IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 3215/06

In the matter between:

DE BEERS CONSOLIDATED MINES LTD	Applicant
and	
ATAQUA MINING (PTY) LTD	First Respondent
THE REGIONAL MANAGER, FREE STATE REGION, DEPARTMENT OF MINERALS AND ENERGY	Second Respondent
DEPUTY DIRECTOR-GENERAL, DEPARTMENT OF MINERALS AND ENERGY	Third Respondent
MINISTER OF MINERALS AND ENERGY	Fourth Respondent

CORAM: BECKLEY, J *et* KRUGER, J

JUDGMENT BY: BECKLEY, J *et* KRUGER, J

HEARD ON: 3 & 4 DECEMBER 2007

DELIVERED ON: 13 DECEMBER 2007

I INTRODUCTION:

[1] The present application ("the review application") is but one of several applications that were filed between the applicant

and the respondents. In March 2006 the applicant applied for an order

(1) prohibiting the first respondent from conducting any prospecting operations on the tailings dumps situated on Subdivision 16 of the farm Jagersfontein 14, Magisterial District Fauresmith;

(2) prohibiting the first respondent from removing any material from the tailings dumps situated on Subdivision 16 pending the final determination of an application to be instituted for a declaratory order

(a) that the applicant is the owner of the tailings dumps on Subdivision 16,

(b) that the first respondent's prospecting rights 7/2006 do not entitle the first respondent to conduct prospecting operations on the tailings dumps on Subdivision 16;

(3) reviewing and setting aside the first respondent's prospecting right aforesaid as well as further ancillary relief.

[2] During the same month a second application was launched by the applicant against the same respondents (application number 924/2006) in which the applicant applied for a rule *nisi* to be issued calling upon the first respondent to show cause why the first respondent should not be prohibited

forthwith, pending the final determination of the application instituted by the applicants under application number 865/2006, which was enrolled for the 23rd March 2006, from conducting any prospecting operations on the tailings dumps situated on Subdivision 16 of the abovementioned farm. The two aforementioned applications were referred to in the course of the hearing of the review application as the "semi-urgent application" (case number 865/2006) and the "urgent application" (application number 924/2006). On the 27th July 2006 and in the present application (the review application) the applicant applied for an order:

(i) declaring that the applicant is the owner of the tailings dumps situated on Subdivision 16 of the farm Jagersfontein 14;

(ii) declaring furthermore that the prospecting right executed at Welkom on the 31st January 2006 issued under number 7/2006 to the first respondent in respect of Subdivision 16 does not entitle the first respondent to conduct prospecting operations on the tailings dumps situated on Subdivision 16; as well as a further order reviewing and setting aside the decision of the third and/or the fourth respondents to grant a prospecting right to the first respondent in respect of the said Subdivision as well as reviewing and setting aside Prospecting Right 7/2006, executed pursuant to such decision.

[3] Various defences were raised by the respondents in the papers. They will be dealt with separately later in this judgment.

II THE HISTORY OF THE APPLICANT'S INVOLVEMENT IN JAGERSFONTEIN :

[4] In May 1887, the mining operations at Jagersfontein were conducted by the New Jagersfontein Mining and Exploration Company Ltd. ("the New Company"). During 1932, the New Company became part of the applicant's group and the applicant became its secretary. Also in 1932, owing to the prolonged depression and flooding, mining operations were closed down. Treatment of accumulated pulsated tailings in the recovery plant continued up until the end of May 1932. As from January 1940, the applicant leased the New Company's assets and operated the mine for its own account. No mining was done owing to the Second World War, but the re-treatment of old pulsated gravels was continued up to October 1940. Shortly thereafter the mine was closed down and refitted and re-equipped with a new reduction plant. The reconditioned Jagersfontein Mine, which had been shut down for 17 years, recommenced production in July 1949, and continued until 1971, when the applicant ceased the mining operations of the New Company. At the time, the applicant had full knowledge of the fact that the tailings dumps contained diamondiferous material which could, when economic circumstances were conducive to further exploitation, again be the subject of further mining operations.

[5] It is not disputed by the first respondent or the other respondents that the applicant and the New Company

entered into a notarial deed of agreement on the 28th November 1940 in terms of which all the assets of the New Company were leased by the applicant including certain land, blue ground, mines and mining claims. The agreement took effect retrospectively on 1 January 1940. In terms of this notarial deed of agreement the applicant became entitled to work and exploit the mine and to carry on the business of the New Company for its own account. For that purpose the applicant was entitled to, and did, take possession of all the assets of the New Company which, however, remained the property of the New Company. In consideration for its undertakings, the applicant became entitled to and could retain all the profits of the mine and business. The applicant had to give up possession of the mine and other assets to the New Company at the termination of the agreement.

[6] It is also not disputed that the applicant is the holder of the rights to minerals in respect of Subdivision 16 by virtue of a notarial deed of cession of mineral rights, which notarial deed was registered on the 20th September 1973 in terms

whereof the cedent, the New Jagersfontein Mining and Exploration Company Limited, ceded, assigned and transferred and made over to the applicant, amongst others, all rights to all precious stones and all precious metals, base minerals, oils etc. in and under Subdivision 16 of the farm Jagersfontein 14. The Jagersfontein mine ceased mining operations on the 28th May 1971 as the ore had been depleted and it was deproclaimed as a mine on the 23rd June 1972. Thereafter the mine was stripped of all treatment plant and equipment and the infrastructure for resuming underground operations was removed and sold off. In terms of another notarial agreement of cession executed on the 8th October 1973, the New Company ceded, assigned, transferred and made over to and in favour of the applicant all its assets, whether immovable, movable, incorporeal or otherwise. Accordingly it became the owner of the tailings dumps situated on what is now known as Subdivision 16.

III **THE AFFIDAVIT OF DR. LOCK:**

[7] Before we deal with the arguments relating to the review application, it is necessary to deal with the application which was filed on behalf of the second, third and fourth respondents for leave to file an affidavit of Dr. Lock, a chartered geologist. In his affidavit, Dr. Lock discusses a number of issues, including whether or not the diamonds that may occur in the Jagersfontein tailing dumps "are natural diamonds all subjected to a geological process", and furthermore, whether or not they are "minerals in the geological/scientific" meaning of the word. Having heard arguments for and against the admissibility of the affidavit, we ruled that the affidavit should be allowed, and the reasons therefor would be furnished at a later stage.

[8] The contents of the affidavit did not appear *prima facia* to be relevant, as the question to be decided in the present case was not whether the diamonds found in the tailings dumps are diamonds (or minerals) or not but whether they are diamonds or minerals <u>for purposes of the interpretation of the Mineral and Petroleum Resourses Development Act, Act No.</u>

28 of 2002 ("the MPRDA"). It was, however submitted that, as the outcome of these proceedings is likely to have far reaching consequences, and for that reason, as well as the importance of the application generally, the affidavit should be admitted. It was, at the time when the admissibility had to be decided, not possible to anticipate whether certain paragraphs of the affidavit may be relevant and accordingly, mainly because of the importance of the matter and the fact that the possibility could not be excluded that certain paragraphs may be relevant, it was ruled to be admissible.

