The Right to be Granted Access Over the Property of Others in Order to Enter Prospecting or Mining Areas: Revisiting *Joubert v Maranda Mining Company (Pty) Ltd* 2009 4 All SA 127 (SCA)

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Abstract

A new mineral law regime was introduced when the *Mineral and Petroleum Resources Development Act* 28 of 2002 (MPRDA) commenced. Common law mineral rights were abolished and replaced by statutorily created rights to minerals. Prospecting rights and mining rights granted in terms of the MPRDA entitle their holders, amongst other things, to enter the designated prospecting or mining area in order to commence with and conduct prospecting or mining activities. This contribution focusses on the question whether the entitlement to "enter" the land to which a specific prospecting or mining right relates automatically includes the ancillary right to be granted access over the property of others in order to enter the designated prospecting or mining area. It is important to determine the source or origin of the right to access in the new regime and to differentiate between "access" and "entry". It would not be just or justifiable summarily to accept that legal principles that developed under a completely different regime apply unchanged in a new regime.

Keywords

Mineral; mineral right; mining area; prospecting right; prospecting area; custodian; access; enter.

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1 Introduction

The extraction of mineral resources in South Africa is regulated by the *Mineral and Petroleum Resources Development Act* 28 of 2002 (MPRDA).[1] Section 5(1) of the MPRDA defines prospecting and mining rights that have been granted in terms of the Act and registered in terms of the *Mining Titles Registration Act*[2] as limited real rights in the minerals *and* the land to which they relate. This Act purports, amongst other things, to delineate the rights and obligations of holders of prospecting and mining rights.[3] Section 5(3) sets out the entitlements acquired by right holders. This section *inter alia* provides that the holder of a prospecting or mining right is entitled to enter the land to which the right relates and to carry out any activity incidental to prospecting or mining, provided that the relevant activity does not contravene the provisions of the MPRDA. As prospecting and mining rights are often acquired in relation to land owned by other parties, the entitlements associated with these rights infringe on and burden the ownership entitlements of landowners. This is a common characteristic shared by all limited real rights or *iura in re aliena*.[4] The extent of the infringement that has to be endured by landowners is symmetrical to the extent of the right holders' entitlements.[5]

One would expect that the interpretation of provisions delineating the entitlements acquired by holders of prospecting and mining rights and the determination of the consequential burden on landownership that they create would be quite simple. However, things are rarely as simple as they seem at first glance. The complex nature of the relationship between holders of rights to minerals and landowners is illustrated when the

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1 *Mineral and Petroleum Resources Development Act* 28 of 2002 (hereafter the MPRDA).

2 *Mining Title Registration Act* 16 of 1967.

3 For the purposes of this contribution the term "mining rights" must be understood to include "mining permits". The discussion is of specific importance to small-scale miners due to the fact that mining permits are issued for mining operations only where the mining area does not exceed 5.0 hectares. Before the MPRDA was amended by the *Mineral and Petroleum Resources Development Amendment Act* 49 of 2008, s27(1)(b) stipulated that where parties applied for mining permits the mining area was limited to 1.5 hectares.

4 Mostert and Pope *Principles of the Law of Property in South Africa* 236.

5 Van der Walt *Law of Servitudes* 187 explains that servitudes are limited real rights that grant the holder specified entitlements over someone else's property and correspondingly reduce or burden the servient owner's entitlement to use and enjoy her own property.

nuanced differentiation between the terms "enter" and "access" comes into play. The question arises whether section 5(3) that creates the statutory entitlement for a holder of a prospecting and mining right to enter the land to which the right relates automatically entitles the holder of the right to access over an unburdened portion of land in order to enter the prospecting or mining area;[6] or whether access over unburdened portions of property to facilitate entry to the prospecting or mining area must independently be negotiated and compensated. The question gains prominence due to the fact that the MPRDA is mute on the issue of access and does not expressly provide for the compulsory compensation of a land owner for the surface use of its property for the purposes of prospecting or mining,[7] except in cases of expropriation or by means of arbitration.[8]

The geological location of a given prospecting or mining site increases the potential for the matter of access to become a contentious issue. Where the prospecting or mining area borders on a public road, it is unlikely that access to the prospecting or mining area will become problematic. However, where the prospecting or mining area is located well within someone else's property in such a manner that it may be described as a landlocked area, or "blokland", the right to cross over another's property in order to enter the prospecting or mining area becomes important. The inherent complexity of the right to access such a landlocked prospecting or mining area is accentuated where the location of the prospecting or mining area provides for multiple possible access routes over different landowners' properties. The question that arises in these circumstances can be formulated from the perspective of the potentially affected parties as either:

- From the right holder's perspective, is the holder of a prospecting or mining right entitled to be granted access over the property of the landowner on whose property the prospecting or mining site is located in order to enter the land to which the right relates by virtue of the fact that a prospecting or mining right has been granted? or

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6 The meaning that should be attributed to the term "the land" is discussed in para 3 below.

7 In the light of the decision of the Constitutional Court in *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) it may be argued that compensation is implicitly provided for in the MPRDA as reference to "any other law" includes reference to the common law, where the restriction of the ownership of landowners through the acquisition of limited real rights by others was accompanied by the duty to compensate the landowner justly.

8 *Meepo v Kotze* 2008 1 SA 104 (NC) para 8.1(b)

- From the landowner's perspective, is the landowner whose land is burdened with a prospecting or mining right statutorily obliged to provide access over his property to the holder of a right to minerals, particularly if there is a potentially shorter and less burdensome route over another's property? or

- From a neighbour's perspective, may a neighbouring owner's land be burdened with the obligation to provide access to a prospecting or mining area located on another party's land?

Three basic premises underpin this contribution. The first is that the notions "access" and "enter" should not summarily be regarded as synonyms. It is possible to differentiate between these terms on the basis of their ordinary meanings. From dictionaries it is clear that "access" can be interpreted as "the means by which you get to a place"[9] or "the ability to approach or pass to and from a place".[10] "Enter" on the other hand is defined as "to come or go into a particular place",[11] or "to set foot in, cross the threshold of, pass into".[12] In addition it can be deduced from the wording of section 54(1) of the MPRDA that the legislature did not regard "access" and "enter" to be synonyms either. Section 54(1)(a) deals with scenarios where the holder of a right to minerals is refused entry to the land, while section 54(1)(b) refers to those scenarios where the owner of the land "places unreasonable demands in return for access to the land". Section 54(1)(c) attempts to assist right holders where the owner of the land or the lawful occupier "cannot be found in order to apply for access".

