

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

20/12/2011
DATE

10
CASE NO. 28980/10

28980/10

In the matter between:

SISHEN IRON ORE COMPANY (PTY) LIMITED	First Applicant
ARCELORMITTAL SOUTH AFRICA LIMITED	Second Applicant
and	
MINISTER OF MINERAL RESOURCES	First Respondent
DIRECTOR-GENERAL: DEPT OF MINERAL RESOURCES	Second Respondent
DEPUTY DIRECTOR-GENERAL: MINERAL REGULATION DEPARTMENT OF MINERAL RESOURCES	Third Respondent
THE REGIONAL MANAGER, NORTHERN CAPE REGION, DEPT OF MINERAL RESOURCES	Fourth Respondent
IMPERIAL CROWN TRADING 289 (PTY) LIMITED	Fifth Respondent
THE OFFICER PERFORMING FUNCTIONS IN TERMS OF THE MINING TITLES REGISTRATION ACT 1967, DEPT OF MINERAL RESOURCES	Sixth Respondent

20/12/2011

JUDGMENT

ZONDO, J:

INTRODUCTION

It is necessary to describe the parties to this matter before I can go into the merits of the dispute between the parties. The first applicant is Sishen Iron Ore Company (Proprietary) Limited, a

company that is duly registered as a company in accordance with the company laws of the Republic. For convenience the first applicant will be referred to in this judgment interchangeably as either Sishen or S10C. Sishen is a subsidiary of Kumba Iron Ore Limited, also a company that is registered in accordance with the company laws of the Republic. Kumba Iron Ore Limited will be referred to as Kumba in this judgment. Sishen carries on business as a mining company. Its registered office is in Centurion, Gauteng.

- [2] The second applicant is ArcelorMittal South Africa Limited, a company that is duly registered as a company according to the company laws of the Republic. For convenience it will be referred to in this judgment as AMSA or where context so requires, ISCOR. AMSA was previously known as Mittal Steel South Africa Limited and, before that, ISCOR Limited. AMSA was not party to these proceedings when they were instituted. It was joined as a second applicant in terms of an order I made on the 6th June 2011 pursuant to an application that had been made by Sishen for it to be joined in these proceedings. AMSA had also made a similar application but the order that I made was granted pursuant to Sishen's application. Pursuant to the order I made on the 6th June 2011 AMSA delivered an affidavit supporting the relief that it seeks in these proceedings. Sishen and the respondents delivered and served answering affidavits to AMSA's affidavit and subsequently AMSA delivered and served its replying affidavit.

- [3] The first respondent is the Minister of Mineral Resources who is cited in her official capacity as such. In terms of the Mineral and Petroleum Resources Development Act, 2002 ("the MPRDA") the Minister is charged with the authority of making some of the decisions that are sought to be reviewed in this matter even though she may have delegated such authority to

some of the officials in her Department and may not have taken these decisions herself in this case. In this judgment she will be referred to as the Minister

[4] The second respondent is the Director-General of the Department of Mineral Resources. At all times material to this matter the Director-General of the Department was Mr Sandile Nogxina. The Director-General will be referred to in this judgment as either the Director-General or Mr Nogxina. He is cited in these proceedings because, inter alia, of the powers vested in him by section 103(1) and (2) of the MPRDA and in his capacity as the person in charge of the Mineral and Petroleum Title Registration Office ("MPTRO") by virtue of section 5(1) of the Mining Titles Registration Act, 1967 ("MTRA") and because of the interest he may have in the relief sought by Sishen in this matter.

[5] The third respondent is the Deputy Director-General: Mineral Regulation: Department of Mineral Resources. He is Mr Rocha. The third respondent is cited because he was the official of the Department who took the decision to grant ICT a prospecting right which is one of the decisions that both Sishen and AMSA seek to have reviewed and set aside in this matter. The third respondent will be referred to in this judgment as either the DDG (short for Deputy Direct- General) or as Mr Rocha.

[6] The fourth respondent is the Regional Manager, Northern Cape Region, Department of Mineral Resources. The fourth respondent is cited because he took the decision to approve the environmental management plan submitted by the fifth respondent in support of the latter's application for a prospecting right which approval Sishen seeks to have reviewed and set aside.

- [7] The fifth respondent is Imperial Crown Trading 289 (Pty) Limited, a company that is duly registered in accordance with the company laws of the Republic. In this judgment the fifth respondent will be referred to as ICT. It is cited because of the interest it has in the decisions which Sishen seeks to have reviewed and set aside as they had been taken in its favour.
- [8] The sixth respondent is the Officer in the service of the Department of Mineral Resources who is designated by the Director-General to perform functions in the Mineral and Petroleum Title Registration Office in terms of the MTRA.
- [9] One of the largest opencast iron ore mines in the world is situated in the district of Kuruman, Kimberley, in the Northern Cape, South Africa. It is called the Sishen Iron Ore Mine. The Sishen Iron Ore Mine is said to account for almost 65% of South Africa's total iron ore demand and 3.9% of the global seaborne trade in iron ore. The first applicant owns the Sishen Iron Ore Mine. This matter relates to a number of disputes amongst the parties. The disputes all concern the entitlement of some or other of the parties to iron ore or a certain portion thereof in the Sishen Iron Ore Mine or the reviewability of certain decisions taken by the State functionaries cited in these proceedings about certain rights to such iron ore. Exactly which party has what dispute with which party will emerge later in this judgment.
- [10] On 1 March 2001 the board of directors of ISCOR Limited, which was a state corporation originally established in 1928, announced the unbundling of ISCOR. In the course of that year ISCOR was unbundled into two entities, namely Vicva Investments and Trading Seven (Pty) Ltd (which later became known as Kumba Resources Limited,) and Vicva Investments and Trading Eight (Pty) Ltd (which later became Sishen Iron Ore Company (Pty) Ltd), the first applicant in this matter. Vicva Investments and Trading Seven (Pty) Ltd was to focus on steel production whereas Vicva Investments and Trading Eight (Pty) Ltd was to focus on mining.

ISCOR's operations included iron ore mines at Sishen and Thabazimbi and steel manufacturing plants at Vanderbijlpark, Vereeniging and Newcastle.

- [11] ISCOR's mining division had been more profitable than its steel division. One motivation for the unbundling was to separate the mining side from the steel side of the business. It was envisaged that the steel side would in the long term require a total of approximately 8.25 mtpa of iron ore if the mine operated at 100% of its capacity. The parties believed that 21.4% of the expected annual yield of the Sishen Mine was approximately equivalent to 6.25mtpa of iron ore.
- [12] On the 10th April 2001 ISCOR and Sishen concluded an agreement, styled the Notarial Acquisition Agreement in terms of which ISCOR sold to Sishen its entire operation in relation to the business of prospecting, mining and processing of iron ore. The agreement was to take effect from 01 July 2001. This agreement was later amended by way of, inter alia, a notarial third amendment which was executed on the 22nd of October 2001. This amendment recorded that ISCOR had sold to Sishen the business comprising the operation as defined therein but that the parties had "agreed further to amend the agreement in order to exclude 0,21,4000 undivided share of the rights to iron ore in respect of certain of the properties listed in annexure B7 to the agreement and to effect amendments consequential thereto." For convenience, I shall refer to this agreement as the "business agreement."
- [13] Prior to July 2001 ISCOR Limited was the 100% holder of a common law right to iron ore in the Table 1 properties set out below. On July 2001 the business agreement came into effect and ISCOR sold the Sishen Mine to Sishen. Furthermore, ISCOR ceded an undivided 78.6% share in its common law right to iron ore in the Table 1 properties. ISCOR retained the remaining 21.4% share of its common law right to iron ore in Table 1 properties.

- [14] On the 22nd October 2001 and in anticipation of the conclusion of a certain agreement on the 23rd October 2001, ISCOR and Sishen applied to the Director-General: Mineral Resources for the latter's approval under section 20(3) of the Minerals Act, 1991 ("the Minerals Act") for the division of the right to iron ore in and upon the properties into respectively 21, 4% and 78, 6% undivided shares.
- [15] On 23 October 2001 ISCOR and Sishen concluded an agreement in terms of which Sishen would conduct mining operations in respect of the common law right to iron ore in the Table 1 properties, beneficiate the iron ore and supply 6.25 million tons per annum (mtpa) iron ore products to ISCOR. As for ISCOR it bound itself to contribute on a pro rata basis to the costs of mining by paying to Sishen a fee of 3% of the mining costs to Sishen for Sishen's services.
- [16] Owing to the importance of the agreement of the 23rd October 2001 between the parties, it is necessary to refer to, and, if necessary, quote certain provisions thereof. Under the heading: "RECITALS" at the beginning of the agreement it is recorded that ISCOR was at that time "the holder of 100% (one hundred percent) of the mineral rights in the properties but was in the process of transferring 78.6% (seventy eight comma six percent) of the iron ore mineral rights in the properties to [Sishen] with the result that it [would] hold a 21.4% (twenty one comma four percent) of the undivided share in the mineral rights pertaining to iron ore on specified properties."
- [17] The properties that were specified in the agreement were the Table 1 properties. The Table 1 properties were the following:
- (a) the remaining extent of portion 3 (portion of portion 1) of the farm
GAMAGARA 541, division of Kuruman, Northern Cape Province,

measuring 452,3519 hectares held under a Certificate of Rights to Minerals in favour of ISCOR.

- (b) the remaining extent of portion 4 of the farm GAMAGARA 541, division of Kuruman, Northern Cape Province, measuring 593, 3233 hectares held under a Certificate of Rights to Minerals.
- (c) the remaining extent of portion 2 (RUSSOORD) (portion of portion 1) of the farm SACHA 468, division of Kuruman, Northern Province, measuring 840,1399 hectares;
- (d) remaining extent of portion 3 (portion of portion 1) of the farm SACHA 468, division of Kuruman, Northern Cape Province, measuring 298,9699 hectares held under certificate of Rights.
- (e) the remaining extent of portion 1 (BERNADENE) of the farm SIMS 462, division of Kuruman, Northern Cape Province, measuring 1231,5732 hectares held under a Certificate of Rights to Minerals.
- (f) the remaining extent of the farm SISHEN 543, division of Kuruman, Northern Cape Province, measuring 1050, 6221 hectares.
- (g) the remaining extent of portion 1 (LOT A) of the farm SISHEN 543, division of Kuruman, Northern Cape Province, measuring 11534290.
- (h) the remaining extent of the farm SACHA 468, division of Kuruman, Northern Cape Province, measuring 6379782 hectares.

[18] In section B of the recitals of the agreement the following provision appeared:

“SIOC will become the holder of 78, 6 % (seventy eight comma six percent) of the undivided mineral rights pertaining to iron ore (but also all the rights (100%) to other minerals which do not form part of this agreement) in and upon the properties” (my underlining).