IV WHETHER THE DECISION OF THE THIRD AND FOURTH RESPONDENTS SHOULD BE SET ASIDE:

[9] At the commencement of the proceedings before us, certain questions were raised with Mr. Nthai regarding submissions in his heads of argument. Most of the questions related to the compliance or the non-compliance of the second respondent with the statutory requirements in the MPRDA. After an adjournment, Mr. Nthai conceded that the requirements had not been complied with and conceded that the applicant was entitled to an order in terms of prayer 3 of the notice of motion, setting aside the decision of the third and fourth respondents to grant the prospecting right to the first respondent in respect of Subdivision 16, and also setting aside the prospecting right 7/2006 executed pursuant to such decision.

[10] The concession made by Mr. Nthai is certainly justified, having regard to the following:

Regulation 3(3) of the Regulations published in Gazette dated the 23rd April 2006 requires that the application must be made known by, *inter alia*, "Notice in the Magistrate's Court in a Magisterial District applicable to the land in question". The only allegations in the opposing affidavit of the second respondent in this regard are as follows:

> "The practice of the Regional Manager: Mineral Regulations and Administration, Free State Region for all such applications, including the application by the first respondent, is to make known by a notice (same as 01) in the Magistrate's Court in the Magisterial District applicable to the land in question. The applicable Magistrate's Court in the present instance was the Magistrate's Court, Jagersfontein. In the present case he did not opt for any other method of notification or publication in the Government Gazette, in the Provincial Gazette or advertisement or national newspaper."

[11] In the replying affidavit, the deponent reacted as follows:

> "Third respondent does not in fact state that in the present instance second respondent did place a notice in the Magistrate's Court. The fact that it was his practice to do so does not mean that he did in fact do so in the present instance. Nor is such non-existent statement confirmed by second respondent in his confirming affidavit. To the extent that it is alleged that the second respondent placed a notice of the first applicant's application 'same as 01' in the Magistrate's Court, Jagersfontein, it is denied. The third respondent certainly does not provide any proof of this allegation."

[12] No copy of the alleged notice is annexed to the papers. There is no indication or confirmation by the relevant magistrate that this procedure had been followed. There is no indication as to how long or as from which date such notice had been affixed in the Magistrate's Court. More importantly, no copy of such notice forms part of the review record. It can therefore safely be assumed that the third respondent could not be satisfied that the requirements of Regulation 3(3)(b) had been complied with. A further aspect

which was raised with Mr. Nthai, was the question whether the provisions of section 16 of the Act had been complied with. Section 16(4) requires the regional manager, on acceptance of an application, within 14 days of such acceptance, to notify the applicant for a prospecting permit in writing

> (b) "To notify in writing and consult with the landowner or lawful occupier and any other affected party and submit the result of the consultation within 30 days from the date of this notice."

[13] The letter that was addressed by the second respondent to the first respondent on the 17th May 2005 does not comply with the requirements set out in subsection 16(4)(b) referred to above, and, moreover, allegations that the first respondent complied with the request, are also lacking. Furthermore, Mr. Nthai conceded that, at the stage when the first respondent's prospecting permit was issued on the 31st January 2006, the second respondent was fully aware of the applicant's contentions and its attitude regarding its rights in

respect of the tailings dumps and the minerals therein. He conceded that the applicant was in no uncertain terms an "affected party". Under the circumstances the second respondent had a duty to direct the first respondent to notify in writing and consult with the applicant as an affected party and this he did not do. It is clear that the provisions of the Promotion of Administrative Justice Act, Act No. 3 of 2000, had not been complied with at all.

[14] After it was conceded that the review application should succeed, Mr. Budlender, who appeared on behalf of the first respondent, was excused from further attendance.

V WHETHER THE TAILINGS DUMPS ARE MOVABLES:

[15] The first aspect that calls for consideration, is, having regard to the cession of movable assets to the applicant, whether the tailings dumps were included in the cession. The applicant contends that the tailings dumps are movables, and have not acceded to the surface of Subdivision 16. In this regard, the argument of Mr. Grobler, on behalf of the applicant, was as follows:

[16] It is common cause that the dumps originate from the ore mined by the New Company and, since 1941, by the

applicant. When the New Company severed the kimberlite ore from the earth, it became the owner of the ore with the diamonds contained therein, such ore then being movable objects created through severance. After extracting certain diamonds, the ore was deposited in what is now referred to as the tailings dumps on Subdivision 16.

[17] Whether the ore, after processing, remains movable, is in dispute. The argument advanced by Mr. Nthai, on behalf of the second, third and fourth respondents, was that the applicant had not proven that the dumps are movables and did therefore not acquire ownership in the tailings dumps.

[18] To decide whether it has been shown that the tailings dumps are movables or not, it is necessary, firstly, to consider the allegations made by the deponents on behalf of the applicant in that regard, not only in the review application, but also in the semi-urgent application, taking into account the fact that the contents of the allegations in the semi-urgent application have been incorporated by reference in the papers relating to

the review application. The applicant's contentions are summarised in paragraph 4.8 of the founding affidavit in the semi-urgent application as follows:

[19] The tailings dumps contain kimberlite ore mined from the pipe which had been treated for the recovery of diamonds by more or less effective recovery methods. It was always realised, through the history of the mine, that recovery processes left diamonds in the tailings and that the tailings dumps still contained unrecovered diamonds. Therefore, the tailings were not simply discarded but kept for re-treatment as and when technology became available whereby the diamonds could be recovered economically and, sometimes, under circumstances where mining of the ore or blue ground could not take place in times of war or economic depression. There was therefore never an intention on the part of the New Company or the applicant when it conducted the business of the New Company for its own account, to discard the tailings and to attach them permanently to the land. The first re-treatment occurred in 1903, and thereafter at regular

intervals in 1907, 1910, 1911, 1913, and annually from 1919 – 1932. Indeed, the intention was clearly to own and retain ownership of the mined material which had been treated or which could at the time not be treated for want of applicable technology or for the adverse economic circumstances at the time. The dump material can be easily distinguished from the surface of the ground on which it is situated and can be removed without damaging the land. The intention was always that the tailings dumps are movables and could be treated as and when necessary.

[20] These contentions are not disputed at all in the opposing affidavit. Certainly, the allegations in the opposing affidavit are also relevant, namely,

> "These tailing dumps can by nature accede to the land... Their mere weight could form an effective attachment to the land... These dumps might have become acceded to the land."

[21] Nowhere is it categorically denied that they have in fact remained movables, as suggested by the applicant, and Mr. Nthai was constrained to concede that the opposing

affidavits did not contain any allegations to the contrary. He submitted that, despite the fact that a denial is lacking in the opposing affidavits, the factors to be taken into account, in deciding whether the tailings dumps were movables or not, are:

i) the nature of the dumps,

ii) the manner of the annexation; and

iii) the intention of the owner of the movables at the time of annexation.

[22] In the opposing affidavit filed on behalf of the first respondent, it is merely stated that the first respondent does not admit that the tailings dumps remained movable assets. As in the case of the second to fourth respondents, it is not denied that the tailings dumps were kept for re-treatment.

