



University of the Witwatersrand

**CAPITAL GAINS TAX IMPLICATIONS UPON THE
DIRECT OR INDIRECT DISPOSAL OF MINERAL RIGHTS
GRANTED IN TERMS OF THE MINERAL AND
PETROLEUM RESOURCES DEVELOPMENT ACT**

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Abstract

South Africa has the status of being the richest country based on mineral reserves. This status incentivised many offshore investors to invest in shares in South African mining companies which, in turn, hold mining rights and/or prospecting rights. This research evaluates, with specific reference to offshore investors, whether any South African capital gains tax implications would arise upon the disposal by non-residents of shares in a South African company holding prospecting rights or mining rights. The report focuses on paragraph 2 of the Eighth Schedule to the Income Tax Act 58 of 1962 ('the Act') as well as the legal nature of mining rights, prospecting rights and prospecting information to determine whether such rights and information would fall within the ambit of paragraph 2 of the Eighth Schedule to the Act. The report concludes on whether the disposal by non-resident shareholders of shares in a South African company which holds mining rights and/or prospecting rights would fall within the ambit of paragraph 2 of the Eighth Schedule to the Act.

Key words: mining rights, prospecting rights, immovable property, interest or right to or in immovable property, prospecting information, paragraph 2 of the Eighth Schedule to the Act, capital gains tax.

Declaration

I declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Commerce (specialising in Taxation) at the University of Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination at any other university.

Gerdus van Zyl

26 May 2014

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1 Chapter outline

1.1 Chapter 1: Introduction

The introductory chapter will introduce the background and significance of the research. The introduction will further set out the research problem, sub-problems, scope and limitations as well as the methodology utilised to conduct the research report.

1.2 Chapter 2: The legal nature of the term ‘immovable property’

Chapter 2 will analyse the general meaning of the term ‘immovable property’ as this term is not defined in the Eighth Schedule to the Act, nor is it defined anywhere else in the Act. It is therefore important to obtain a firm understanding of the general context of the words in order to interpret same in the context of the Act.

1.3 Chapter 3: The words ‘immovable property’ and ‘any interest or right of whatever nature to or in immovable property’ as contemplated in paragraph 2 of the Eighth Schedule to the Act

Chapter 3 will consider the meaning of the term ‘immovable property’ and the phrase ‘any right of whatever nature to or in immovable property’ as used in paragraph 2 of the Eighth Schedule to the Act. It is important to consider the context in which these words are used the Eighth Schedule to the Act in order to determine whether the general meaning of ‘immovable property’, as concluded in Chapter 2, could be ascribed to these words as provided in paragraph 2 of the Eighth Schedule to the Act.

1.4 Chapter 4: The nature of prospecting rights and mining rights

Chapter 4 will explore the nature of prospecting rights and mining rights which is granted to an applicant in terms of the MPRDA. Consideration will be given as to how the South African Revenue Service (‘SARS’) classifies prospecting rights and mining rights as set out in the Capital Gains Tax Guide provided by SARS.

1.5 Chapter 5: The interpretation of paragraph 2 of the Eighth Schedule to the Act

Chapter 5 will analyse and interpret paragraph 2 of the Eighth Schedule to the Act in order to determine the meaning and purpose of the words set out in this paragraph following from the understanding obtained in the previous chapters of the various terms and phrases as well as the nature thereof.

1.6 Chapter 6: Separation of prospecting rights and prospecting information as well as the nature of prospecting information

Chapter 6 will establish whether a distinction can be drawn between a prospecting right and prospecting information obtained in the prospecting phase of a mining operation. The chapter will further consider the nature of the information gained from prospecting in order to determine whether such information would be regarded as ‘immovable property’ and therefore fall within the provisions of paragraph 2 of the Eighth Schedule to the Act.

1.7 Chapter 7: 80% analysis

Chapter 7 will explore how to conduct the 80% analysis as provided in paragraph 2 of the Eighth Schedule to the Act. It will consider any guidance provided by SARS as well as the potential assistance provided from a double tax agreement.

1.8 Chapter 8: Conclusion and recommendation

Chapter 8 will conclude on the findings of the research and will further attempt to provide a recommendation as to additional aspects which could be considered to provide further clarity on the research conducted to formulate the opinion reached in Chapter 8.

2 Chapter 1: Introduction

2.1 Context of the Study

Based on various internet sources¹, South Africa is the richest country based on mineral reserves with a mineral reserve value of US\$2.5 thousand billion. South Africa is the world's biggest producer of the mineral platinum and one of the leading producers of gold, diamonds and coal. Some of the top mining companies within South Africa include, *inter alia*, BHP Billiton, Anglo American and Impala Platinum. Ninety-five percent² of South Africa's market capital is also dominated by the thirteen top mining companies within South Africa. It can therefore be argued that South Africa is an attractive investment option for foreign companies, especially foreign mining companies looking to expand into Africa (with specific reference to South Africa).

One of the brilliant minds and mathematicians in history, Albert Einstein, was quoted saying that '*The hardest thing in the world to understand is the income tax.*'³ With reference to the filing of tax returns, Albert Einstein went on to say that '*This is too difficult for a mathematician. It takes a philosopher.*'⁴ Considering the South African tax legislation and the interplay between the tax legislation and other statutes, the opinions expressed by Albert Einstein would, in all probability, hold true when attempting to interpret such statutes.

