THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 641/09

In the matter between:

HOLCIM (SOUTH AFRICA) (PTY) LTD	**Appellant**

and

PRUDENT INVESTORS (PTY) LTD	**1st Respondent**
LOUIS HENDRIK MEYER	**2nd Respondent**
TOMMIESRUS (PTY) LTD	**3rd Respondent**

Neutral citation: *Holcim v Prudent Investors* (641/09) [2010] ZASCA 109 (17 September 2010)

Coram: MPATI P, CLOETE, HEHER, CACHALIA AND TSHIQI JJA

Heard: 1 September 2010

Delivered: 17 September 2010

Updated:

Summary: Mining and Minerals – Mineral and Petroleum Resources Development Act 28 of 2002 – Schedule II Transitional Arrangements – whether necessary for obtaining an 'old order mining right' that holder of the mineral rights and mining licence conducted its operations on all properties covered by rights and licence on the day before the Act took effect.

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ORDER

On appeal from: North West High Court (Mafikeng) (Landman J sitting as court of first instance):

1. The appeal succeeds with costs including the costs of two counsel.

2.1 Paragraphs 1 and 3 of the order of the court a quo are set aside.

2.2 Paragraph 1 is replaced by an order in the following terms:

'1.1 The first and second respondents are:-

1.1.1 directed forthwith to grant the applicant access to Portions 10, 12, 14 and 20, the Remaining Extent of Portion 6, and the Remaining Extent of the farm Bethlehem 75, registration division IO, district Lichtenburg, North-West Province for the purpose of performing prospecting and/or mining activities as contemplated in the definition of "mine" in the Minerals Act 50 of 1991;

1.1.2 interdicted from refusing or preventing the applicant and its contractors access to the properties for the purpose of prospecting and/or mining and from conducting such activities thereon.

1.2 Failing compliance by first and/or second respondents with paragraph 1.1 of this order, the sheriff is hereby authorised and directed to take all such steps as may be necessary to enable the applicant to gain access to the properties.'

2.3 Paragraph 3 is replaced by an order in the following terms:

'3. The respondents are ordered jointly and severally to pay the costs of the application.'

JUDGMENT

HEHER JA (MPATI P, CLOETE, CACHALIA AND TSHIQI JJA concurring):

[1] The central issue in this appeal is whether the Transitional Arrangements contained in Schedule II to the Mineral and Petroleum Resources Development Act 28 of 2002 ('the Act') provide security of tenure to the holder of a mining licence which, immediately, before the Act took effect, was conducting authorised mining operations on land covered by the licence even though the operations had not been extended to all cadastral units so covered and might not be so extended in the immediate future.

[2] In May 2008 the appellant applied to the High Court (Bophuthatswana Provincial

Division) for an order in the following terms:

'1. It is declared that:–

1.1 the applicant is the holder of an old order mining right as contemplated in Schedule II of the Mineral and Petroleum Resources Development Act 28 of 2002 in respect of limestone and clay, on the farms Dudfield 35, registration division IP; Hibernia 52, registration division IP; Kalkfontein 77, registration division IO; and Bethlehem 75, registration division IO ["the applicant's old order mining right"], by virtue of-

1.1.1 Mining Licence 3/1997 which the applicant holds in respect of the properties; and

1.1.2 the rights which the applicant holds under Notarial Deed of Cession of Mineral Rights K 4272/2000 RM;

1.2 the applicant's old order mining right entitles it to access Portions 10, 12, 14, 20, the remaining extent of Portion 6 and the remaining extent of the farm Bethlehem 75, registration division IO, in the magisterial district of Lichtenburg, North-West Province ("the properties");

2. The first and second respondents are:-

2.1 directed forthwith to grant access to the properties to the applicant for the purpose of performing prospecting and/or mining activities as contemplated in the definition of "mine" in the Minerals Act 50 of 1991;

2.2 interdicted from refusing or preventing the applicant and its contractors access to the properties for the purpose of prospecting and/or mining and from conducting such activities thereon;

3. Failing compliance by first and/or second respondents with paragraph 2 of this order forthwith, the sheriff is hereby authorized and directed to take all such steps as may be necessary forthwith to enable the applicant to gain access to the properties.'

The applicant sought attorney and client costs against the two respondents but did not persist in that claim on appeal.