The second basic premise is that a prospecting right and a mining right are meaningless and void of value if the holder thereof is not provided with access to the area designated as the prospecting or mining area in order to enter onto it, to commence with, and to conduct the relevant exploitation activities. The third basic premise is that access over another's property (as distinguished from entrance to the prospecting or mining area) will generally become a contentious issue only where parties do not constructively engage with each other, or relationships between the affected parties are either non-existent or deteriorate over time with one or all parties having unrealistic claims or expectations. In order to address these disputes fairly, and to ensure that parties who do engage

9 Macmillan Dictionary 2016 http://www.macmillandictionary.com/thesaurus-category/british/entrances-exits-and-gateways.

10 Merriam Webster 2016 https://www.merriam-webster.com/dictionary/access.

11 Cambridge Dictionary 2016 http://dictionary.cambridge.org/dictionary/english/enter.

12 Cambridge Dictionary 2016 http://dictionary.cambridge.org/dictionary/english/enter.

constructively are on an equal footing during the deliberations, it is imperative to understand the legal nature, origin and extent of the right to access in the MPRDA regime.

In an attempt to contextualise the discussion regarding the right of the holder of a prospecting or mining right to obtain access over a non-right holder's property to enter the land to which the prospecting or mining right relates, this discussion will commence with an overview of applicable common law principles.[13] Thereafter, light is shed on the right to access and entry as provided for in the MPRDA. In the penultimate section of this contribution the decision of the Supreme Court of Appeal in *Joubert v Maranda Mining Company (Pty) Ltd*[14] is revisited. In the final instance the issue of access is considered from a different angle.

2 A discussion of applicable common law principles

2.1 Why does the common law matter?

The MPRDA introduced a new regulatory regime pertaining to the exploitation of the country's mineral and petroleum resources. Although this system irrevocably broke all bonds with the preceding regulatory regime by disavowing the judicially recognised link between land and the minerals embedded in the land,[15] the legislature did not summarily wipe the common law slate clean. South African mineral law has since its earliest days comprised of a unique blend of statutory law and common law.[16] Despite the regime change effected by the MPRDA,[17] the Act provides for the continued but contextualised application of the common law in the current mineral and petroleum regime. Section 4 of the MPRDA requires that when a provision of the Act is interpreted, "any reasonable interpretation which is consistent with the objects of the Act must be preferred over any other interpretation which is inconsistent with such objects". Section 4(2) then expressly states that it is only when the

13 The term "common law" when used in this contribution refers to South Africa's Roman-Dutch common law heritage unless it is specifically indicated that the term refers to English common law principles.

14 *Joubert v Maranda Mining Company (Pty) Ltd* 2009 4 All SA 127 (SCA).

15 *London and SA Exploration Company v Rouliot* (1891) 8 SA 75 91; *Erasmus and Lategan v Union Government* 1954 1 All SA 31 (O); Van der Schyff *Property in Minerals and Petroleum* 5, 271-275. However, see Mostert *Mineral Law* 8 for her opinion that the extent to which the *cuius est* principle has survived the statutory development of mineral law in South Africa is contentious.

16 Stone *Mining Laws of the British Empire* 1; Mostert *Mineral Law* 1; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (A) 509D.

17 Van der Walt *Constitutional Property Law* 396.

common law is inconsistent with the MPRDA that the Act prevails. This section of the MPRDA statutorily entrenches the accepted principle of the interpretation of statutes that statutory provisions are not deemed to interfere with or detract from the common law unless the intention of the legislature to do so is expressly stated or the inference from the statute is such that no other conclusion can be reached than that the legislature had such an intention.[18] Section 4(2) subsequently underpins the requisite analyses of applicable common law principles when any provision of the MPRDA is to be interpreted.

2.2 The right to access

Under the preceding mineral law regime, independent mineral rights were classified as *quasi* servitudes.[19] An independent mineral right originated from the common law entitlement of a landowner to use his or her immovable property to his or her benefit. Once mineral rights were severed from landownership the landowner's *dominium* was subtracted from, and a third party acquired a right that initially formed part of the all-encompassing ownership entitlement of the landowner. As such, independent mineral rights were classified as *iure in re aliena,* or limited real rights. Mineral rights were thus regarded as a "portion of the *dominium* of the land"[20] which could be severed from the ownership of the land to constitute independent rights.[21]

At common law, and in terms of the *Minerals Act* 50 of 1991, the genesis of the relationship between a landowner and the holder of mineral rights in his land was a contractual agreement entered into between the parties or their predecessors in title.[22] Because mineral rights were intricately linked with landownership, their severance from ownership occurred mainly at

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18 *Casserley v Stubbs* 1916 TPD 310 312; *Dhanabakium v Subramanian* 1943 AD 160 167; *Andrews v Narodien* 2002 1 SACR 336 (C) 345; *S v Kimberley* 2004 2 SACR 38 (E) para 16; *Fish Hoek Primary School v GW* 2010 2 SA 141 (SCA) para 14.

19 *Rocher v Registrar of Deeds* 1911 TPD 311 316; *Ex parte Pierce* 1950 3 SA 628 (O) 634C; *Minister of Land Affairs v Rand Mines Ltd* 1998 4 SA 303 (SCA) 320I-J.

20 *Erasmus and Lategan v Union Government* 1954 1 All SA 31 (O) 34; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (A) 510A; *Aussenkjer Diamante (Pty) Ltd v Namex (Pty) Ltd* 1980 3 SA 896 (SWA); *Coronation Collieries v Malan* 1911 TPD 577 591; *Rocher v Registrar of Deeds* 1911 TPD 311; *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 7.