In South Africa, the Act governs tax on income. Minerals and the rights to such minerals have been governed by various forms of legislation which includes, *inter alia*, the Minerals Act 50 of 1991. Nevertheless, for most of the past decade, the right to extract minerals has been governed by the Mineral and Petroleum Resources Development Act 28 of 2002 ('the MPRDA'). The MPRDA came into effect on 1 May 2004 and, in essence, provides that the State is the custodian of mineral resources.

Upon consideration of the shareholding of active South African mining companies, all of which holds mining rights, prospecting rights or a combination of both, a vast amount of these

¹ Forget Oil: 15 Countries Sitting On A Fortune Of Metals And Minerals - Gus Lubin. Available at <http://www.businessinsider.com/15-resources-rich-countries-2010-4?op=1>. [Accessed 28 March 2013]; The World's Top 5 Mining Countries - Cori O'Donnell. Available at <http://www.wealthwire.com/news/global/2372>. [Accessed 28 March 2013].

² The World's Top 5 Mining Countries - Cori O'Donnell. Available at <http://www.wealthwire.com/news/global/2372>. [Accessed 28 March 2013].

³ Tax Quotes, Funny Tax Quotes That Unravel the Mystery of Income Tax - Simran Khurana. Available at <http://quotations.about.com/od/moretypes/a/taxquotes1.htm>. [Accessed 28 March 2013].

⁴ Tax Quotes, Funny Tax Quotes That Unravel the Mystery of Income Tax - Simran Khurana. Available at <http://quotations.about.com/od/moretypes/a/taxquotes1.htm>. [Accessed 28 March 2013].

companies are ultimately held by non-resident offshore shareholders who, in most cases, enter the South African market through favourable tax jurisdictions (i.e. Mauritius, Cyprus, Luxembourg, the Netherlands etc.). The reason for these jurisdictions being considered as favourable, is due to the double tax agreements currently in force between South Africa and the respective jurisdictions which provide protection against, *inter alia*, capital gains tax upon the disposal of the shares in the South African companies where such shares are considered to be property rich for South African tax purposes. In general, non-resident will be subject to South African income tax or capital gains tax in the event of a disposal which is regarded as a disposal of ‘immovable property’ or ‘an interest or right to or in immovable property’ as contemplated in paragraph 2 of the Eighth Schedule to the Act.⁵ In order for a disposal to be regarded as a disposal of an ‘interest or right to or in immovable property’ two requirements need to be met. Firstly, there needs to be a disposal of at least 20% of the shareholding in a South African company and secondly, 80% or more of the market value of the shares disposed of must be directly or indirectly attributed to immovable property situated within South Africa.⁶ It is imperative that both these requirements are met before paragraph 2 of the Eighth Schedule to the Act can apply. A company is therefore referred to as being ‘property rich’ where both the aforementioned requirements are met.

In light of the above and in the context of mining companies, the question that often arises is whether a company which holds a prospecting right, mining right or a combination of both would be considered to be ‘property rich’ and whether the disposal by a non-resident shareholder of its shares in such a company would fall within the ambit of paragraph 2 of the Eighth Schedule to the Act.

Before it can be concluded whether a disposal of shares by a non-resident shareholder in a South African company holding mining rights or prospecting rights would fall within the ambit of paragraph 2 of the Eighth Schedule to the Act, certain additional questions need to be answered. The questions that need to be answered, to name but a few, is what is the nature of mining rights and prospecting rights and what is the meaning of the term ‘immovable property’ in general as well as in the context of paragraph 2 of the Eighth Schedule to the Act.

This study will therefore firstly consider the general legal meaning of the term ‘immovable property’ after which the term will be interpreted in the context of paragraph 2 of the Eighth Schedule to the Act. Once this has been established, a further analysis will be conducted on the

⁵ As set out in paragraph 2(1)(b)(i) of the Eighth Schedule to the Act.

⁶ Paragraph 2(2) of the Eighth Schedule to the Act.

legal nature of mining rights and prospecting rights to determine whether these rights would be regarded as ‘immovable property’ in the context of paragraph 2 of the Eighth Schedule to the Act. After consideration is given to the meaning of paragraph 2 of the Eighth Schedule to the Act and whether a distinction can be drawn between a prospecting right and prospecting information, a final conclusion will be drawn on whether a disposal of shares by a non-resident shareholder in a South African company holding mining rights or prospecting rights would fall within the ambit of paragraph 2 of the Eighth Schedule to the Act.

2.2 Problem statement

2.2.1 Main problem

Will mining rights and prospecting rights be regarded as ‘immovable property’ or ‘an interest or right of whatever nature to or in immovable property’ as contemplated in paragraph 2 of the Eighth Schedule to the Act?

2.2.2 Sub-problems

The sub-problems identified, which need to be addressed in order to assist in attempting to provide an academic answer to the main research problem, are as follows:

- What is the general meaning that can be ascribed to the term ‘immovable property’?
 - This question needs to be answered due to the term ‘immovable property’ not being defined in the Act. Consideration should therefore be given to the general meaning in order to ascribe such a meaning to the term as used in paragraph 2 of the Eighth Schedule to the Act.
- What is the meaning of the words ‘immovable property’ and the phrase ‘any interest or right of whatever nature to or in immovable property’ as used in paragraph 2 of the Eighth Schedule to the Act?
 - Once the general meaning of the term ‘immovable property’ has been established, the focus shifts to the interpretation of the words ‘immovable property’ and the phrase ‘any interest or right of whatever nature to or in immovable property’ in the context of paragraph 2 of the Eighth Schedule to the Act by virtue of ascribing the general meaning of the term to the aforementioned term and phrase.

