Promised Land

Property rights and the prospect of Karoo uranium mining under South Africa's Minerals Policy

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On the farm Katdoornkuil, a neat white house with blue trimmings stands shuttered, a kempt garden before it. A few sheep in the fields, a drove of goats in encampment. It is a modest scene and the unlikely setting of a seismic windfall. In 2005, owners Solomon Ngondo and his four brothers made headlines when a mining company paid R20 million – around $3 million at the time – for the uranium ore beneath their soil.

The Ngondos are black South Africans. Under apartheid they were restricted to owning land in certain designated areas, but when change came they bought a 6000 hectare Karoo farm with a state subsidy and loan. Hard hit by drought, however, they struggled to make their repayments.

Then the prospectors came knocking. The Ngondos were able to sell their mineral rights and keep their land. They also have royalties to look forward to once operations start. It is a satisfying tale of the ordinary man triumphant, and articles about the family appeared in the *BBC* and *Guardian*.

Other farmers in South Africa have not been so fortunate. Previously, under common law, landowners were the owners of "the whole of the land, including the air space above the surface and everything below it". This principle is expressed by the Latin *cuius est solum* maxim: 'for whoever owns the soil, it is theirs up to heaven and down to hell'. Minerals could therefore be privately held by landowners, or by third parties if these rights had been severed and sold.

When the Mineral and Petroleum Resources Development Act (MPRDA) came into effect in 2004, it abolished private ownership and introduced the notion of "state custodianship". Now mineral and petroleum resources are vested in the state. Government appropriated this control in exchange for a promise: the nation's mineral wealth would be held as part of the "common heritage" of all her people.

Transitional arrangements were put in place to smooth the MPRDA's passage. This included the "use it or lose it" principle, where rights holders could convert their "old order" rights into "new order" rights. Those who failed to do so within the prescribed timeframes – either because they could not afford it or because they did not wish to mine their land – automatically lost them. These landowners now only retain their surface rights, and anyone

can apply to mine on or below their property. Applicants do not need to obtain their consent, and the MPRDA is unclear about how they should be consulted, or even the kind of compensation they should receive.

Tiaan Theron is a third generation Karoo farmer. He describes the wheeling and dealing that started shortly before minerals passed into custodianship. “The first company was a shelf company,” he said. “Midnight Masquerade Properties. A classic, classic shelf company.”

“It was literally a few months before the expropriation of mineral rights,” he said. “A whole bunch of companies descended on the area.” These companies offered landowners money to apply for rights, on condition they cede these once they had been granted by the Department of Mineral Resources (DMR).

The company Tasman Pacific and its BEE partner, Lukisa JV, are presently re-applying to mine for uranium and molybdenum in the Karoo. Their original application was vast, spanning 750 000 hectares. Their footprint has since been significantly reduced, in part because of mounting public pressure. Tasman is however resubmitting a mining right application over Theron’s land.

“There’s a direct correlation between this renewed interest in what lies here in the Karoo and the expropriation of mineral rights,” said Theron. “From that moment on there was suddenly just too much uranium in the Karoo. And too much shale gas and too much molybdenum. I expect they’ll soon have oil they’ll need to come and extract here,” he said. Theron believes this is because applicants no longer have farmers standing in their way.

Theron may call it expropriation, but the Constitutional Court disagrees. In 2013, with Chief Justice Moegoeng Moegoeng at the helm, it ruled that the MPRDA did not expropriate any rights, but merely deprived owners of these.

Agri SA, a South African association representing farmers, had actively been looking for a suitable test case to see whether or not the MPRDA had expropriated mineral rights. It found it in a company called Sebenza’s claim against the state. Sebenza’s right to compensation was ceded to Agri SA, who took up the mantle. The DMR however rejected their claim, prompting a series of four court cases.

The first case was a technical matter and not of import here. The second before the Gauteng North High Court, however, saw Agri SA vindicated: it was found that expropriation had indeed occurred and that compensation should be payable.

In the third and fourth cases, the Supreme Court of Appeal (SCA) and the Constitutional Court (CC) did not however agree. The case pivoted around the legal distinction between

the notions of “deprivation” and “expropriation”, terms which can be found under section 25 of the Constitution.