I have underlined the words “the holder of 78, 6% (seventy eight comma six percent) of the undivided mineral rights pertaining to iron ore” to make it quite clear what the 78, 6% was 78, 6% of in the arrangement between Sishen and ISCOR.

- [19] In section C under the recitals the parties to the agreement undertook to take all the necessary steps to obtain mining authorisations as contemplated in section 9(1)(a) and (b) of the Minerals Act, No. 50 of 1991 as amended. In section D the agreement provided as follows:

“ISCOR wants to appoint SIOC to mine its undivided share of the mineral rights in iron ore on the properties and SIOC is prepared to accept such appointment”

Clause 5 of the agreement dealt with the principles of the agreement. Some of the principles are dealt with below. Clause 5.2 read as follows:

“5.2 SIOC shall mine on behalf of ISCOR Lump Iron Ore, DR Iron Ore, DRS Iron Ore, and fine iron ore on the basis of and in accordance with the geological physical and chemical composition of the iron ore reserve in and upon the properties.”

Clause 5.8 dealt with the ownership of the iron ore. It provided thus:

“5.8 because the parties have undivided rights to the iron ore on the properties, ownership shall only be determined once Iron Ore has become loaded on the rail wagons.”

Clause 5.11 provided as follows:

“5.11 ISCOR will not sell any of the Iron Ore products directly or indirectly to any third party, except in accordance with this agreement.”

- [20] In clause 6.1 of the agreement the parties undertook to display good faith and reasonableness in dealing with each other and, where possible, to co-operate in the implementation of the agreement. Clause 6(1) also provided that the parties “undertake to do all such things, perform all necessary acts and procure the taking of all necessary steps to give effect to the intention,

the principles agreed to in clause 5 and the terms and conditions of this agreement.” Clause 6.2 read as follows:

“6.2 The parties acknowledge that pursuant to the anticipated promulgation as binding legislation of the draft Mineral and Petroleum Resources Development Bill (“the Bill”) circulated for public comment as at the effective date.

6.2.1 The Minerals Act will be repealed and replaced by the new legislation.

6.2.2 The concept of the common law ownership of mineral rights regime premised on the vesting of the right to prospect and mine for all minerals in the state”

[21] Under clause 7 of the agreement Sishen was appointed which appointment Sishen accepted but there is no provision in that clause on what Sishen was appointed to do. It seems that this clause must be read together with section D under “recitals” because in that section it is stated that Sishen was to be appointed “to mine [ISCOR’s] undivided share of the mineral rights in the iron ore on the properties.” It is also indicated in that section that Sishen was prepared to accept that appointment. That being the case, it can safely be accepted that the appointment of Sishen contemplated in clause 7 was an appointment of Sishen to mine ISCOR’s undivided share of the mineral rights in the iron ore on the properties whatever that means.

[22] With regard to the remuneration of Sishen, clause 8 of the agreement provided that Sishen would be entitled to 3% of “the ISCOR contract cost as a contractor’s fee for services rendered in terms of this agreement.” Clause 8.2 provided that Sishen would invoice ISCOR on a monthly basis “for the contractor’s fee which invoice and payment shall be in accordance with clause 14.” Clause 13 of the agreement dealt with Sishen’s obligations. Clause 13.1 was to the effect that Sishen acknowledged that it was aware of the terms, conditions, restrictions and obligations subject to which ISCOR held its rights to the iron ore in and upon the properties

and would, accordingly, observe and comply therewith. Clause 14 dealt with payment and invoicing. Clause 14.1 read thus:

“14.1 SIOC shall submit within 7(seven) working days after the end of the month a value added tax invoice, stating the ISCOR contract cost plus 3% (three percent) of such cost payable for the number of Dry Tons of Iron Ore dispatched to the Plants ex Sishen Mine during that month.”

In terms of clause 15.1 the parties agreed that the total tonnage of iron ore to be supplied by Sishen to ISCOR from the Sishen Mine during any contract year would not exceed 6.25 million dry metric tonnes.

[23] Clause 19 dealt with the nature of the relationship between Sishen and ISCOR. In clause 19.1 both Sishen and ISCOR bound themselves not to “in any way represent or do anything to create the impression that the one acts as agent or partners for the other.” Clause 19.2 was to the effect that Sishen’s appointment by ISCOR was “as an independent contractor, to mine ISCOR’s undivided share of the iron ore on the properties and to beneficiate such ore to comply with the specifications as set out in Annexure “B” to the agreement.”

[24] On the 17th October 2002 the Department of Minerals and Energy issued to ISCOR an authorisation to mine, or mining licence in terms of section 9(1) read with section 9(3) (d) of the Minerals Act. Part of what was written on the authorisation or licence document was: “Permit NO ML 06/2002.” The office reference in the Department was also given. Then the following appeared immediately below the office reference:

“authorisation is hereby granted under and subject to the provisions of Minerals Act, 1991 to ISCOR Limited identity or registration numbers 1989/02 64/06 (hereinafter referred to as ‘the holder’) of P.O Box 9229 PRETORIA 0001 to mine for Iron Ore and Quartzite on various farms.(see attached annexure).”

A little below this appears the following in the authorisation:

“Full name of the holder of the right to the said mineral.

**SISHEN IRON ORE COMPANY PROPRIETARY LIMITED and
ISCOR LIMITED”**

It must be noted that in the mining authorisation issued by the Department of Minerals and Energy the reference to 21, 4% (and, therefore also to 78, 6%) was reflected as a 21, 4% (and, therefore, also a 78, 6%) “share of the rights to iron ore in and upon” the Table 1 properties. Attached to the permit or authorisation was a document which at the top reflected the following:

“a 0.214000 (nought comma two, one, four, nought, nought, nought) share of the rights to iron ore in and upon” and thereafter then followed a list of the Table 1 properties.

On the same day the Department issued to Sishen a similar permit or authorisation. The permit number for Sishen was reflected as ML 07/2002. The office reference was MC 5/3/2/106. All material information on the permit was the same as in ISCOR’s permit.

[25] On the 13th of November 2001 the Department of Minerals and Energy approved “the division of the rights to the minerals into undivided shares in favour of Sishen Iron Ore Company (Proprietary) Limited and ISCOR Limited as requested.” This appeared in a letter that was sent to Sishen and ISCOR by the Department informing them of the approval. The approval read thus in part:

“APPROVAL TO DIVIDE THE RIGHTS TO MINERALS

By virtue of the powers delegated to me LOUIS SELEKANE, DIRECTOR, MINERAL DEVELOPMENT; NORTHERN CAPE REGION by the Director-General of Minerals and Energy and in terms of section 20(3) of the Minerals Act, 1991 (Act 50 of 1991) approval is hereby granted that the rights to the minerals in respect of the under-mentioned properties be divided as follows:

and thereafter it is written that the division that was approved was one “into equitable undivided shares between ISCOR Limited 21.4% and Sishen Iron Ore Company(Pty) Ltd

78,6%.” This was said to be “all rights to iron” The farms mentioned are the Table 1 properties.

[26] Pursuant to the agreement between ISCOR and Sishen, Sishen conducted mining operations on the Table 1 properties in accordance with the agreement between itself and ISCOR. It is common cause that during the period before 1 May 2004 Sishen and ISCOR were co-holders or joint-holders of undivided shares in the right to iron ore in, under and on the Table 1 properties.

[27] ISCOR’s obligations under the agreement (i.e. the agreement of 23 October 2001) were in essence taking delivery of the iron ore tonnages and paying SIOC in accordance with the agreement. On 5 December 2001 a Certificate of Rights to Minerals K47/2001 RM was registered in the Deeds Registry in favour of ISCOR. As a result of that, the rights to all minerals (excluding gold, silver and precious stones) were severed from the ownership of the properties and were from then on held by ISCOR under a separate title.

[28] By Deed of Transfer T3280/2001, which was registered on the 05th December 2001, ISCOR ceded to Sishen an undivided 78, 6% share of the rights to iron ore in and upon the properties and the rights to all other minerals excluding gold, silver and precious stones. In the result Sishen and ISCOR were vested with personal rights (*iura in personam*) vis-a-vis each other in respect of the undivided real right by reason of the provisions of the agreement.

[29] From about the beginning of 2002 Sishen was conducting mining operations on the Sishen mine and complying with its contractual obligations to ISCOR with regard to the two parties’ joint rights to iron ore on the Table 1 properties. On the 1st of May 2004 the Mineral and Petroleum Development Act, 2002, (“the MPRDA”) came into operation. Sishen and AMSA had anticipated that the time would come when this Act would come into operation and had made this clear in their agreement of the 23rd October 2001. The MPRDA abolished the mineral

rights system that was based on, essentially, the owner of the land being, first and foremost, the owner of the minerals occurring in and on his land. The MPRDA made the State the grantor of mineral rights. Anyone seeking to have rights in minerals had to apply for the grant of rights (such as the prospecting right, the mining right and others) and the State, through the Minister, was given the power to grant or refuse such rights.

[30] Sishen points out in its founding affidavit that historically and immediately prior to 1 May 2004 when the MPRDA took effect, it was “conducting mining operations in respect of its mining licence in respect of its own 78,6% undivided share on behalf of itself.” Sishen then goes on to say that AMSA “was conducting mining operations in respect of its mining licence in respect of its 21,4% undivided share on behalf of itself through SIOC as AMSA’s mining contractor for which SIOC was paid a contractor’s fee being the contract cost (being the cost of exploration, mining, beneficiation, stockpiling and handling) plus 3%.” Sishen pointed out in paragraph 22 of its founding affidavit that “such mining operations were being conducted on the mining right area of the Sishen Iron Ore Mine, which included inter alia the SIOC properties and the ICT properties(exclusive of remaining extent of portion 4 Sacha 468.”

[31] Item 7 of Schedule II of the MPRDA provided in effect that “old order mining rights” would continue for five years from date of the commencement of operation of the MPRDA. That date, as already pointed out, was 1 May 2004. Item 7 also provided that during that period of five years a holder of such right had to lodge such right for conversion into in effect a mining right under the MPRDA. Item 7(8) further provided that, if such right was not lodged within the five year period for conversion, it would “cease to exist.” An “old order mining right” is defined in item 1 of Schedule II as meaning:

“any mining lease, consent to mine, permission to mine, claim licence, mining authorisation or right listed in Table 2 to this Schedule in force

immediately before the date on which this Act took effect and in respect of which mining operations are being conducted.”

In this regard it needs to be pointed out that the Director: Mineral Development had issued two identical documents to both ISCOR and Sishen in which the holder of the mining authorisation was reflected as ISCOR and Sishen. When one has regard to the rights listed in Table 2 to Schedule II, one sees that the first right listed under Table 2 to Schedule II is: “the common law mineral right, together with a mining authorisation obtained in connection there-with in terms of section 9(1) of the Minerals Act.” The right which Sishen and AMSA held jointly in the iron ore in the Table 1 properties was a common law mineral right. Accordingly, their joint right fell within the ambit of “the common law mineral right” contemplated under category 1 of Table 2 to Schedule II. The mining authorisation that was issued to AMSA and Sishen as “holder” was a mining authorisation issued in terms of section 9(1) of the Minerals Act. Such mining authorisation was contemplated in the second part of the right falling under Table 2 to Schedule II of the MPRDA.