- What is the legal nature of prospecting rights and mining rights granted in terms of the MPRDA?
 - In order to conclude on whether a prospecting right or mining right would be regarded as ‘immovable property’ or an ‘interest or right of whatever nature to or in immovable property’, the legal nature of a prospecting right or mining right would firstly need to be determined following which a conclusion can be drawn on whether it will fall within the ambit of paragraph 2 of the Eighth Schedule to the Act.
- What is the meaning of paragraph 2 of the Eighth Schedule to the Act as a whole, more specifically, the meaning of paragraph 2(2) of the Eighth Schedule to the Act?
 - Paragraph 2(2) of the Eighth Schedule to the Act is specifically applicable to non-residents as they will be subject to capital gains tax should they fall within the ambit of this paragraph. It therefore needs to be determined what the intention of this sub-paragraph is and how this sub-paragraph seeks to pull non-residents into the capital gains tax net.
- Can a distinction be drawn between a prospecting right and prospecting information and if so, what is the nature of such prospecting information?
 - Due to the fact that prospecting information is obtained through conducting prospecting activities by virtue of a prospecting right, it needs to be established whether the value of such prospecting information can be separated from the prospecting right. If this holds true, it further needs to be established whether such prospecting information would be regarded as ‘immovable property’ for purposes of paragraph 2(2)(a) of the Eighth Schedule to the Act.

2.3 Delimitations of the study

The research question will be limited to the provisions of paragraph 2 of the Eighth Schedule to the Act. The term ‘immovable property’ is used in section 9(2)(j) and section 35A of the Act (to name but a few). Section 9(2)(j) specifically deals with a disposal on revenue account whilst section 35A provides for a withholding obligation upon the disposal by a non-resident of immovable property situated in South Africa respectively. The report will therefore not focus on the disposal on revenue account as envisaged in section 9(2)(j) and will be limited to a disposal of immovable property on capital account as that term is used in paragraph 2 of the Eighth Schedule to the Act.

2.4 Research methodology

This research will be performed using a qualitative approach through conducting an extensive literature review. This review will explore the legal nature of prospecting rights and mining rights, the meaning of the term 'immovable property' and the phrase 'interest or rights of whatever nature to or in immovable property' as well as interpret the meaning of paragraph 2 of the Eighth Schedule to the Act as a whole. The results of this review is intended to provide clarity on whether non-residents would be subject to South African capital gains tax upon the disposal of shares held in a South African company which holds prospecting rights and/or mining rights.

3 Chapter 2: The term ‘immovable property’

The Act does not provide a definition for the term ‘immovable property’. It therefore goes without saying that paragraph 2 of the Eighth Schedule to the Act, which refers to the term ‘immovable property’ on multiple occasions, also does not provide a definition for this term.

Due to the fact that no definition is provided for the term ‘immovable property’ in the Act, it is necessary to ascertain the general meaning of the term ‘immovable property’ in order to understand the context in which it is used in paragraph 2 of the Eighth Schedule to the Act.

3.1 Immovable property: The common law meaning

When looked at from a legal perspective, the term ‘immovable property’ is used in order to draw a distinction between things based on their relation to man and/or according to their nature, in this case, the distinction between movable and immovable.⁷ It is provided in LAWSA (*supra*) that the ‘most important classification of things is the division between movables and immovables’.⁸ Although the distinction between movables and immovables was firstly made in Roman law, this distinction was of a subordinate interest at the time. It was, however, later taken over by the Roman Dutch law and thereafter confirmed in South African case law.⁹ The general accepted legal definition which has been attributed to the term ‘immovable property’ is land and everything which is attached to such land, either by way of natural or artificial means, and which cannot be removed from such land without causing damage to that land or without that land losing its identity.¹⁰

There is little debate, and it is generally accepted, that land constitutes immovable property. Conversely, numerous views exist on whether that which affixes to immovable property has become immovable property or not. This aspect is, however, not of importance for the current analysis and has therefore not been considered further. What is important is whether things of an incorporeal nature would be regarded as immovable property. In layman’s terms, incorporeal things are things which lack physical substance and include, *inter alia*, rights, shares etc. This

⁷ Joubert, W.A. (ed.), 2001. *The Law of South Africa. Vol. 25(1)*. 2nd ed; sv “Things” by C G van der Merwe, paragraph 211; Badenhorst, P.J., Pienaar, J.M., Mostert, H., van Rooyen, M., 2003. *Silberberg and Schoeman’s: The Law of Property*. 5th ed; Grotius *Inleidinge* 2 1 4 Van der Keessel, D G, 1961-1975. *Praelectiones Iuris Hodiernie Grotii Introductionem ad Iurisprudentiam Hollandicam*; Van Leeuwen *RHR* 2 1 1.

⁸ LAWSA (*supra*) paragraph 224.

⁹ LAWSA (*supra*) paragraph 224.