21 Mostert *Mineral Law* 8-11; Van der Schyff *Property in Minerals and Petroleum* 46-48.

22 *Sepha Ku Tin (Pty) Ltd v Kranskoppie Boerdery* (GNP) (unreported) case number 47561/2010 of 7 May 2012 para 6; Dale *et al South African Mineral and Petroleum Law* (Issue 1, 2005) MPRDA-124.

the behest of the landowner.[23] The severance of rights to minerals was captured in written agreements that significantly determined the rights and responsibilities of the different parties. Thus, the entitlements acquired by the holder of an independent mineral right to "go upon the property [to which the right related], search for minerals and … remove them"[24] were derived directly from the landowner's *dominium* and founded in the contractual relationship between the parties. This contractual agreement was supplemented by the principle laid down in 1936 by the Appellate Division in *West Witwatersrand Areas Ltd v Roos*,[25] where the court stressed: "whosoever grants a thing is deemed to grant that without which the grant itself would be of no effect". Where mineral rights were willingly and consensually severed from ownership (either by the current landowner or his predecessors), a landowner could not deny the holder of the mineral rights access over the land in order to enter the specific designated prospecting or mining area. The right to be allowed access over property in order to enter a prospecting or mining area was regarded as an ancillary right without which prospecting or mining could not effectively be conducted.[26] This state of affairs corresponds with the principles applicable to the "creation of a right of way by implied consent"[27] - the rule that applied where a landlocked-portion of land was created by the subdivision of the land. In such circumstances it was assumed that a right of way was established by implied consent in favour of any subdivision without direct access to a public road. Due to the existence of the implied right of way, a servitude of right of way could not be imposed on third-party neighbours who were not involved in the subdivision.

However, the right to access the property and the mineral right were not regarded as a collective unity and more often than not servitudes of right of way were registered against title deeds of property in addition to the registration of the mineral rights. The registration of the servitudes of right of way created independent limited real rights that were enforceable by the holders thereof against the whole world (*erga omnes).*[28] It provided security of tenure to the holders of severed mineral rights in that landowners and their successors in title were bound to tolerate the use of

23 *Aussenkjer Diamante (Pty) Ltd v Namex (Pty) Ltd* 1980 3 SA 896 (SWA) 903A.

24 *Van Vuren v Registrar of Deeds* 1907 TS 289 294; *Gluckman v Solomon* 1921 TPD 335 338.

25 *West Witwatersrand Areas Ltd v Roos* 1936 AD 62 72.

26 Also see *Hudson v Mann* 1950 4 SA 485 (T) 488C; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (A) 320C-E.

27 Van der Walt *Law of Servitudes* 341. Also see *Wilhelm v Norton* 1935 EDL 143 169; *Beukes v Crous* 1975 4 SA 215 (NC) 220A-H.

28 Van der Walt *Law of Servitudes* 90.

a specific access road by the mineral rights holder who exercised his rights.

As both the severance of mineral rights from landownership and the location of access roads were contractually determined, the parties agreed to the extent of compensation payable to the landowners for the occupation of both the prospecting or mining areas and access roads. Consequently the landowner was duly compensated for the restriction of his *dominium*.[29] This compensation mitigated the burden brought about by the interference with the landowner's surface rights and the obligation to allow the right holder access to the prospecting or mining area. This relationship was governed by the principles of the law of servitudes,[30] and consequently the mineral right holder's rights often trumped those of the landowner in cases where irreconcilable conflict arose between the parties in situations where they were in competition. There was "no room for the exercise of the rights of both parties simultaneously"[31] - a fact attested to by the decision in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*.[32]

3 The right to access and entry provided for in the MPRDA

Section 5(3) of the MPRDA sets out the entitlements acquired by holders of prospecting and mining rights.[33] This section entitles the holder of a prospecting or mining right to:

> (a) enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting [or] mining, … as the case may be;

29 This compensation must not be confused with the royalties paid to the landowner calculated after the minerals were extracted.

30 Van der Schyff *Property in Minerals and Petroleum* 67.

31 *Hudson v Mann* 1950 4 SA 485 (T) 488D-E. See also *Finbro Furnishers (Pty) Ltd v Registrar of Deeds Bloemfontein* 1985 4 SA 773 (A) 807H-808B.

32 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (SCA). In para 22 the court explained "absent any express or tacit term of the grant, the mineral rights holder is entitled, by virtue of a term implied by law, to conduct open cast mining when it is reasonably necessary in order to remove the minerals, provided that is done in a manner least injurious to the interests of the surface owner". The intricate framework within which servitudes are to be interpreted is analysed by Van der Walt *Law of Servitudes* 192-222.

33 Similar entitlements are afforded to holders of mining permits in s 27(7)(a) of the MPRDA.

> (b) prospect [or] mine, …, as the case may be, for his or her own account on or under that land for the mineral … for which such right has been granted;
>
> (c) remove and dispose of any such mineral found during the course of prospecting [or] mining, …, as the case may be;
>
> (d) subject to section 59B of the Diamonds Act, 1986 (Act No. 56 of 1986), (in the case of diamond[s]) remove and dispose of any diamond found during the course of mining operations;
>
> (e) carry out any other activity incidental to prospecting [or] mining … operations, which activity does not contravene the provisions of this Act.

The entitlements that have been associated with the extraction of mineral resources in preceding mineral law regimes as set out in case law[34] and codified in the *Minerals Act*[35] have been captured in section 5(3) of the MPRDA.[36] The entitlement to be granted access over another's land in order to enter the prospecting or mining area is, however, glaringly absent. Although the entitlement to enter land to which a prospecting or mining right relates is basically without meaning if the right holder does not obtain the necessary right to traverse surrounding property in order to be able to enter the designated prospecting or mining area, the principles that underpin the relationship between holders of prospecting and mining rights and landowners have changed substantially with the promulgation of the MPRDA. It is proposed in this contribution that although the right to access and the entitlement to entry are still interrelated and inter-dependent, the structure and foundation of the new mineral law regime renders it impossible to argue that these are two sides of the same coin and simultaneously entrenched in section 5(3)(a). This proposition is founded on the argument that although the entitlement to enter a designated prospecting or mining area is a statutorily created entitlement, the right to access a non-right holder's property in order to enter the designated prospecting or mining area is an independent right that has to be negotiated independently with the landowner or landowners over whose property reasonable access to the prospecting or mining area would cause the least damage and which would constitute the route that allows the

34 *Hudson v Mann* 1950 4 SA 485 (T).

35 Section 5(1) of the *Minerals Act* 50 of 1991. For a brief discussion of the pre-1991 codification of the law relating to minerals and metals see Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act* ch 2.

36 *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* 2001 1 All SA 364 (SCA) para 21.

shortest exist to a public road - a right for which affected landowner(s) should be adequately compensated.