- 37] The “old order mining right” was required to be lodged with the Regional Manager of the Department of Mineral Resources together with, among other things the prescribed particulars of the holder and other information (see item (7(2))). Item 7 (3) of Schedule II provides that the Minister “must convert the old order mining right into a mining right if the holder of the old order mining right” has met certain requirements stipulated in item 7(3) (a) to (e). Item 7(5) provides that 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 for deregistration of the old order mining right as the case may be.” Item 7(7) provides that 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.” Item 7 (8) provides that “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.”

[55] Sishen says that on the 13th December 2005, which was still within the five year period within which old order mining rights had to be lodged, it “duly lodged its old order mining right in respect of a 78.6% undivided share for conversion” (underlining supplied). It must be noted that in describing what it lodged on the 13th December 2005, Sishen says that it lodged its “old order mining right in respect of a 78.6% undivided share for conversion” and it does not say it lodged its 78.6% undivided share in the right to iron ore. I shall deal with the significance hereof later in this judgment.

[34] In the forms used for the lodgement of an old order mining right which Sishen used to lodge its old order mining “right” there is a section in which Sishen was required to provide “the registered description of the land, area or offshore blocks to which this application relates together with respective SG diagrams.” Sishen listed over 20 farms. This included both Table 1 properties and Table 2 properties. In the space in which Sishen had to specify the relevant minerals in the lodgement documents, it specified iron ore and aggregate. The method of mining was specified in the form as “open cast.” There was also an area in the form where the lodger was required to state the period “for which the right [was] required”. Sishen specified 30 years in this regard.

[22] On the 5th of May 2008, that is about two and a half years after the lodgement, the Director General of the Department of Mineral Resources addressed a letter of that date to Sishen. The letter was annexed as annexure “F10” to Sishen’s founding affidavit. The subject of the letter was reflected as follows:

“Application for the conversion of an old order mining right into a mining right in terms of item 7(2) in Schedule II. (Transitional Arrangements) of the Mineral and Petroleum Resources Development Act, 2002 on various farms (Annexure A), administrative district of Hay” (my underlining).

The body of the letter read as follows:

“1. This is to confirm that your above-mentioned application for the mining of iron ore and quartzite in respect of the above-mentioned properties has been granted in terms of section 23(1) of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002).

A copy of a standard mining right similar to the one that will be signed is attached hereto only for your information. This office will prepare the final copies of the right to be signed.

2. Take note that the Regional Manager will execute / conclude your converted right on the 31st July 2008.

3. Further note that in terms of section 17(5) of the Act, the mining right comes into effect on the date on which the Environmental Management Programme is approved. In terms of section 25(2) mining activities must commence within a year of the effective date.

4. In the light of the afore-going you are requested to:

4.1 ensure that all outstanding matters regarding your application are finalised and that relevant documents are submitted to the office of the Regional Manager one week prior to the date of execution.

4.2 make arrangements for the authorised representative(s) of your company to be present and attend the signing of the mining right.

5. Note further that in terms of section 25(2) (a), the signed executed mining right must be lodged for registration at the Mineral and Petroleum Titles Registration Office within 30 days of the effective date.

6. Failure to comply may result in the withdrawal, suspension or cancellation of the right.”

I have provided the underlining to those parts of the letter that are underlined. I now turn to refer to certain parts of the content of the Converted Mining Right that the Minister granted to Sishen.

Sishen's Converted Mining Right

- [36] In the converted Mining Right document Sishen is referred to as "the holder" as opposed to "a holder". It records what was lodged for conversion as the holder's old order mining right.
- [37] Clause 2 of the Converted Mining Right deals with the "conversion of the old order mining right." Clause 2 reads as follows:
- "Without detracting from the provisions of item 7 of the schedule to the Act, sections 5 and 25 of the Act, the Minister converts the holder's old order right and grants to the Holder the sole and exclusive right to mine and recover the minerals 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 minerals, 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."
- [38] Clause 3 of the Converted Mining Right document deals with the date of the commencement, duration and renewal of the converted mining right. In terms of clause 3.1 the mining right commenced on the 11th November 2009 and, unless cancelled or suspended, in terms of clause 13 of the converted mining right document and or section 47 of the MPRDA, it would continue to be in force for a period of 30 years ending on 10 November 2039. Clause 3.2 requires "the Holder" to continue mining operations failing which the right could be cancelled or suspended.
- [39] Clause 7.1 of the Converted Mining Right provides that "the Holder is entitled to the rights referred to in section 5(2),(3) and section 25 of the Act and such other rights as may be contained in this mining right or such other right as may be granted to, acquired by or conferred upon the Holder by any other applicable law."

[40] Clause 8 makes it a condition of the conversion of “this old order mining right that the Holder should dispose of all minerals and/or product derived from the exploitation of the mineral at competitive prices or non-export parity prices.” Clause 8 goes on and provides:

“If the minerals are sold to any entity, which is an affiliate or non-affiliated agent or subsidiary of the Holder or is directly or indirectly controlled by the Holder, such purchaser must unconditionally undertake in writing to dispose of the minerals and any products produced from the minerals at competitive market prices.”

[41] Clause 9 of the Converted Mining Right document requires that the Minister’s written consent be obtained before “[t]his mining right, a shareholder, an equity, an interest or participation in the right or joint venture or a controlling interest in a company, close corporation or joint venture may be encumbered, ceded, transferred, mortgaged, let sublet, assigned, alienated or otherwise disposed of.”

[42] It needs to be highlighted that nowhere in the Converted Mining Right document is there any reference to a restriction or limitation of the grant to 78.6% of the Converted Mining Right. The document refers to a converted mining right which, of necessity, means a full mining right and not a fraction of a mining right. In fact clause 2 of the Converted Mining Right states clearly, unequivocally and unconditionally that the Minister granted Sishen “the sole and exclusive right to mine and recover the minerals in, on and under the mining area for the Holder’s own benefit and account...”

There can simply be no doubt that what the Minister granted to Sishen was not a 78.6% undivided share in the converted mining right to equate with what Sishen held before the conversion but that she or her delegate granted Sishen more than Sishen had held before and granted it a full 100% right which it did not jointly hold with anyone.

[13] It is common cause that AMSA did not itself lodge any old order mining right within the period of five years prescribed for the lodgement of an old order mining right. Both Sishen and the Department of Mineral Resources believed that AMSA should have lodged "its" old order mining right within the period if it did not wish to risk losing it in the light of the provision of item 7(8) of Schedule II to the MPRDA. The day on which the five year period was to expire was the 30th April 2009. That day was a Friday. The next day, a Saturday, was the 1st May 2009. The 1st of May was a public holiday, it being May Day.

[14] As the 30th of April 2009 approached, Sishen was very much alive to the fact that AMSA had not lodged "its" old order mining right. It was Sishen's understanding that, if AMSA failed to lodge "its" old order mining right within the prescribed five year period, it i.e. AMSA would lose "its" "old order mining right" which would then become available to the Department of Mineral Resources to grant to someone else in terms of the MPRDA. Sishen was very keen to secure such "mining right". Sishen then began to prepare the necessary documentation to apply for the grant to it of that mining right should AMSA fail to lodge "its" old order mining right in terms of item 7 on or before 30 April 2009 and, therefore lose such right.

[15] It would seem that close to the 30th April 2009 or during the weekend of the 30th April to the 3rd of May 2009, Imperial Crown Trading also learnt that AMSA had not yet lodged "its" old order mining right for conversion as the five year period approached its expiry date. ICT also began preparing documentation necessary for it to apply for a prospecting right based on AMSA's 21, 4 % share of the right to iron ore on the Table 1 properties. It is common cause that by 24h00 on the 30th April 2009, AMSA had not lodged any old order mining right for conversion in terms of item 7.

[45] Sishen said in its founding affidavit that “(s)ince AMSA failed to convert its old order mining right as to a 21,4% undivided share, [Sishen] applied for a mining right for iron ore and aggregate in respect of the 21,4% undivided share in respect of the SIOC properties, as is set out more fully below.” Sishen also said in its founding affidavit that “the fifth respondent, Imperial Crown Trading 289 (Proprietary) Limited made application for a prospecting right in respect of the ICT properties. ICT’s application for a prospecting right was in respect of iron ore and manganese ore although initially it was only for diamonds.”

[46] In paragraph 28 of Sishen’s founding affidavit Sishen pointed out that the above meant that the Department of Mineral Resources (“the Department”) was, therefore, in receipt of two applications in respect of substantially the same land: (i) Sishen’s application (the existing land owner and mining operator) “in respect of the 21,4 % undivided share” for a mining right for iron ore and aggregate in respect of the SIOC properties; (ii) the application of ICT which Sishen described as a new comer, with no previous interest in the land or the mine, for a prospecting right for iron ore and manganese ore in respect of the ICT properties. In due course the Minister or her delegate took the decision to approve ICT’s proposed environmental management plan and to grant ICT’s prospecting right application”. At that time no decision had been taken by the Minister or her delegate on Sishen’s application for a mining right.

[47] For a long time after ICT’s application had been approved, Sishen’s application remained pending with no decision taken on it. Sometime after Sishen had instituted the present proceedings, the Department of Mineral Resources declined Sishen’s application for a mining right “for iron ore and aggregate in respect of the 21, 4% undivided share in respect of the SIOC properties....” I understand that Sishen has either appealed against that decision or has instituted legal proceedings to challenge the decision.

[45] By a letter dated 30 November 2009 Mr J.F. Rocha, Deputy Director-General: Mineral Regulation, advised ICT that ICT's application for a prospecting right to prospect for iron ore and manganese ore in respect of the "properties" had been granted in terms of section 17(1) of the MPRDA. The above-mentioned properties were listed in the subject of the letter as:

- (a) the remaining extent of Portion 1 of the Farm Sims No 462;
- (b) the remaining extent of Portions 3 and 4 of the Farm Gamagara No 541;
- (c) the remaining extent of Portion 1, and
- (d) the remaining extent of the Farm Sishen No 543 situated within the administrative district of Kuruman.

In the second sentence of the letter Mr Rocha wrote:

"Kindly note that the farms Constantia No 309 and Simondium No 308 have been excluded as there is a right granted on these properties for the same minerals that your company has applied for."

[50] In paragraph 4 of the letter Mr Rocha told ICT that the prospecting right that was being granted to it only applied "to the undivided share in the old order right which has not been converted in terms of Item 6 or 7 of Schedule II." From this it is clear that the prospecting right which Mr Rocha purported to grant to ICT was based on the assumption that the so-called old order mining right that Sishen and the Department believed AMSA should have lodged for conversion but did not lodge had ceased to exist with the result that, thereafter, a corresponding mining right under the MPRDA had become available to the Department to grant to an eligible person who applied for it.

