as the case may be, together with such persons, plant or equipment as may be required for purposes of prospecting or mining and to prospect and mine for such mineral on or in such land or tailings, as the case may be, and to dispose thereof'.

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8 *Van Vuren v Registrar of Deeds* 1907 TS 289 at 294, quoted with approval in *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499(A) at 509G-H.
9 *Trojan Exploration* (supra) at 509G-590H.

Further, under subsecs 1(a)(i)-(ii), the definition of 'holder' meant, amongst other things, in relation to a mineral in respect of land or any undivided share therein, the owner of such land: Provided that –

[I]f the right to such mineral or an undivided share therein has been severed from the ownership of the land concerned, the person in whose name such right or an undivided share therein is registered in the deeds office concerned, either by means of a separate deed or by means of a reservation in the title deed of the land concerned; or

[I]f the right to such mineral or an undivided share therein vests in any other manner in a person, that person, shall be the holder',

but s 5(2) provided clearly that

'no person shall prospect or mine for any mineral without the necessary authorization granted to him in accordance with this Act. . .'

[23] The Minerals Act 50 of 1991 (the Minerals Act) also provided for the issue of mining authorisations in certain circumstances[10] and for the division of rights to any mineral or minerals in respect of any land amongst two or more persons into undivided shares, provided that this was approved in writing by the Director-General.[11]

[24] The MPRDA fundamentally changed the law relating to mineral rights and the right to prospect for and mine minerals. With effect from 1 May 2004, when the Act commenced, all mineral and petroleum resources vested in the State, as the custodian thereof[12] and (subject to the Transitional Arrangements) all mineral rights as they were known prior to that date ceased to exist. Henceforth, the Minister would grant any right necessary for the purpose of searching or prospecting for or mining any mineral.[13] The MPRDA made no provision for the continuation of existing prospecting or mining operations. This was regulated by the Transitional Arrangements.

[25] The meaning and effect of the MPRDA and its Transitional Arrangements in relation to mining operations being conducted before the commencement of the MPRDA have been considered in some detail in three recent judgments of this Court: *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* [2011] 1 All SA 364 (SCA); Xstrata

10 Section 9 of the Minerals Act.
11 Section 20 of the Minerals Act.
12 Section 3(1) of the MPRDA.
13 Section 3(2) of the MPRDA.

South Africa (Pty) Ltd & others v SFF Association 2012 (5) SA 60 (SCA); and *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA). Before summarising the statements of the law in these cases it will be convenient to refer to Item 7 of Schedule II which regulates the continuation of an 'old order mining right' which is an 'old order right' in terms of the Schedule. An 'old order mining right' means, amongst other things, a 'right listed in Table 2 to this Schedule in force immediately before the date on which this Act took effect and in respect of which mining operations are being conducted'.[14] One of the old order mining rights listed in Table 2 is 'the common law mineral right, together with a mining authorisation obtained in connection therewith in terms of s 9 (1) of the Minerals Act'. As will appear later, SIOC and AMSA each held an undivided share in respect of iron ore and quartzite in respect of the Table I properties, together with a mining authorisation issued in connection therewith in terms of s 9(1) of the Minerals Act.

[26] Item 7 of Schedule II reads as follows:

'**7 Continuation of old order mining right**

(1) Subject to subitems (2) and (8), any old order mining right in force immediately before this Act took effect continues in force for a period not exceeding five years from the date on which this Act took effect subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued.

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

(a) the prescribed particulars of the holder;

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

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

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

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

(f) a prescribed social and labour plan;

14 Item 1 of Schedule II.

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

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

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

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

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

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

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

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

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

(d) has an approved environmental management programme; and

(e) has paid the prescribed conversion fee.

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

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

(6) If a mortgage bond has been registered in terms of the Deeds Registries Act, 1937 (Act 47 of 1937), or the Mining Titles Act, 1967 (Act 16 of 1967), over the old order mining right, the mining right into which it was converted must be registered in terms of this Act subject to such mortgage bond, and the relevant registrar must make such endorsements on every relevant document and such entries in his or her registers as may be necessary in order to give effect to this subitem, without payment of transfer duty, stamp duty, registration fees or charges.