[3] The court a quo (Landman J) concluded that the Transitional Arrangements do not provide such security of tenure in the appellant's circumstances. The learned judge said:

'But even if mining, in a very broad sense, is carried on [on] some land and nothing is carried on or in respect of other land, covered by the licence, then it is difficult to conclude, even on a liberal interpretation, that mining operations are being conducted on the other land. It may be, if there is a

systematic plan which would immanently[1] involve the properties, that this could be said to be mining

[1] It is not clear to me what the learned judge intended, whether 'immanent' in the sense of 'inherent' or 'imminent' in the sense of 'impending'.

operations in respect of that land. But this is not the case here. Where the land has been left, as it were, to lie fallow or kept in reserve, then it cannot reasonably [be] said that mining operations or mining is being conducted in respect of that land. A business approach which may be prudent and farsighted must nevertheless give way if it is contrary to the objects of [the Act] and Schedule II.'[2]

The learned judge granted leave to appeal to this Court.

[4] Before us counsel for the respondents supported the conclusion of the learned judge. However they sought to justify it by reliance on an argument not developed in the judgment. I shall address the substance of their submission later in this judgment.

[5] The appellant established a limestone quarry on the farm Dudfield in the Lichtenberg district in 1950 to supply limestone to the then Roodepoort Cement Kilns. In 1965 the first cement kiln was commissioned at Dudfield, followed by a second in 1972 and a third in 1977. Since then the appellant's Dudfield operations have been producing about 20 per cent of the total cement market requirements of the country.

[6] On 9 September 1997 the appellant obtained Mining Licence ML3/1997 in terms of s 9(1) of the Minerals Act 50 of 1991 to mine the limestone resources on the contiguous farms Dudfield 35IP, Kalkfontein 77IO, Bethlehem 75IO and Hibernia 52IO. The licence was issued for an indefinite period, until the minerals could no longer be mined economically. The operations under this licence are known as the 'Dudfield operation'.

[7] The farms that comprise the area of the mining licence consist of various subdivisions owned by several different persons. The first respondent is the owner of Portions 10, 12 and 14 and the Remaining Extent of the farm Bethlehem. The second respondent owns the Remaining Extent of Portion 6 and Portion 20 of the same farm.

[8] Since 1968 the appellant has held the right to mine limestone in respect of the whole of Bethlehem farm. During that year the appellant[3] entered into Notarial Mineral Lease 496/1968 RM with African and European Investment Company Limited in respect of

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[2] The approach of the learned judge, if correct, gives rise to apparent practical problems of where and how to draw the line in any given case. Because of the conclusion I have reached it will be unnecessary to answer that question.

[3] Then known as Anglo-Alpha Cement Limited.

the farm Bethlehem 75IO, 5484.2146 morgen in extent, which was registered on 29 September 1968. During or about 2000 the appellant[4] took cession of the rights to 'limestone, calcareous minerals, and all other minerals used in the manufacture of cement' in, on and under the farm Bethlehem 75IO, measuring 4697.4053 hectares, in terms of Notarial Deed of Cession of Mineral Rights K4272/2000 RM.

[9] Immediately before the commencement of the Act, which was on 1 May 2004, the appellant conducted mining operations on the land to which Mining Licence ML3/1997 applies, but that mining had not yet reached the respondents' properties.

[10] The current life of the mineral resource, excluding that part situated on the first and second respondents' properties, is 49 years. Should the appellant commission a further kiln (Dudfield Kiln 4), as it proposes to do, mining capacity will have to increase by an additional 170 million tons of limestone over a 60 year period, assuming that the mining of feedstock for the currently operating Kilns 2 and 3 continues. The appellant is, therefore, considering mining into the respondents' properties and, to that end, wishes to delimit the resource of limestone and other minerals used in the manufacture of cement present on the respondents' properties. The respondents, however, have refused the appellant access to the properties to commence prospecting and mining on them.

[11] The respondents justify their refusal on the ground that no mining operations were being conducted on their properties immediately before the date on which the Act took effect. Thus, so the submission continues, the appellant was not possessed of an 'old order mining right' as defined in Item 1 of Schedule II to the Act but, instead, the rights which I have identified above constituted an 'unused old order right'. Because an unused old order right continued in force for a maximum period of one year from the date on which the Act took effect[5] and the appellants did not exercise their exclusive right to apply for a prospecting or mining right in terms of the Act within that period[6] their unused old order right ceased to exist.[7]

[4] By now known as Alpha (Pty) Ltd.
[5] Item 8(1) of Schedule II.
[6] Item 8(2).

