

Expropriation of old order mining rights: the Constitutional implications

Last week the Constitutional Court delivered judgment in which it dismissed Agri SA's compensation claim which was brought in terms of Schedule II to the Mineral and Petroleum Resources Development Act, 28 of 2002 ("the MPRDA").

Agri SA claimed its old order mining rights were expropriated by the promulgation of the MPRDA, which deprived it of its rights and placed those rights in the custodianship of the State. According to Agr SA, this was expropriation in terms of section 25 of the Constitution, which entitled it to compensation.

Despite the dismissal of Agri SA's claim, however, the Constitutional Court (in a judgment written by Chief Justice Mogoeng) stated that *"it would... be inappropriate to decide definitively, that expropriation is in terms of the MPRDA incapable of ever being established... I accept that a case could be properly pleaded and argued, to demonstrate that expropriation did take place. That is the avenue that must be left open"*.

An examination of this effort not to close the door on future claims, however, makes it clear that any future compensation claim under the MPRDA will be extremely difficult to substantiate, and is unlikely to be successful.

Notably, the Justices in the Constitutional Court were divided in their reasons for the dismissal of Agri SA's claim, with Justice Froneman (in a minority judgment) disagreeing with the Majority's reasons.

The Court's Majority judgment

The Court's dismissal of Agri SA's claim was based on the interpretation of the definition of 'expropriation' in section 25 of the Constitution which it found to involve, essentially, a two part enquiry; firstly: was the owner *deprived* of property? and secondly, was this property (or the substance or core content of that property) *acquired* by the State for a public purpose?

The Majority found that, as the MPRDA designates the State merely as the custodian (and not as owner) of the country's mineral rights, it cannot be said that the State *acquired* the mineral rights.

For that reason Agri SA was found to have failed to prove the second part of the enquiry, and its claim for compensation was dismissed.

As justification for the Majority's stance on the meaning of 'expropriation', they reasoned that there is an *"obligation imposed by section 25 [of the Constitution] not to over-emphasise private property rights at the expense of the State's social responsibilities"*.

The Minority judgment

The Minority on the other hand disagreed with this narrow definition of expropriation. In their view, expropriation does not always necessarily involve the requirement of State acquisition.

The Minority also disagreed that there had been no State acquisition in the circumstances of the case. In their view, while the State may not have acquired the right to exploit the minerals, it did acquire the power to allocate and dispose of the exploitation rights of those minerals. As Justice Froneman succinctly states, *"what private owners of minerals previously had in this regard, the State now has. It really seems as plain and simple as that."*

Rather, the Minority's finding that the claim should be dismissed was based on their finding that there was in fact compensation in the circumstances, in the form of the MPRDA's transitional provisions which allow the holder of an unused old order right a period of one year to convert its right into an MPRDA mining or a prospecting right. This the Minority termed *"compensation in kind"* which they found to be *"just and equitable"* in the circumstances.

If not now, then when?

As the Minority (correctly in our view) points out, it is difficult to see how, in light of the Majority's categorical finding that the MPRDA's appointment of the State as custodian does *not* constitute expropriation, there can ever be any sustainable argument that the MPRDA expropriated any rights.

On this assumption, the implication is that there is little prospect of any future claim for expropriation being successful.

This is unfortunate, as the reasoning in the Minority judgment would have allowed the lower Courts to treat compensation claims on a more fluid, case-by-case basis, by examining whether the *"compensation in kind"* provided by the MPRDA in the form of its transitional provisions was just and equitable in the circumstances of each individual claimant.

Furthermore, the Minority identified a category of mineral right holder who would have the best chances of a successfully lodging a compensation claim, if the Minority's findings were applied. In this regard, the Minority found that the MPRDA does not provide any type of *"compensation in kind"* for the mineral right holder who does not wish to exploit the minerals,

but rather to preserve the surface of his land. The Minority found that the right *not* to exploit the minerals is a value in itself, and identified persons falling within that category to have the best chance of successfully lodging a compensation claim.

Unfortunately, however, the conclusion in the Majority judgment that State custodianship of minerals is not expropriation, would effectively exclude even this category of compensation claim.

Implications for other types of Expropriation

There may be broader implications of this judgment for future expropriation claims brought in terms of section 25 of the Constitution that extend to those outside the mining industry.

The Court's interpretation of this section and narrow definition of 'expropriation' could result in the future justification of deprivation of property without compensation, in a manner not supported by an interpretation that accords with the "spirits and purports" of the Constitution.

As heeded by the Constitutional Court on previous occasions, the purpose of section 25 has to be seen as striking a balance between protecting existing property rights as well as serving the public interest.

In our view, the failure to maintain the integrity of our country's historical compromise which involved the equitable balancing of these two interests may result in a slippery slope where private ownership is eroded to an extent that distorts the Constitutional order.