REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 326/2011

In the matter between:

Xstrata South Africa (Pty) Ltd	First Appellant
Tavistock Collieries (Pty) Ltd	Second Appellant
Duiker Mining (Pty) Ltd	Third Appellant
and	
SFF Association	Respondent

Neutral citation: *Xstrata & others v SFF Association* (326/2011) [2012] 20 ZASCA (23 March 2012)

Coram: MPATI P, BRAND, HEHER, MHLANTLA and WALLIS JJA.

Heard: 12 March 2012

Delivered: 23 March 2012

Summary: Mineral and Petroleum Resources Development Act 28 of 2002 – interpretation of a notarial exchange agreement between the

respondent and second and third appellants and a notarial mineral lease between the respondent and the second appellant concluded prior to the Act coming into force – effect of the Act on such agreements – whether obligation to pay a royalty in terms of the notarial mineral lease extinguished by the new system of mining rights in the Act.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Vally AJ sitting as court of first instance) it is ordered that:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below is altered to read:

'The application is dismissed with costs such costs to include the costs of two counsel.'

JUDGMENT

WALLIS JA (MPATI P, BRAND, HEHER and MHLANTLA JJA concurring)

[1] 'The old order changeth, yielding place to new.'[1] Those words aptly describe the changes brought about by the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act), which came into operation on 1 May 2004. It fundamentally altered the legal basis upon which rights to minerals in South Africa are acquired and exercised. Previously such rights vested in the owner of the land on or under which minerals were found. The owner of the land, or a party authorised to do so by the owner, could exploit the minerals, subject to the person exploiting the minerals possessing a mining authorisation in terms of the Minerals Act 50 of 1991. Once the Act came into operation all mineral resources vested in the State as the custodian of such resources on behalf

[1] Alfred, Lord Tennyson *The Passing of the King* from *Idylls of the King* 1. 407.

of all South Africans. The right to exploit such minerals was thereafter to be conferred by the State by way of mining rights granted in terms of s 23 of the Act. In order to avoid disrupting a key sector of the South African economy, the Act contained transitional provisions in Schedule II. These provided for existing rights to remain in force for a limited period of five years as what were termed 'old order mining rights'. During that period the holder of old order mining rights could apply for them to be converted into mining rights in terms of the Act. This case concerns the effect of these statutory changes on rights accruing to the respondent, SFF Association (SFF),[2] by virtue of two agreements.

[2] The first agreement was a notarial exchange agreement between, on the one hand, Tavistock Collieries (Pty) Ltd (Tavistock), the second appellant, and Duiker Mining (Pty) Ltd (Duiker), the third appellant,[3] and, on the other, SFF. The exchange agreement was concluded in April 2001 to settle a dispute between Tavistock and SFF arising from the storage by SFF of oil in containers in disused mine shafts in Mpumalanga. The presence of the containers and spillages of oil from them had the effect of sterilising Tavistock's right to exploit the coal deposits on one property, where three of the oil containers were situated, and portions of two other properties in the immediate vicinity of two further storage tanks. Arising from this Tavistock instituted a substantial claim against SFF. The parties agreed to resolve the dispute on the basis that Tavistock's rights in the sterilised deposits, as well as Duiker's rights

[2] SFF was originally called the Strategic Fuel Fund and had responsibility during the days of apartheid for the procurement and storage of oil at a time of sanctions against South Africa. The storage of oil referred to in this judgment commenced at that stage. SFF remains an organ of state and continues to procure and store strategic oil supplies on behalf of the State.

[3] Tavistock is a wholly-owned subsidiary of Duiker, which is in turn a wholly-owned subsidiary of Xstrata, the first appellant, a major international mining group. For reasons not explained in the founding affidavit SFF originally sought declaratory relief in the alternative against Tavistock and Xstrata. The order was made only against Tavistock, but all three appellants were ordered to pay SFF's costs.

in a specified mine dump (the Ogies dump), would be exchanged for rights held by SFF in relation to coal deposits (the SFF deposits) on other pieces of land. In addition the parties would assume certain obligations in regard to the rehabilitation of the exchanged properties.