As alluded to above, the promulgation of the MPRDA abolished the common law origin of rights to minerals.[37] After the statutory severance of the unity between land and the minerals embedded in and under the land, ownership can no longer be regarded as the source of the entitlements acquired by the holders of any of the MPRDA-determined rights in minerals. A major legal consequence flowing from this development is that the relationship between landowners and holders of mining and prospecting rights has been redefined.[38] Under the MPRDA this relationship originates from and is rooted in statute.[39] Although the MPRDA provides for a consultation process through which applicants planning to conduct mineral or petroleum development operations must engage with landowners, lawful occupiers and interested-and-affected parties,[40] there is no question of a mutually consensual contractual relationship between the parties from which the right holders' entitlements originate. The logic and reasonableness behind the reasoning that a landowner who alienated his mineral rights simultaneously provided the full extent of ancillary rights without which mineral rights could not be exercised, including the implied consent to provide access over his property to the designated prospecting or mining area, fell away when the landowner's mineral rights were extinguished with the promulgation of the MPRDA.

The first inkling that access over property is not summarily included in the scope of the entitlements provided for in section 5(3) is found in section 54. Here the legislature not only differentiates between "entry" and "access",[41] but obliges holders of prospecting rights and mining rights to

37 *Xstrata South Africa (Pty) Ltd v SFF Association* 2012 5 SA 60 (SCA); *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* 2001 1 All SA 364 (SCA); *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* 2014 2 SA 603 (CC).

38 *Sepha Ku Tin (Pty) Ltd v Kranskoppie Boerdery* (GNP) (unreported) case number 47561/2010 of 7 May 2012 para 6.

39 The court held in *Meepo v Kotze* 2008 1 SA 104 (NC) 8.1(d) that the MPRDA brought about a "prevalence of State power of control over the mineral resources of the Republic and the concomitant ousting of the (mineral) rights of the land owner and/or the holder of mineral rights".

40 MPRDA ss 16(4)(b), 22(4)(b). See in this regard *Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd* 2014 ZAGPPHC 218 (14 March 2014) para 9; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC); Gumbi 2012 *Advocate* 47-50; Badenhorst and Olivier 2011 *De Jure* 126-148; Humby 2012 *PELJ* 166-188; Van der Schyff *Property In Minerals and Petroleum* para 12.5.2.

41 MPRDA s 54(1)(a), (b), (c).

notify the relevant regional manager if the holder of the right is prevented from commencing or conducting prospecting or mining operations because the lawful occupier or the owner of the land in question "cannot be found in order to apply for access". It is imperative to note the context of the obligation created in section 54(1)(c). The responsibility to notify the regional manager falls on *holders* of prospecting and mining rights and not on applicants for prospecting and mining rights. The importance of this observation is rooted in the fact that sections 16 and 22 of the MPRDA respectively oblige applicants for prospecting and mining rights to "consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party", whereas section 54 refers to the "holder" of a right to minerals. Section 54 consequently can come into play only once the prospecting or mining right has already been granted and the consultation process completed. The significance hereof is that although one could accept that deliberations ensuring adequate access over property in order to enter the prospecting or mining area would generally (and preferably should) form part of the consultation process, "access" and "entry" are regarded by the legislature as two distinct notions.

In addition, it should be emphasised that section 5(1) stipulates that, once granted and registered in the terms of the *Mining Titles Registration Act*,[42] a prospecting right or mining right is a limited real right in respect of the mineral *and* the land to which such a right relates. It is difficult to see how the "land to which the right relates" can have another meaning than the meaning attributed respectively to "prospecting area" and "mining area" in section 1 of the MPRDA.[43] Here it is provided that "mining area" in relation to a mining right "means the area on which the extraction of any mineral has been authorised and for which that right … is granted". "Prospecting area" in turn means "the area of land which is subject to any prospecting right".[44] If these definitions are read with regulation 2 of the Mineral and Petroleum Resources Development Regulations,[45] it appears that an

42 *Mining Title Registration Act* 16 of 1967.

43 In *Meepo v Kotze* 2008 1 SA 104 (NC) para 15 the court states – "Once a prospecting right has been granted to a holder, he or she, as soon as that right becomes effective on the date of the EMP, is entitled *to enter the relevant prospecting area…*".

44 Dale *et al South African Mineral and Petroleum Law* (Issue 17, 2015) MPRDA−150, however, argues that the phrase "land to which the right relates" as used in this context is not necessarily limited to the mining area or mining right area itself.

45 Mineral and Petroleum Resources Development Regulations (GN R527 in GG 26275 of 23 April 2004) as amended. Regulation 14 contains similar provisions when mining permits are applied for.

application for a prospecting or mining right must be accompanied by a plan of the land to which the application relates. This plan must contain:

> (a) the co-ordinates and spheroid (Clarke 1880/Cape Datum, WGS84/WGS84, WGS94/Hartebeesthoek94) of the land to which the application relates;
>
> (b) the north point;
>
> (c) the scale to which the plan has been drawn;
>
> (d) the location and where applicable, the name and number of the land to which the application relates;
>
> (e) the extent of the land to which the application relates;
>
> (f) the boundaries of the land to which the application relates;
>
> (g) surface structures and registered servitudes where applicable; and
>
> (h) the topography of the land to which the application relates.

The limited real right acquired by the right holder thus relates to a precisely described piece of land. It is only this carefully circumscribed area that may be entered with the aim of conducting the authorised extractive activities, and only this area from which minerals may be removed to be disposed of. Although a mining right holder's responsibilities in relation to any environmental, health, social and labour matters are statutorily extended to cover an area that may exceed the prospecting or mining area,[46] the extent of the limited real right and its concomitant entitlements acquired by a right holder are limited to the precise area as indicated in the required plans and diagrams. It is noteworthy that the regulations do not prescribe that the access route to the prospecting or mining area must be indicated on the prescribed plan. This is arguably another indication that the legislature did not mean to incorporate access over the land of the landowner on whose property the prospecting or mining area is located as an integral, non-negotiable part of the entitlement to "enter the land to which the right relates", but considered it an independent matter that had to be determined on a case-by-case basis. This may even be done after the appropriate right has been granted.

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46 MPRDA s 1 definition of "mining area" (b).