¹⁰ LAWSA (*supra*) paragraph 224, Silberberg and Schoeman (*supra*) page 40, paragraph 3.2.2.2 (a).

classification between corporeals and incorporeals was confirmed in Roman law where tangibles (i.e. land, clothing, gold etc.) were classified as corporeal things while intangibles (i.e. usufruct, contractual rights etc.) were classified as incorporeal.¹¹ One of the first court cases in which this exact issue was considered was in *Ex Parte Master of the Supreme Court*.¹² The facts of that case can be summarised as follows:

- The City and Suburban Co. granted a stand for ninety-nine years to the applicant;
- Matthews, for the applicant, argued that the stand is a lease in *longum tempus* (i.e. long time and long use), and that a lease in *longum tempus* is immovable property;
- Dickson, for the Registrar of Deeds, was of the view that in the Roman law, only *fundus praedium* (i.e. real estate) was immovable, all other things were movables;
- Innes C.J. was required to decide whether the deed granted for ninety-nine years would indeed be regarded as immovable property as referred to in the Administration of Estates Proclamation, 1902.

Section 108 of the Administration of Estates Proclamation allowed the Master to occasionally invest money into the Guardian's Fund where such funds were to be invested on mortgage of immovable property. As the term was not defined in the Administration of Estates Proclamation, the court decided that the legislature's intention must be followed in order to determine the meaning of the term 'immovable property'. In this regard, it was assumed that the legislature used this term based on its ordinary legal meaning. In establishing the ordinary legal meaning, the court referred to writers such as van der Keessel, Voet and Mattheus. Van der Keessel was quoted to say:

'By the law of Holland, as under the Roman law, incorporeal things, where the law or the will of the owner has given no direction to the contrary, are not comprehended under movables or immovables, as in the case of legacies, agreements and mortgages.'

Voet, on the other hand, was quoted saying:

'Incorporeal things are things which can neither be handled nor touched, and consist in a right, as inheritances, servitudes, debts, actions, and revenues. But as the greatest portion of the municipal laws ignores the division into corporeal and incorporeal, and

¹¹ Silberberg and Schoeman (*supra*) page 33, paragraph 3.2.2.1.

¹² 1906 TS 563 at 565 – 566.

is content with a mere division into movables and immovables (Matthaeus, de Auctionibus, 1, 3, 13, and de Criminibus, 48, 20, 4, 21), it will be worth while to inquire under which class each incorporeal thing is to be accounted, whether movable or immovable.'

Based on the above wording, the court came to the conclusion that Voet's view is common sense and the preferred view and that, as a result, incorporeal rights can be divided into movable or immovable things where possible. The court further concluded that, based on Roman Dutch law, not only is this the general rule but it is also the intention of the legislature when it used the term 'immovable property' and that it was intended that the wider meaning of the term was to be used to include incorporeal rights.

When considering the definition of the term 'immovable property' in different legislation, it is noticed that the exact same meaning is not always used throughout. The Administration of Estates Act¹³ defines immovable property as '*land and every real right in land or minerals (other than any right under a bond) which is registrable in any office in the Republic used for the registration of title to land or the right to mine*'. The Deeds Registries Act¹⁴ defines immovable property as '*any registered lease of land which, when entered into, was for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period amount in all to not less than ten years¹⁵, a registered right of leasehold¹⁶ and a registered right of initial ownership contemplated in section 62 of the Development Facilitation Act, 1995*'.¹⁷ Although the meaning of the term 'immovable property' as used in these statutes cannot provide a court with the meaning which should be ascribed to the term when interpreting paragraph 2 of the Eighth Schedule to the Act, it can be used as a guideline as to what the legislature of the Act could have intended the meaning of 'immovable property' to be and could furthermore be used for persuasive purposes.

Regardless of the aforementioned, when one refers back to publications on the law of property, a conclusion can be drawn that authors of such publications are all of the view that in order to determine whether a right is movable or immovable, one would need to establish the nature of

¹³ No. 66 of 1965, section 1.

¹⁴ No. 47 of 1937, section 10.

¹⁵ Paragraph (b).

¹⁶ Paragraph (c).

¹⁷ Paragraph (d).

the object to which such a right relates.¹⁸ As a result, a further distinction should be made between real rights and personal rights. Based on the classical theory, a real right considers the relationship between a person and a thing while a personal right considers the relationship between two persons.¹⁹ On the other hand, the personalist theory states that a real right is a right to a thing and generally has corporeal property as its object. Such a real right is normally enforceable against all other persons. Conversely, a personal right is normally only enforceable against a certain person and has performance as its object.²⁰ Due to the fact that the object of a personal right can never be a corporeal item, it can be said that a personal right can never constitute immovable property.

With regard to real rights, a further distinction can be drawn between real rights which have immovable property as its object and real rights which have movable property as its object. The first mentioned will be regarded as immovable property whilst the latter will be regarded as movable property. The question that needs to be asked when considering this approach is whether it can be practically applied throughout the Act and on a consistent basis. From a general perspective and based on the discussion above, a long term lease is regarded as immovable property. When one refers back to the definition of immovable property in the Deeds Registries Act (*supra*) quoted above, it is clear that only a lease of land for a period of at least ten years would be regarded as immovable property. This would imply that regardless of the fact that one has a lease over property (i.e. the object of which is immovable) and to the extent that the lease period over such property is not for a period of at least ten years, such a lease (or right) would not be regarded as immovable property.

3.2 Conclusion

Based on the above a view can be reached that, in general, immovable property constitutes land. Incorporeal rights can be divided into movable or immovable things and in order to determine whether a right is movable or immovable, one would need to establish the nature of the object to which such a right relates. A personal right can never be a corporeal item and would therefore never be regarded as immovable property whilst a real right which has immovable property as its object will be regarded as immovable property.