[23] Regarding the nature of the tailings dumps and the manner of annexation, the second to fourth respondents point out that the tailings dumps are enormous in size, similar in size to some of the surrounding natural koppies in fact. That is also evident from photographs annexed to the papers. Despite their size, it does not seem to be in dispute that the tailings dumps are distinguishable from the surface of the farm. It is also admitted that the tailings dumps are capable of being removed without injuring the land.

[24] Mr. Nthai argued that, taking the abovementioned factors into account, the tailings dumps have indeed acceded to the land, having been left there for more than a century. His submission was furthermore that the nature of the dumps and the manner of annexation are pointers to the intention of the owner of a movable, and that, only when the attachment is inconclusive, the subjective intention becomes of overriding importance.

[25] This approach is referred in **LAWSA**, Vol. 18 (1st re-issue) par. 23, p. 27 as the "traditional approach". The "modern approach" is that suggested by Nienaber JA in **KONSTANZ PROPERTIES (PTY) LTD v Wm SPILHAUS EN KIE (WP) BPK** 1996 (3) SA 273 (SCA), namely, that the subjective intention or *ipse dixit* is determinant, and that the nature of the material (*in casu* tailings dumps) and the way in which the dumps were affixed, are, as a question of degree, only indicative of the intention. If we accept, as Mr. Grobler submitted we should, that the intention was that the tailings dumps should be regarded as movables, and that the *ipse*

dixit is therefore determinant, the following question to be considered then is whether the other factors (the nature of the tailings dumps and the manner in which the dumps are affixed) are indicative of the intention of the applicant at the time of the annexation, namely, that they should be considered as movables. We are of the opinion that the second and the third requirements are both compatible with and indicative of that intention. Having regard to the modern approach, and also having regard to the undisputed allegations made in the founding affidavits, we are satisfied that it has been shown that the tailings dumps are to be considered as movables. Mr. Nthai conceded that, should we find that the tailings dumps are movables, the ownership in the tailings dumps vests in the applicant. It therefore follows that prayer 1 in the notice of motion should be granted.

VI APPLICABILITY OF THE MPRDA TO TAILINGS DUMPS: PARTIES' SUBMISSIONS

1) Origin and genesis of the MPRDA

a) Respondents' submissions

[26] The thrust of Mr Nthai's argument is that this is remedial legislation. One must look at its origin and genesis in order to understand it properly. Respondents contend that the traditional private ownership regarding mineral law and mineral rights has been replaced by the MPRDA, recognising the internationally accepted right of the state to exercise sovereignty over all minerals, to acknowledge that the state is the custodian of South Africa's mineral resources (preamble to MPRDA second paragraph). Unsevered minerals, in whatever form they are found, are mineral resources, and their exploration, prospecting, mining and removal are regulated by the MPRDA.

[27] In Roman-Dutch law the ownership of the minerals lies in the *dominus* of the soil (**NEEBE v REGISTRAR OF MINING RIGHTS** 1902 TS 65 at 85). The principles relating to mineral rights can be stated as follows:

i) The owner of the land is the owner of the minerals in the land, until the minerals are extracted from the land (**VAN VUREN AND OTHERS v REGISTRAR OF DEEDS** 1907 TS 289).

ii) It is not possible to transfer ownership of minerals not yet served from the land (**LE ROUX AND OTHERS v LOEWENTHAL** 1905 TS 742 at 745).

iii) Once minerals have been separated, they become movable, and form the subject of separate ownership (**TROJAN EXPLORATION CO (PTY) LTD AND ANOTHER v RUSTENBURG PLATINUM MINES LTD AND OTHERS** 1996 (4) SA 499 (A) at 509J – 510A).

[28] Constitution 24(b) embodies the right "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and

other measures that –

.....

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[29] Against this backdrop, respondents submit that the MPRDA was enacted, as is evident from the preamble, to realise these constitutional objectives. Any claim to mineral rights must be considered with due regard to constitutional provisions. Limitations of rights under the common law should be developed to promote the spirit, purport and objects of the Bill of Rights (Constitution 39(2)). The argument is that the property clause in the Constitution recognises reform of the property regime as a legitimate reason for regulatory limitation of existing property rights. Reform-orientated deprivation of property is just as much part of the purpose of the property clause as the protection of existing property interests and rights. The courts are

obliged to strike an equitable balance between the protection of existing rights and the public interest. Constitution 25 should be interpreted and applied purposively, with due regard to its purpose to reform (see Van der Walt, **The Constitutional Property Clause** (1997) 15). Henderson, **Environmental Laws of South Africa**, Vol II, p. 2 – 450 states:

"The Act achieves sovereignty over mineral and petroleum resources, over a period of time, by extinguishing mineral rights as a class of property, and by exercising control over minerals by the administrative grant of rights to prospect and mine."

[30] Deprivation of property as contemplated in Constitution 25(1) will only be arbitrary if it is done without sufficient reason – **FIRST NATIONAL BANK OF SA LTD t/a WESBANK v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE AND ANOTHER; FIRST NATIONAL BANK OF SA LTD t/a WESBANK v MINISTER OF FINANCE** 2002 (4) SA 768 (CC) par. [99]). In order to determine whether there is sufficient

reason for a particular deprivation, certain factors are mentioned by Ackermann J in the **FIRST NATIONAL BANK**-case (*supra*) at par. [100]. (He points out that that judgment is not concerned with incorporeal property (par 100(e))). The greater the extent of the deprivation, the more compelling the purpose of the deprivation, and the relationship between means and ends must be (**MKONTWANA v NELSON MANDELA METROPOLITAN MUNICIPALITY AND ANOTHER; BISSETT AND OTHERS v BUFFALO CITY MUNICIPALITY AND OTHERS; TRANSFER RIGHTS ACTION CAMPAIGN AND OTHERS v MEC, LOCAL GOVERNMENT AND HOUSING, GAUTENG, AND OTHERS (KWAZULU-NATAL LAW SOCIETY AND MSUNDUZI MUNICIPALITY AS AMICI CURIAE)** 2005 (1) SA 530 (CC) par. [35]). The view expressed in **LEBOWA MINERAL TRUST BENEFICIARIES FORUM v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** 2002 (1) BCLR 23 (T) at 28 E – H that the Constitution does not protect

mineral rights is, according to Dale, **South African Mineral and Petroleum Law** at MPRDA–131 "so clearly wrong that it does not need further discussion". One cannot look at property, including mineral rights, in a simplistic manner. In view of the history of this country, it is not simplistic.

[31] The MPRDA has its origin in Constitution 25 dealing with prospecting rights. We must look at prospecting law through the lens of public law, not private law. The MPRDA has done away with private acquisition of mineral rights (sections 3, 5, 13, 16, 18, 22, 23 and 27 of MPRDA). The MPRDA has placed limitations or restrictions on mineral rights (**SECHABA v KOTZE AND OTHERS** [2007] 4 ALL SA 811 (NC) par. [8]). Under Constitution 25(4)(b) property is not limited to land (see also Van Der Walt, **The Constitutional Property Clause**, 64). Respondents submit as follows in their heads of argument:

"The outdated perception of property as an exclusive and unlimited private right which should not be interfered with cannot pass constitutional muster and it is better to base the property clause on the modern perception of property rights, which leaves room for a wide range of different and contextualised property rights that derive from the context, including social and public aspects of the context. This means that the social, environmental, physical and other characteristics of property determine the nature, scope, limits, and protection of each right so that both the scope of the property holders' entitlements towards and the scope of State powers to interfere with it are inherently determined by the context.