[3] The second agreement was a notarial mineral lease in respect of the SFF deposits, concluded on 12 June 2001 between SFF, as lessor, and Tavistock, as lessee, in order to give effect to the exchange agreement so far as Tavistock was concerned. In terms of clause 8 of the lease Tavistock undertook, once it had extracted certain defined quantities of coal from the SFF deposits, to pay SFF royalties on any further coal extracted from those deposits. The present dispute arose because SFF contended that, notwithstanding the changes wrought by the Act to the system of mineral rights in South Africa, the obligation to pay royalties remained in force. There was initially some ambiguity about Tavistock's stance, but in a letter written prior to the commencement of proceedings it said it would comply with its obligations 'to the extent that such obligations continue to remain in force … post the conversion of Tavistock's old order mining right'. SFF then sought a declaratory order that the obligation to pay the royalty continued after the commencement of the Act and 'notwithstanding any conversion' of Tavistock's rights. Tavistock conceded that it remained obliged to pay royalties after the commencement of the Act, but denied that the obligation would continue after conversion. At a practical level the concession was probably meaningless in view of the lengthy period that would necessarily elapse before Tavistock could commence mining the coal in respect of which a royalty was payable. SFF obtained the order it sought, including the period after conversion of Tavistock's rights, from Vally AJ sitting in the South Gauteng High Court, Johannesburg. This appeal is with his leave.

[4] The exchange agreement, plays a lesser role in these proceedings, and can be described briefly. It recorded in the recitals that SFF owned the Epsilon, Delta, Gamma and Klippoortje North and South oil containers. The presence of these had sterilised Tavistock's coal reserves in the manner already described. As a result Tavistock had instituted a substantial claim against SFF. To resolve the dispute SFF agreed to grant to Tavistock the right to search for, dig, mine, win, remove and, for its own benefit and account, to dispose of, coal on three portions of land and three mineral areas in respect of which SFF enjoyed those rights (the SFF rights). SFF would in turn acquire Tavistock's rights to coal in one of the sterilised areas and, in relation to the other sterilised areas, Tavistock agreed not to mine the affected seams. In addition SFF would acquire Duiker's share of the Ogies dump. SFF did not propose to exploit these rights, but to continue the situation where they were sterilised and posed no threat to its storage of oil.

[5] As Tavistock intended to exploit the SFF rights, clause 2.2 of the exchange agreement provided that SFF would, contemporaneously with the execution of the cession of mineral rights in favour of SFF, procure the execution of a mineral lease between itself and Tavistock in respect of the SFF rights, substantially in a form annexed to the exchange agreement. Clause 2.4 recorded that:

'No additional consideration shall be payable by either Tavistock or SFF to the other or to Duiker or to any third party in respect of the exchanges envisaged in 2.1 and 2.2 since Tavistock and SFF consider the rights so exchanged to be of equal value.'

Clause 2.5 provided that the exchange agreement would constitute the consents necessary for Tavistock and SFF respectively to acquire mining authorisations under the Minerals Act in respect of the properties in question. Lastly, in terms of clause 2.6, Tavistock assumed responsibility

for the rehabilitation, restoration and anti-pollution obligations of SFF in respect of the areas where it was acquiring rights and SFF assumed corresponding obligations in regard to the Tavistock properties and Duiker's interest in the Ogies dump.