¹⁸ Silberberg and Schoeman (*supra*) page 35, paragraph 3.2.2.2 (b). Also see Voet 1 8 20 et seq; Van der Keessel (*supra*) at GR 2 1 14 and Huber, *Heedendaegse Rechtgeleetheyt*, 2 1 10.

¹⁹ Silberberg and Schoeman (*supra*) page 47, paragraph 4.2; C G van der Merwe (*supra*), paragraph 234.

²⁰ Silberberg and Schoeman (*supra*) page 48, paragraph 4.2; C G van der Merwe (*supra*), paragraph 232.

3.3 Immovable property: Mining rights and prospecting rights

In light of the Deeds Registries Act (*supra*) and when referring to mineral rights, the court case of *Government of the Republic of South Africa v Oceana Development Investment Trust Plc*²¹ is one case in which a judgment regarding the nature of these rights was delivered. In this case, Goldstone J held that:

*‘...whatever difficulties might still remain about the precise juristic nature of mineral rights, and having regard to ss 70 - 74 of the Deeds Registries Act 47 of 1937, there appeared to be no doubt that they constituted real rights, ius in re aliena; there was also no doubt that they were incorporeal rights relating to immovable property and had to be regarded as immovable incorporeals.’*²²

The difficulty expressed by Goldstone J above with regards to the juristic nature of mineral rights is something which courts have been faced with since the early nineties. As early as 1903, Innes CJ in *Lazarus and Jackson v Wessels, Oliver, and the Coronation Freehold Estates, Town, and Mines Ltd*²³ made a confession that he experienced a great deal of difficulty to be in a position to attribute a suitable juristic niche to the right to search for and remove minerals.²⁴ This exact question is one which has come under scrutiny by various academic writers; all expressing different views, and it was also subject to much judicial comment.²⁵ In the abovementioned case, Innes CJ was reluctant to express an explicit view on the nature of such rights. He did, however, make the following comment:

*‘Rights of that nature are peculiar to the circumstances of the country, and do not readily fall under any of the classes of real rights discussed by the commentators. They seem at first sight to be very much of the nature of personal servitudes; but they are freely assignable.’*²⁶

In *van Vuren and Others v Registrar of Deeds*²⁷, Innes CJ did not have any additional comments to add, save for those mentioned in the *Lazarus and Jackson* case (*supra*). He did, however, refer to a transaction giving effect to the reservation of mineral rights which would constitute a

²¹ 1989(1) SA 35 T.

²² See Voet 1.8.20ff.

²³ 1903 TS 499 at 510.

²⁴ Franklin and Kaplan, *Mining and Mineral Laws*, page 8.

²⁵ Franklin and Kaplan (*supra*).

²⁶ *Lazarus and Jackson* case (*supra*).

²⁷ 1907 TS 289.

‘personal quasi-servitude’.²⁸ This view expressed by Innes CJ has been adopted in a vast number of decisions. In *Rocher v Registrar of Deeds*²⁹, the court held that:

‘What exactly these rights ought to be called is a matter of some difficulty, but I think that the phrase which was used by Innes C.J., in van Vuren’s case is a convenient one – that is, that they are quasi-servitudes. They confer the right to go on the soil of another person and extract minerals for you own benefit.’

This view was also accepted by Bristow J in *Coronation Collieries v Malan*³⁰ where he added:

‘...and I think that it might be added that a so-called lease of mineral rights is really a grant of a quasi-servitude.’

Based on the above, and referring back to the Deeds of Registries (*supra*)³¹, a conclusion can be drawn that minerals rights are regarded as real rights (or *iura in re aliena*) with the nature of personal quasi-servitudes and are also registrable as such.³² Furthermore, in light of the discussion in 3.1 above, a mining right, from a common law perspective, would be regarded as immovable property. The reason being is that a mining right provides the holder the right to the underlying minerals situated on a property, which is therefore an incorporeal right to land and that which relates to such land.

A prospecting right (i.e. a contract to prospect), on the other hand, does not provide the holder with a right to the underlying minerals. A prospecting right merely provides the holder the right to go onto someone’s property, and conduct prospecting activities, which includes excavations, sinking of boreholes and any other activities necessary to conduct the prospecting operations.³³ At no time does the holder of a prospecting right have a right to the minerals nor do they have a right to dispose of minerals obtained as part of the prospecting operations save for such quantities required to conduct tests on the minerals or to identify or analyse such minerals.³⁴ The questions that need to be answered in this regard are whether:

- i. a prospecting right provides the holder with a right against the world (i.e. a real right);
and

²⁸ Franklin and Kaplan (*supra*).

²⁹ 1911 TPD 311 at 316.

³⁰ 1911 TPD 577 at 591.

³¹ Section 64(1).

³² Franklin and Kaplan (*supra*), page 15.

³³ Franklin and Kaplan (*supra*), page 16.

³⁴ Unless the holder of a prospecting right obtained written consent from the Minister to remove and dispose of bulk samples for its own account as provided in section 20 of the MPRDA.

- ii. such right provides the holder with a title to land to which such prospecting right relates to.

In order to determine whether the above would indeed hold true, consideration is given to a prospecting contract. A prospecting contract consisted of two elements, firstly a right to prospect and secondly the option to acquire the land or the mineral rights.³⁵ It needs to be considered whether a prospecting contract, when registered, would create a real right which is enforceable against the world with regard to both elements of a prospecting contract.