[51] In its letter of application for the mining right, which was directed to the Director: Mineral Development of the Department of Mineral Resources, Sishen requested that regard be had to a preamble that was enclosed with the application letter "in order to contextualise the current

application.” Sishen’s application letter was signed by Dr V. Lickfold, Head of Geoscience at Sishen. At the bottom of the letter appeared a signature that looks like “Jozanna” as the person who received the application. Against that signature appeared the date 01/05/2009 as the date on which the application was received.

[5.7] In the preamble supporting Sishen’s application for a mining right, Sishen made amongst others, the following points:

- (a) Sishen was the owner of the various farms to which the application related.
- (b) the application for a mineral right was being made in terms of section 22 of the MPRDA.
- (c) Sishen was the holder of a converted new order mining right in respect of the properties (NC 5/3/2/106 MRC granted on 12 May 2008-“SIOC converted mining right”).
- (d) the conversion of the Sishen converted mining right was based on the preceding valid old-order mining right: Sishen was the holder of the undivided shares (78,6% -the Sishen undivided share in the right to minerals in terms of section 20(3) of the Minerals Act, 1991 on 13 November 2001(see copy of approval attached) It is in respect of this 78,6% undivided share that SIOC obtained an old order mining right (Mining licence 07/2002 in terms of section 9 of the Minerals Act,1991). In turn this mining licence served as the basis of the SIOC converted mining right.”(Underling supplied).

Sishen then wrote:

“It therefore follows that the SIOC converted mining right relates to the right to mine 78, 6% of the iron ore found in situ on the properties.”

Later in the preamble Sishen explained that its “application accordingly” sought “the grant to SIOC of the residual 21, 4% interest to mine the iron ore on the properties” (underlining supplied).

[33] It was after the Department had granted ICT the prospecting right in respect of the 21, 4% undivided share that Sishen decided to launch its application in these proceedings to have certain administrative decisions that had been taken by the Minister or her delegate or by other officials in the Department reviewed and set aside including the decision of the Regional Manager of the Department, Northern Cape, to accept ICT’s application and the decision by the Minister’s delegate to grant ICT the prospecting right. The respondents delivered answering affidavits to oppose Sishen’s application. Later Sishen filed its replying affidavit.

[54] Sishen notified AMSA that it would no longer continue to supply it with iron ore as provided for in the agreement of the 23rd October 2001 at cost plus 3% of the cost as had been agreed between the parties in terms of that agreement. Sishen took the view that AMSA’s “loss” of its 21,4% undivided share in the right to iron ore on the Sishen Mine relieved it of its contractual obligations to AMSA. AMSA took a different view and insisted that Sishen was still obliged to perform in terms of the agreement. This resulted in a dispute between AMSA and Sishen. That dispute was referred to private arbitration and is still pending.

[55] Subsequently, AMSA and Sishen brought separate applications for the joinder of AMSA in the present proceedings. The respondents opposed the two applications. After hearing argument and considering the matter I granted the application brought by Sishen and ordered that AMSA be joined as second applicant. AMSA was subsequently joined as second applicant. In terms of the order joining AMSA in these proceedings, AMSA was allowed to deliver and serve an affidavit in support of the relief that it would be seeking in these proceedings. AMSA delivered

and served an application for, inter alia, certain declaratory orders and interdicts. Sishen and all the respondents delivered answering affidavits in support of their opposition to AMSA's application. The gist of the relief sought by AMSA is a declaratory order that Sishen was granted a 100% mining right to iron ore upon conversion and that, therefore, it would be incompetent to grant anybody a mining right by virtue of AMSA's alleged loss of its 21.4% undivided share in the right to iron ore in the Table 1 properties. If such an order was made, it would mean that both Sishen's and ICT's applications based on AMSA's alleged loss were incompetent in law.

[56] In an email dated the 08th October 2009 from one Brenda Meyer, apparently writing on behalf of Sishen, to Patience Chuene in the Department of Mineral Resources, it was inter alia said:

“Sishen Iron Ore Company (Pty) Ltd (“SIOC”) applied for a new mining right of the residual 21.4% interest to mine iron ore on its properties situated in the district of Kuruman (Kimberley region)” (underlining supplied).

Patience Chuene appears to have been Mr Rocha's secretary or personal assistant.

[57] At this stage I do not propose to set out more facts about ICT's application for a prospecting right nor do I propose to set out at this stage the grounds on which Sishen seeks to have the grant of the prospecting right to ICT reviewed and set aside. The reason for this is that, as there are two review applications (apart from two applications for interdicts and an application to strike out) before me one of which is Sishen's and the other AMSA's, I am of the view that I should deal with these two review applications separately and that I should start with AMSA's one. Should I grant AMSA's review application, I shall have to consider what the effect of that decision will be upon Sishen's application. Accordingly, I turn to consider AMSA's review application.

[58] In his opening address before me , Counsel for AMSA submitted that the question that lies at the heart of the dispute between AMSA, on the one hand, and, Sishen and the respondents including ICT, on the other, was whether or not the MPRDA permits the holding of a mining right or prospecting right of less than 100%. He also submitted that another question that is quite fundamental to the resolution of the dispute between AMSA, on the one hand, and, Sishen and the respondents, on the other, was whether or not the MPRDA permits the grant of more than one mining right in respect of the same mineral and land. I shall start with the first mentioned question.

[59] AMSA contends that the MPRDA does not permit the grant of less than a 100% prospecting right or mining right whereas Sishen contends that the MPRDA does. AMSA submits that prior to the coming into operation of the MPRDA Sishen and AMSA had, respectively, a 78, 6% interest and 21, 4% interest or undivided share in the right to iron ore in the Table 1 properties. He submitted that they did not each have a discreet separate and whole right to the iron ore. Counsel for Sishen submitted that, contrary to AMSA's submission that Sishen and AMSA held a single undivided right to iron ore in the Table 1 properties prior to the coming into operation of the MPRDA, there was clearly not a single right. He submitted that there was a right registered in the name of ISCOR (later AMSA) and there was a different right registered in Sishen's name and each right had different outcomes in law.

[60] Counsel for Sishen submitted that Sishen's right entitled it to 78. 6% of the iron ore extracted and AMSA's entitled AMSA to 21. 4% of the iron ore extracted. He pointed out that this matter is not an academic exercise and that nobody had spent the millions of rands which they have spent and the legal fees which they had spent and would still spend because they have an interest in mining rights in general. He submitted that what is at stake in this matter is "the right to retain for one's own benefit what is mined on SIOC properties and that amounts to several

billions of rands.” He added: “That is why ultimately we are here.” Counsel for Sishen went on to say that the reason why AMSA was in this matter was “to establish who has a right to the iron ore that is mined [in the Table 1 properties] because the argument will no doubt be that, if we somehow got their rights, then we should really be giving it to them at cost plus 3%. ICT says, rather boldly, that, despite the fact that it has only a contested prospecting right, it really has a right to 21% of everything we are mining at the moment and then it goes on to say, if we do not have it, the State has it. The State does not say itself but you can see that the focal point of all of this is really who has that right.”

[61] Counsel for Sishen submitted that under the Minerals Act it was permissible for two persons to be issued with two separate prospecting rights or mining rights in respect of the same mineral and land. In support of this he referred to section 15 of the Minerals Act. Counsel also submitted that under the Minerals Act separate mining authorisations were granted and this supported his submission that, prior to the MPRDA, both AMSA and Sishen each had a separate and discreet right. Counsel for Sishen referred me to the mining authorisations that were issued to AMSA and Sishen. He submitted that the issuing of those documents was preceded by the splitting or division of the right. This must have been a reference to section 20 of the Minerals Act and the division that was approved by the Director-General in favour of AMSA and Sishen at the request of both AMSA and Sishen. However, Counsel for Sishen emphasised that the mining authorisations or permits were licences. He also said that it was common cause that the mining authorisations did not expand on the substantive rights. He said that they licensed one to do things which the common law empowered one to do.

[52] Counsel for Sishen submitted that prior to the MPRDA each party held a separate right to minerals in undivided shares i.e. undivided in relation to the minerals in the land. Their right was registered in their name and could be expropriated, transferred, alienated in some way,

hypothecated and mortgaged. Counsel for Sishen submitted that “the starting point is that you cannot sensibly talk of a single right. Those two rights could go their own way. “For example”, he continued, “if AMSA abandoned its rights, it would probably become “*bona vacantio*”. He said that what had been one right became two rights because of the “two authorisations”. He said that there was a cession because the only way to transfer a share of one’s right to minerals is through a cession because it is a real right. It seems to me that it is appropriate to precede a discussion of the Minerals Act and the MPRDA with a discussion of the legal position at common law.

The Common Law

[63] As to what the principles are which governed the acquisition, transfer and joint ownership of mineral rights at common law there appeared to be no material dispute among the parties. The content of common law mineral rights was essentially that the holder was entitled to enter upon the property to which they related, to search for the minerals and, if he found any, to sever them, carry them away and dispose of them for his own account. (*Trojan Exploration Company v Rustenburg Platinum Mines Ltd* 1996(4) SA 499 (A) at 509A-510C; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 371E-F, paragraph 16; *Du Plessis J in Agri South Africa v Minister of Minerals and Energy* case no 55896/07, dated 28 April 2011 in the North Gauteng High Court). Mineral rights included such rights as were reasonably necessary to exercise them (*Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007(2) SA 363 (SCA) at par 21). The holder of a mineral right had a real right (*Du Plessis J in Agri South Africa* at par 22). The holder of a mineral right only acquired ownership of the minerals once the minerals had been severed from the land and not before (*Du Plessis J in Agri South Africa* at par 22).

[64] Mineral rights were freely transferrable, could be sold, alienated in any way, used as security and in general be dealt with to the benefit of the holder (*Du Plessis J in Agri South Africa* at par

22). The holder of mineral rights was under no obligation, generally speaking, to exploit the minerals.(Du Plessis J in *Agri SA* at par 22). Mineral rights constituted a valuable asset that the holder could bequeath to his or her heirs – he or she could deal with it to his or her advantage and could retain it as an investment (Du Plessis J in *Agri SA* at par 30).

[65] Rights to minerals over another's property were regarded at common law as real rights in the nature of quasi-servitudes or real rights sui generis binding on third parties. (Trojan case at 509; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363(SCA) at 371E-F). In the Trojan Exploration case the Appellate Division described those rights in the following terms at 509G-510A:

“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 transferrable- 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 e.g. *Nolte's case* supra at 315; *Hudson v Mann and Another* 1950 (4) SA 485 T at 488E-F. For so long as minerals remain in the ground they continue to be the property of the land owner: only when the holder of the rights 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.”