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

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

[27] The legal position before the MPRDA, during the operation of the Provisional

Arrangements, and after conversion of the old order mining right, as it is stated in *Holcim, Xstrata* and *Agri SA*, may be summarised as follows:

(a) Under the Minerals Act a person wishing to mine a mineral had to hold the right to exploit that mineral, either because that person held a right to that mineral or was authorised to exploit the mineral by the holder of the right and had to be in possession of a mining authorisation issued in terms of the Minerals Act. The mining authorisation gave practical value to the mineral rights by authorising the holder to exercise them. (*Holcim* paras 22 and 37; *Xstrata* para 1; *Agri SA* para 70-71);

(b) From the time when the MPRDA came into operation all mineral and petroleum resources vested in the State as custodian thereof and from that date the State has conferred the right to exploit such resources in terms of s 23 of the MPRDA. (*Holcim* para 20; *Xstrata* para 1; *Agri SA* paras 8-10);

(c) The purpose of the Transitional Arrangements is to avoid disrupting existing mining operations. They do this by providing that the relevant rights ('the old order right') remain in force for a period of five years and that during that period the holder of the old order right is entitled to convert it into a mining right in terms of the MPRDA (*Holcim* para 26; *Xstrata* para 1; *Agri SA* paras 77-78);

(d) The statutory 'old order right' referred to in the definitions of Schedule II is a new statutory right and is not merely the previous right under a different guise (*Holcim* para 37; *Xstrata* para 10; *Agri SA* para 76). This new statutory right embodies the rights previously enjoyed under the relevant old order right, together with an entitlement to convert that right into a mining right under the MPRDA (*Holcim* para 37; *Xstrata* para 10; *Agri SA* para 78);

(e) The object of the Transitional Arrangements is to achieve 'the seamless continuation of existing mining operations which are tested . . . by the scope of the licence pursuant to which the operations are being conducted' (*Holcim* para 26; *Agri SA* para 78 and 80);

(f) The main body of the MPRDA does not deal with pre-existing mining rights or their holders. Existing mining rights are only relevant in relation to the Transitional Arrangements and the way they are dealt with depends upon whether they had been exercised under the Minerals Act or not. If they had not been exploited by the time the MPRDA commenced, they 'simply disappeared into thin air' (*Holcim* para 25; see also *Agri SA* para 80);

(g) In terms of Item 7(1) of the Schedule the old order mining right continues for five years. During that period, the holder continues to enjoy precisely the same rights enjoyed under the Minerals Act save that the holder is entitled to convert the right but is not entitled to transfer that right to a third party. The holder may only convert the old order right if he or she lodges the right for conversion within the five-year period and complies with the requirements of Item 7(3) (*Agri SA* paras 77-78);

(h) Upon conversion, the holder of the old order mining right becomes the holder of a mining right under the MPRDA 'with all the advantages flowing from such right as set out in s 5, read with s 23 and 24 of the MPRDA' (*Agri SA* para 78).

[28] It is clear from these statements that the package that constituted the old order mining right (the common law right to the mineral and the mining authorisation) (*Holcim* para 15) is, in accordance with the Transitional Arrangements, converted into the right described in s 5 of the MPRDA (a limited real right in respect of the mineral and the land to which such right relates, which, subject to the MPRDA, entitles the holder to (1) enter the land to which the right relates together with his or her employees, and to bring onto that land any plant, machinery or equipment and to build, construct or lay down any surface, or underground infrastructure which may be required for the purpose of mining; (2) mine for his or her own account on or under that land for the mineral for which such right had been granted; (3) remove and dispose of such mineral during the course of mining; (4) subject to the National Water Act 36 of 1998, use water from any natural spring, lake, river or stream, situated on or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and (5) carry out any other activity incidental to mining or production operations which does not contravene the provisions of the MPRDA.