Land deserves special treatment because it is a special, vital, and limited resource, the use and exploitation of which have serious social implications. In the constitutional dispensation, the scope of land users' rights to use and exploit land and the scope of the State's power to interfere with and control land use can never be determined abstractly. This also means that the adherence to ownership as the fundamental and most important land guide should be abandoned so that the development of a wide range of divergent land rights for different kinds of land and for different uses of land, can be promoted.

In private law, property (especially ownership) is traditionally

described as an absolute right to indicate that it is unrestricted in principle; restrictions have to be imposed specifically and clearly by legitimate legislative or regulatory action. In accordance with the constitutional purport, it is necessary to distinguish the constitutional property concept from the aspect of the private law concept, since the view of absolute or unrestricted and exclusive rights are in conflict with the constitutional provisions regarding the limitation of fundamental rights. In constitutional law, property is mostly regarded as an inherently limited right, even when it is regarded as a fundamentally absolute right in private law."

[32] In the new order, replacing the common law with the MPRDA, the principles are clear. The principle of permanent sovereignty over natural resources developed over two main periods:

(i) From its inception in 1952 up to the adoption of resolution GAR 1803 (XVII) of The General Assembly on 14 December 1962 (Brownlie, **Basic Documents in International Law**, 4th Ed 235);

(ii) From 1962 to the adoption of The Charter of Economic Rights and Duties of States (CERDS) in 1974.

(Visser, "The principle of permanent sovereignty over natural resources and the nationalisation of foreign interests" XXI **Cilsa** 1988 76 – 91).

[33] During the period 1952 – 1962 the concept of permanent sovereignty over natural resources was seen as a right vested in the people rather than the states (Visser 77). Resolution 1803 (XVII) was, according to Visser, generally accepted as being conservative, and acceptable to most developed countries (Visser 78). During the second period, by 1974, the concept of permanent sovereignty over natural resources had been "transformed into a political demand for a New International Economic Order". There was now absolute economic sovereignty in the sphere of foreign investment (Visser 79). As to the payment of compensation the following circumstances are considered relevant when dealing with

nationalisation and payment of compensation: "(1) the host state's financial capacity to pay; (2) the period of exploitation; (3) whether or not the initial investment had been recovered; (4) the excessiveness of profits; (5) undue enrichment as a result of the colonial situation; (6) the contribution of the nationalised company made to the economic and social development of the host country; (7) the reinvestment of the nationalised undertaking; and (8) the loss of future earnings of the nationalised undertaking:" (Visser 82).

[34] The right to permanent sovereignty over natural resources has been recognised as a basic element of the right to self determination (first introductory paragraph to General Assembly Resolution 1803 (XVII) of 14 December 1962, as quoted in Brownlie, **Basic Documents in International Law**, 4th Ed 236).

[35] The MPRDA seeks to deal with injustices of the past.

It is the first of its kind. One has to look at its origin. To that end the White paper: "A Minerals and Mining Policy for South Africa October 1998, Pretoria" should be considered. The intent of Government is set out in paragraph 1.3.2:

"1.3.2 Intent

Government will:

i) promote exploration and investment leading to increased mining output and employment;

ii) ensure security of tenure in respect of prospecting and mining operations;
iii) prevent hoarding of mineral rights and sterilisation of mineral resources;
iv) address past racial inequities by ensuring that those previously excluded from participating in the mining industry gain access to mineral resources or benefit from the exploitation thereof;
v) recognise the State as custodian of the nation's mineral resources for the benefit of all;
vi) take reasonable legislative and other measures, to foster conditions conducive to mining which will enable entrepreneurs to gain access to mineral resources on an equitable basis; and
vii) bring about changes in the current system of mineral rights ownership with as little disruption to the mining industry as possible.

1.3.3 The Present System: Views For and Against

Many differing views have been expressed in support of or against the current arrangements in respect of mineral rights and prospecting information."

In the White paper it is stated as to ownership of

mineral rights:

"1.3.6 Government Policy

1.3.6.1 Ownership of mineral rights

i) Government recognises the inherent constitutional constraints of changing the current mineral rights system. However, in terms of the Constitution the State is bound to take legislative and other measures to enable citizens to gain access to rights in land on an equitable basis. In addition, it empowers the State to bring about land rights (including mineral rights) and other related reforms to redress the results of past racial discrimination. Furthermore, article 2(1) of the UN Charter of Economic Rights and Duties of the State grants the States full permanent sovereignty, including possession and disposal, over all its natural resources. Government therefore does not accept South Africa's current system of dual state and private ownership of mineral rights.

ii) Government's long-term objective is for all mineral rights to vest in the State for the benefit of and on behalf of all the people of South Africa.

iii) State-owned mineral rights will not be alienated.

iv) Government will promote minerals development by applying the "use-it or lose-it"/"use-it and keep-it" principle."

b) Applicant's submissions

[36] It should of course be borne in mind, as Mr Grobler said, that the White paper expressed government policy in 1998. Government is the executive part of the state. Parliament is the legislative arm. The legislature may have its own policy which differs from the policy of the executive as set out in the White paper. A further important point is that the White paper was drawn up in 1998, then drafting of the MPRDA started. There could have been important changes in drafts. The MPRDA should be interpreted according to its own wording.

[37] On behalf of the Applicant, as to the state's sovereignty over all mineral resources (section 2 of MPRDA), Mr Grobler pointed out that sovereignty is a concept of international law. In the 1950s developing countries believed that their wealth was being taken out of the soil by foreigners (or colonialists). There was not general consensus in the 1974 resolution. The

developed countries were not willing to accept the resolution.

[38] Section 2(a) of the MPRDA recognises that the state may regulate mineral resources. The objects of the Act, set out in section 2, do not vest ownership in the state. One has to look inside the Act, at the provisions of the Act, to determine what the Act says. Section 2(b) refers to the "State's Custodianship". That is similar to preamble (2). These provisions do not mean that minerals are *res publicae*. Nowhere in the Act does it say that minerals vest in the state. Section 3 of the MPDRA deals with custodianship of the nation's mineral resources. The state is also the custodian of the nation's fishing resources. However, that does not mean that the state owns the fishing resources. The fishing resources comprise, simply, the wealth of fish which South Africa can call upon if need be. The MPRDA controls the use of the "resource". Property rights are determined by local law (**JOSIAS VAN ZYL AND OTHERS v THE GOVERNMENT OF RSA AND**

OTHERS SCA Case 170/06, unreported Judgment 20 September 2007 par [64]).

[39] The MPRDA contains provisions amounting to institutionalised expropriation. The institution of mineral rights is abolished by the MPRDA. The whole concept of mineral rights is expunged, not ownership of what has already been mined. It is important to note that the MPRDA does not expropriate tailings.