However, the Supreme Court of Appeal (SCA) seemingly held an opposing view in *Joubert v Maranda Mining Company (Pty) Ltd*.[47] In order to validate the argument raised in this contribution, it is necessary to assess the reasoning underlying the SCA's decision in *Joubert v Maranda Mining Company (Pty) Ltd.*

4 *Joubert v Maranda Mining Company (Pty) Ltd*

4.1 Introductory remarks

The concern with the SCA's decision in *Joubert v Maranda Mining Company (Pty) Ltd* to confirm Maranda Mining Company's right to access the land in question in order to enter the designated mining area is not directed at the order itself, but at the reasoning that underpinned an aspect of the court's decision. Although decided cases are of value not for their facts, but for the principles of law which they lay down,[48] the facts of a particular case create the background and context against which the principles laid down in that case have to be interpreted.[49] It is, therefore, necessary to have regard to the facts of *Joubert v Miranda Mining Company (Pty) Ltd.*

4.2 The facts[50]

The dispute between the parties concerned an area of about 1,5 hectares that comprise 0,3 per cent of the applicant's property and typically represented a "blokland" or landlocked area. The mineral rights were severed from landownership during the previous mineral law regime. When the respondent, Maranda Mining Company (Pty) Ltd (Maranda Mining), acquired the "mineral rights",[51] Come Lucky (Pty) Ltd (Come

47 *Joubert v Maranda Mining Company (Pty) Ltd* 2009 4 All SA 127 (SCA), hereafter the SCA-case.

48 *R v Wells* 1949 3 SA 83 (A) 87-88.

49 *Steinberg v Cosmopolitan National Bank of Chicago* 1973 4 All SA 11 (RA) 15 – courts therefore often distinguish between cases based on the facts.

50 The factual background to the dispute between the parties is set out in the SCA's decision in paras 2-10 and supplemented in *Joubert v Maranda Mining Company (Pty) Ltd* 2010 2 All SA 67 (GNP), hereafter the NGHC-case, paras 3-17.

51 Although it is not relevant to this discussion, it is interesting to note that the court stated that Maranda Mining had acquired the mineral rights from Dynamic Mineral Development (Pty) Ltd and had then applied for a mining permit. The MPRDA commenced on 1 May 2004. On that date the State became the custodian of the country's mineral resources, and mineral rights as they then existed were replaced by old order rights. Old order rights subsequently had to be converted into new order rights. Maranda Mining could have acquired its predecessor's old order rights. The use of terminology that existed in the previous regime is indicative of

Lucky) was the owner of the land. After Maranda Mining acquired the mineral rights it applied to the Minister of Minerals and Energy for a mining permit.[52] The regional manager accepted the application. In accordance with the statutory prescriptions, Maranda Mining informed Come Lucky of the acceptance of its application for a mining permit. Maranda Mining stated that it intended to conduct open cast mining on a section of the mining area, referred to its obligation to compensate Come Lucky, and invited the latter to lodge objections, if any, against the issue of the mining permit. Come Lucky lodged an objection against the application in June 2005. The reason for the objection was that it had initiated an eco-tourism business on the farm that encompassed *inter alia* game breeding, game capture and safari operations. This development required an extensive capital investment. The foreseen deleterious impact that the mining operations would have on the eco-tourism and environmental operations underpinned Come Lucky's objection.

On 15 July 2005 Maranda Mining published a notice in the local newspaper informing the public that it had initiated an environmental assessment process. Interested and affected parties were invited to a public meeting. It seems that very few (if any) people attended the meeting. An environmental management plan was subsequently lodged. Despite Come Lucky's objection the Minister granted the mining permit on 21 September 2006 and approved the environmental management plan on 19 December 2006. With the mining permit being issued and the environmental management plan approved, Maranda Mining informed Come Lucky in March 2007 of the development, stated its intention to exploit the rights in terms of the mining permit and raised the issue of access to the land as well as compensation. Come Lucky did not respond favourably and its attorneys requested copies of the application for the mining permit. A copy of the permit was forwarded to Come Lucky's attorneys in April 2007. They ultimately indicated that they had instructions to oppose any application that might be brought.

During the first half of 2007 Maranda Mining tried in vain to gain access to the land in order to enter the mining area and commence with mining activities. It notified the regional manager of its dilemma as required in section 54 of the MPRDA. Unbeknown to both Maranda Mining and the

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the fact that courts had not yet come to terms with the full impact of the new regime at the time of the adjudication of this matter.

52 It is anomalous to state that Maranda Mining acquired the "mineral rights", but due to the fact that this is the manner in which the courts described the facts of the case, this is the manner in which the facts will be presented in this contribution.

regional manager, Come Lucky had in the meantime alienated the property on 25 June 2007 to Wilduso103 (Pty) Ltd (Wilduso 103).[53] Wilduso 103 later changed its name to Murray Foundation Conservation Holdings (Pty) Ltd (Murray Foundation). Ignorant of the fact that the property had changed hands, the regional manager accordingly called on Come Lucky in a letter dated 11 July 2007 to "make representations and show why"[54] Maranda Mining should not be allowed access to the land. No response was received from Come Lucky. Maranda Mining subsequently notified Come Lucky that it intended to enter the land and commence with mining activities. On 13 September 2007 the attorneys of the Sanwild Wildlife Trust (Trust), which was represented in the court proceedings by its trustees and which had apparently occupied the land in question since August 2006, addressed a letter to the Department of Minerals and Energy informing the Department that the Trust had taken occupation of the land pursuant to the sale agreement concluded between Come Lucky and Murray Foundation, and that the land had been incorporated into a wild life conservancy. The letter also stated that mining operations on the land would be disruptive and dangerous.

Still ignorant of the fact that the ownership of the land had changed hands, Maranda Mining, which envisaged the construction of a new access road over the property to the mining area,[55] once again attempted to gain access to the land during October 2007. It was prevented from accessing the land by a representative of the appellants, the latter comprising of one Joubert, the trustees of the Sanwild Wildlife Trust (who occupied the land) and Murray Foundation (Pty) Ltd (who owned the land). It was only at this stage that Maranda Mining became aware of the fact that the property had been alienated to the Murray Foundation. During November 2007 Maranda Mining was informed by the first appellant, Joubert, that "under no circumstances would it be granted access to the land".[56] Despite deliberations with the Trust and Murray Foundation's attorneys, the issue of access could not be resolved. Maranda Mining consequently launched an application to the North Gauteng High Court in February 2008 seeking

53 The sale agreement contained a "voetstoots clause" which recorded that the Murray Foundation was aware that Maranda Mining had lodged an application for a mining permit and that Come Lucky had lodged an objection against the issuing of the mining permit. However, the Murray Foundation had not been informed of or was not aware of the fact that a mining permit had indeed been issued, despite the fact that Come Lucky's attorneys had been provided with a copy of the mining permit as early as in April 2007.