[6] The notarial mineral lease conferred the SFF rights on Tavistock. It dealt with the manner in which mining was to take place and imposed obligations on Tavistock in regard to the commencement of mining and the rate of mining extraction that had to be achieved after mining commenced. Failure to satisfy these obligations would not, however, constitute a breach of the mining lease, but would result in Tavistock's right to mine being restricted to certain specified tonnages of coal and it would cease to be entitled to mine these areas to exhaustion. The limits that would then apply were that Tavistock would be entitled to extract the quantity of coal specified in clause 8.1 of the lease and would lose the right to extract the quantities of coal specified in clauses 8.2 and 8.3 of the lease. These three clauses deal with the obligation to pay royalties and hence are the critical ones insofar as the present dispute is concerned. They read as follows:

'CONSIDERATION

As consideration for the rights hereby granted, the Lessee shall pay to the Grantor a royalty calculated and payable as provided hereunder:

8.1 in respect of the first 29 523 000 (TWENTY NINE MILLION FIVE HUNDRED AND TWENTY THREE THOUSAND) of mineable *in situ* tons of No. 4 seam coal reserves mined by the Lessee, in respect of the first 6 046 000 (SIX MILLION AND FORTY SIX THOUSAND) of mineable in situ tons of No.5 seam coal reserves mined by the Lessee and in respect of 200 000 (TWO HUNDRED THOUSAND) tons of run-of-mine No. 4 seam coal mined by the Lessee, there shall be no royalty payable. It being recorded that in exchange for the rights to mine this tonnage the Lessee has ceded and

assigned to the Grantor certain rights more fully specified in the exchange agreement to which a draft of this lease was annexed as annexure "D";

8.2 in respect of the balance of the No. 4 seam coal reserves on the property, namely 18 738 000 (EIGHTEEN MILLION SEVEN HUNDRED AND THIRTY EIGHT THOUSAND) of mineable *in situ* tons, the Lessee shall pay to the Grantor a royalty of 4,25% (FOUR COMMA TWO FIVE PERCENT) of the selling price of the No.4 seam coal mined from the property and sold by the Lessee;

8.3 in respect of the balance of the No. 5 seam coal reserves on the property namely 7 507 000 (SEVEN MILLION FIVE HUNDRED AND SEVEN THOUSAND) of mineable *in situ* tons, the Lessee shall pay to the Grantor a royalty of 3,5% (THREE COMMA FIVE PERCENT) of the selling price of the No. 5 seam coal mined from the property and sold by the Lessee.'

[7] The issue before us is whether the obligation to pay royalties in terms of clauses 8.2 and 8.3 survives the introduction of the new regime in respect of mining rights brought about by the Act. In order to address this it is necessary to have regard to certain of the provisions of the Act. Section 2 records that its objects are to give effect to 'the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic' and 'the principle of the State's custodianship of the nation's mineral and petroleum resources'. Section 3 records that mineral and petroleum resources are the common heritage of all the people of South Africa and that the State is the custodian of such resources for the benefit of all South Africans. In that capacity the State, acting through the Minister of Minerals and Energy henceforth grants all mining rights in South Africa.

[8] The effect of this is to destroy all rights to minerals existing under the common law and vest their custodianship in the State.[4] Had that taken place without some transitional measures being in place that would have created chaos in the South African mining industry, which is a major sector of the country's economy. In order to avoid that Schedule II of the Act contains transitional arrangements intended to ease the transition from the old to the new order. According to items 2(*a*) and (*b*) of the Schedule its objects, which are in addition to the objects set out in s 2 of the Act, are to ensure that security of tenure is protected in respect of prospecting, exploration, mining and production operations that are being undertaken at the commencement of the Act and to enable holders of what it terms 'old order rights' to comply with the Act. In order to achieve this it provides for the continuation of various rights previously existing, of which an existing mining right is relevant for present purposes.

[9] Old order rights are defined in item 1 of the Schedule as meaning an old order mining right, an old order prospecting right or an unused old order right. An old order mining right is defined as meaning, amongst other things, a mining lease in force immediately before the date on which the Act took effect and in respect of which mining operations are being conducted.[5] Such old order rights are dealt with in item 7 of the Schedule, which reads as follows:

7. **Continuation of old order mining right**.—

(1) Subject to subitems (2) and (8), any old order mining right in force immediately before this Act took effect continues in force for a period not exceeding five years

[4] *Holcim South Africa (Pty) Ltd v Prudent Investors (Pty) Ltd* [2011] 1 All SA 364 (SCA) paras 20 to 24.