Moegoeng Moegoeng described deprivation as relating to “sacrifices” – sacrifices that holders of private property rights “may have to make without compensation”. But then he said something that not only prompted the writing of two minority judgements, but also caught the attention of analysts and jurists alike.

Under the constitutional property clause, compensation is only payable when expropriation can be proved. Moegoeng however said, “There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.”

In his minority judgement, Justice John Froneman wrote that if private ownership of minerals could be abolished without compensation – using the construction that the state *transferred* the substance of the rights, without actually *acquiring* them – then what would prevent the abolition of private ownership “of any, or all, property in the same way?”

Analysts have warned this might open the door to de facto expropriation: by calling it deprivation, the state could dodge payment of compensation. In an opinion piece Martin Brassey, senior counsel at the Johannesburg bar, wrote that there was “no denying” the decision was “a setback” for property owners, and a “wake up call” for those who believed property rights would be protected by the Constitutional Court. He said that, “emboldened”, the state was invoking “the heritage-plus-custodianship formula to legitimise seizures in other contexts.”

But why would the state adopt this formula? The answer is twofold. The first can be found in the 2011 Agri SA case before the High Court, where the state contended that, should expropriation indeed be found to have occurred, the test case would result in many previous rights holders seeking compensation. The state said it could not afford this.

Judge Du Plessis however found that it was “no defence for the State, or any expropriator, to plead that it cannot afford to pay compensation”. The DMR testified that the overall compensation bill would come to R90 billion rand. Du Plessis said the evidence for this was “by no means persuasive”, adding that, under cross-examination, the witnesses conceded this figure was “far from accurate, and in reality [had] no foundation in fact”.

The second answer lies in the thrust and intention of the MPRDA. It is a deeply transformative piece of legislation. From the earliest green and white papers, one of the main aims was to prevent mineral rights owners from “sterilising” or “hoarding” minerals. Previously, if landowners – such as farmers – did not want to see the surface of their land disturbed, they could choose not to exploit the minerals under their land. The state could

only compel them to exploit these minerals through expropriation and the payment of compensation.

Moegoeng said the MPRDA had the “immediate” and “deliberate” effect of abolishing the right to sterilise minerals. He said this should come as “no surprise” in a country with a “progressive Constitution, a high unemployment rate and a yawning gap between the rich and the poor”.

The Chief Justice found that, when it comes to expropriation, the constitutional property clause had a “special role” to play in nation-building and reconciliation. He said private property rights should not be over-emphasised at the expense of the state’s social responsibilities. He therefore called Agri SA’s interpretation an “overly liberal one”, which disregarded the public interest and the constitutional imperative of transformation.

Because mineral ownership therefore previously had this non-exploitation value, Froneman said rights owners in this category might have the best chance of proving compensable expropriation. They had not received what he termed “compensation in kind” for this right. This connection was similarly made in the second Agri SA case. The judge said that while it was true that the right not to exploit minerals meant that holders could sterilise them, it was equally true that there was a “social imperative” to balance the agricultural value of the surface with the need to exploit minerals.” Environmental considerations therefore do play a role and the right not to exploit minerals was “not necessarily negative or contrary to the public interest,” he said.

The impact of South Africa’s minerals policy

Tim van Stormbroek is an environmental assessment practitioner (EAP). He works for Ferret Mining, the company appointed by Tasman to carry out their environmental management process. When companies apply for mining-related rights, EAPs become the pointmen who facilitate the process between applicants and interested and affected parties.

Van Stormbroek said that after the legislative changes, many farmers did not apply for their mining rights. “If you could snap up prospecting rights, there was a potential to sell or utilise [them] to build your own company.” He however added that, in the case or uranium, the numbers were significantly driven by the increase in uranium price.

A 2011 Moneyweb article revealed some staggering data. The DMR had created an online database for anyone interested in tracking mining-related applications. This was hailed as a step in the right direction, although it appears the department’s system is no longer operational. At the time, however, there were **1 330 065** prospecting applications underway in South Africa.