Referring to an earlier decision regarding the nature of an agreement which provides an option or a right of pre-emption, De Villiers CJ³⁶ said:

‘I cannot agree that in the view that an option is capable of formal transfer and registration in the Deeds Office. It is a personal contract, giving the purchaser of the option the right to purchase the farm for a certain price, and until the farm is purchased there is no real right which is capable of registration.’

The above judgment was followed in various other decisions.³⁷ Regardless of the above, there are numerous court decisions which support the view that where there is a right which is a subtraction from the *dominium* and which also binds the successor of the grantor of such right, such a right would constitute a real right. Franklin and Kaplan (*supra*)³⁸ agree with the above and submit that *‘the content of the right to prospect on property amounts to a diminution of or subtraction from the full dominium of the owner, and as such constitutes a real right’*.³⁹ This statement is based on the analysis by Franklin and Kaplan in Chapter I.⁴⁰

With specific reference to a contract which contains the right to prospect and win minerals (which he also regarded as a real right) and an option to purchase the mineral rights, Innes CJ in the *Lazarus and Jackson* case (*supra*)⁴¹ was of the view that:

‘The option to purchase the mineral rights of the farm, on the other hand, is merely a personal right, and no amount of legislative direction as to its form can make it anything else.’

³⁵ Franklin and Kaplan (*supra*), page 15.

³⁶ *Kotze v Civil Commissioner of Namaqualand* (1900) 17 SC 37 at 39.

³⁷ *Michell v De Villiers* (1900) 17 SC 85; *Van der Hoven v Cutting* 1903 TS 299.

³⁸ At page 630.

³⁹ With reference to *ITC 321* 8 SATC 236 at 238.

⁴⁰ Franklin and Kaplan (*supra*), page 19 with reference to *Ex parte Geldenhuys* 1926 OPD 155 at 163 – 164; *Estate Napier v Trustee Estate Weir* 1927 SR 33 at 4; *Ex parte Zunckel* 1937 NPD 295 at 298 – 299 and other authorities cited therein.

⁴¹ At 510.

A decision supporting the above and along similar lines, was in *Hollins v Registrar of Deeds*⁴². In this specific case, a farmer sold half of any mynypacht to which he was or might have been entitled to under the Gold Law. Innes CJ held that such a contract merely provided the purchaser with a personal right which was contingent upon the farm being proclaimed under the Gold Law and furthermore, that such a personal right could not be registered against the title deeds.⁴³ In *Cape Coast Exploration Ltd v Registrar of Deeds*⁴⁴, Centlivres AJ said

‘...a contract which allows only prospecting...does not appear to be registrable.’

It can therefore be said that where a prospecting contract does not provide the option to lease or purchase the mineral right or land to which it relates, such a prospecting contract would not be regarded as a real right. This is supported in *Vansa Vanadium SA Limited v Registrar of Deeds and Others*⁴⁵ where it was held that a prospecting contract registered in the Deeds Office did not create a real right. In coming to this conclusion, the court relied on the decision of *Cullinan v Pistorius*⁴⁶, the views of Joubert 1959 THRHR 82 and other writers.⁴⁷ The view expressed by these writers was that a prospecting contract which merely provides the prospector with the right to search for minerals was a personal right and not a real right. This court in the *Vansa Vanadium* case (*supra*) further rejected the view expressed by Franklin and Kaplan (page 630) that the right to prospect ‘amounts to a diminution of or subtraction from the full dominium of the owner, and as such constitutes a real right’.

One of the factors which was considered and ultimately lead to the court’s final decision in the *Vansa Vanadium* case (*supra*) was, as mentioned above, the fact that the prospecting contract could not be registered under the Deeds Registries Act and was therefore not binding on the successor of the grantor. Although many writes do not agree with the judgment delivered in the *Vansa Vanadium* case (*supra*), to date, the case has not been challenged or overruled and the principles set out there in therefore remains.⁴⁸

⁴² 1904 TS 603.

⁴³ Franklin and Kaplan (*supra*), page 17 with approval from the Appellate Division in *British South Africa Company v Bulawayo Municipality* 1919 AD 84 at 93.

⁴⁴ 1935 CPD 200 at 210.

⁴⁵ 1979 (2) SA 784

⁴⁶ 1903 ORC 33.

⁴⁷ Badenhorst and Mostert, *Mineral and Petroleum Law of South Africa*, page 4-4

⁴⁸ See Badenhorst P.J. and Olivier N.J.J. in Die aard van regte ingevolge n propsekteerkontrak – *Vansa Vanadium SA Ltd v Registrar of Deed* in Journal of South African Law (1997) 583 at 594.

3.4 Conclusion

In order to conclude on the nature of common law prospecting rights, and with regard to the above analysis, it can be said that a mere right to prospecting without the option to lease or purchase the mineral right or land to which it relates would be regarded as a personal right and not real right. Accordingly, due to a personal right not being regarded as immovable property, a common law right to prospect would not be regarded as immovable property in the normal meaning of the word.

4 Chapter 3: The words ‘immovable property’ and ‘any interest or right of whatever nature to or in immovable property’ as provided in paragraph 2 of the Eighth Schedule to the Act

4.1 Immovable property

Following the consideration of the general meaning of the term ‘immovable property’, it has been determined that the term ‘immovable property’ includes incorporeal real rights in immovable property (i.e. in land). As the general meaning of the term ‘immovable property’ has now been established, it needs to be determined whether the general meaning of the term ‘immovable property’ can be applied in the context of paragraph 2 of the Eighth Schedule to the Act.