[29] The Transitional Arrangements do not pertinently provide for the conversion of an 'old order right' where the mineral right is held in undivided shares by two or more persons, but the provisions must be understood to apply equally to such a situation because one of the objects of the arrangements is to 'ensure that security of tenure is protected in respect of . . . mining and production operations which are being

undertaken'.[15] The Legislature was obviously aware of the relevant provisions of the Minerals Act and therefore knew that the right to a particular mineral on a specific property could be held by two or more persons in undivided shares. The Legislature was also aware that such persons were entitled to mine the mineral if they were in possession of a mining authorisation issued in terms of s 9 of the Minerals Act. Unless they could convert these rights into the mining right created by s 5 of the MPRDA they would not enjoy security of tenure and there would be no 'seamless continuation of existing mining operations'. In principle there is no reason why two or more persons should not be able to be joint holders of a mining right in terms of the MPRDA provided they can comply with the relevant provisions of the MPRDA.[16] It seems to me that the co-holder's undivided share in the right to the relevant mineral would be converted to an undivided share in the limited real right in respect of the mineral and the land to which the right relates and each co-holder would enjoy the rights set out in s 5(2) of the MPRDA. How the co-holders would share the mineral after it has been severed from the ground would have to be regulated by agreement between the co-holders. The present case is a good example. As previously shown, SIOC and AMSA are parties to a comprehensive agreement which regulates their mining activities and the manner in which they will share the iron ore mined on the properties.

The conversion of SIOC's right and the consequences

[30] The MPRDA and Transitional Arrangements commenced on 1 May 2004. As already mentioned, the Transitional Arrangements in Schedule II regulated the position in respect of existing 'old order rights'. SIOC and AMSA held abortive discussions about jointly lodging their old order mining rights for conversion in terms of Item 7 of Schedule II of the MPRDA. Such an application had to be lodged on or before 30 April 2009.

[31] On 12 December 2005 SIOC lodged for conversion its old order mining right to mine for iron ore in, on and under both the Table I properties (in respect of which SIOC and AMSA jointly held undivided shares in the common law mineral right to iron ore) and the Table II properties (in respect of which SIOC alone held the common law mineral right to mine ore) with the Regional Manager, Northern Cape Region.

15 Item 2(a) of Schedule II. See also *M O Dale et al South African Mineral and Petroleum Law* Schedule II: 27-34.
16 See the requirements listed in s 23 of the MPRDA.

[32] The documents which SIOC lodged for conversion were unqualified and related to the entire iron ore deposit on the Table I and Table II properties. This appears from the Lodgment Document and the Mining Work Program which accompanied it. SIOC therefore sought a mining right in respect of iron ore on both the Table I and Table II properties.

[33] On 23 April 2008 the Regional Manager addressed a written recommendation to the DG in which the Regional Manager recommended that the conversion be approved as SIOC had complied with all the requirements of Item 7(3) of Schedule II to the MPRDA. The Regional Manager also requested the DG to sign the power of attorney authorizing the Regional Manager to sign, on the Minister's behalf, the mining right to be converted. On 5 May 2008 the DG, Mr S Nogxina, signed the document approving the conversion as well as the power of attorney which clearly and unambiguously stated that the old order mining right was converted in terms of Item 7(3) of Schedule II to the MPRDA into a mining right in respect of a number of properties set out in an annexure to the power of attorney to mine iron ore and quartzite according to the approval signed that day. The relevant Annexure lists the Table I and Table II properties.

[34] On 5 May 2008 and 18 June 2008, Nogxina addressed letters to SIOC to inform SIOC that the conversion of its old order mining right had been granted in terms of Item 7(2) of Schedule II of the MPRDA and on 11 November 2009 the terms and conditions of SIOC's converted mining right for iron ore in respect of the Table I and Table II properties were notarially executed by the Minister's delegate and SIOC. Clause 2 of the document states that –

'…the Minister converts the holder's old order right and grants to the holder the sole and exclusive right to mine, and recover the mineral/s in, on and under the mining area for the Holder's own benefit and account, and to deal with, remove and sell or otherwise dispose of the mineral/s, subject to the terms and conditions of this mining right, the provisions of the Act and any other relevant law in force for the duration of this right.'