2) Remedial legislation: Purposive interpretation

a) Respondents' submissions

[40] In constitutional interpretation the purpose is to test legislation against the values and principles imposed by the Constitution (**MATISO AND OTHERS v THE COMMANDING OFFICER, PORT ELIZABETH PRISON AND OTHERS** 1994 (3) BCLR 80 (SE) 87 E – G; **LAWSA** Vol 25(1) par. 315). Courts rely on preambles not only in constitutional interpretation, but also in statutory interpretation (**LAWSA** Vol 25(1) (1st Reissue) par. 349). The preamble has been held to be an expression of the intention of legislature (**KONYN AND OTHERS v SPECIAL INVESTIGATING UNIT**

1999 (1) SA 1001 (Tk) at 1007H-I). History and sources of an Act may be used as an aid to interpretation (Kellaway, **Principles of Legal Interpretation** (1995) 299).

[41] The rule that legislative history is not admissible in the interpretation of statutes is no longer as firmly entrenched as it once was (**CASE AND ANOTHER v MINISTER OF SAFETY AND SECURITY AND OTHERS; CURTIS v MINISTER OF SAFETY AND SECURITY AND OTHERS** 1996 (5) BCLR 609 (CC) par [12] footnote 18). There seems to be a trend to permit limited use of the history as an aid to interpretation (Cockram, **INTERPRETATION OF STATUTES** 3rd (1987) 55).

[42] The proper approach in interpreting the MPRDA is to look at the Act as a whole. The traditional approach to the interpreting of statutes must give way to purposive

interpretation of remedial legislation. The following exposition is given by Moseneke DCJ in **DEPARTMENT OF LAND AFFAIRS AND OTHERS v GOEDGELEGEN TROPICAL FRUITS (PTY) LTD** 2007 (6) SA 199 (CC) par. [53]:

"[53] It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing 'as a result of past racially discriminatory laws or practices' in its setting of s2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values.

> Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous."

[43] In this case the applicant relied on the views of Dale to the exclusion of other views. Dale's view, as set out by Badenhorst, Mostert and Dendy in **LAWSA** Vol 18 2nd Edition par. 101 is that "ownership of unsevered minerals still vests in the owner of the land, but he may not exploit such minerals". The alternative view is that ownership of minerals not yet severed, is vested in the state (Dale, 2002 **Annual Survey** 574), who points out that such vesting is not clear because the MPRDA does not expressly refer to ownership of minerals (**LAWSA** Vol 18 par. 101). The respondents say one must look at –

(i) the preamble,

(ii) the White paper, and

(iv) the objectives.

Then, as to tailings dumps, one cannot simply say

"These are my dumps and I am not going to do with them as I please."

b) Applicant's submissions

[44] The Applicant does not dispute that this is remedial legislation. The MPRDA expressly puts mineral rights under custodianship of the state (section 3(1)). The question is whether it also puts rights in respect of minerals in old tailings dumps under state custodianship. The Act does not expressly say so. One would have to read words into the Act that are not there in order to find that minerals in pre-2004 tailings dumps are included as part of the minerals in respect whereof state custodianship exists. The definition of "mineral" refers to minerals in residue stockpiles and residue deposits. These terms were not used in previous legislation; they have particular and defined meanings flowing from their nature created by the terms of the MPRDA.

3) <u>Is there compensation if applicant's rights were expropriated</u>?

[45] Respondent contends that any legislation which made the acquisition of mineral rights possible, has been repealed, and rights derived from such legislation no longer exist, subject to the transitional provisions of the MPRDA. Prospecting permit 13/2000, in respect of the dumps in question, was renewed by the applicant and the renewal period expired on 4 May 2004. Applicant was invited by the Department of Minerals and Energy to apply for the conversion of that prospecting right to a new prospecting right regarding the dumps. Applicant declined that invitation.

[46] Section 55 of the MPRDA gives the minister the power to expropriate property. Schedule II of the MPRDA contains transitional arrangements. One of the objects of Schedule II is to ensure that security of tenure is protected (Schedule II item 2). Item 12 of Schedule II deals with the payment of compensation. If the old

order right has not been converted, Applicant might feel it has been expropriated as contemplated in item 12, and can claim compensation. Applicant is not without a remedy. In fact, it has two remedies:

(i) It can lodge an application with the DME; and

(ii) It can claim compensation as contemplated by item 12 of Schedule II.

There will be expropriation if the holder of "old order prospecting right" fails to apply for conversion to prospecting rights within the stipulated period (**LAWSA** Vol 18 par. 68, par. (a) at p. 91). Expropriations can also take place "if holders of mineral rights or other rights were excluded on 1 May 2004 from the transitional provisions in the sense that they did not become holders of old-order rights" (loc cit, par. (i) at p. 92).

[47] Whereas Applicant says that it could not convert its old-order prospecting right, the respondents contend that the MPRDA provided for such a case, and the

remedy is a claim for compensation as set out in Schedule II item 12. Applicant is not without a remedy.

4) Casus Omissus and absurdity

[48] As to the *casus omissus* and absurdity arguments raised by the first respondent in the heads of argument, Mr Grobler pointed out that courts may "depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the legislature" (**SUMMIT INDUSTRIAL CORPORATION v CLAIMANTS AGAINST THE FUND COMPRISING THE PROCEEDS OF THE SALE OF THE M V JADE TRANSPORTER** 1987 (2) SA 583 (A) 596G – H). The court must be sure that the contrary legislative intent is clear and indubitable (**DU PLESSIS v JOUBERT** 1968 (1) SA 585 (A) at 595A). The courts cannot usurp the functions of the legislature (**MINISTER VAN WATERWESE v VON DURING** 1971 (1) SA 858 (A) at 876F). One cannot assume that purpose is something external to language which exists

in pure and perfect form. Purpose must be constructed by the court. Purpose "cannot serve as a fixed determinant of meaning, leading to a correct interpretation. There is simply no single, correct meaning to any statutory provision" (De Ville, "Meaning and statutory interpretation" (1999) 62 **THRHR** 377-8).

[49] Mr Grobler sets out his submissions as follows in his heads of argument (paragraphs 3.4 – 3.7):

"3.4. Indeed, it is clear that the legislature deliberately chose not to regulate "minerals" which occur in material which was mined before the MPRDA came into effect. This appears from the fact that the legislature expressly dealt with the subject matter of "debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of …" in the definitions of residue stockpile and residue deposit. In fact, "tailings" are mentioned by name. Even though the subject matter is expressly dealt with, the legislature did not include tailings produced and

products derived from mining operations conducted under the previous mineral law dispensation. This is a clear indication that the literal meaning of the definitions reflects the true intention of the legislature.

3.5. Furthermore, the structure of the transitional provisions also expresses the clear intention of the legislature to exclude tailings predating the MPRDA: The statutory mineral right created in section 1 of the Minerals Act in respect of tailings does not form the basis of any old order right continued in terms of Schedule II after 1 May 2004. In none of the Tables and categories of Schedule II does one find the statutory mineral right with a license issued in respect thereof, to be continued as either an unused old order right, an old order prospecting right or an old order mining right. This indicates that there is no *casus omissus* in the definition of *residue stockpile* or *residue deposit*: the question has indeed been contemplated by the legislature and so provided for in Schedule II.