[5] In the course of argument we were referred to Table 2 to the Schedule but that does not refer to mining leases and appears to be relevant only for the purpose of identifying certain mining authorisations and rights that are included as old order mining rights.

from the date on which this Act took effect subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued.

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

(*a*) the prescribed particulars of the holder;

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

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

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

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

(*f*) a prescribed social and labour plan;

(*g*) …;

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

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

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

(*k*) …

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

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

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

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

(*d*) has an approved environmental management programme; and

(*e*) has paid the prescribed conversion fee.

(4) No terms and conditions applicable to the old order mining right remain in force if they are contrary to any provision of the Constitution or this Act.
(5) The holder must lodge the right converted under subitem (3) within 90 days from the date on which he or she received notice of conversion at the Mining Titles Office for registration and simultaneously at the Deeds Office or for the Mining Titles Office for deregistration of the old order mining right as the case may be.
(6) …
(7) Upon the conversion of the old order mining right and the registration of the mining right into which it was converted the old order mining right ceases to exist.
(8) If the holder fails to lodge the old order mining right for conversion before the expiry of the period referred to in subitem (1), the old order mining right ceases to exist.'

[10] As pointed out in the *Holcim* decision of this court[6] these provisions do not serve to preserve common law rights. Instead, for the period of five years specified in item 1, or such lesser period as may elapse until the conversion of the old order right into a mining right under the Act, they create a new right, statutory in origin, embodying the rights previously enjoyed under the relevant old order right, together with an entitlement to convert that right into a mining right under the Act. In this case the rights that Tavistock enjoyed under the mineral lease are therefore the rights that it enjoyed as the holder of an old order right under item 7(1). That was common cause between the parties, as was the fact that this old order right was subject to the conditions contained in the mineral lease, including the conditions in clauses 8.1, 8.2 and 8.3 regarding the mining of coal and the obligation to pay royalties. (The latter two were largely of academic importance as they were unlikely to arise for some 20 to 25 years, by which stage the old order right would have been converted into a mining right or have lapsed.)

[6] At para 37.

[11] The primary argument on behalf of SFF rested on the following propositions. First, the settlement of the dispute between the parties by way of the exchange agreement constituted an indivisible whole so that the rights conferred on Tavistock under the mineral lease, together with their corresponding obligations such as the obligation in certain circumstances to pay royalties, were an integral part of the overall settlement. When the Act came into operation all of these rights remained in force as part of the old order mining right created by the Act. Second, under item 7(4) of the Schedule the conditions attaching to Tavistock's right to mine, as set out in the mining lease, would remain in force after conversion of the old order right into a mining right unless they were contrary to any provision of the Constitution or the Act. Third, the obligation to pay royalties was not expressly stated to be contrary to the provisions of the Act nor had Tavistock demonstrated that it was, by necessary implication, contrary to those provisions. Accordingly on conversion of the old order mining right into a mining right under the Act, the obligation to pay royalties would remain in force. Counsel accepted that if the court did not accept his contentions concerning item 7(4) then the appeal would succeed.

[12] All three of these propositions were challenged by Tavistock. It argued that the agreement in relation to the coal in respect of which a royalty was payable was additional to the settlement agreement and that the entitlement to mine that coal and the obligation to pay royalties did not form part of the settlement. In support of that it referred to clause 2.4 of the exchange agreement, (quoted in paragraph 5 above), and to the statement in clause 8.1 of the mineral lease that 'in exchange' for the right to mine the tonnage of coal there specified Tavistock had ceded and assigned to SFF certain rights specified in the exchange agreement. SFF

countered by referring to the fact that under the exchange agreement Tavistock not only ceded certain rights but also undertook not to mine certain areas and undertook a range of rehabilitation and related obligations. It relied on clause 2.2 of the exchange agreement, which provided that:

'In exchange for the cession, assignment, transfer and making over in 2.1, SFF undertakes to procure the execution of a mineral lease …';

for the contention that the exchange agreement was not limited in the manner for which Tavistock contended, which it said artificially divided the mineral lease into two separate and distinct arrangements. I assume for present purposes, without deciding, that SFF is correct in its approach to the two agreements.