The 'mining area' comprises the 21 Table I and Table II properties.

[35] AMSA did not lodge for conversion its old order mining right in respect of iron ore

on the Table I properties before 30 April 2009, the expiry date for such lodgment, and, accordingly, as provided in Item 7(8) of Schedule II of the MPRDA, at midnight on 30 April 2009 AMSA's old order mining right ceased to exist.

[36] Sometime between 30 April and 4 May 2009[17] –

(1) SIOC applied in terms of s 23 of the MPRDA for a mining right in respect of a 21.4 per cent share in iron ore in respect of the Table I properties;

(2) ICT applied in terms of s 16 of the MPRDA for a prospecting right in respect of iron ore and manganese on seven of the Table I properties.

[37] On 15 May 2009 the Regional Manager, Northern Cape Region accepted ICT's application for a prospecting right in terms of s 16(2) of the MPRDA and SIOC's application for a mining right in respect of a 21.4 per cent share in respect of the Table I properties in terms of s 22(2) of the MPRDA.

[38] On 19 June 2009 SIOC lodged with the Department of Mineral Resources an objection to ICT's application for a prospecting right, and, in August and October 2009, made further representations to the Regional Manager in connection with ICT's application. On 6 October 2009 SIOC addressed a letter to the Regional Manager seeking an answer to its objection to ICT's application for a prospecting right and, on the same day, the Regional Manager submitted a written recommendation to the Deputy DG that ICT's application be refused.

[39] Thereafter SIOC directed further enquiries to the Regional Manager and to the Chief Director Department of Mineral Rights regarding ICT's application and, although the Regional Manager and the Chief Director undertook to investigate the matter further, nothing came of their undertakings.

[40] On 30 November 2009 the Acting Deputy DG, Mr Rocha, granted ICT's application for a prospecting right and signed the power of attorney authorizing execution of the deed incorporating the right in respect of manganese ore but omitting any reference to iron ore.

17 The date of lodgment for both parties is contentious but for present purposes need not be resolved.

[41] In February 2010 SIOC discovered that ICT's application had been granted and on 1 March 2010 SIOC lodged an appeal in terms of s 96 of the MPRDA against the decision to grant ICT a prospecting right and the decision to approve ICT's environmental management plan.

[42] On 16 March 2010 the Regional Manager approved ICT's environmental management plan and the Acting Deputy DG signed an amended power of attorney to provide for the registration of a prospecting right in respect of iron ore. On the same day,
the Chief Mine Economist signed a Mine Economics Valuation Report in which he concluded that ICT's application for a prospecting right complied with the minimum requirements of s 17(1) of the MPRDA and the ICT prospecting right was notarially executed. The prospecting right was to remain in force for two years from the date of its execution.

[43] In the meantime, arising out of AMSA's failure to lodge for conversion its old order mining right to mine iron ore in respect of the Table I properties, SIOC, in February 2010, had informed AMSA that it, SIOC, was no longer bound by the Supply Agreement to mine iron ore on behalf of AMSA and to deliver to AMSA, at the agreed price, up to 6.25 mpta of iron ore every year. This gave rise to a dispute which SIOC and AMSA referred to arbitration. Although they have filed arbitration statements, they have not proceeded with a hearing because of the issues to be decided in this appeal.[18] The key dispute in the arbitration seems to relate to the effect on the Supply Agreement of AMSA's failure to convert, in accordance with Item 7 of Schedule II of the MPRDA, its old order mining right to mine iron ore in, on or under the Table I properties.

[44] On 21 May 2010 SIOC launched its review application in the North Gauteng High Court, Pretoria, seeking, as against the five appellants, orders reviewing and setting aside the decision in terms of s 17 of the MPRDA to grant a prospecting right to ICT relating to iron ore as to a 21.4 per cent share (and as to a 100 per cent share in so far as the remaining extent of Portion 4 of the farm Sacha 468 is concerned) and

18 Referred to at the beginning of this judgment.

manganese ore in respect of seven of the Table I properties; reviewing and setting aside the decision in terms of s 39(4) of the MPRDA to approve ICT's environmental management plan pursuant to the grant of the prospecting right and other relief. All the appellants opposed the application and filed answering affidavits.