This amounted to a “frightening recognition that South Africa’s mineral wealth [was] under attack,” wrote journalist Geraldine Bennett. Given the numbers, Bennett questioned the DMR’s capacity to perform its duties, and raised concerns about public consultation.

A complex minerals policy history

Throughout South Africa’s history, there has been tension between the various rights accorded to private individuals, mining houses and the state. Except for a brief period of around five years, there has however always been a dual ownership system.

The 1991 Minerals Act attempted to consolidate a very complex system that had developed piecemeal over more than 300 years. The Act’s opponents however felt it leaned too heavily in support of private ownership. These critics said South Africa was “out of step” with internationally-accepted norms, and that private ownership “suppressed exploration activity” and led to “hoarding” of mineral rights. This created a barrier to entry, they said, closing off the system to small-scale miners.

The African National Congress (ANC) from as early as 1955 noted its intention to have mineral rights pass into state custodianship. This was expressed in the Freedom Charter as follows: *The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole*. In 1998, under the National Water Act, government became the public trustee of the nation’s water resources. Then, in 2015, the Preservation and Development of Agricultural Land Framework Bill was quietly released for public comment. It has a similar clause to the MPRDA, stating that agricultural land is “the common heritage” of the people of South Africa, of which the state will be custodian.

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Olive Grove Guest Farm lies a few minutes outside Beaufort West on the N12. The farm is an ecotourism destination, and besides the olive business, it carries livestock and game. When Ronald Samuels bought the property in 2014, he did not know about Tasman’s plans.

“No-one made me pertinently aware that there’s any activity going on here,” he said. The sales agreement did not stipulate that mining was on the cards, and Samuels said he would not have bought the property if he had known.

Samuels always had a passion for farming, and he describes his journey to acquiring Olive Grove as being one of “utter sacrifice”. In 1978, when he was nine years old, he was separated from his family and moved to the Cape Flats. Growing up in Athlone, money was scarce, but by the age of 12 he started working on weekends. He later propelled himself to the position of CEO at a leading corporate, where he is today.

Consultation

Samuels said the consultation process has been poor. “I feel this is just part of a process and that either I fit in or I fit out. And now whether I’m happy or not happy, I’m not sure how much it bothers these okes,” he said.

Tasman has recently resubmitted a prospecting application over his land. He has repeatedly tried to arrange meetings and does not know to what extent he will be affected. “Nothing is constituted in advance, giving me the opportunity to get my lawyers here and [have] people around. Everything is quick-quick."

Theron agrees. “They pitch up, they put up a projector, and then they bury you under a whole bunch of information that you can do nothing with,” he said. “It’s not like it’s in good faith, where you meet with someone and you sit with him and discuss things.”

Van Stormbroek said that all departments that authorise licensing either want to see evidence of signatures, a liaison meeting, or a contract between the applicant and the landowner. The legislation does not however specify what contracts should contain.

Theron said he merely wants to get a surface agreement in place. “If their plans come off, they’ll make it impossible for me,” he said.

Theron had a surface agreement drafted by an attorney specialising in mining law. He wanted this attached to the application, so that the DMR was aware of his position. When he contacted the department, however, they were unresponsive. As a landowner and farmer, he feels he is entitled to know who holds rights over his land. ‘I mean, that’s surely a basic constitutional right?” he said.

Theron believes companies were previously willing to negotiate with landowners before the legislative changes. “Now they’re no longer prepared to come to the table and talk about anything whatsoever. Because they don’t have to,” he said.

Compensation

The MPRDA does not make it clear how landowners should be compensated. Section 54 only states that if there is a dispute – for example if a landowner refuses access to his property or places “unreasonable demands” – then the DMR’s regional manager must request the parties to come to an arrangement about compensation. Failing this, the dispute must be arbitrated.

Many mining companies do offer leases or surface use agreements. “The clients I tend to represent go with the view of compensating the landowner from the word go,” said Wandisile Mandlana.

Mandlana specialises in environmental and mining law and is a partner at Bowman Gilfillan. “The greater part of my exposure has been with the relatively well-established mining houses that have existed across regimes,” he said.