[13] As regards item 7(4) Tavistock contended that it was only relevant to conditions of the mineral lease maintained in force under item 7(1) and had no bearing on the conditions attaching to a mining right after conversion. This is a point of some considerable difficulty. Item 7(4) is not well phrased, if its purpose is that for which SFF contends. In particular, the words 'remain in force' seem to refer back to the words 'continued in force' in item 7(1) and thus refer only to the period prior to conversion. But there is force in the points that item 7(2)(h) requires an applicant for the conversion of an old order right to incorporate in its application a statement setting out the terms and conditions applicable to the old order right and that, if item 7(4) is confined in the manner for which Tavistock contends, it is oddly placed in item 7, appearing after the provisions governing applications for conversion and not, as one would expect if its purpose was limited to the interregnum period, after item 7(1). This and the parallel provisions in items 4(4), 5(4) and 6(4) have led commentators on the transitional provisions of the Act to say:

'It is submitted, given the positioning of subitem (4) after subitems (2) and (3) which deal with the conversion process, that subitem (4) is intended to apply to the new right acquired on conversion. The effect is that the terms and conditions of the old right, except those contrary to the Constitution or the MPRDA, will also apply to the new right. It is submitted that the requirement in items 4(2)(e), 5(2)(h), 6(2)(g) and 7(2)(h) to lodge a statement setting out the terms and conditions which apply to the old right, supports the aforegoing contention.'[7]

[14] Counsel for Tavistock sought to counter these arguments by submitting that the Minister has the power under the Act to impose conditions on the conversion of an old order mining right. He accepted that there is no express power to do this but contended that it necessarily flowed from the provisions of s 3 of the Act and the obligations of consultation with landowners imposed on the holders of mining rights under s 5(4)(*c*) of the Act read with s 54 thereof. It is apparent from the complexity of these contentions that the correct interpretation of item 7(4) is a difficult issue with potentially far-reaching ramifications in relation to factual situations that are not before us in this appeal. As, in my view, SFF's contentions must fail on the third of its propositions, I refrain from expressing a view on the proper meaning to attach to item 7(4) and will proceed on the assumption in favour of SFF that its approach is correct.

[15] One then comes to the issue whether the provisions in the mineral lease providing for the payment of a royalty are contrary to any provision of the Act. Counsel approached this question on the footing that, as there was no express provision nullifying such royalty payments in existing mining leases, the question is whether by necessary implication such

[7] M O Dale and others *South African Mineral and Petroleum Law* (Loose-leaf issue 10) SchII-86. See also SchII-76 and 150 where the same point is made. P J Badenhorst and H Mostert *Mineral and Petroleum Law of South Africa* (2011)(Loose-leaf issue 7) at 25-4 is to the same effect.

payments are excluded by the Act. He submitted that courts do not lightly read words into a statute by way of implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands.[8] He also drew attention to the difficulty of formulating such an implied provision.[9]

[16] I do not think that this approach is correct. Accepting, for present purposes, that the effect of item 7(4) is that the terms and conditions attaching to the old order mining right are continued in the mining right obtained on conversion, to the extent that they are not contrary to the provisions of the Constitution or the Act, the latter qualification dictates a different enquiry. It requires each term or condition embodied in the old order mining right to be considered and assessed in the light of and against the provisions of the Constitution and the Act to determine whether it is contrary to either of them. Whether a term or condition is contrary to a provision or the provisions of the Act requires that the term or condition be considered, both as to its content and as to its effect, and weighed in the light of the entirely new system of mineral rights embodied in the Act. If it is inconsistent with that system then it is contrary to the provisions of the Act. The search is not for an express or implied prohibition of the provision in question. It is an assessment of its compatibility with the Act's provisions. If it is incompatible then it cannot form part of the terms and conditions attaching to a mining right obtained by way of conversion of an old order mining right.