3.6. It is submitted that there is thus no reason to depart from the ordinary and grammatical meaning of the relevant definitions in the MPRDA. Indeed, there is simply not a 'duidelike en onbetwyfelbare bepaalde bedoeling' for the meaning contended for by the first respondent, which

would justify a departure from the literal meaning of the words.

3.7. A departure from the literal meaning of the definitions is also not justified on the basis that the literal meaning leads to any absurdity. Analysis shows that the so called absurdity lies not in the application of the definitions within their stated field of operation, but in the fact that the statute does not provide for the same system in respect of material which was mined before the Act commenced. The literal meaning clearly brings about an exclusion of materials mined prior to the inception of the MPRDA, from the provisions of the MPRDA for obvious reasons. Were these kinds of tailings and products not excluded, the state would have been liable to pay compensation to the owners thereof as a result of their expropriation. And, as appears from the *Trojan* matter, materials which have been mined already are infinitely more valuable than the *in situ* resource. It must also be pointed out that, structurally, the MPRDA expropriates only rights and not separate movable property."

5) T**he National Environmental Management Act 107 of 1998 ("NEMA')**

[50] Respondent contends that The National Environmental Management Act 107 of 1998 ("NEMA") does not provide sufficient control in respect of tailings dumps.

[51] Whoever wants to remove diamonds from the dumps, will have to engage in mining activity. There is a vast difference between NEMA and the MPRDA e.g. the MPRDA requires an environmental impact assessment (39(1)), whereas NEMA has no such requirement. Section 40 of the MPRDA imposes a duty on the Minister of Minerals and Energy to consult with other state departments. NEMA contains no such provision. Section 41(1) of the MPRDA imposes a duty on an applicant for a prospecting or mining right to make financial provision in advance for rehabilitation and management of negative environmental impacts. NEMA has no such provisions. Thus the taking of minerals from dumps cannot be regulated only by NEMA.

6) The meaning of "mineral" in the MPRDA

a) Respondents' submissions

[52] The respondents contend that diamonds in the tailings dumps are "unsevered" minerals. Respondents say that unsevered minerals, in whatever form they are to be found, are "mineral resources". The respondents contend that, because some diamonds are still in the kimberlite lying on the tailings dumps, they are still "occurring naturally on the earth", and therefore fall under the definition of mineral and form part of the mineral resources which under section 2(1) of the MPRDA fall under the custodianship of the state.

b) Applicant's submissions

[53] Applicant, on the other hand, argues that if the diamonds are still in the ore, ownership does not vest in the miner. Transfer of ownership of minerals is impeded by the fact that they form part of the land. As soon as the ore containing the minerals is severed from the land, a new object (movables res) is created which is the object of separate ownership (**TROJAN**

EXPLORATION CO (PTY) LTD AND ANOTHER v RUSTENBURG PLATINUM MINES LTD AND OTHERS 1996 (4) SA 499 (A) at 534 F – H). Applicant contends that ownership of the ore containing the diamonds passes as soon as the ore is separated from the earth. When you take out the kimberlite ore you become owner of the ore and the diamonds inside the ore. A diamond is a simple mineral, not like gold which appears in many forms.

[54] The MPRDA defines "mineral" as follows:

> "'mineral' means any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes –
>
> (a) water, other than water taken from land or sea for the extraction of any mineral from such water;
>
> (b) petroleum; or

(c) peat".

[55] There are distinctions in the terminology used by the Minerals Act of 1991 and the MPRDA. Under the Minerals Act a substance in tailings is included under the definition of "mineral". "Tailings" was defined to mean "any waste rock, slimes or residue derived from any mining operation or processing of any mineral". In the MPRDA the definition of "mineral" does not refer to substances in tailings, but to any mineral occurring in "residue stockpiles" or in "residue deposits". The respondents do not contest that a residue stockpile is created under the MPRDA. The MPRDA does not contain a definition of "tailings".

7) The nature of tailings

[56] The concept of tailings differs from mineral to mineral. Tailings comprise the mined material. It may have been put through a process of extraction or refinement e.g. coal which has to be sold in small pieces. Tailings can be a heap, it is mined material. There are vast differences in the processes which different minerals have to go through. There is not a uniform process for all minerals to arrive at the extracted mineral or tailings.

[57] The MPRDA does not define "tailings". A "mineral" can

also occur in “residue stockpiles” or “residue deposits”. A “residue stockpile” contains *inter alia* tailings stockpiled for potential re-use. A “residue deposit” is a residue stockpile remaining at the end the particular period. Applicant’s case is that their tailings dumps are not residue stockpiles as they were produced before the MPRDA came into operation. The definition of “mineral” in the MPRDA says nothing about tailings dumps. It includes “minerals” in a stockpile. If a mineral is in a stockpile, it cannot be said to be “occurring naturally in or on the earth” as required in the definition of “mineral” in section 1 of the MPRDA. There are two basic requirements for a substance to be classified under the definition of a mineral: (i) it must occur naturally; (ii) it must have been formed by or subjected to a geological process. Minerals in a stockpile have already been severed from the earth. A tailings dump, such as those relevant here, is not a residue stockpile.

[58] The purpose of the MPRDA is to regulate mining activity, including prospecting and processing. It defines substances for the purpose of regulating them. The argument raised by the first respondent in its heads of argument is that it is inconceivable that the MPRDA regulates dumps under the old Act, and not under the new Act. This would give rise to anomalies.

[59] The applicant's answer to that submission is that that is the structure of the Act. The MPRDA does not intend to regulate tailings dumps in the manner the Minerals Act did. There are sufficient legislative controls to regulate the processing of tailings dumps. There is a plethora of statutory provisions, apart from the MPRDA, which would regulate the processing of dumps. If you mine tailings, you will be subject to some controlling regime, not under the Department of Mining.

[60] Applicant's case is that the legislature made a conscious choice not to include the minerals in old tailings dumps under its definition of minerals. The legislature must have known that there are many dumps which were created before the MPRDA came into operation. There are specific industries which concern only the re-working of these dumps. Existing tailings dumps were contemplated by the legislature

when it enacted the MPRDA. The legislature must have known that the dumps contain material which has already been mined. Prospecting rights were issued either including or excluding tailings dumps. There are many different types of tailings dumps, also depending on the type of mineral. In order to regulate them the state will have to (i) expropriate ownership in them, and (ii) give the right to them to a third party. A regulatory framework is required to deal with tailings dumps which were created from 1860 up to 2002. One cannot look at the purpose of the Act and then, on the basis of that purpose, say that the wording of the Act must be ignored.

[61] As to “residue stockpile”: can one broaden the definition so as to capture tailings dumps which were created during the regime of the 1964 Precious Stones Act? All Acts had different regimes. The court cannot make a new law. The court cannot re-word the Act. The Act is read by people in commerce. They buy

dumps on the basis of what the law says. It is not in accordance with the Constitution to interpret words into an Act which are not there, and which do not address the spectrum of situations in practice.