[12] The correctness of the respondents' submission, and, indeed, of the reasoning of the court a quo,[8] depends upon an interpretation of the rights possessed by the appellant and a determination of the proper scope of the security of tenure which the Transitional Arrangements provided for in Schedule II afford to the holder of mining rights that were in force and in use on 30 April 2004.

[13] An 'old order mining right' is defined in Item 1 of Schedule II as:

'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'.

[14] In so far as the appellant is concerned, the old order mining right that it claims has three components, which derive from the definition and Table 2. These are:

1. The mining authorisation in terms of s 9(1) of the Minerals Act.[9]
2. The underlying common law rights (ie the common law mineral right[10] or its consent to mine together with the common law mineral right[11]).
3. The fact (if such be the case) that it was conducting mining operations in respect of the said authorisation and the underlying common law mineral rights.

[15] In this regard I agree with counsel for the appellant that the definition of 'old order mining right' embraces the 'package' of the relevant common law rights together with the mining authorisation. There is no serious dispute as to the appellant's satisfaction of the first two components. As I have indicated previously the real issue relates to the third, and more particularly whether it was necessary that the appellant be conducting mining operations on all properties (ie registered cadastral units) covered by the mining licence on the date immediately preceding the operative date of the Act.

[16] At this stage it will be convenient to outline the justification for the order of the court a quo which was put forward by the respondents' counsel. I trust that I do not undervalue his argument in the summary which follows:

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[7] Item 8(4).
[8] See para 2 above.
[9] See para 9 above.
[10] See para 8 above.

(i) An 'old order mining right is defined in Item 1 of the Transitional Arrangements contained in Schedule II[12] by reference to specific rights that are listed in Table 2.

(ii) Table 2 ('old order mining rights') contains six categories. *Category 1* is 'The common law mineral right, together with a mining authorisation obtained in connection therewith in terms of section 9(1) of the Minerals Act'. It is this old order right that the appellant possessed when the Act came into effect in so far as it had been conducting mining operations on properties other than those of the respondents on the preceding day.

(iii) *Category 1* identifies two rights: the common law mineral right and a concomitant mining authorisation (such as a mining licence). Each right has a specific content.

(iv) In so far as the appellant relied on *Category 1* rights it had to establish that they survived the repeal of the Minerals Act. That it could only do if *each* right was an 'old order mining right' as defined. The appellant had therefore to prove that immediately before the Act came into effect it was conducting mining operations 'in respect of' both its mineral rights and its rights under the licence.

(v) The rights under a mining licence may attach to one or more registered units of land or may, as they do in this case, adhere to a defined area not expressly delimited by cadastral boundaries of any unit or units. But a separated mineral right is a right which always derives from a specific registered unit of land (as a subtraction from the rights of ownership of that land), as each such right also does in this instance. If the appellant was exercising such a right, that right did not extend beyond the borders of the unit to which it related.

(vi) It follows that the appellant could only claim an 'old order mining right', in the form of a preserved right to minerals, to the extent that it was, on the effective date, conducting mining operations on each registered unit to which a mineral right attached. Since it was common cause that the appellant had never conducted mining operations on the respondents' properties, the mineral rights in respect of those properties did not qualify as 'old order mining rights' but fell instead into the definition of 'unused old order rights'.[13] As they had not been the subject of a timeous (or, indeed, any) application for a mining right under Item 8(2), the mineral rights over the appellant's properties had, by reason of Item

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[11] Ibid.

[12] See para 13 above.

[13] '"[U]nused old order right" means any right, entitlement, permit or licence listed in Table 3 to this Schedule in respect of which no prospecting or mining was being conducted immediately before this Act took effect.': Item 1 of Schedule II.

8(4), ceased to exist. Absent preservation of the mineral rights, the rights under the mining licence retained no enforceable content. The appellant, therefore, possessed no right capable of sustaining the relief claimed by it in the court a quo.

[17] In my view the line of reasoning followed by counsel for the respondents is fallacious. Before explaining why I have reached that conclusion it would be fair, I think, to address first the rationale for the judgment a quo.