When the wording in paragraph 2 of the Eighth Schedule to the Act is considered, it is clear that the term ‘immovable property’ is used four times in this section. In order to ensure that the correct interpretation is used when paragraph 2 of the Eighth Schedule to the Act is interpreted, one would need to consider the presumptions of interpretation of statutes. More specifically, it is presumed that in the instance of the same or similar words or phrases being used in various places within legislation, such words or phrases shall bear the same meaning throughout.⁴⁹ It goes further to say that the same is true in the instance where such words or phrases refer to the same object.⁵⁰ There are various authorities in which this presumption has been considered and also confirmed.⁵¹ Based on the presumptions discussed above, it is clear that one must interpret the term ‘immovable property’ to bear the same meaning every time it is mentioned in paragraph 2 of the Eighth Schedule to the Act.

Upon further consideration of paragraph 2, more specifically paragraph 2(1)(b)(i), one finds that the term ‘immovable property’ is used twice in the same phrase or sentence. The term is firstly used in the phrase ‘immovable property situated in the Republic’ and thereafter in the phrase ‘any interest or right of whatever nature to or in immovable property...’ What further comes to light is that these two phrases are linked by the conjunction ‘or’. As mentioned in Chapter 2

⁴⁹ LAWSA Volume 25(1) Second Edition at 347.

⁵⁰ LAWSA (*supra*) at 347. Also see De Ville, *Constitutional and Statutory Interpretation* at 218.

⁵¹ See *Principal Immigration Officer v Hawabu* 1936 AD 26 at 33; *South African Transport Services v Olgar and Another* 1986(2) SA 684A at 688 as well as other authorities referred to in LAWSA (*supra*) at 347.

above, the term ‘immovable property’ is not defined in the Act and accordingly, by again referring to the presumptions of interpretation, it is presumed that where the language of a legislative instrument (i.e. the Act) is not clear and is unambiguous, the ordinary meaning of the words must prevail.⁵² In this regard, and as pointed out in Chapter 2, the general accepted legal definition of the term ‘immovable property’ is land and everything which is attached to such land, either by way of natural or artificial means and which cannot be removed from such land without causing damage or without that land losing its identity (i.e. corporeal property). Referring to the general accepted legal meaning, it can be said that the first reference to the phrase ‘immovable property’ in paragraph 2(1)(b)(i) refers to immovable property in its normal general meaning, therefore corporeal property, whilst the second reference to the phrase immovable property would not refer to corporeal property.

The reason for the above analogy is due to the presumption that words or phrases are not used unnecessarily. Based on this particular presumption of interpretation of statutes, to the extent that words are regarded as being superfluous, such words cannot qualify the meaning of non-superfluous words as this will render the applicable provision to be nugatory.⁵³ De Ville⁵⁴ is of the opinion that the rule of grammatical interpretation that a meaning must be assigned to every word can be expressed as a rule of grammatical interpretation or as a presumption.⁵⁵ Where it is expressed as a presumption, the presumption that the legislature does not intend to enact invalid or purposeless provisions would find application. It is however said that the presumption and the rule can remain distinct as the inherent validity and purposefulness of statute law is articulated by the presumption (i.e. its effect-directedness) while the language in which the effect-directness enactments will be understood is verbalised by the rule.⁵⁶ The aforementioned canon of construction is recognised by a variety of case law.⁵⁷ More specifically, in *Wellworths Bazaars Ltd v Chandler’s Ltd*⁵⁸ Davis AJA said:

‘...a Court should be slow to come to the conclusion that the words are tautologous or

⁵² LAWSA (*supra*) paragraph 349.

⁵³ LAWSA (*supra*) paragraph 353.

⁵⁴ De Ville, *Constitutional and Statutory Interpretation* 114.

⁵⁵ LAWSA (*supra*) paragraph 353.

⁵⁶ LAWSA (*supra*) paragraph 353.

⁵⁷ LAWSA (*supra*) paragraph 353. Also see *Attorney-General, Tvl v Additional Magistrate for Johannesburg* 1924 AD 421 436; *Wellworths Bazaars Ltd v Chandler’s Ltd* 1947 2 All SA 233 (A); 1947 2 SA 37 (A) 43; *R v Standard Tea & Coffee Co (Pty) Ltd* 1951 4 All SA 265 (A); 1951 4 SA 412 (A) 416D–F; *Israelsohn v Commissioner for Inland Revenue* 1952 3 All SA 427 (A); 1952 3 SA 529 (A) 536E–H cited in this section.

⁵⁸ 1947 2 All SA 233 (A); 1947 2 SA 37 (A) 43.

superfluous'.

He further quoted the Privy Council in *Ditcher v Denison* (11 Moore P.C. 325, at p. 357) in which he said:

'It is a good general rule in jurisprudence that one who reads a legal document whether public or private, should not be prompt to ascribe - should not, without necessity or some sound reason, impute - to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use'.

Regardless of the fact that functional repetition is a phenomenon which is not expected to be present in statutory language, one should be aware of the possibility of human error and that the legislature '*may have made a mistake...or may have omitted a word or added what is mere surplusage*'.⁵⁹ Accordingly, when interpreting a statute, one point of origin should be that different words or phrases are meant to have different meanings as the intention of the legislature was to express different ideas or refer to a different situation.⁶⁰

Furthermore, should there be a repetition of the term 'immovable property' in paragraph 2 of the Eighth Schedule to the Act, such a repetition will be superfluous and can therefore not bear the same meaning (i.e. corporeal property). From a purely grammatical perspective, it would also not make grammatical sense to refer to the same concept twice, by linking the concept with the word 'or', and thereby implying it should have an alternative meaning (i.e. a building or a building). The reference to 'any interest or right of whatever nature to or in immovable property...' can therefore not refer to corporeal property, but would rather refer to incorporeal property.