[45] On 16 August 2010 the Minister addressed a letter to SIOC in which she informed SIOC that she had decided to uphold the decision of the Deputy DG to grant the prospecting right to ICT and to uphold the decision of the Regional Manager to approve

ICT's environmental management program.

[46] In early 2011, when SIOC's application for a review had reached an advanced stage, SIOC and AMSA each applied for the joinder of AMSA as a party to the proceedings; SIOC wished AMSA to be joined as an applicant and AMSA wished to be joined as a respondent. The court a quo granted SIOC's application and joined AMSA as an applicant. AMSA then filed its own substantive application seeking, amongst other relief, orders declaring (1) that SIOC became, with effect from 5 May 2008, alternatively, 18 June 2008, the exclusive holder of a converted mining right in terms of Item 7(3) of Schedule II to the MPRDA for iron ore and quartzite in respect of the Table I and II properties (where the Sishen mine is situated) and (2) declaring that, in consequence, any decision taken to accept or to grant any application lodged after 5 May 2008 or 18 June 2008 (including by Sishen and ICT) for a prospecting right, mining right or mining permit in respect of a 21.4 per cent share (or any other share or shares) for iron ore and quartzite in respect of the Table I and II properties, as well as any execution and registration of any such right pursuant to such grant is void ab initio; and declaring that clause 8 of the terms and conditions of SIOC's converted mining right, executed in November 2009, did not preclude SIOC from supplying iron ore to AMSA from the Sishen mine at cost plus 3 per cent as agreed in the Supply Agreement entered into on 23 October 2001.

[47] In its application AMSA challenged the common assumption of all the other parties to the litigation that prior to 30 April 2009, AMSA held a distinct 21.4 per cent share in the right to the iron ore on the Table I properties and that the relevant old order mining right lapsed because AMSA did not lodge a conversion application in terms of the MPRDA's Transitional Arrangements. It also contended that it was not a consequence of the lapsing of this limited right, after 30 April 2009, that it was open to SIOC and / or ICT to apply for a new order prospecting and or mining right in respect of this 21.4 per cent share. The basis of AMSA's challenge was that SIOC had applied for and had been validly granted the exclusive mining right in respect of iron ore in respect of the Table I and II properties and that, accordingly, it was not possible for any party to apply for a 21.4 per cent right in respect of the Table I properties as no such right exists. AMSA also contended that an administrative decision was taken on 5 May 2008

to convert SIOC's old order mining right into an exclusive mining right in respect of the Table I and II properties; that this decision clearly and unambiguously granted SIOC the sole and exclusive right to mine the iron ore on the Table I or II properties and that that administrative action had not been challenged by any party either on appeal or on review and was therefore valid and binding.

[48] It will be remembered that the court a quo accepted AMSA's contentions and granted the declaratory relief which it sought. For the same reasons the court a quo granted the relief sought by SIOC referred to at the beginning of this judgment. Although granting this relief on the basis contended by AMSA, the court a quo recorded that at least one of SIOC's grounds for this relief was good.[19]

[49] The appellants contend that SIOC did not seek the conversion of its old order mining right (which was limited in respect of the Table I properties) into a mining right in respect of the Table I and Table II properties. I disagree. First, the decision is clear and unambiguous. Secondly, in so far as they are relevant, the documents lodged in support of the conversion: the Regional Manager's recommendation to the DG, the DG's letters dated 5 May 2008 and 18 June 2008 to SIOC to inform SIOC that its rights had been converted, the power of attorney signed by the DG and the converted mining right executed on 11 November 2009 leave no room for doubt that SIOC sought to convert, and was understood by the Regional Manager to seek to convert, its old order mining right without qualification, into a mining right in terms of the MPRDA. While SIOC held an undivided 78.6 per cent share in the right to iron ore on the Table I properties, it held the entire right to iron ore on the Table II properties and its mining authorisation clearly related to all the properties. It could not be otherwise. A mining authorisation simply authorises the holder to mine the mineral to which it relates. The fact that the holder's right to the mineral is limited is irrelevant. In compliance with Item 7(2)(j) of Schedule II, SIOC had lodged with its documents for conversion the original old order right which consisted of the Notarial Deed of Cession of Mineral Rights K 48 2001 RM and Mining Licence ML07/2002, both of which reflect that SIOC held an undivided 78.6 per cent share of the right to iron ore in respect of the Table I properties