[18] Central to the reasoning of the court a quo was what it saw as a requirement viz that mining operations were being conducted on the critical date *in respect of the land to which the licence relates*. But that emphasis does not accord with the plain words of the definition: the operations must be conducted in respect of the authorisation and the rights attaching to it. It is therefore necessary to examine the terms of the relevant licence in order to determine whether mining operations were being conducted in respect of that licence at the relevant time.

[19] The court a quo found that the subject matter being preserved in the definition of 'old order mining right' is 'primarily the land'. I agree with the submission of the appellant's counsel that this finding does not take into account the structure of the Act and the reason for the creation of the concept of old order rights in the context of the Transitional Arrangements.

[20] Under the new Act the previous system of common law mineral rights[14] as

[14] And derivative rights such as prospecting contracts and mineral leases.

controlled through a system of statutory authorisations to prospect or mine under the Minerals Act 50 of 1991,[15] was completely superseded by a new administrative system whereby-

(a) the common law mineral rights were replaced by similar rights granted by the Minister of Mineral Resources; and

(b) the statutory authorisations such as mining licences or prospecting permits were fused into the prospecting or mining right thus granted.

[21] Thus the new composite mining right contains what was previously held separately by means of the mining licence and common law mineral right. The new mining right is similar to the common law mineral right inasmuch as it is also a limited real right that confers upon the holder the right to enter on to the land, to search for minerals, and, if found, to mine and dispose of them for the account of the holder.[16]

[22] As under the Minerals Act, where the holder of a common law mineral right could not mine without first obtaining a mining licence, so mining is prohibited by the terms of s 5(4) of the Act unless a mining right has been obtained pursuant to its provisions.

[23] The new system and the old system of common law mineral rights are mutually exclusive:

(1) In terms of s 3 of the Act, South Africa's mineral and petroleum resources belong to the nation and the State is their custodian.[17]

(2) As custodian, the State, acting through the Minister, may grant inter alia prospecting and mining rights.[18]

(3) As mentioned mining is prohibited without first obtaining a mining right.[19]

(4) In so far as the common law is inconsistent with the Act the Act prevails.[20]

[24] All these considerations together with the repeal of the 1991 Act resulted in the destruction of common law mineral rights and the administrative controls which previously

[15] See ss 6 and 9 of that Act.
[16] See ss 5(1), (2) and (3)(a) to (c).
[17] Preamble to the Act and s 3.
[18] Section 3(2).
[19] Section 5(4).
[20] Section 4(2).

regulated the acquisition and utilisation of rights.

[25] As Hartzenberg J pointed out in *Agri South Africa v Minister of Minerals and Energy*; *Van Rooyen v Minister of Minerals and Energy*,[21] it is evident that there is, in the main body of the Act, no acknowledgment of any pre-existing mineral rights or their holders. In so far as such mineral rights had not been exploited by the time of the commencement of the Act, they simply disappeared into thin air. With reference to secs 2 to 5 of the Act, the learned judge noted that an interpretation in terms of the dictates of s 4 indicates clearly that the only way to acquire new rights is to obtain them from the State, through the Minister. But for the Transitional Arrangements which give certain rights to the holders of 'old order rights', the effect of the Act would have been to extinguish all those rights and to render existing mining operations unlawful. As Ebrahim J (Cillie J concurring) put it in *De Beers Consolidated Mines Ltd v Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy and Another*,[22] 'The only relevance of previous mineral rights is that they constitute an element of the transitional arrangements in [the Act]'.

[26] Transitional arrangements were thus necessary to prevent the stultification and total disruption of an important sector of the economy until such time as existing mining operations could be regulated in terms of the new Act. This was done by continuing the existing rights with respect to such operations in the form of transitional rights called 'old order rights' and affording the holder of such rights the opportunity to comply with the Act. But there is no indication in the text of the Act or Schedule II of an intention to limit the continuation of such rights to the very land on which the operations are being conducted. Rather the focus in the Transitional Arrangements is the seamless continuation of existing mining operations which are tested not according to the physical scale of the operations on the relevant date but by the scope of the licence pursuant to which the operations are being conducted. As will be seen, such an approach accords with the practicalities of planning and undertaking mining operations.

[27] Section 4(1) of the Act requires that when interpreting a provision in it, any reasonable interpretation which is consistent with the objects of the Act must be preferred over any other interpretation which is inconsistent with those objects.