[62] Mr Grobler says that the Minerals Act of 1991 brought back the reign of the mineral right. The underlying concept was that of private law mineral rights. The ore in all stages of processing was the property of the holder of the mineral right under the Minerals Act 1991. The MPRDA did away with all the common law mineral rights. It started with a clean slate. Section 5(4) states that no-one is entitled to mine without a right granted by the minister. Whereas the Minerals Act regulated existing private law rights, the MPRDA destroys the common law rights and creates rights granted by the minister. Section 5(1) grants a limited real right in property. Before the MPRDA a person had a right because of having a mineral right. After the MPRDA the minister can give a person a right.

[63] The minister can give a prospecting right to someone else after a person's ownership of the mineral right has lapsed. Before the minister can grant a right in respect of a tailings dump to someone else, the initial holder's right must first be taken away.

[64] The Minerals Act regulated tailings incorporating tailings in the definition of mining (section 5 Minerals Act 1991). The right to minerals is held by the holder of the mining right (par. (b) under the definitions of "holder" under the Minerals Act 1991). Had it not been for this provision, the owner of the tailings could go on processing the tailings. The legislature wanted to control also the processing of tailings under the Minerals Act. Under section 6 a prospecting permit could be issued in respect of "land or tailings" (section 6(1)). A mining authorisation could be issued in respect of "land or tailings" (section 9(1)).

[65] Applicant contends that a section 9 permit, or a section 6 prospecting permit, is not a common law mineral right. It is a statutory mineral right. Schedule II to the MPRDA dealing with transitional provisions, does not continue this statutory mineral right.

[66] Applicant's case is that the definition of "mineral rights" in the MPRDA was not intended to include old order dumps. In respect of the tailings dumps in question, applicant had a section 6 mineral prospecting right. It did not have a common law mineral right in those dumps. It did not have an old order right which could be converted. Applicant's activities regarding the tailings dump do not fall under MPRDA.

VII CONCLUSION

[67] The central question in this case is whether the MPRDA deprives the applicant of the ownership of the minerals in its tailings dumps. The MPRDA leaves no doubt that mining rights in respect of minerals which have not been mined,

have been taken out of private hands, and that such rights vest in the custodianship of the state (sections 2 and 3 MPRDA). Was the intention to include tailings dumps?

[68] There are several reasons why tailings dumps, and in particular applicant's tailings dumps which form the subject matter of this case, are not subject to control by the MPRDA:

(i) The tailings dumps are movable, and the diamonds occurring in them do not occur "naturally in or on the earth".

(ii) Tailings dumps do not occur naturally. They are formed by the placement of processed and partly processed materials, to be re-worked in future years when technology improves.

(iii) The tailings dumps have been owned by Applicant since 1973. Applicant's ownership of the tailings dumps is not in dispute. Applicant has spent money and labour and time on these tailings dumps.

(iv) The Minerals Act of 1991 recognised the applicant's ownership of the tailings dumps. Section 9(1) of the Minerals Act provided for the issuing of a mining authorisation for "land or tailings". The MPRDA, on the other hand, has a clear definition of

a residue stockpile. The transitional provisions of the MPRDA in schedule II do not continue applicant's permit under section 6. The MPRDA did not want to regulate tailings dumps. There is no continuation of the regime under the Minerals Act in respect of tailings dumps. "Mining" of a tailings dump is in fact "processing". It is the winning of the mineral.

(v) As to purposive interpretation, looking at the history and origin of the MPRDA, the White paper and the objects of the Act, those sources are silent on tailings. There is no reference to tailings indicating that mineral rights in tailings fall under the custodianship of the state in terms of the MPRDA. As Henderson (above) points out, the MPRDA achieves sovereignty over a period of time. The purpose of the Act is not defeated or notably reduced by excluding tailings dumps.

(vi) A finding that the state is now the custodian of the minerals remaining in tailings dumps, would amount to expropriation, which is not expressly provided for and cannot be inferred to have been contemplated by the legislature. Our law requires that a strict construction be placed upon statutory provisions which interfere with elementary rights (**DADOO, LTD AND OTHERS v KRUGERSDORP MUNICIPAL COUNCIL** 1920 AD 530 at 552). Legislative provisions curtailing common law rights must be restrictively interpreted (**BREBNER v SEATON** 1947 (3) SA 629 (EDLD) at 640). The court must be satisfied that the legislature has in express terms or by clear implication altered the common law and taken away existing rights (**MOTOR INSURERS' ASSOCIATION OF SOUTHERN AFRICA v SCHUURMAN AND LANDSAAT** 1961 (1) SA 486 (A) at 491A-B). If the legislature intended to take away private rights in tailings dumps, which have existed for more than a hundred years, it would have stated so clearly and unambiguously.

(vii) The argument that, if there has been an expropriation, the applicant has a right to compensation under Schedule II item 12, is fallacious. In the first place the respondents deny that there has been any expropriation. They say that the applicant's old-order prospecting right ceased to exist subject to transitional provisions. Applicant failed to apply for the conversion of that prospecting permit to one under the MPRDA. The Applicant was of the view that the MPRDA does not apply to the tailings dumps in question

because they are movable assets which were not produced under the MPRDA. The position is thus that the respondents contend that there was no expropriation; applicant's permit expired; applicant allowed its permit to expire, whereby applicant discarded it. Furthermore, applicant brought its current situation upon itself. It was invited to protect its rights, but deliberately declined to do so. In such circumstances anyone considering compensation for "expropriation" will give the applicant short shrift.

(viii) Tailings dumps cannot be considered a *casus omissus* – no absurdity follows if tailings are excluded. It is quite easy to give full and proper effect to the MPRDA if tailings are left out. The MPRDA targets mining rights in unsevered minerals in the ground, not in tailings which have been mined.

(ix) As to NEMA, in enacting the MPRDA the legislature must have contemplated that environmental legislation would adequately regulate the processing of minerals from dumps created before 2002. This is not an unregulated activity. In the management of the environment, NEMA places people and their needs at the forefront (Nel, "Of African Pots, plans and people's needs" **De Rebus** September 2007 51 at 52).

x) A mineral right is rendered worthless if it does not incorporate the right to extract (**Trojan** – case (*supra*) at 525G-H). A tailings dump is made, kept, sold and bought because of the knowledge that it contains valuable material. The deponent on behalf of first respondent says:

> "I admit the origin of the tailings dumps on Subdivision 16 and that these dumps have a valuable diamond content. This diamondiferous content makes them a valuable mineral resource".

These tailings dumps have been the uncontested property of the applicant since 1973. The minerals in the tailings dumps have value to applicant.

(xi) The question in this case is not whether the diamonds occurred in the ore. In order for diamonds in the tailings dumps to be considered "minerals" for purposes of the MPDRA (and therefore vesting under custodianship of the state) they must be found to be occurring naturally in the earth. The fact that they still occur naturally in the ore is irrelevant for purposes of the definition of "mineral" in the MPRDA. The diamonds in the ore were severed from the mother rock. Then the ore became a new object. That vested ownership in the mineral title holder, the applicant. That all happened before the MPRDA came into operation. The MPRDA did nothing to detract from applicant's rights to the tailings dumps.