[17] Approached on that footing the starting point is the nature of the term or condition in issue. Here it is the provisions of clauses 8.1, 8.2 and

[8] *Rennie NO v Gordon & another NNO* 1988 (1) SA 1 (A) at 22E-I
[9] *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 557E-G.

8.3 of the mining lease. They are said in the preamble to clause 8 to embody the consideration for the rights granted to Tavistock by SFF. Tavistock undertakes to pay a royalty as determined in the three sub-clauses. In the case of clause 8.1 it is said that 'there shall be no royalty payable'. In the case of the other two clauses a royalty is payable expressed as a percentage of the selling price of coal mined from the particular seams.

[18] These payments are in all outward respects conventional royalty payments. They are embodied in a mineral lease executed notarially and intended to be registered in the Deeds' Registry and to be used for the acquisition of a mining authorisation in terms of the Mining Act 50 of 1991. The expression 'royalty' has a well understood and relatively universal meaning in this context. It is:

'A payment made to the landowner by the lessee of a mine in return for the privilege of working it. Also, a payment made, or a portion of the production given, by a producer of minerals, oil or natural gas to the owner of the site or the mineral rights over it.'[10]

An Australian legal dictionary – pertinent because that country, like ours, has substantial mineral deposits and mining is a vital part of its economy – has the following definition:

'A payment made in respect of the exercise of a right to take a substance, and calculated either in respect of the quantity taken or the value of the substance taken, or the occasions upon which the right is exercised.'[11]

A similar view of a royalty is taken in the United States of America. A leading legal dictionary defines 'royalty' as:

'A share of the product or profit from real property, reserved by the grantor of a mineral lease, in exchange for the lessee's right to mine or drill on the land.'[12]

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[10] *The Oxford English Dictionary* 2 ed Vol XIV p 187.
[11] *Butterworths Australian Legal Dictionary* (1997) sv 'royalty'.
[12] *Black's Legal Dictionary* 9 ed (2009) sv 'royalty'.

In South African mining practice concerning mineral leases 'it is more common for the rental to be calculated on some royalty basis or as a share of profits related to the actual recovery'.[13] The mineral lease in this case reflects that common situation.

[19] Counsel did address an argument to us to the effect that, notwithstanding the outward appearance that these clauses provide for royalty payments, that is an erroneous categorisation. He submitted, in line with his argument that the notarial lease is the *quid pro quo* for the performance by Tavistock of its obligations under the notarial exchange agreement, that the 'royalty' component of the mineral lease is to be regarded, together with the performance of those obligations, as more akin to a purchase price for the benefits and advantages conferred on Tavistock by SFF including the right to mine the coal. In my view this is a strained and unnatural meaning to be given to the mineral lease. The exchange agreement created various rights and obligations on the part of the parties. They chose to embody some of those rights and obligations in a notarial mineral lease in conventional form and making use of conventional terminology. They said that in certain circumstances royalties would be payable. Why should they not be taken at their word?

[20] This is not a case where the agreements were drafted by lay people and reflect a lack of awareness of legal nuance. They were drafted by experienced attorneys on behalf of substantial business enterprises and related to multi-million rand transactions. As Lord Hoffmann said in *Jumbo King Ltd v Faithful Properties Ltd*:[14]

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[13] B L S Franklin and M Kaplan *The Mining and Mineral Laws of South Africa* 607.
[14] *Jumbo King Ltd v Faithful Properties Ltd* [1999] 2 HKCFAR 279 at 296.

'Of course in serious utterances such as legal documents, in which people may be supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other.'