[21] 2010 (1) SA 104 (GNP) 109-110, para 11.
[22] (1590/2007) [2008] ZAFSHC 40 (15 May 2008).

[28] Item 2 provides that the objects of the Schedule are to-

'*(a)* ensure that security of tenure is protected in respect of prospecting, exploration, mining and production operations which are being undertaken;

(b) give the holder of an old order right, and an OP26 right[23] an opportunity to comply with this Act; and

(c) promote equitable access to the nation's mineral and petroleum resources.'

[29] I agree with appellant's counsel that the mining operations contemplated in Item 2 are *continuing* mining operations not limited to that part of the mineral resource being mined at the date when the Act took effect, but extending also to future mining operations aimed at the exploitation of the whole of the resource which is the subject of the mining licence. At any one stage a resource will, for a variety of practical reasons, only be mined on a certain part or parts of the licence area with a view to systematically moving through the reserve over the life of the mine, usually a long-term undertaking. Continuing mining operations are not restricted by the cadastral boundaries of the registered units that form part of the area to which the mining licence applies, nor by separate mineral rights in respect of such units. It is a matter of common knowledge that the mineral resources which justify mining operations often extend over many properties covered by a single mining licence, only some of which will be worked at any particular time, according to the constraints of the market, the rise and fall in the demand for the mineral and the viability of its extraction. Flexibility in conducting operations is important: an example from the cement industry (for which the minerals at issue here are destined) is the mothballing of kilns for long periods when demand from the building industry stagnates. Thus inactivity on one portion of land subject to mining rights is no certain indicator that mining operations are not taking place or have ceased to be conducted pursuant to the common licence.

[30] In this regard the court a quo quoted, in the context of counsel's argument, a passage from OM Dale et al, *South African Mineral and Petroleum Law*, Issue 6, Sch II-12. The extract is as follows:

'**The unifying effect of the requirement in Table 2 of holding a mining authorization.**

A mining authorization is one of the components of each of the categories in Table 2. This has the

[23] The mining lease granted to Mossgas (Pty) Ltd.

effect that the area in respect of which the mining authorization has been issued is "unified". The fact that more than one of the underlying rights could be covered by the same mining authorization has the effect that various underlying rights are "grouped together" under one mining authorization. The result is that if mining operations are being conducted on the area of any of those underlying rights, that would satisfy the requirements of the conducting of mining operations for the whole of the area covered by the mining authorization. The contrary interpretation, i.e. that mining operations must be conducted on the area of each separate underlying right, even if covered by one mining authorization, would, it is submitted, lead to an absurdity when it is considered that there are for example thousands of claims held under numerous claim licences which are being mined conjointly and constitute a mining operation and yet clearly not every single claim will be being worked simultaneously. The interpretation suggested above to be correct would also, it is submitted, be a reasonable interpretation which, for purposes [of] section 4, is consistent with the object of the MPRDA in section 2(g) and item 2(a) of Schedule 11 to provide for security of tenure of mining operations. A single mining operation is often covered by one mining authorization, underlying which could well be several or numerous rights. If it were a requirement that mining operations are being conducted on each right, this would jeopardise the security of tenure of the mining operations considered in their totality.'

I agree with the views expressed by the learned authors but do not consider that the learned judge accorded the weight to them that they merited.

[31] Furthermore, as counsel point out, mining operations have, by law, to take place in terms of an optimal progressive mining plan and/or work programme. This was required by the Minerals Act.[24] The same plan and/or programme remains applicable during the transitional period[25] until it is eventually substituted by the mining work programme required by the Act[26] once the old order mining right is converted into a mining right under the main body of the Act. Once again it is well-known that in many instances the mining work programme extended over many properties covered by a single mining licence.

[32] In the light of all these considerations the conclusion that the holder of a mining licence must have been conducting mining operations in respect of each and every property that is the subject of a mining licence issued under the Minerals Act 1991 in order to obtain an 'old order' mining right is inconsistent with the security of tenure which is an object of the Transitional Arrangements. Moreover the interpretation favoured by the court

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[24] Act 50 of 1991, s 9(5), regulation 33, and Form 2 para 7 issued in terms of regulation 34.