54 NGHC-case para 12.

55 SCA-case para 18.

56 SCA-case para 8.

inter alia that Sanwild Wildlife Trust, Come Lucky and Murray Foundation be interdicted and restrained from refusing it access to the land. The court *a quo* found that Maranda Mining had substantiated its right to the requested relief as it had a clear right to access the land, because the mining permit's validity had not been challenged. Although the required relief was granted to Maranda Mining, leave to appeal was granted to the parties who were cited as appellants in the appeal proceedings.

4.3 Appellants' submissions

The appellants' main argument to the SCA was that Maranda Mining, the respondent in the SCA, "sought access to the entire parcel of land from a gate envisaging a seven kilometre route to the mineral rights area" although it was apparent from the environmental management plan that "the respondent's access to the mineral rights area was to be on a route of no longer than 1.5 km".[57] In addition the appellants surmised that the environmental management plan did not envisage the construction of a new road to provide access to the respondent over the property.

4.4 The SCA's finding

After scrutinising the notice of motion and founding affidavit, the court rejected the appellants' factual contention that Miranda Mining sought access to the entire land encompassing a seven kilometre route. The court held that "[w]hat [Maranda Mining] sought was access in principle to the mining area".[58] Therefore "[t]he crisp issue" before the court, to use Mlambo JA's words, was "whether the court *a quo* was correct in finding that the respondent had established a clear right to access".[59]

In the run up to its finding the SCA briefly considered the scheme of the MPRDA relevant to the issue that had to be decided.[60] The court explained that section 27(5) contains obligatory notification and consultation directives. Even before a mining permit is granted,[61] the

57 SCA-case para 11.
58 SCA-case para 15.
59 SCA-case para 11.
60 SCA-case para 12.
61 In contrast to ss 17 and 23, where it is respectively stated that prospecting and mining rights are "granted", it is stated in the MPRDA that mining permits are "issued". At the time when the dispute arose and was adjudicated, s 27 prescribed that when the regional manager accepted the application he was obliged to notify the applicant to consult with the landowner, lawful occupier and other interested and affected parties. The applicant had to submit the results of the consultation to the regional manager within 30 days.

section envisages consultation with landowners, lawful occupiers and interested and affected parties after the lodging and acceptance of an application for a mining permit. In addition, section 5(4)(c) (which has since been repealed but applied to the dispute at hand) required that the holder of a mining permit had to notify and consult with the owner or occupier of the land in question before mining activities could commence. The court held that the legislature had included the consultation requirement so that the applicant for a mining permit would have to explain to the landowner the impact that the prospecting or mining activities might have on the land and to "alleviate possible serious inroads being made on the property right of the landowner".[62] Mlambo JA, as he then was, alluded to section 27(7)(a), which affords holders of mining permits the entitlement to "enter the land to which such permit relates".[63] This right, he said, solidified once the holder of the mining permit had complied with the notification and consultation prescriptions. Maranda Mining had clearly complied with these requirements.

The court then dealt with the appellants' second submission, an issue that the court addressed "while strictly speaking" it thought it unnecessary to do so.[64] (This renders the court's remarks as *obiter dicta*, but they are still very relevant as they underpinned a later finding in the subsequent NGHC judgement cursorily discussed in paragraph 4.5 below.)[65] The appellants contended that the construction of a new road over the property had not been envisaged in Maranda Mining's approved environmental management plan. This submission was based on the fact that the "no" option block had been ticked in answer to the question whether it would be "necessary to construct roads to access the proposed operations", which question was contained in a form that had to be completed when Maranda Mining submitted the environmental management plan.[66] The court held that the issue could not be considered by relying on one part of the form in isolation from the rest of the form, as this question was one of a number of questions that related to access roads.[67] After considering all the questions and answers collectively, the court held that the construction of a new road had indeed been envisaged when the environmental management plan was submitted and approved. In addition the court held that, because there was no indication on the documents before the court

62 SCA-case para 12.
63 SCA-case para 13.
64 SCA-case para 18.
65 *Joubert v Maranda Mining Company (Pty) Ltd* 2010 2 All SA 67 (GNP).
66 SCA-case para 18.
67 SCA-case para 19.

that there were existing roads from any public road to the mineral rights area, the Minister and officials of the DME were alive to the need for the construction of a new road. Despite the fact that the envisaged access route was not indicated on the submitted documents, the court abruptly came to the conclusion - "[t]herefore, when the permit was granted and the environmental management plan approved, *the respondent was also granted the right to construct a new road to the mineral rights area*".[68] – [Own emphasis].

The manner in which this finding is articulated leads to the conclusion that the court argued that because no access road existed, and because the right holder would not be able to commence with its mining activities if it were not granted access over the property in order to enter the mining area, the right to access the landlocked mining area summarily formed part of the right holder's right to enter the designated mining area. The court never distinguished between the notions of access and entry and clearly regarded the matter of access as inherently linked to the right holder's entitlement to enter the land and exploit its mining permit.[69] The court subsequently implicitly afforded a very wide interpretation to the term "enter". In coming to this view, the court did not consider that the MPRDA profoundly altered the relationship between landowners and holders of rights to minerals. It seems as if the court, when considering Maranda Mining's predicament (and perhaps being influenced by the appellants apparently obtrusive behaviour), unwittingly reverted to the common law position where access to prospecting and mining areas was regarded as following summarily upon the granting of a prospecting or mining right, because it was regarded as an ancillary right that implicitly formed part of the contractual agreement that underpinned the rights holder's right to exploit minerals. The court essentially attributed legal consequences to the consultation process prescribed in the MPRDA similar to those that originated in the previous regime from consensual contractual agreements that were concluded when mineral rights were severed from landownership.

4.5 Subsequent development

After the SCA's decision had been handed down in May 2009, the parties entered in negotiations regarding the proposed point of access to the land. However, a dispute arose over the proper interpretation of the court order,

68 SCA-case para 20.

69 This corresponds with the approach in *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* 2001 1 All SA 364 (SCA).

and in July 2009 Maranda Mining entered into contracts with the owner of the adjacent property to facilitate access which all parties agreed would be less intrusive to the applicants. Maranda Mining purchased the interest in the neighbouring land at a cost of R3.5 million for the purpose of gaining access to Murray Foundation's land "in a more convenient fashion".[70] Unfortunately another dispute arose between the parties when Maranda Mining started to fence off the prospecting area. The relationship between the parties deteriorated even further and resulted in the launching of an application for an interdict in the NGHC. A number of issues were raised in the application. As this contribution is concerned with the question of access only, the remainder of the claims will not be dealt with and the focus will fall only on the part of the application that dealt with the issue of access.