(xii) Tailings are a unique place in which minerals can be found after someone has taken them out of the earth and processed them to some extent. Unmined materials are different: they are in the ground, in a sense they were a bonus to the land owner. If they were undiscovered when the landowner bought, they were transferred without cost. Tailings are different: the owner of the

tailings has, while exercising a legal right, made later extraction by improved means possible. It is not part of the heritage to which section 3(1) of the MPRDA refers.

[68] In the circumstances the declaration sought by the applicant should be granted.

VIII THE STRIKING OUT APPLICATION:

[69] Having concluded his argument relating to the review application, Mr. Grobler indicated that the applicant wished to apply for certain paragraphs in the affidavit of Dr. Lock to be struck out. A notice in terms of Rule 6(15) of the Uniform Rules of Court had indeed been filed by the applicant in which the applicant intimated that, should the application to file the affidavit of Dr. Lock be granted, an order would be sought that certain paragraphs of Dr. Lock's affidavit be struck out on the basis that they are irrelevant, alternatively constitute inadmissible evidence, alternatively are vague and embarrassing.

[70] The first paragraph that the applicant seeks to strike out, is paragraph 10, in which Dr. Lock deals with definitions of the word "mineral", "tailings" and where diamonds may be found. They deal with aspects that are not in dispute, therefore cannot appreciably assist the court and are therefore irrelevant. In paragraph 11, Dr. Lock states the following:

> "11.6 The inclusion of the phrase "in tailings or dumps" in the Code is in conflict with the MPRDA definition of mineral,

despite the 2000 version of the Code being in clear alignment with the then current mineral Law.

11.7 The Code thus allows the reporting of mineral resources for material that is not defined as a mineral under the MPRDA.

11.8 …. thus any report of diamond resources relating to the presence of diamonds in the Jagersfontein tailings dumps is acceptable under SAMREC, even though the same substance may be a "non mineral" under the definition of mineral in the MPRDA."

Clearly, in these subparagraphs the deponent is seeking to advance legal opinion regarding the interpretation of some of the provisions of the Act – precisely that which the Court is called upon to decide in the present matter.

[71] In paragraph's 12 and 13, the deponent merely deals with definitions, which are not in dispute in the present matter. In paragraph 15.22 a legal opinion is once again expressed, dealing with one of the issues that has to be decided by this Court, namely, whether the diamonds on the tailing dumps are still naturally occurring. Lastly, in paragraph 15.23, an

opinion is expressed that seems to be in conflict with the opinion stated previously, and also one which cannot assist the Court in any way, and is therefore, in our view, irrelevant.

[72] We are therefore of the opinion that the application to strike out should be allowed. In coming to that conclusion, we have taken cognisance of the *dicta* of Wessels JA in **COOPERS (SA) LIMITED v DEUTCHE SCHáDLINGBEKáMPFUNG MBH**, 1976 (3) SA 352 (A), in particular the dicta at page 370 D – H, and we have also applied the dicta of F S Steyn, J, in **ASSOCIATION OF AMUSEMENT AND NOVELTY MACHINE OPERATORS v MINISTER OF JUSTICE**, 1980 (2) SA 636 (A). The main purpose of the filing of the affidavit of Dr. Lock was, if we understand Mr. Nthai correctly and if we understand the affidavit correctly, to assist the Court in deciding whether the MPRDA is applicable to diamonds in the tailings dumps. Clearly the affidavit is not permissible if that was the reason why it had been filed. The other paragraphs deal with definitions that are not in dispute and are therefore irrelevant.

[73] Mr. Nthai conceded, correctly in our view, that in the event of the above-mentioned paragraphs being struck out, the corresponding paragraphs in the applicant's responding affidavit should also be struck out. The relevant passages are paragraphs 2.6, 2.7.2, 2.8, 2.9 and 2.11. The relevant order will be made at a later stage, and the costs of the application to file the affidavit of Dr. Lock will be dealt with later in this judgment.

IX COSTS:

[74] The remaining question is that of costs. Having regard to the fact that Mr. Nthai conceded that paragraph 3 of the Notice of Motion should be granted, and that we have concluded that prayer 1 should also be granted, as well as the declarator in respect of the applicability of the Act to the tailings dumps, we conclude that the applicant is entitled to the costs of the review application. It was suggested by Mr. Budlender on behalf of the first respondent, and Mr. Nthai, for the remaining respondents that the respondents should

be ordered to pay the costs jointly and severally, the one paying the other to be absolved. We agree that that order will be fair under the circumstances, but for the costs of the second day of the hearing of the application, as Mr. Budlender was excused from further attendance after the lunch adjournment on the first day. The first respondent can therefore not be held liable for the costs incurred after 13:00 on the first day.

[75] At a previous hearing, costs were reserved and such costs have to be considered now. On the 14th May 2007, the review application was postponed to the 3rd of December 2007, and the costs of that day were reserved, as well as the costs relating to an application for postponement (case number 1259/07). We are not convinced that, as far as the costs are concerned that were reserved on the 14th of May 2007 in respect of both applications, such costs should be considered differently and are of the opinion that such costs should also follow the event, and that respondents should be

ordered to pay such costs.

X ORDER:

[76] In the result the following orders are made:

1. It is declared that the applicant is the owner of the tailings dumps situated on Subdivision 16 of the farm Jagersfontein 14, Magisterial District of Fauresmith.
2. The decision of the third and/or fourth respondent to grant a prospecting right to the first respondent in respect of Subdivision 16, is reviewed and set aside.
3. The prospecting right 7/2006 executed pursuant to the decision referred to in prayer 2 above, is set aside.
4. It is declared that the provisions of the Mineral and Petroleum Resources Development Act, No. 28 of 2002, do not apply to the tailings dumps situated on subdivision 16 of the farm Jagersfontein 14, Magistrarial District of Fauresmith.
5. The application to strike out is allowed with costs, and paragraphs 10, 11.6, 11.7, the last sentence of paragraph 11.8, paragraph 12, paragraph 13, paragraph 15.22 and 15.23 of the affidavit of Dr. Lock are struck out as well as

the paragraphs 2.6, 2.7.2, 2.8, 2.9 and 2.11 of the applicant's responding affidavit.

6. The first, second, third and fourth respondents are ordered to pay the costs of the review application (this application) jointly and severally, the one paying the other to be absolved, with the exception of the costs incurred after 13:00 on the 3rd December 2007, as well as the costs of the 4th December 2007, which costs are to be paid by the second, third and fourth respondents.

7. The costs reserved on the 14th of May 2007 in the review application as well as the costs that were reserved in application number 1259/2007, are to be paid by the first, second, third and fourth respondents, jointly and severally, the one paying, the other to be absolved.

8. The costs relating to the affidavit of Dr. Lock, are to be paid by the second, third and fourth respondents jointly and severally, the one paying the other to be absolved.

_____ _____

A.P. BECKLEY, J **A. KRUGER, J**

On behalf of applicant:	G L Grobler SC J L Gildenhuys Instructed by: Webbers (Bloemfontein) Deneys Reitz (Johannesburg)
On behalf of first respondent:	G M Budlender Instructed by: Israel Sackstein Matsepe Inc BLOEMFONTEIN
On behalf of second, third and fourth respondents:	S Nthai SC J Y Claasen Z Eloff Instructed by: State Attorney BLOEMFONTEIN

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