19 The decision to grant the prospecting right was in contravention of Section 10(2) of the MPRDA because SIOC's objection was not referred to the Regional Mining Development and Environmental Committee (REMDEC) to consider and advise the Minister.

and the entire right to iron ore in respect of the Table II properties. SIOC's limited interest in the right to iron ore in respect of the Table I

properties was therefore disclosed and had to be taken into account by the Regional Manager and the Minister when converting the old order right. This was not disputed by the State's witnesses. It would serve no purpose to attempt to divine SIOC's real intention (assuming it to be different) when the objective evidence is so clear.

[50] The court a quo therefore correctly found on the facts that after the conversion SIOC was the sole holder of the mining right in respect of the Table I and Table II properties. The conversion took place on the date of the Minister's decision (the DG took the decision on behalf of the Minister), 5 May 2008. What would have happened if AMSA had sought to convert its old order right on or before 30 April 2009 will be considered later.

[51] The court a quo also found that until the Minister's decision to convert SIOC's old order mining right to a single mining right in terms of the MPRDA (in respect of the Table I and Table II properties) was set aside, it had legal effect in accordance with the principle stated in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 26: that an administrative decision, whether it be right or wrong, stands until set aside. Accordingly, the court a quo found that not even AMSA could apply for the conversion of its old order mining right into a mining right in terms of the MPRDA within the five year period. The State appellants contend that the *Oudekraal* principle does not apply on the facts of this case because there was not an initial invalid administrative act (the grant of the conversion of SIOC's old order mining right) followed by a series of administrative acts pursuant to the initial act. The State appellants and ICT argued that the *Oudekraal* principle can apply only where the substantive validity of the initial decision was a necessary precondition for the validity of subsequent acts. In addition, ICT contended that the grant of the conversion to a single mining right in terms of the MPRDA was a clerical error which could be corrected (in terms of s 103(4)(b) of the MPRDA) at any time before registration of the right. This registration has not yet taken place.

[52] In my view, s 103(4)(*b*) of the MPRDA clearly empowered the Minister to withdraw or amend the DG's decision to grant SIOC the entire mining right in so far as

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This appears clearly from Item 7(2), (3), (5) and (7) of the Transitional Arrangements.

it related to

the Table I properties. Until midnight on 30 April 2009 AMSA had the right to convert its old order right and had it sought to do so the Minister would have been obliged to withdraw or amend the DG's decision in respect of the Table I properties so that AMSA's rights could be accommodated. However, this conclusion cannot assist the appellants because AMSA did not seek to convert its old order right.

[53] The appellants are thus faced by an insurmountable obstacle: the provisions of Item 7(8) of the Transitional Arrangements. These provide that if the holder of an old order mining right fails to lodge that right for conversion before the expiry of the five year period, that old order right ceases to exist. Accordingly, even if SIOC had wrongly been granted the entire mining right in respect of all the properties and AMSA still held an undivided share in the right to iron ore on the properties, the effect of AMSA's failure to lodge, timeously, its undivided 21.4 per cent share in the old order mining right in respect of iron ore on the Table I properties, was that that undivided share ceased to exist.