The issue of access in this application manifested itself as part of "other issues [that] relate to the compensation payable to the applicants for the occupying of the access road".[71] The applicants, which included the Trust and the Murray Foundation, essentially sought an order that Maranda Mining had to negotiate with them before it "occupied" the access road.

Murphy J held that the applicants fundamentally misconstrued their rights under the MPRDA.[72] Without separating the applicants' claim that Maranda Mining had to negotiate with them for occupation of the access road from the applicants' claim that Maranda Mining had to negotiate before taking occupation of the mining area, the court held that "there is no right in law to negotiate and agree the terms of occupation". Murphy J did not distinguish between the notions "access" and "enter" and essentially held that once a mining permit has been granted, the holder thereof has the right to access the property on which the mining area is situated in order to enter the latter. He also held that the duty to consult as contained in sections 5(4) and 27 of the MPRDA should not be regarded as a negotiation process but merely requires "that the permit holder engage in a consensus-seeking process involving the exchange of proposals and representations".[73] He held that the legislative scheme embodied in section 54 anticipates that a permit holder will be permitted to proceed to exercise its right even where parties have reached a "deadlock" during the consultative process, and consequently concluded that the question of compensation for loss or damage suffered or to be suffered as a

70 NGHC-case para 36.
71 NGHC-case para 43.
72 NGHC-case para 44.
73 NGHC-case para 46.

consequence of the mining operations constituted the only topic for consultation.[74]

It is not disputed that section 54 embodies the correct remedy when parties cannot reach consensus regarding the provision of access over property through which the holder of a prospecting or mining right is enabled to enter the property. Neither is it disputed that the right holder's entitlement to enter and occupy the mining area solidifies once the mining permit is granted and that this requires no further negotiations. What is disputed is that a prospecting or mining right should be regarded as the source of a right holder's entitlement to access the property on which the prospecting or mining area is situated in order to enter this area. The effect of the courts' decisions in both the *Joubert v Maranda Mining Company (Pty) Ltd*-cases is to extend the burden associated with allowing third parties entry to and access over one's property that is statutorily placed on landowners, but which burden is curtailed by being restricted to a designated portion of the landowner's property, to other portions of the property not burdened with the limited real right. It is not denied that holders of rights to minerals should be afforded access to the designated areas where the extractive operations are conducted. Should it be assumed, however, that the landowner on whose property the prospecting or mining area is situated is summarily burdened with the obligation to provide the required access over the land that would enable the right holder to enter the prospecting or mining area, particularly if other potential access routes over other properties exist?

5 A different perspective

5.1 Discussion

Although the decisions in *Joubert v Maranda Mining Company (Pty) Ltd* have been singled out in this contribution, no decided cases could be found where a court clearly differentiated between the entitlement to enter the prospecting or mining area and the ancillary right to access over property in order to enter a prospecting and mining area.[75] It seems as if a prospecting or mining right holder's right to access the property which is burdened with the prospecting or mining right is considered to be captured

74 NGHC-case para 47.

75 *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* 2001 1 All SA 364 (SCA); *Sepha Ku Tin (Pty) Ltd v Kranskoppie Boerdery* (GNP) (unreported) case number 47561/2010 of 7 May 2012; *Meepo v Kotze* 2008 1 SA 104 (NC); *Coal of Africa Limited v Akkerland Boerdery (Pty) Ltd* 2014 ZAGPPHC 195 (5 March 2014).

within the entitlement to enter the prospecting or mining area.[76] Although it is frequently mentioned as a point of departure in the judgments consulted that a new mineral law regime has been introduced by the MPRDA and that "common law mineral rights have been done away with under the MPRDA",[77] no court has paused to consider the effect of this regime-changing development on the interpretation of the entitlements acquired by holders of prospecting or mining rights, and the consequential burden the change places on landowners. This may be attributed to the manner in which arguments are presented to the courts, but maybe the time has come to take a step or two back and consider whether it is the only plausible interpretation that the legislature statutorily granted a right holder the right to access over the property of the landowner whose land is burdened with the prospecting or mining right to enable the right holder to enter a prospecting or mining site.

The need to establish a right to access is undisputed. This need would arise whenever the geographical location of a particular prospecting or mining site does not border a public road. However, to assume that the entitlement to enter a prospecting or mining area is encompassed in the statutory entitlement to enter a prospecting or mining area is unnecessarily limiting the right to access. Such an approach obliges the landowner whose land is burdened with the prospecting or mining right with the responsibility to provide the necessary access over the property, merely because his property is burdened with the prospecting or mining right. It simultaneously restricts the right holder's ability to negotiate the best suitable access route which might traverse other nearby or neighbouring but unrelated properties.

To consider a different approach regarding the notions "access" and "enter" it is necessary to assume, for a moment, that the legislature intentionally refrained from including an entitlement granting access over property in order to enable the right holder to enter the prospecting or mining area from the ambit of entitlements that collectively constitute prospecting or mining rights. This assumption can be motivated by the fact that the legislature distinguishes between the notions "access" and "entry" in section 54, as indicated in paragraph 3 above. Two questions immediately come to mind. [i] Why might the legislature have refrained from incorporating this entitlement statutorily?; and [ii] If the assumption is

76 To date none of the academic authors of the authoritative sources in the field of mineral law have made this distinction either.

77 Eg *Coal of Africa Limited v Akkerland Boerdery (Pty) Ltd* 2014 ZAGPPHC 195 (5 March 2014) para 23.

correct, wherein then lies the origin and source of the indispensable right to be granted access over others' properties in order to enter designated prospecting and mining areas?

[i] Why might the legislature have refrained from incorporating the entitlement to access over property statutorily?

With the promulgation of the MPRDA the legislature has intentionally severed the link between ownership of land and the minerals contained in the land. The country's unsevered mineral resources have been bequeathed to the people of South Africa and the State has been declared the custodian thereof.[78] Due to the practical reality that minerals are contained in land, the majority of which is owned in a private property paradigm by *legal personae*, private landownership has to be restricted whenever a right to prospect or mine is granted, to ensure that holders of prospecting or mining rights can exercise their rights undisturbed and in accordance with the provisions of the MPRDA and the terms and conditions of the respective rights. Herein lies the reason for the statutory entitlement to enter the prospecting or mining area and to conduct the appropriate extractive actions as prescribed in section 5(3).