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. (Botha JA in *Trojan Exploration* at 534 F-I).

[66] The immediate transfer of the ownership of minerals is impeded when they still form part of the land. (Botha JA in *Trojan* at 534 F-I). Botha JA said in *Trojan Exploration* at 534 F-I:

“that impediment is removed as soon as the ore containing the minerals is removed from the land. A new movable res is then created which is the object of separate ownership. At that moment, in my opinion the ownership of the ore vests in the cessionary, as was envisaged in the act of 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 affected, 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 recognised in this country. If this manner of passing or the acquisition of ownership does not fit into any hitherto recognised circle, a new one will have to be found to cater for it.”

The severance of the right to minerals from full ownership of the land on which such minerals existed constituted a subtraction from the full dominion of the owner of the land and if there was an irreconcilable conflict between the landowner and the holder of the mineral rights, the latter’s rights would, as a general proposition, prevail. (*Hudson v Mann and Another* 1950 (4) SA 485 (T) at 488).

[67] As in the case of movable and immovable property, mineral rights could be held in undivided shares (*Erasmus v Afrikander Proprietary Mines Ltd* 1976 (1) SA 950 (W) at 964G; *Trojan Exploration* case supra, at 525J). In the case of mineral rights that were held in undivided shares, the joint holder of mineral rights was entitled to exercise his rights provided that in so doing he did not infringe upon the rights of the other joint holders. Each co-owner had to exercise his rights *civiliter modo*. The courts had a wide equitable discretion to regulate conflicts between co-owners as to the exercise of their respective rights including the partition of such rights, (*Erasmus v Afrikaner Proprietary Mines Ltd* 1976 (1) SA 950 (W) at 964;

Trojan exploration case, *supra* at 525J). A co-owner of land has no exclusive right to any specific identifiable portion of the land but has an undivided share in the whole land (Franklin & Kaplan at 199). The same applies to the holder of an undivided share of rights to minerals (Franklin & Kaplan at 199). The undivided share is held in respect of the mineral rights as a whole. Franklin and Kaplan say that a joint owner of mineral rights does not own an undivided share in any property but is a joint owner of a real right in land, and not of land. (Franklin and Kaplan at 200) They say that ownership in the minerals does not vest in him until the minerals have been severed from the soil and, when so severed, they become the common property of the mineral right holders. (Franklin & Kaplan at 200 citing Erasmus's case at 960 as authority for the proposition). The holder of an undivided share of mineral rights is entitled to dispose of his interest without the consent of the other joint owners.

[58] At common law, a joint owner of property is entitled to make reasonable use of the common property, proportionate to his interest and in accordance with the purpose or object for which the property is intended to be used. (Franklin & Kaplan at 202 citing *Sauerman & Another v Schultz* 1950 (4) SA 455 (O) at 460-1). He is, however, not entitled to appropriate any specific or defined portion of the property for his exclusive use. I shall deal with the relevant provisions of the Minerals Act, 1991 within the context of considering one of the submissions made by Counsel for Sishen. The relevant provisions of the MPRDA will be discussed later.

[69] When one has regard to Sishen's affidavit, its heads of argument and the oral argument presented on its behalf in this matter, one finds that it sometimes says it had a 78,6% undivided share in the right to iron ore in the Table 1 properties or it says it had a right to the iron ore as to a 78,6% undivided share or it says it had a right to a 78,6% undivided share in the iron ore in the Table 1 properties. AMSA's position is that Sishen had a 78,6% undivided share in the right to iron ore in the Table 1 properties and it i.e. AMSA had a 21,4% undivided share in the same right to iron

ore in the Table 1 properties. AMSA's position in this regard is stated clearly and unequivocally and left no room for confusion whereas Sishen's position was subject to some uncertainty as a result of the various inconsistent statements it made in this regard. I am here referring to the position of AMSA and Sishen immediately before the coming into operation of the MPRDA.

[20] In so far as it may be necessary to decide exactly what Sishen's interest or share was either in the right to iron ore in the Table 1 properties or in the iron ore itself, there can be no doubt that the correct position is that Sishen had a 78,6% undivided share in the right to iron ore in the Table 1 properties immediately before the coming into operation of the MPRDA. When the position is described on the basis, as Sishen has so frequently done in its papers, that it had a right to a 78,6% undivided share in the iron ore, it may mislead one into believing that Sishen held a right as opposed to being a co-holder together with AMSA in a single right to iron ore in the Table 1 properties. In support of the conclusion that Sishen held a 78,6% undivided share in the right to iron ore in the Table 1 properties, reference can be made to the agreement that was concluded between Sishen and ISCOR on the 23rd October 2001 and to the statement of claim that was delivered by Sishen to the Arbitration Tribunal in regard to the dispute between itself and AMSA in March or April 2010. That agreement makes it crystal clear that the reference to 78,6% is a reference to a 78,6% undivided share in the right to iron ore in the Table 1 properties or SIOC properties. Furthermore, in par 8.2 of its statement of claim in the arbitration between itself and AMSA, Sishen put its case on the basis that "[t]he rights to iron ore in respect of the Sishen properties were subdivided into undivided shares between ISCOR (as to 21,4%) and SIOC (as to 78,6%)" (my underlining). Another paragraph of Sishen's statement of claim reads:

"ISCOR became the owner of a 21,4% undivided share ("the 21,4% undivided share") and SIOC became the owner of a 78,6% undivided share ("the 78,6% share") of the rights pertaining to iron ore on the Sishen properties" (my underlining). (See clause 8.3 of Sishen's statement of claim in the arbitration proceedings).

[71] Para 10.1 of Sishen's statement of claim in the arbitration proceedings confirms that, even immediately before the coming into operation of the MPRDA on the 1st May 2004, Sishen held a 78.6% undivided share in the right to iron ore in the Table 1 properties and AMSA similarly held a 21.4% undivided share in the right to iron ore in those properties.

[72] Counsel for Sishen submitted that, immediately before the coming into operation of the MPRDA, the position was that Sishen held a separate and discrete right to 78.6% undivided share to iron ore in the Table 1 properties. He said AMSA held a separate and discrete right to 21.4% undivided share in the iron ore in the Table 1 properties. On this proposition there was a sharp dispute between the parties because Counsel for AMSA submitted that AMSA and Sishen did not each hold a separate and discrete right. He submitted that there was only a single right to iron ore in the Table 1 properties which both companies jointly held. Of course, AMSA's submission in this regard is supported by the provisions of the agreement of the 23rd October 2001 referred to above and by Sishen's own statement of claim in the arbitration proceedings.

[73] In support of his submission Counsel for Sishen relied upon the Deed of Cession between the parties in 2001, the fact that two separate mining authorisations were issued to both AMSA and Sishen in terms of section 9 of the Minerals Act and 15 and 20 of the Minerals Act. The submission that the cession of the 23rd October 2001 supports the proposition that Sishen and AMSA held separate and discrete rights in the iron ore is not borne out by the terms of the cession or agreement of the 23rd October 2001. The provisions of that agreement are clear. They are to the effect that ISCOR and Sishen became joint owners of undivided shares in the right to iron ore in the Sishen properties. Accordingly, Sishen's submission in this regard falls to be rejected.

[74] Before I deal with sections 5, 9, 15 and 20 of the Minerals Act, I need to refer to the definitions of the word “holder” in that Act. The word “holder” was defined in that Act as follows:

“ ‘holder’ ”, in so far as is relevant for present purposes, was defined as meaning, in relation to the right to a mineral in respect of land or any undivided share therein, the owner of such land: Provided that—

- (i) if 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
 - (ii) if the right to such mineral or an undivided share therein vests in any other manner in a person, that person shall be the holder;
- (a) ...
- (b) any permit, license, permission, certificate, authorization or any other document issued, granted or in force in terms of this Act, the person in whose name it has been issued, granted or in force in terms of this Act.”

[75] Section 5(1) seems to be a confirmation of the content of a mineral right at common law. It reads as follows:

“Right to prospect and mine for and dispose of minerals

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

[76] Section 5(2) precluded anybody from mining or prospecting for any mineral without any authorisation granted to him in accordance with the Minerals Act. Section 5(2)(a) and (b) made provision for two exceptions to the prohibition. Section 5(3) authorised a person mining for a particular mineral under a mining authorisation to also mine for another mineral and dispose of such mineral in respect of which he was not the holder if, while mining for the mineral in respect of which he was the holder of the right thereto, he found the other mineral "which must of necessity be mined together with the mineral in respect of which he is the holder." There is a proviso to this general provision. The proviso is that in such a case 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..." A further proviso was that in the determination of the amount, section 12 of the Expropriation Act, 1975 would apply *mutatis mutandis* as if an expropriation of property has taken place. Sec 5 did no more than confirm the content of the common law right. It did not support the proposition advanced by Sishen.

[77] Section 6 deals with the issuing of prospecting permits. The Director: Mineral Development was required to issue a prospecting permit which authorised the applicant to prospect for a mineral in respect of which he was the holder of a prospecting permit or had acquired the written consent to prospect on his own account, from such holder, in respect of the land or tailings, as the case may be, comprising the subject of the application (section 6(1)). Once again, sec 6 does not support Sishen's proposition of a discrete and separate right.

[76] Section 9 dealt with the issuing of mining authorisations. Section 9(1) read as follows:

“Issuing of mining authorisations

9(1) The Director: Mineral Development shall, subject to the provisions of this Act, upon application in the prescribed form and on payment of the prescribed application fee, issue a mining authorisation in the prescribed form for a period determined by him authorising the applicant to mine for and dispose of a mineral in respect of which he –

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

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

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

Section 9(3) precluded the issuing of a mining authorisation unless the Director: Mineral Development was satisfied with certain matters and that certain conditions were met. Section 13 provided that a prospecting permit or mining authorisation “shall not be alienated, transferred, ceded or encumbered by mortgage.” In their well-known work: *A Guide to the Minerals Act, 1991*, Kaplan and Dale describe the nature of permits and authorisations under the Minerals Act as being like a driver’s licence. The authors say that such authorisations are:

“...necessary to enable the holder of common law rights to exercise them, much in the same way as does a driver’s licence, namely, the relevant person obtains his rights of ownership or the use of the vehicle at common law, but then in order to exercise such common-law rights must obtain a licence or authorisation entitling him to do so...” (see par 1.5.5 and 4.4.2)

[77] It is clear from the provisions of both section 6 (relating to the issuing of prospecting permits) and section 9 (relating to the issuing of mining authorisations) that each one of them could only be issued in favour of a person who was either the holder of a mineral right already or who had acquired the written consent from such holder to mine for his own account and dispose of the mineral. At common law such a person already had a right to mine for the mineral. Accordingly, the prospecting permit and the mining authorisation simply regulated the exercise of the right to

mine which the holder of a mineral right already had. At common law each joint holder of a mineral had the right to mine as long as he did so *civilliter modo*. In the case of AMSA and Sishen, if the Minerals Act had not been there, each one of them would still have had a right to mine for iron ore in the Table 1 properties and yet it could not have been said that they had two separate and discrete rights. Accordingly, the issuing of two mining authorisations to AMSA and Sishen under sec 91(1) of the Minerals Act did not give AMSA and Sishen any new right which they did not already have.