[54] This necessarily had the effect that there was no longer a potential limitation of SIOC's mining right (in terms of the MPRDA) in respect of iron ore on the Table I properties and obviously, if the undivided share in the old order mining right in respect of the Table I properties no longer existed, neither that undivided share nor an undivided share in a mining right in terms of the MPRDA was available to the State to allocate to any other party. In short, as a matter of law, SIOC became, as from 30 April 2009, the sole holder of the mining right (in terms of the MPRDA) in respect of iron ore on the Table I and Table II properties. Whatever reasons may have existed for setting aside or amending SIOC's mining right (in terms of the MPRDA) in respect of the Table I properties became irrelevant and SIOC was correctly reflected in the documents as the sole and exclusive holder of the mining right in respect of iron ore on the Table I and Table II properties. It will be remembered that the mining right into which SIOC's old order right had been converted was executed on 11 November 2009, after AMSA's old order right had ceased to exist. The appellants' counsel were unable to deal satisfactorily with the clear meaning and obvious consequences of Item 7(8) of the Transitional Arrangements. They referred to the new mining dispensation and the clear import of the MPRDA that the State is now vested with all mineral and petroleum

resources but that is no answer to the clear provisions of Item 7(8).

[55] Accordingly, whether or not SIOC's old order mining right was correctly converted on 5 May 2008, SIOC, as a matter of law, became the sole holder of the mining right in terms of the MPRDA in respect of iron ore on the Table I and Table II properties when AMSA failed to convert its undivided share in the old order mining right in respect of the Table I properties before the five year period expired on 30 April 2009.

Conclusion

[56] To summarise: the answers to the three questions posed at the beginning of this judgment are as follows:

First question:

On the facts, the effect of the conversion of SIOC's old order mining right on 5 May 2008 was that, on that day, SIOC became the holder of the sole and exclusive mining right in respect of iron ore on the Table I and Table II properties.

Second question:

Prima facie the conversion granted by the Minister on 5 May 2008 stands until amended or set aside. Although it is doubtful whether the conversion could be amended or set aside at this stage, this is not an issue which it is necessary to decide.

Third question:

As a matter of law, at midnight on 30 April 2009, after AMSA failed to convert its undivided share of the old order mining right in respect of iron ore on the Table I properties, SIOC became the sole holder of the mining right in respect of those properties as well as the Table II properties.

[57] It is found, therefore, that, subject to the amendment of the date and the formulation of order 1.1 so that it accords with this judgment, the court a quo correctly granted the declaratory orders and other relief sought by AMSA and SIOC referred to earlier in this judgment.

[58] During the hearing it was common cause that the court a quo's order 1.4 (setting aside the Minister's decision to include clause 8 in the terms and conditions of SIOC's converted mining right and declaring that clause *pro non scripto*) was granted without opposition and was not subject to attack in this appeal.

[59] It remains to record that in their heads of argument, the State appellants' counsel contended that AMSA had no locus standi to seek the declaratory orders granted by the court a quo in paragraphs 1.1 and 1.2 of its order but at the hearing no argument was presented in support of this contention. It therefore requires no further consideration.[20]

[60] The parties agree that costs must follow the result of the appeal and cross-appeal and that where three counsel were employed such costs must include the costs of three counsel. Except for the State appellants all the parties were represented by three or more counsel.

[61] The following orders are made:

1 The first, second, third, fourth and fifth appellants' appeals are dismissed with costs, such costs to include the costs of three counsel.

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

'It is declared that as a result of the first applicant's (SIOC's) conversion of its 'old order mining right' in respect of iron ore and quartzite on the Table I properties (the properties described in Annexure "B" to SIOC's amended Notice of Motion) in accordance with Item 7(3) of Schedule II to the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the second applicant's failure to convert its old order right in respect of iron ore and quartzite on these properties, the first applicant became, with effect from midnight on 30 April 2009, the exclusive holder of a mining right (SIOC's converted mining right) in respect of iron ore and quartzite on the Table I properties.'

3 The first respondent's conditional cross-appeal is dismissed with costs, such costs to include the costs of three counsel, where employed.

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20 The point does not appear to have been raised before the court a quo which did not deal with it in its judgment.

B R SOUTHWOOD
ACTING JUDGE OF APPEAL

APPEARANCES

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