[25] See item 7(2)(e) of Schedule II.

a quo would, because of the arbitrary nature of excision of portions of the area to which a mining licence was previously applicable, on many occasions lead to consequences in conflict with the objects set out in s 2 of the Act: the sterilization of bodies of land unworkable otherwise than in conjunction with excised portions, and the waste of expenditure and resources in relation to mining developments which can no longer be economically pursued – it is a fact that the cost of infrastructure laid down in the early stages of such developments is recovered over the whole life of a planned project. Consequences of this sort are inimical to the promotion of economic growth and mineral development in the Republic (s 2(e) of the Act) and unlikely to conduce to the development of the nation's mineral resources in an orderly manner (s 2(h)).

[33] Nor, in my view, is the interpretation favoured by the trial court necessary in order to promote any of the objects listed in s 2 of the Act or those in Item 2 of the Schedule. Indeed the learned judge did not find that it would have that effect.

[34] It follows that literal, contextual and purposive interpretations of the Transitional Arrangements all lead to a common conclusion viz that the creation of an old order right depends not upon use of any particular portion of land to which a mining licence relates but rather upon whether mining operations were being conducted according to the terms of the licence on the relevant date.

[35] The licence granted to Alpha Limited authorised, under and subject to the provisions of the Minerals Act 1991, the right to mine for limestone and clay on the farms Dudfield 35IP, Kalkfontein 77ID, Bethlehem 75IO and Hibernia 52IP as indicated on an attached sketch plan No ML 3/1997. It provided that, 'Unless this licence is suspended, cancelled or abandoned or lapses it shall be valid until the mineral the mining of which is hereby authorised can no longer be mined economically by the holder of the land concerned.' The sketch plan, although said to represent certain portions of the named farms, reflects merely a single irregularly shaped block of land without indication of the names or limits of any of the farms concerned, thus bearing out the practical reality to which I have earlier referred viz that the land covered by the licence has been treated in it

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[26] Section 23(1)(a) of the Act read with regulations 10(1)(f) and 11.

as a single indivisible unit in which cadastral boundaries are irrelevant to the right conferred by it. In so far as the creation of an 'old order right' depended upon the conduct of operations 'in respect of' Mining Licence No ML 3/1997, it is plain that operations taking place on any part of the land identified by the sketch plan could properly be regarded as being carried on in respect of the rights conferred by the licence. There is no reason whatsoever in its terms to regard inactivity on any one or more of the farms as a ground for the severability of such farm or farms from the land on which the operations were actually being conducted.[27] It is hardly necessary to mention (and I do so merely because of the finding to the contrary in the judgment) that the appellant's mining right under the licence over the land owned by the respondents was not an 'unused old order right' within the meaning of item 1 of Schedule II. In this latter regard it may be noted that the definition does not contemplate that such an 'unused' right can be constituted in relation to part of the geographical area that is the subject of a licence. This is consistent with the interpretation of such a licence as an authorisation over the whole of the land which it covers possessing the 'unifying effect' to which Dale *et al* refer.

[36] I am now able to turn to a consideration of counsel's submission as I have set it out in paragraph 16 above.

[37] As I have been at pains to emphasise, a common law mineral right is not preserved under the new statutory dispensation. It is not of itself an 'old order right' which can be converted under Item 7 of Schedule II. It survives only as a right underlying a mining authorisation. Nor can such a right properly be said to be a right 'in respect of which mining operations are being conducted'. Under the Minerals Act 1991 (and previous to that Act) it was the mining authorisation which conferred practical value on the mineral rights by authorising the exercise of those rights. In order to qualify under the definition of 'old order mining right' both the mineral right and the mining licence must have been in force immediately before the date on which the Act took effect, but it is the mining licence and not the mineral right 'in respect of which' operations are conducted.

[38] The interpretation placed on the definition by the respondents' counsel could hardly

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[27] Any more, indeed than it makes sense to divorce a part of a cadastral unit on which operations have commenced from the, as yet, unexploited part of the same unit.