On subsequent occasions he has stressed that courts do not easily accept that people have made linguistic mistakes[15] and that it requires a strong case to persuade a court that something has gone wrong with the language of a formal contract.[16] I accept that in the drafting of complex commercial contracts 'there are bound to be ambiguities, infelicities and inconsistencies',[17] but the suggestion that what are expressed to be royalties under a mineral lease are to be construed as the purchase price of a congeries of rights under both the mineral lease and the exchange agreement, involves such a fundamental alteration of the mineral lease that it cannot be ascribed to the inevitable drafting problems that manifest themselves in documents of this type. In my view the parties chose to say that royalties would be payable and that is what the words they have used should be taken to mean.

[21] Accepting that the mineral lease provided that Tavistock would pay a royalty in respect of some of the coal that it became entitled to mine under the mineral lease and that the undertaking to pay the royalty secured the right to mine that coal originally, I turn to consider the relevant provisions of the Act. My starting point is that Tavistock's entitlement to mine the coal no longer has its origins in the mineral lease. Its rights in terms of that agreement were terminated by the Act. In their

[15] *BCCI v Ali* [2001] 1 AC 251; [2001] 1 All ER 961 (HL) para 39.
[16] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101; [2009] 4 All ER 677 (HL) para 14.
[17] Lord Collins SCJ in *Re Sigma Finance (in administrative receivership) Re the Insolvency Act 1986* [2010] 1 All ER 571 (SC) para 35.

place it acquired a statutory right, described as an old order mining right, on the same terms and conditions as it had hitherto enjoyed. When that old order mining right is converted into a mining right under the Act its right to mine the coal will derive solely from that mining right and its source will be the custodianship that the State now exercises over minerals in South Africa. It makes little sense in those circumstances for it to continue to be required to pay SFF, the original owner of the minerals, for the right to mine them, when in truth its right to do so stems from the Act and the State and not SFF.

[22] That view is reinforced by the fact that in exercising its custodianship of minerals 'for the benefit of all South Africans' one of the benefits that the State secures is an entitlement itself to be paid royalties in respect of the rights it grants to mine those minerals. Under s 25(2)(*g*) of the Act the holder of a mining right is obliged to pay royalties to the State. Whatever basis existed for the determination of the amount of such royalties in 2004 when the Act became operative, there is now a statutory foundation for such determination in the Mineral and Petroleum Resources Royalty Act 28 of 2008. It would be inconsistent and potentially unfair for the Act not just to permit, but to compel, the continued payment of royalties under contracts concluded pursuant to the previous minerals regime as well as extracting a royalty from the holders of mining rights in terms of the Act. Such double payment of royalties could imperil the financial viability of marginal mining operations and would be inconsistent with the obligation imposed upon the Minister in terms of s 3(3) of the Act to promote the sustainable development of South Africa's mineral and petroleum resources.

[23] Next there is the fact that the transitional provisions in Schedule II include a provision dealing with royalties. It is item 11 the relevant portions of which read as follows:

'(1) Notwithstanding the provisions of item 7 (7) and 7 (8), any existing consideration, contractual royalty or future consideration, including any compensation contemplated in section 46 (3) of the Minerals Act, which accrued to any community immediately before this Act took effect, continues to accrue to such community.

(2) The community contemplated in subitem (1) must annually, and at such other time as required to do so by the Minister, furnish the Minister with such particulars regarding the usage and disbursement of the consideration or royalty as the Minister may require.

(3) If the consideration or royalties contemplated in subitem (1) accrued to a natural person, it may continue to accrue to the person subject to such terms and conditions as the Minister may determine, if—

(*a*) the discontinuation of such consideration or royalty will cause undue hardship to the person; or

(*b*) the person uses such consideration or royalty for social upliftment.

(4) If it is determined that the consideration or royalties referred to in subitem (3) continues then the provision of subitem (2) apply to such a recipient.

(5) The recipients contemplated in subitems (1) and (3) must within five years from the date on which this Act took effect inform the Minister of their need to continue to receive such consideration or royalties and the reasons therefor, and furnish the Minister with the prescribed information.'