[80] As to section 15 of the Minerals Act, its heading is reflected as:

“Restriction on issuing of more than one prospecting permit or mining authorisation in respect of the same mineral and land”

Section 15 read as follows:

“No prospecting permit or mining authorisation shall be issued in respect of any mineral in respect of land or tailings, as the case may be, if a prospecting permit or mining authorisation has already been issued in respect of such mineral and land or tailings, as the case may be, unless the Director: Mineral Development is satisfied that such first mentioned issuing will not detrimentally affect the object of this Act in relation to optimal exploitation of minerals or rehabilitation.”

[81] It seems to me that Counsel for Sishen’s reliance upon the provision of section 15 of the Minerals Act for the proposition that Sishen had a separate and discrete right immediately before the commencement of the MPRDA is misplaced. Section 15 did nothing more than lay a general rule of one land, one mineral and one mining authorisation or prospecting permit unless the Director: Mineral Development was satisfied in a particular case that the issuing of a second prospecting permit or mining authorisation would not detrimentally affect the need for the optimal exploitation of minerals or rehabilitation. Section 15 provided no support for the proposition that the issuing of a prospecting permit or mining authorisation created a separate

and discrete right to the mineral to which it related. Accordingly, reliance upon section 15 in support of Counsel for Sishen's contention must be rejected. Section 16 reveals that a person who had been issued a prospecting permit or a mining authorisation lost the prospecting right or mining authorisation if he ceased to be the holder of the mineral right or if the written consent issued to him by the holder to prospect or mine on his own account lapsed. Sec 16 emphasises the point I made earlier that the permits and authorisations issued under the Minerals Act were issued if the person already held a common law mineral right. If you did not already hold such a right, you did not qualify to be issued with such a mining authorisation or such a permit. I now turn to section 20.

[82] Counsel for Sishen also relied upon the provision of section 20 of the Minerals Act to support his contention that Sishen held a separate and discrete right to iron ore in the Table 1 properties when the MPRDA came into operation. Section 20(1) of the Minerals Act read as follows:

"Restriction on dividing of rights to minerals

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

- (a) the division of any right to any mineral or minerals in respect of land among two or more persons into undivided shares; or
- (b) an increase in the number of holders of undivided shares in any right to any mineral or minerals in respect of land,

and if such right has been severed from the ownership of the land concerned or is about to be so severed upon the registration of such deed, shall be registered by the registrar of deeds concerned unless the Director-General has under section (3) in writing approved such division or increase."

Section 20(1) deals with the division of any right to any mineral or minerals in respect of land into undivided shares or an increase in the number of holders of undivided shares in any right to

any mineral or minerals in respect of land. Section 20(1) says a division of any right to a mineral or minerals in respect of land into undivided shares shall not occur unless the written approval of the Director-General is obtained. That is in relation to a right to a mineral which right has been severed or is about to be severed from the ownership of the land. Section 20(2) makes provision for any person who desires the approval of the Director-General in terms of section 20(1) to lodge an application with the Director-General. Section 20(3) confers upon the Director-General the power to approve or not to approve the division contemplated in section 20(1).

[83] It is important to point out that what section 20(1) provides for is not the partition of a right to a mineral which is the way to bring about separate and discrete rights and which is the way of terminating a co-ownership of a right to mineral that is jointly owned. In my view sec 20 does not provide for a legal framework for the termination of a co-holdership or joint ownership of rights to minerals.

[84] Counsel for AMSA submitted that, when one has regard to the fact that a mining authorisation authorised the mineral holder to mine and dispose of a mineral as defined in the Minerals Act in respect of the land comprising the subject of the application and that it authorised the holder thereof to mine for a certain defined mineral or minerals on such land, such an authorisation to mine could not be split between holders of undivided shares because it would be impossible to mine 78.6% of every molecule.

[85] In so far as Sishen's case includes the proposition that it had a right to mine its 78,6% undivided share of the iron ore, this must be rejected. As Counsel for AMSA correctly submitted this cannot happen at a practical level. How can you mine 78, 6% of every molecule of the mineral in the whole mining area? The position is that at common law a joint-owner of a right to a mineral was entitled to mine the whole area concerned subject to acting reasonably bearing in mind his interest. As Kaplan and Dale point out the mining authorisations were there to ensure that a

joint owner of a right to a mineral could exercise the joint right to mine without having to obtain the consent of the other co-owners.

[56] In the light of all the above I conclude that AMSA and Sishen were co-holders of, respectively, a 21.4% undivided share and a 78.6% undivided share in the right to iron ore in the Table 1 properties and that Sishen's contention that the two companies each held a separate and discrete right to iron ore falls to be rejected. I now turn to consider the issue of the conversion of old order rights under Schedule II to the MPRDA.

[57] As I have already said before, the MPRDA came into operation on the 1st May 2004. Schedule II to the MPRDA dealt with transitional arrangements. Item 7(1) of Schedule II ("the Schedule") provided that, subject to sub-items (2) and (8), any old order mining right in force immediately before the MPRDA took effect continued in force for a period of not exceeding five years from the date on which the MPRDA took effect subject to the terms and conditions "under which it was granted or issued." Prior to the MPRDA there was no concept of an old order mining right. That term came with the Schedule. However, I agree with Counsel for Sishen that one must have regard to the context in understanding the use of the term. The context suggests that what item 7(1) contemplated were the rights which, after the coming into operation of the MPRDA, would fall within the definition of the "old order mining right". Those are the rights which item 7(1) sought to preserve for at least five years from the date of the coming into operation of the MPRDA subject to subitems (2) and (8) of item 7 to the Schedule. I also agree with Counsel for Sishen that the common law mineral rights were not granted or issued. Accordingly, the reference in item 7(1) to such rights having been granted or issued is awkward, to say the least.

[58] Item 7(2) of the Schedule enjoined "a holder of an old order mining right" to lodge the right for conversion within the period of five years referred to in subitem 1. Item 7(8) provided that, if a

holder of an old order mining right failed to lodge the old order mining right for conversion within the prescribed period of five years, "the old order mining right ceases to exist." In terms of item 7(3) the Minister was required to convert the old order mining right into a mining right if the holder of the old order mining right complied with certain conditions or requirements prescribed by item 7(3) of the Schedule. Item 7(3) uses the words "must convert" to describe what the Minister is required to do after a holder of an "old order mining right" had lodged the right for conversion within the period prescribed by item 7(1) but the Minister was only required to convert the old order mining right into a mining right if the holder of the "old order mining right" met five requirements prescribed in item 7(3).

289] I agree with Counsel for Sishen that the Minister had no discretion but to convert the "old order mining right" into a "mining right" but, in my view, that obtained only if the holder of the old order mining right had met all the five requirements prescribed by item 7(3). During argument Counsel for Sishen presented his argument on the issue of the conversion of an old order mining right into a mining right in a manner that may have created the impression that, once a holder of an "old order mining right" had lodged the right for conversion, there was no basis on which the Minister could refuse to convert the "old order mining right". That there was no basis upon which the Minister could refuse to convert an "old order mining right" into a mining right once it had been lodged by a holder in terms of item 7(1) is not borne out by the provisions of item 7(3). On the contrary, it is clear from the five requirements laid down in item 7(3) that the Minister was not required to convert, and, therefore, could refuse to convert, an "old order mining right" into a mining right if any one or more of the conditions prescribed therein was not met. Accordingly, while the criticism levelled by Counsel for AMSA on Counsel for Sishen's submission on item 7(1) read with subitem (3) that the road along which he sought to lead us was one with neither "traffic cops" nor traffic lights may have been justified in so far as Counsel for Sishen's submissions suggested that the Minister could never refuse to convert an "old order

mining right" under item 7(3), the criticism could not fairly be directed at the provision of item 7(3) because under item 7(3) the Minister could refuse to convert an "old order mining right" into a mining right if any one of the conditions therein prescribed was not met.

- [90] Under item 7(1) read with (3) a holder would, so to speak, surrender a so called "old order mining right" and be in effect issued with a mining right if he met the conditions prescribed by item 7(3). Item 7(4) provided that no terms and conditions attached to an "old order mining right" prior to the MPRDA would continue to apply if they were contrary to any provision of the MPRDA or the Constitution. The mining right which a holder of an old order mining right acquired upon conversion was a right that survived beyond the period of application of the provisions of the Schedule. Accordingly, the ordinary provisions of the MPRDA, as opposed to the provisions of the Schedule, govern the mining right. There would be a few provisions of the Schedule such as those of item 7(6) and (7) that would apply to the mining right but, on the whole, the mining right would be subject to the ordinary provisions of the MPRDA. In this regard Counsel for Sishen pointed out that the definition of the term "mining right" in section 1 of the MPRDA did not apply to a mining right acquired upon conversion because section 1 defines a mining right as meaning "a right to mine granted in terms of section 23(1)" whereas the mining right acquired upon the conversion of an "old order mining right" was not "granted", in the first place and, in the second, not granted in terms of section 23(1). Instead of using the concept of the Minister converting an old order mining right into a mining right, the Legislature could equally have used the concept of a holder surrendering his old order mining right whereupon the Minister would grant the holder a new mining right. I do not say this on the basis that I criticise the use of the term "convert" in item 7(3). I have no quarrel with it. I say this only to point out that, within the context of the grant by the Minister of a mining right under section 23(1) and the conversion of "an old order mining right" under item 7(3) into a mining right, there

may not be much of a difference in substance and effect provided the different statutory requirements which must be met in each case are not lost sight of.

[91] I have said earlier that Sishen lodged an old order mining right in terms of item 7(1) for conversion into a mining right within the prescribed period of five years from the day on which the MPRDA came into operation. The Minister converted such old order mining right into a mining right. This was in May 2008. The five year period was to expire on the 30th April 2009. AMSA did not lodge "its" old order mining right in terms of item 7(1) for conversion into a mining right. In fact AMSA did not lodge anything. In the meantime the end of the five year period within which old order mining rights had to be lodged was fast approaching. In the last few days before the expiry of the five year period and, in the case of ICT, even after the expiry of the period. Sishen and ICT worked very hard to place themselves in as good a position as possible to be ultimately granted a mining right or a 21.4% share of the mining right to iron ore in the Table 1 properties which they believed became available as a result of AMSA's failure to lodge its 21.4% undivided share in the right to iron ore on those properties. It was within this context that Counsel for AMSA pointed out during his address that Sishen had stabbed AMSA in the back to which, in due course, Counsel for Sishen retorted that nobody had stabbed AMSA in the back but that AMSA had slept on the wheel as the period of five years came and went.