The link between the minerals and the land and a particular landowner is purely coincidental and determined by the location of the mineral deposits. The remedial aim of the MPRDA is to transform the mineral exploration landscape *inter alia* by promoting equitable access to the nation's mineral resources.[79] For this reason, ownership of land is no longer the bargaining chip that determines access to mineral resources. However, the MPRDA is neither aimed at excessively burdening landowners as a punishment for the collective sins committed during the time of the apartheid regime nor overtly generous with the nation's mineral resources. Therefore, the limited real right that is created in both the minerals and the land to which a prospecting or mining right relates is restricted to the clearly circumscribed area depicted in the relevant plans and diagrams for which the right has been granted. It may thus be argued that the legislature did not intend to extend the scope of the burden associated with the limited real right on the land encumbered with the prospecting or mining right to portions of the property that lay beyond the boundaries of the limited real right.

It might also have been that the legislature foresaw that certain factual situations might arise where it would be more beneficial and reasonable to

78 MPRDA s 3.
79 MPRDA s 2.

develop an access route to the designated prospecting or mining area that crossed over other nearby or neighbouring but unrelated properties. If the right to be granted access over an unburdened portion of the burdened property is interpreted as statutorily incorporated in the entitlement of the prospecting or mining right, an unrelated landowner may argue that neither he nor his property is linked to the limited real right in question, as no legal *nexus* exists between his land and the "land to which the right relates". Such a landowner would thus not be obliged to engage in negotiations regarding access, as the right holder is required by law to look for access to the landowner on whose property the prospecting or mining area is located.

The argument is thus advanced that section 5(3) statutorily creates the entitlement to enter a prospecting or mining area. This entitlement, however, does not encompass the ancillary right to be summarily or simultaneously granted access over unburdened portions of property in order to exercise this entitlement. The right to access is to be negotiated with the affected landowner(s). (It is interesting to note in passing that the exclusive licence to exploit for and develop oil and gas that may be obtained in the United Kingdom in terms of the *Petroleum Act* of 1998, Chapter 17 does not include any rights to access. Licensees must obtain additional consent to access property in order not to commit trespass.)[80]

[ii] Wherein then lies the origin and source of the indispensable right to be granted access over others' properties in order to enter designated prospecting and mining areas?

It is obvious that the entitlement to enter a prospecting or mining area to conduct prospecting or mining, without the ancillary right to be granted access over unburdened property (or an unburdened portion of property) in order to reach the prospecting or mining area, is an empty entitlement. Huffman noted in a different context that "[t]he law is the handmaiden of social existence".[81] In fulfilling its social function[82] of maintaining social order[83] the law of property has developed a remedy that may assist both landowners and right holders in this context. The *nexus* between South African mineral law and property law is undisputed. Mostert indicates "[f]or as long as South African mineral law has existed, it has been rooted in

80 *Star Energy Weald Basin Limited v Bocardo SA* 2010 UKSC 35 para 42.
81 Huffman 1989 *Envtl L* 531.
82 Stevens 1980 *UC Davis LR* 199.
83 Murphy 1984 *Human Studies* 23.

property law".[84] It is thus not unbecoming to revert to the law of property to find a solution to balance the rights of holders of prospecting or mining rights with those of affected landowners once more. In addition, by stating in section 5(2) of the MPRDA that "the holder of a prospecting right [or] mining right ... is entitled to the rights referred to in this section and such other rights as may be granted to, acquired by or conferred upon such holder under this Act or *any other law*" the legislature created a conduit for the application of applicable common law principles.[85]

When a prospecting or mining right is granted, the holder of the right acquires the exclusive right to use a specific demarcated area that is owned by another person. Where this area is geographically cut off from any public road, it is landlocked. The prospecting or mining area that is landlocked requires the granting of access to a public road. The "necessity" to be granted access is indisputable and inextricably linked to the granting of a prospecting or mining right. Where parties cannot negotiate a right of way the holder of the prospecting or mining right would be entitled to approach a court for the granting of a right of way of necessity once the prospecting or mining right has been granted.[86] Considering the surrounding circumstances of each individual case, the right holder would be able to identify the shortest route that provides access to a public road that permits the economic use and exploitation of the dominant tenement which does not impose an unreasonable burden on the servient land.[87] Just compensation must be offered.[88]

Servitudes of right of way, or right of way of necessity are the mechanisms through which the right to access a prospecting or mining area is realised. Although there is a causal link between the granting of a prospecting or mining right, the common law underpins the existence of the right to access. This is the result of the MPRDA being mute regarding access over unburdened parcels of land or portions thereof. Van der Walt indicated that the right of way "remains the most important praedial servitude in South African law".[89] A whole body of legal principles has been developed by the courts that will apply *mutatis mutandis* whenever access is sought

84 Mostert *Mineral Law* 1.
85 *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC) paras 46, 114.
86 Van der Walt *Law of Servitudes* 246.
87 *Sanders v Edwards* 2003 5 SA 8 (C) 11E.
88 Van der Walt *Law of Servitudes* 352.
89 Van der Walt *Law of Servitudes* 411.

by holders of prospecting or mining rights who want to enter the prospecting or mining areas to commence with or conduct mining.[90]

5.2 Concluding remarks

Courts readily profess that the MPRDA heralded a new mineral law regime. That this new regime diminishes a landowner's ability regarding his property is undisputed. Despite the fact that the common law still has a significant role to play in this new regulatory paradigm, it would not be just or justifiable to summarily accept that legal principles that developed under a completely different regime apply unchanged in a new regime. The foundational basis of the rights and concomitant ancillary rights that exist in this new regime must be re-determined. The interesting result may just be that "other" common law principles provide solutions to problems that arise in the MPRDA-founded dispensation.[91]

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90 See *inter alia* Van der Merwe and De Waal "Servitudes"; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 328 ev.

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List of abbreviations

DME	Department of Minerals and Energy
Envtl L	Environmental Law
MPRDA	Mineral and Petroleum Resources Development Act
PELJ	Potchefstroom Electronic Law Journal
SCA	Supreme Court of Appeal
SDG	Soli Deo Gloria
UC Davis LR	University of California Davis Law Review