reflect the intention of the legislature since that construction gives rise to absurd consequences. Take the present case (which is not untypical in a mining context). Mining is, according to the terms of the licence, authorised over land which includes portions of a number of registered units. Mining operations were being conducted on the effective date but the mineral rights had not been exercised over all the units. According to the respondents' interpretation, in order to secure its operations after that date the appellant had (a) to convert its old order mining rights in terms of Item 7 (ie its rights over units where it was conducting operations), and (b) to apply for the processing of its unused old order rights in terms of Item 8 (ie its rights over units where it was not conducting operations). But the two procedures are materially different and so are the consequences. Compliance with Item 7 is reasonably straight forward, implementing as it does a conversion of rights; once there is compliance the Minister must convert the rights. Item 8 by contrast requires a new application (albeit with the benefit of an exclusive right in favour of the holder of an unused old order right for a period of one year); the applicant must satisfy the extensive demands of ss 22 and 23 of the Act, in many respects novel; success is by no means a matter of course. In addition there must certainly be a contrast between the time taken up by Item 7 and 8 applications – it is easy to envisage a long drawn out process in respect of the latter.

[39] Moreover the interpretation favoured by the respondents may conceivably lead to the refusal of licences in respect of pockets of land the exploitation of which is necessary for the continued feasibility of mining. If rights in respect of those areas are granted to one or more third parties the consequence may be a patchwork of rights in the hands of owners with different and competing interests. Such fragmentation is unlikely to promote efficiency or economic viability. Crucial reserves may remain unexploited for reasons of impracticability or lack of resources.

[40] In a nutshell, if the respondents' construction of an 'old order mining right' were to be adopted, a miner in the position of the appellant might well find operations, planned but not executed before the commencement of the Act, held up by red tape and, perhaps, eventually thrown into disarray by systemic delay or a refusal to grant an Item 8 application. The economic and practical viability of continued mining operations could thereby be placed at risk. That consequence is absurd because it flies in the face of two of

the three stated objects of Schedule II ((a) and (b)), without contributing anything to the third ((c)).

[41] In addition to this initial absurdity, all the same practical and commercial objections apply to the consequences of the respondents' interpretation as those I have discussed in relation to the finding of the court a quo.

[42] For these reasons I hold that an interpretation of 'old order mining right' which depends on the conducting of mining operations on each of the respective registered units of land to which mineral rights attach is contrary to the terms of the Transitional Arrangements and inimical to its objects. By contrast, an interpretation which depends on the terms of the mining authorisation that is relied on satisfies both the word and spirit of the Arrangements.

[43] In conclusion, therefore, even though mining activities were not yet taking place on or in relation to the subdivisions owned by the first and second respondents immediately before the Act took effect, their properties formed part of the ongoing mining project on the area with respect to which the appellant was entitled to conduct mining operations, and these properties cannot be separated from those areas on which operations were physically being conducted. The appellant's old order mining right consequently included the properties of the first and second respondents and the respondents were bound to grant access to the appellant in order to enable it to exercise its mining right (including a right to prospect).

[44] Counsel for the appellants asked, in the event of the appeal succeeding, that the order in his client's favour be limited to the relief set out in paragraphs 2 and 3 of the notice of motion together with an order for party and party costs.

[45] In the result the following order is made:

1. The appeal succeeds with costs including the costs of two counsel.

2.1 Paragraphs 1 and 3 of the order of the court a quo are set aside.

2.2 Paragraph 1 is replaced by an order in the following terms:

'1.1 The first and second respondents are:-

1.1.1 directed forthwith to grant the applicant access to Portions 10, 12, 14 and 20, the Remaining Extent of Portion 6, and the Remaining Extent of the farm Bethlehem 75, registration division IO, district Lichtenburg, North-West Province for the purpose of performing prospecting and/or mining activities as contemplated in the definition of "mine" in the Minerals Act 50 of 1991;

1.1.2 interdicted from refusing or preventing the applicant and its contractors access to the properties for the purpose of prospecting and/or mining and from conducting such activities thereon.

1.2 Failing compliance by first and/or second respondents with paragraph 1.1 of this order, the sheriff is hereby authorised and directed to take all such steps as may be necessary to enable the applicant to gain access to the properties.'

2.3 Paragraph 3 is replaced by an order in the following terms:

'3. The respondents are ordered jointly and severally to pay the costs of the application.'

J A Heher
Judge of Appeal

APPEARANCES

APPELLANT: G L Grobler SC with him J L Gildenhuys

Instructed by Deneys Reitz Attorneys, Sandton;

Webbers, Bloemfontein

RESPONDENTS: H B Marais SC with him H P van Nieuwenhuizen

Instructed by Bosman & Bosman Attorneys, Lichtenburg;

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