[92] AMSA's case is that Sishen did not lodge a 78.6% undivided share in the right to iron ore in the Table 1 properties for conversion but it lodged the whole right i.e a 100% right to iron ore in the Table 1 properties and that the Minister or her delegate also converted the whole right and not 78.6% and that the mining right which Sishen then acquired upon conversion was not a fraction of a mining right, i.e. not a 78.6% share of a mining right but a full 100% mining right. In its application AMSA effectively sought a declaratory order to this effect and to the effect that, in the light of the grant to Sishen of a full mining right to the iron ore in the Table 1 properties, the

Minister could not and cannot competently grant anybody including Sishen and ICT any mining right to iron ore in the Table 1 properties. Sishen submits that upon conversion of the “old order mining right” as to 78,6% of the share to the iron ore in the Table 1 properties it lodged for conversion, it did not acquire anything more than what it had held before the conversion. Before conversion Sishen held a 78, 6% undivided share in the right to iron ore in the Table 1 properties. The submission by Sishen would drive one to the conclusion that, on its understanding, it now holds 78,6% undivided share in the mining right that was, in effect, issued by the Minister upon conversion. However, Sishen may be putting the position as being that upon conversion it acquired a mining right as to 78, 6% undivided share of the iron ore in the Table 1 properties.

[95] Counsel for AMSA submitted that, after Sishen had lodged a full 100% right to all the iron ore in the Table 1 properties for conversion, the Minister or her delegate granted Sishen a full 100% right to all iron ore in the Table 1 properties. Counsel for AMSA pointed out that, after the Minister had received Sishen’s lodgment of the so-called old order mining right, she or her delegate ought to have taken steps to establish what AMSA’s position was because it was well-known to the Department that AMSA held a 21,4% undivided share in the right to iron in those properties. He pointed out that, if the Department had done that, AMSA would have become aware that Sishen was lodging a full 100% “old order mining right” and the issue of possibly the old order mining right being lodged jointly by both Sishen and AMSA or Sishen lodging it alone with the approval or agreement of AMSA on certain agreed terms and conditions would have been addressed. Counsel for AMSA implied that AMSA found itself in the position in which it had to bring the application it has brought in this Court partly because of the Department’s failure to deal with Sishen’s lodgment of a full “old order mining right” properly and because the Department failed to consult AMSA on the matter.

[54] Counsel for AMSA submitted that, if he was right that the Minister or her delegate granted Sishen a full 100% mining right to all the iron ore in the Table 1 properties, it would follow that, as a matter of law, there is no mining right or 21,4% undivided share in the right to iron ore in the Table 1 properties that is available to the Minister to grant to Sishen or ICT or anybody for that matter. In this regard Counsel for AMSA also submitted that the Minister's decision to grant Sishen a full 100% mining right to all the iron ore on the Table 1 properties was an administrative act which, right or wrong, stood until set aside. In support of this proposition he referred to the decision of the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA). The decision to grant Sishen a full 100% mining right has not been set aside and therefore it still stands and will stand until set aside. In *Oudekraal* the SCA found that, in granting permission for the establishment of a township, "the Administrator's permission was unlawful and invalid at the outset." However, the SCA held that this did not mean in that case that the Administrator's decision could simply be ignored. The Court went on to say:

"But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked." (*Oudekraal* case at para 26).

In the next two sentences the SCA said:

"The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in

question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

[93] Counsel for AMSA submitted that as a consequence of the grant of a full 100% mining right by the Minister or her delegate to Sishen, Sishen has moved from a position where, prior to the conversion of the old order mining right, it held a 78,6% undivided share in the right to iron ore in the Table 1 properties to a position where, after the grant to it of a mining right by the Minister or her delegate, it holds a full 100% mining right to all the iron which it has to itself and mines for its own benefit and no longer shares with AMSA as it used to do before the conversion. While this is what Counsel for AMSA had to say in part in support of AMSA’s case, Counsel for Sishen, in opposing, strange as it may sound, the proposition that, after conversion, Sishen held a 100% mining right to the iron ore in the Table 1 properties, pointed out that AMSA had moved from a position where, prior to 30 April 2009, it had held a 21.4% undivided share in the right to iron ore in the Table 1 properties to a position where, after 30 April 2009, it has nothing. He pointed out that life was usually not as cruel as that and thought that AMSA’s story that Sishen, which had previously held a 78,6% undivided share, was now, according to AMSA, the sole owner of a 100% mining right, was probably not true. It seems to me that Counsel for Sishen was saying that, if one adopted AMSA’s analysis, AMSA’s experience was too sad to be true and Sishen’s too good to be true. What makes this case even stranger is that not only does Sishen not admit that it now has a 100% mining right, it actually opposes an application that has been brought by AMSA for an order declaring that it, i.e. Sishen now has a sole and exclusive 100% mining right to the iron ore in the Table 1 properties. What is also very strange in Sishen disputing that it now holds a 100% mining right to iron ore in the Table 1 properties is that it seems to have no problem with keeping to itself all the benefits or proceeds of all the iron ore that it mines in the Table 1 properties. If Sishen does not believe it now holds a 100% right to the

iron ore in the Table 1 properties, I wonder how it explains the fact that all the proceeds of the iron ore that it mines now come to it and it does not share them with anybody.

(95) None of the Counsel who appeared on behalf of Sishen and all the respondents disputed the correctness of the proposition of law advanced by Counsel for AMSA that the grant by the Minister or her delegate of the mining right to Sishen upon conversion was an administrative act which, right or wrong, lawful or unlawful, produced legal consequences and stands until set aside. Of course, the reason none disputed its correctness is that the proposition is correct. What was disputed was that Sishen had lodged a 100% old order mining right and not a 78.6% share and that the Minister or her delegate had granted Sishen, upon conversion, a full 100% mining right to the iron ore in the Table 1 properties. In my view Sishen did not lodge a 78.6% undivided share to the right to iron ore for conversion. In my view Sishen lodged a full 100% old order mining right. It did not in the documents that it prepared for lodgement make any reference to the conversion of a 78.6% share of anything. If there was a reference to a 78.6% it appeared in some annexure that contained a reference to such percentage. Sishen simply prepared its documents in a manner which made it very clear that it was lodging a full old order mining right with no restriction. The Director-General has admitted in his answering affidavit that the documents lodged by Sishen made no reference to any restriction. In fact there is correspondence attached to AMSA's replying affidavits which reflects that at some stage Sishen was seeking an amendment of its converted mining right so as to introduce the restriction relating to 78.6%. This conduct on the part of Sishen was inconsistent with the stance it adopted in its answering affidavit to AMSA's founding affidavit where it said that it was unnecessary for it to stipulate any restriction in its lodgement documents. Strangely enough, in its application against ICT, Sishen made the point that ICT did not in its application for a prospecting right indicate any restriction to 21.4% but sought a full 100% prospecting right. This seems to reveal double standards on Sishen's part because, when AMSA says its failure to refer to a 78.6% share in its

lodgement documents means that it was lodging a full 100% right as opposed to a 78,6% share, it responds by saying that it was not necessary for it to specify 78,6% but when ICT failed to specify 21,4% as the share of the right to the iron ore in respect of which it was applying or had applied for a prospecting right, Sishen takes the stance that ICT should have mentioned that it was applying for a prospecting right in respect of a 21,4% share. Based on what Sishen had done in its lodgement documents and the defence it put up against AMSA's criticism that there was no need to make a reference to a 78,6% share to the right to iron ore, one would have expected that Sishen would have had no quarrel with ICT's failure to refer to the 21,4% share in its application for a prospecting right on the basis that such a reference was not necessary.

77] With regard to the submission by Counsel for AMSA that the Minister or her delegate granted Sishen a full 100% mining right to all the iron ore in the Table 1 properties, one only has to read the Converted Mining Right (document), particularly clause 2 thereof. Clause 2 reads as follows:

“Without detracting from the provisions of item 7 of the schedule to the Act, sections 5 and 25 of the Act, the Minister converts the holder's old order right and grants to the Holder the sole and exclusive right to mine and recover the minerals 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 minerals, 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.”

This leaves no doubt that the Minister or her delegate granted Sishen a full 100% mining right to, among others, the iron ore in the Table 1 properties and did not grant it a 78,6% share in such right. It was in 2008 when the Minister granted Sishen this 100% mining right.

- [98] The question which arises is: what are the legal consequences of the fact that upon the conversion of the old order right lodged by Sishen, the Minister granted Sishen a sole and exclusive full 100% mining right to the iron in the Table 1 properties? It seems to me that, since the Minister granted Sishen the sole and exclusive full mining right to the iron ore in 2008, which was before the expiry of the prescribed five year period for the lodging of old order mining rights, AMSA could not, therefore, competently lodge its old order mining right at any stage after the grant to Sishen of the converted mining right but before the expiry of the five year period on 30th April 2009. If AMSA purported to lodge its old order mining right, the Minister would not in law have been able or competent to convert it into a mining right as contemplated in item 7(3) of the Schedule. The Minister could not competently do so because there would have been no mining right available to her into which to convert AMSA's old order mining right since she had already granted the full 100% mining right to Sishen. She could not give what she did not have.
- [99] If AMSA had attempted to lodge an old order mining right after the Minister or her delegate had granted Sishen the sole and exclusive mining right to iron ore in the Table 1 properties, the Minister or her delegate would not have been able to legally convert such right if the result was not going to be that AMSA would upon such conversion acquire a mining right. This would have occurred even before the expiry of the five year period if AMSA had attempted to lodge an old order mining right after the grant to Sishen of a full mining right. If AMSA wanted to have the grant set aside on the basis that the Minister's conduct was unlawful, it probably would have succeeded. However, it need not challenge it and can elect not to challenge it.
- [100] Another consequence of the fact that the Minister or her delegate granted Sishen a sole and exclusive mining right to iron ore in the Table 1 properties is that, as long as that decision stands and has not been set aside, no-one else can be granted a mining right to iron ore in the Table 1 properties. That includes ICT. Sishen can also not be granted it because, contrary to its belief, it

already holds not only the full mining right to the iron ore but one that the Minister or her delegate has granted on the basis that it is Sishen's and Sishen's alone and for Sishen's sole and exclusive benefit.

[101] Apart from the fact that the Minister's grant to Sishen of the mining right was on the basis that the mining right was solely and exclusively Sishen's, there is also the hurdle created by sections 16(2)(b), 19(1)(b) and (c) and section 22(2) of the MPRDA to anyone being granted another mining right to the iron ore in the Table 1 properties. Section 16 deals with an application for a prospecting right. Section 16(2) prescribes two conditions that must be met before the Regional Manager may "accept an application for a prospecting right..." Section 16(2) reads:

"(2) The Regional Manager must accept an application for a prospecting right if-

- (a) the requirements contemplated in subsection (1) are met; and
- (b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land (my underlining)".