There are obvious difficulties in understanding the opening words of item 11(1) and the references to items 7(7) and (8). What they do make clear is that item 11 is dealing with a situation after an old order mining right has come to an end. In plain terms it then deals with certain situations in which royalties that were payable under the former dispensation and would have remained payable under old order mining rights will, subject to Ministerial discretion, continue to be paid after the old order right has been converted into a mining right under the Act. Significantly item 11 excludes a royalty payment of the type at present

under consideration. It extends the right to continue to receive royalties, not on the basis of the type of agreement under which the royalty is payable, but on the basis of the type of person entitled to receive this benefit.

[24] For SFF's argument to be upheld it would have to follow that royalties payable under mineral leases and other forms of agreement giving rise to old order mining rights under the transitional provisions of the Act, would not only continue to be payable in terms of those old order mining rights prior to conversion, but would, on its approach to item 7(4), continue to be payable after conversion. There is no tenable basis for suggesting that the present is a special situation or that there would be categories of agreements providing for royalties that would survive conversion and others that would fall away at that stage. But that would render the special provisions of item 11 largely, if not entirely, redundant and even prejudicial to the identified beneficiaries, whose right to royalties would become subject to ministerial withdrawal. This stands item 11 on its head. Its manifest purpose is to protect the interests of certain bodies or persons in receiving royalties. On SFF's construction it would not only, not serve that purpose, it would result in their existing royalty rights being significantly diminished. That is not a sensible conclusion.

[25] One other factor that may be relevant, albeit not a major one, is that item 12 of the transitional provisions makes provision for a person 'who can prove that his or her property has been expropriated' in terms of any provision of the Act to seek compensation from the State. This was treated in argument on behalf of Tavistock as a clear indication that SFF would not be prejudiced by the loss of its royalties, because it could

always recover compensation from the State for its loss. However, I am not inclined to attach any weight to this factor. My reason is that it may be debatable whether the Act does in fact expropriate the rights that were enjoyed under the old minerals regime. The point is raised and the relevant cases cited in the work by Professor Dale and others referred to in paragraph 13.[18] The learned authors say that item 12 of the transitional provisions 'has been drafted evasively' in order to avoid a constitutional challenge, but without identifying what property can be expropriated under the provisions of the Act and what would constitute such an expropriation.[19] In view of that potential difficulty I prefer not to attach any weight to item 12.

[26] Weighing all of these factors together their cumulative effect is necessarily that, after conversion of an old order mining right into a mining right, the preservation of a right to claim royalties under a contract, such as this mineral lease, concluded prior to the Act coming into force and maintained during the transitional period in the form of a condition attaching to an old order mining right, does not serve the purposes and would be contrary to the provisions of the Act. That conclusion is dispositive of the appeal and renders it unnecessary to address the arguments about the effect of item 7(7) of the transitional provisions.

[27] For those reasons the appeal must succeed. It was suggested on behalf of Tavistock, at the commencement of the argument, that the proper order to make in that event was one amending the declaratory order issued by the court below to include words making it clear that the

[18] Dale et al supra MPRDA-24.
[19] Dale et al supra Sch II-206 and the discussion that follows up to 206(25).

obligation to pay the royalties would continue after Tavistock obtained an old order mining right but would lapse on the conversion of that right into a mining right. However, Tavistock had in both its answering affidavit in the court below and its heads of argument asked simply for the dismissal of the application and not counter-applied for a declaratory order in the terms suggested. It cannot now obtain such an order by way of this appeal. In any event it does not need such an order. Its rights sufficiently appear from the terms of this judgment. In the result the following order is made:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the court below is set aside and replaced by an order in the following terms;

'The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.'

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	G L Grobler SC (with him L P Dicker) Instructed by: Norton Rose South Africa, Johannesburg Webbers, Bloemfontein
For respondent:	W H L van der Linde SC (with him Tim Bruinders SC) Instructed by: Edward Nathan Sonnenbergs, Johannesburg McIntyre & Van der Post, Bloemfontein.