He said these companies tend to understand licence to operate, and where possible they try to cooperate with landowners. Litigation usually only becomes necessary when landowners won’t budge or consider any reasonable discussion. “Then you assert your right,” he said.

Communal land

It is not only private landowners who are battling the MPRDA’s opaque provisions. Communities on communal land face similar challenges. The most well-known case is arguably Xolobeni, where Pondo people living on the Wild Coast are fighting an application for titanium on their land.

In July this year, Groundup reported that at a meeting held with the Xolobeni community, the Deputy Minister of Mineral Resources, Godfrey Olifant, “warned the crowd not to try and pressure government for or against mining”. He reportedly said the titanium belonged to the people of South Africa and not to them, and government could be trusted to responsibly decide on the mine. They should therefore not “appropriate power” to themselves.

Henk Smith works as a public interest lawyer at the Legal Resources Centre. His office is on the third floor of an upmarket building in Cape Town’s trendy city bowl. The centre itself is not luxe, and Smith’s office bulges with books and files.

“You know all the problems of South Africa started with minerals and it’s still minerals,” he said. “It’s the fact that we can’t come to terms with how to deal with mining.”

“If it’s communal land, we’re saying that the MPRDA is actually unconstitutional,” said Smith. He added that white landowners previously had access to mining rights, and that black people should be put in the same position they would have been in if it weren’t for apartheid. “It’s justifiable under the MPRDA to give them a first option,” he said. “When it comes to black people, we’re saying that the regime should be different, and it isn’t.”

Because the MPRDA is transformational by design, it therefore gives communities living on communal land the option of obtaining a preferent right to prospect for minerals.

“I think that legally, because we (sic) could never be owners of our own communal land, and we could never exercise those ownership rights in relation to minerals, it’s justifiable to say that we must still be given that opportunity under the constitution. And for white titles – white settler titles – it’s justifiable to say that mineral rights must now be shared,” said Smith.

Collective and individual rights

Dr Anthea Jeffery, head of policy research at the South African Institute for Race Relations (IRR), feels there should be equivalent concern for affected individuals.

“There is much concern among various civil society organisations about the community’s right not to have use or enjoyment disturbed by mining,” she said. She added that the DMR was willing to give more protection to communities, but that people seldom prosper under collective forms of ownership. “There is not enough protection for the individual rights of community members and women are particularly vulnerable.”

Jeffery agrees that landowners had more bargaining power before the MPRDA. By selling their mineral rights they could specify certain terms and conditions, and companies might have been under a greater obligation to protect their interests. “[Landowners] no longer have control and can’t prevent mining,” she said. “[They] can at best hope for adequate compensation under the MPRDA,” she said.

Jeffery also stressed the negative effect the legislative changes have had on mining companies. “They invest in a certain policy environment, but there are constantly shifting rules. Now mineral rights are limited rights, which are nothing like a proper ownership right, enforceable against the world for all time.” Instead, she said, the full control over mineral and petroleum resources has been left to an “overburdened and often inefficient state.”

The MPRDA has in addition encouraged the awarding of mining rights to small companies with limited resources. She said junior companies battle to uphold environmental protections, while more established companies have to jump through many regulatory hoops, often at great expense. “The smaller companies just walk away,” she said.

Jeffery also warned that, under radical land redistribution policies, farmers – whether black or white – could lose their farms. She added that because ownership would vest in the state, there would be no real redress for apartheid injustice. “The policy empowers the state, not the individual,” she said.

An uncertain future

Samuels is now in the “untenable position” of not being able to exercise his freedom to sell. He is concerned about exporting his product and feels his ecotourism business will also suffer. “I was expecting a certain return on my property,” he said. “If I can’t sell this farm, and I can’t export these olives, I’ve got a heck of problem.”

He acknowledges that mining operations may be in the national interest. “I understand it,” he said, “but can it be at the cost of my constitutional right? Or anybody else’s?”

“When national interests impact on individual rights or interests, that’s problematic,” he said. “If you say, ‘We’re putting this thing here, you can’t fulfil your dream, and we’re not going to buy your place or compensate you’, that I’ve got a fundamental problem with.”

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