Since Sishen already holds a mining right for iron ore in the Table 1 properties, the Regional Manager would be precluded by section 16(2)(b) from accepting an application for a prospecting right for iron ore in the Table 1 properties. That hurdle would be insurmountable. ICT seems to have got away with that in this case because it was granted a prospecting right to iron ore in effectively the Table 1 properties. In the light of the conclusion that I have reached in this matter, the Regional Manager had no power to accept ICT's application for a prospecting right. It also stands to reason that, if the conclusion I have reached is correct, as I think it is, then the Department should not have granted ICT a prospecting right since the Department had already granted Sishen a sole and exclusive mining right to iron ore in the Table 1 properties. Section 19(1)(b) of the

MPRDA confers upon the holder of a prospecting right, subject to subsection (2), “the exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area in question.” Section 19(1)(c) confers upon the holder of a prospecting right, subject to the permission referred to in section 20, “the exclusive right to remove and dispose of any mineral to which such right relates and which is found during the course of prospecting.”

[102] ICT is in the position of a holder of a prospecting right as provided for in section 19(1) and is supposed to have the exclusive rights provided for in section 19(1)(b) and (c) and yet its “right” to apply for a mining right to iron ore in the Table 1 properties cannot be enforced as long as the Minister’s decision to grant Sishen the sole and exclusive mining right to iron ore in the Table 1 properties stands. Section 22(2)(b) of the MPRDA will also preclude the granting of a mining right to ICT should it wish to acquire a mining right to iron ore in the Table 1 properties which I have no doubt it wishes to acquire. Section 22(2)(b) provides:

“(2) The Regional Manager must accept an application for a mining right if—

(a) ...

(b) No other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.”

Since Sishen already holds a mining right to the iron ore in the Table 1 properties, no other party can be granted a mining right for the same mineral in the Table 1 properties. This is the principle which Counsel for AMSA submitted is part of the MPRDA which can conveniently be said to be reflected in the phrase “one right, one mineral, one land.” It can be called the “one right, one mineral, one land” principle. To grant another party a mining right when Sishen has already such a right in respect of the same mineral and land would violate this very important principle of the MPRDA. Parliament has made its intention clear in the MPRDA in this regard and effect must be given to its intention.

[103] It follows from the above that AMSA's application must succeed and that the Minister or her delegate has no power to grant to any entity or person any mining right to iron ore in the Table 1 properties as long as her grant of the mining right to Sishen stands. I accept that the result of these proceedings is an unusual one in the sense that a party which believes it does not have a full 100% mining right is found to have such a right and that finding is made pursuant not to that party's application but pursuant to an application brought by that party's opponent in the dispute. In other words an order favourable to one party is made pursuant to that party's opponent making an application for such an order. In my view, this is the result of the failure by Sishen and AMSA to speak to each other about the lodging of the old order mining right, the failure by the Department to consult AMSA before it decided to grant Sishen a sole and exclusive mining right and the actual grant by the Department to Sishen of a mining right for iron ore in the Table 1 properties. This matter could have been handled better by all parties involved.

[104] From the above it will be clear that AMSA has been successful and must be granted the main orders that it seeks if not all the orders it seeks. Sishen has also been successful even though not on the basis of most of the grounds upon which it had brought its application. In this regard I do point out that it did contend that the MPRDA precluded the granting of a prospecting right for and mining right to iron ore in circumstances where someone else already held a mining right. That was also one of AMSA's contentions. I have not granted those orders which Sishen sought which are incompatible with the finding I have made that Sishen already holds a 100% mining right to all the iron ore in the Table 1 properties. I have also not granted orders that fall away once it is accepted that ICT's application for a prospecting right was incompetent in law and the Minister had no power to grant ICT either a prospecting right for or a mining right to the iron ore in the Table 1 properties. I record that Counsel for the respondents associated themselves to a very large extent with the submissions advanced by Counsel for Sishen in regard to their

opposition of AMSA's application. It is for this reason that I did not refer much to their argument in this judgment.

[105] In so far as it may be said that any of the two applicants' applications was brought prematurely because the applicant concerned did not exhaust internal remedies as required by sec 7(2) (a) of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) I am of the view that exceptional circumstances exist which justify that such applicant be exempted from such requirement. Indeed, in my view it is in the interest of justice that such exemption be granted. This matter is very complex. The matter has generated much interest nationally and it is in the public interest that it be determined as soon as possible.

[106] In so far as various parties failed to comply with certain rules of this court or orders or directives for the delivery and service of affidavits and have applied for condonation, I am of the opinion that condonation should be granted. The issues in this matter are very important and I do not think that any party should be denied the opportunity of being fully heard. I accordingly propose to grant condonation to all the parties which needed condonation. With regard to Sishen's application to strike out certain portions of certain affidavits delivered by some of the respondents, a separate judgment will deal with that application.

[107] In conclusion I would like to take this opportunity to record my indebtedness to all the legal teams which represented various parties in this matter for the thorough manner in which they discharged their duties to their clients and to this court. The legal teams were led very ably by Senior Counsel of enormous experience on all sides. Almost all the legal teams included two or more Senior Counsel and a number of junior counsels. AMSA's legal team was led by Mr MD Kuper SC, Sishen's legal team by Mr CDA Loxton SC, the state respondents' legal team by Mr WJ Vermeulen SC and ICT's team by Mr C E Puchrin SC. All legal teams worked very hard

and Counsel who addressed the Court during argument did so in a very able manner. Because of the view I have taken of the matter I have not referred to all their submissions in this judgment. By this omission I mean no disrespect to them. However, I do want to assure all the parties that, before I came to focus on the issues dealt with in this judgment, I spent much time going through their heads of argument, their written argument, my notes, some of the authorities I was referred to and the transcript of argument which was provided to me. In other words, before reaching the conclusion that I have reached in this matter, I considered much more than this judgment may reveal.

[108] With regard to costs I shall not at this stage make any order as to costs as no argument on costs was addressed to me during the hearing. It was agreed among all the parties that I should rather give them an opportunity of delivering written arguments on costs once my judgment on the merits has been handed down. I shall, therefore, invite the parties to furnish written submissions on costs whereafter I will make a decision.

[109] In the result I make the following order:

1. With regard to the application for a review brought by the second applicant i.e. ArcelorMittal South Africa Limited:

1.1 It is hereby declared that the first applicant, Sishen Iron Ore Company (Proprietary) Limited ("SIOC"/ "Sishen") became, with effect from 5 May 2008, alternatively 18 June 2008, the exclusive holder of a converted mining right ("SIOC's converted mining right") in terms of item 7(3) of Schedule II to the Mineral and Petroleum Resources Development Act, 2002 ("MPRDA") for iron ore and quartzite in respect of the Properties ("the Properties") comprising the Sishen Mine ("the Sishen Mine") as described in Annexure "A" hereto; and

1.2 in consequence of the order in 1.1 above, it is hereby declared that any decision taken to accept or to grant any application, lodged after the date referred to in 1.1 by any person (including SIOC and Imperial Crown Trading 289 (Proprietary) Limited ("ICT")), for a prospecting right, mining right or mining permit in respect of a so-called 21,4% share (or any other share or shares) for iron ore and quartzite in respect of any or all of the Properties, as well as any execution and registration of any such right pursuant to such grant, is void *ab initio*.

1.3 in so far as it may be necessary, the second applicant is hereby exempted in terms of section 7(2) (c) of the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000) from the requirements of section 7(2) (a) and (b) of that Act from first exhausting its internal remedies before it sought to have clause 8 of the terms and conditions of Sishen's converted mining right reviewed and set aside.

1.4 the decision of the First Respondent i.e. the Minister to include clause 8 of Sishen's converted mining right among the terms and conditions of such mining right is hereby reviewed and set aside and such clause is hereby declared to be *pro non-scripto*.

2. With regard to the application for review brought by the first applicant:

2.1 the decision of the First Respondent or her delegate in terms of section 17 of the MPRDA to grant a prospecting right to Fifth Respondent relating to iron ore as to a 21,4% share ("the prospecting right grant decision") in respect of the prospecting area which is comprised of the properties set out in Annexure "A" ("the ICT grant properties"), all situate in the Administrative District of Kuruman, Northern Cape Province is hereby reviewed and set aside.

2.2 the whole of the notarially executed prospecting right in favour of Fifth Respondent and any registration thereof in the Mineral and Petroleum Titles Registration Office pursuant to the prospecting right grant decision is hereby set

aside and the Second and/or Sixth Respondent is directed to cancel any registration of such right.

2.3 the First Applicant is hereby exempted in terms of section 7(2)(c) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") from the obligation to exhaust such internal remedies as may have be provided to the Applicant by section 96 of the MPRDA in connection with the abovementioned decisions.

3. As to the applications which had been brought by the applicants for interdicts pending the determination of the two review applications:

3.1 The parties are directed to deliver and serve brief written submissions on or before the 24th January 2012 what order can appropriately be made with regard to them in the light of the orders made in the review applications.

3.2 Once the applicants in the interdict applicants have complied with 3.1 above, the respondents must deliver and serve their brief written submissions on the same issue referred to in 3.1 above on or before 1 February 2012.

3.3 Should the applicants wish to reply to the respondents brief written submissions, they must deliver and serve their replies on or before 7 February 2012.

4. As to applications for condonation made by various parties for failure to comply with the Rules of this Court or directions issued by this Court or by the Deputy Judge President in connection with the deadlines for the delivery and service of affidavits, condonation is hereby granted to such parties. In their written submissions on costs, the parties must also deal with the issue of costs relating to condonation applications that were delivered and served in this matter.

5. As to the issue of costs in both the review and interdict applications brought by the applicants:

5.1 The First applicant must deliver and serve its written submissions on or before 24 January 2012.

5.2 The second applicant must deliver and serve its written submissions on or before 1 February 2012 and in doing so must deal with the content of the First applicants submissions on costs.

5.3 The respondents must deliver and serve their written submissions on costs on or before the 7th February 2012.

5.4 Should the first applicant wish to reply, it must deliver and serve its written reply on or before the 14th February 2012.

ZONDO, J



DATE OF HEARING: 15 – 19 AUGUST 2011

DATE OF ORDER: 15 DECEMBER 2011

DATE OF FULL JUDGMENT: 20 DECEMBER 2011

FOR THE FIRST APPLICANT:

ADV C. LOXTON SC

ADV M. ANTROBUS SC

ADV K. HOFMEYER SC

FOR THE SECOND APPLICANT:

ADV M.D. KUPER SC

ADV A. SUBEL SC

ADV S. SYMON SC

ADV J. GILDENHUYS

FOR THE 1ST, 2ND, 3RD, 4TH, AND 6TH RESPONDENTS: ADV W. VERMEULEN SC

ADV T. KHATRI

FOR THE 5TH RESPONDENT:

ADV C.E. PUCKRIN SC

ADV C.N. VAN HEERDEN

ADV E. WESSELS