The above leads us to the conclusion that the first reference to immovable property in paragraph 2 of the Eighth Schedule to the Act does not include incorporeal property as the second time the phrase 'immovable property' is referred to, reference is made to 'any interest or right of whatever nature to or in immovable property...' which, by implication, includes a right to property (i.e. corporeal) and such a right to property, as discussed in Chapter 2 above, is

⁵⁹ LAWSA (*supra*) paragraph 353 with reference to *Ex parte the Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466 476–477 per Wessels ACJ.

⁶⁰ LAWSA (*supra*) paragraph 353 with reference to *Van den Berg v SAS&H* 1980 3 All SA 156 (T); 1980 1 SA 546 (T) 558F and *S v Makandigona* 1981 4 All SA 626 (ZA); 1981 4 SA 439 (ZA) 443D–E.

incorporeal.

Although it has now been established that reference to the term ‘immovable property’ and the phrase ‘any interest or right of whatever nature to or in immovable property...’ in paragraph 2(1)(b)(i) of the Eighth Schedule to the Act bears different meanings, the term ‘immovable property’ referred to in these phrases will still bear the same meaning (i.e. corporeal property). This is also based on the general rule of the presumption discussed above which provides that different words or phrases are meant to have different meanings⁶¹, however, there are exceptions to the general rule.⁶² In this regard, where an *ex abundanti cautela* (repetition in different terms) occurs, it is presumed that such a repetition shall bear the same meaning.⁶³

Before coming to the conclusion that the term ‘immovable property’ as used in paragraph 2 of the Eighth Schedule to the Act excludes any reference to incorporeal property, it might be useful to consider other paragraphs within the Eighth Schedule to the Act which makes reference to the term ‘immovable property’. This is necessary in order to determine whether giving the term ‘immovable property’ a restrictive meaning to only include corporeal property can be consistently applied throughout the Eighth Schedule to the Act.

The term ‘immovable property’ is referred to in multiple paragraphs within the Eighth Schedule to the Act. More often than not, where the term ‘immovable property’ occurs, it is often used in conjunction with the phrase ‘any interest or right of whatever nature to or in immovable property’. A conclusion can therefore be drawn that, in the majority of the instances where the term ‘immovable property’ is used in the Eighth Schedule to the Act, a wider meaning is attributed to such term. This is, however, not the case when one refers to paragraph 57 of the Eighth Schedule to the Act. This paragraph addresses the implication upon the disposal of small business assets. In this paragraph, an ‘active business asset’ is defined as ‘*an asset which constitutes immovable property, to the extent that it is used for business purposes...*’. Upon strict interpretation of this definition, one could come to the view that this definition is restricting the term ‘immovable property’ to only include corporeal property. The reason being is that there is

⁶¹ LAWSA (*supra*) paragraph 353 with reference to *Van den Berg v SAS&H* 1980 3 All SA 156 (T); 1980 1 SA 546 (T) 558F and *S v Makandigona* 1981 4 All SA 626 (ZA); 1981 4 SA 439 (ZA) 443D–E.

⁶² See *Van den Berg v SAS&H* 1980 3 All SA 156 (T); 1980 1 SA 546 (T) 558F; *S v Makandigona* 1981 4 All SA 626 (ZA); 1981 4 SA 439 (ZA) 443D–E referred to in LAWSA (*supra*) paragraph 353.

⁶³ See *R v Herman* 1937 AD 168 174; *SANTAM Versekeringsmpy Bpk v Kemp* *supra* 322; *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Edms) Bpk* 1966 4 SA 434 (A) 441E–H; *Ovenstone v Secretary for Inland Revenue* 1980 2 All SA 25 (A); 1980 2 SA 721 (A) 737A–738C referred to LAWSA (*supra*) paragraph 353.

no reference to ‘any interest of whatever nature to or in immovable property’ in this definition. This occurrence is also true for the wording in paragraph 57A of the Eighth Schedule to the Act. It may therefore be said that the legislature’s intention with the term ‘immovable property’ in this section should bear a wider meaning and thereby including a right to immovable property. The intention of the legislature with the wording in this section is however not directly relevant to the issue at hand.

The meaning of the term ‘immovable property’ was also the subject of a Zimbabwean case as well as in the case of *Berry v Mann*⁶⁴. In *ITC 1610*⁶⁵ (the Zimbabwean Special Court case), the court had to decide on the meaning of the term ‘specified asset’ as defined in section 2(1) of the Zimbabwean Capital Gains Tax Act 54 of 1981 (‘the Zimbabwean CGT Act’). The Zimbabwean CGT Act defined a ‘specified asset’ as ‘*immovable property and any marketable security*’. The facts of the case can be summarised as follows:

- The appellant entered into an agreement with the state to lease certain state land and the agreement also included an option to purchase the land from the state.
- Due to drought and poor farming conditions, the appellant decided to move and he sold the farm together with the option (the option was sold for ZIM\$168 000).
- The Commissioner of Taxes initially included the sale price of the option as part of taxable income, but subsequently amended the assessment to include the sale price of ZIM\$168 000 as a capital gain.
- The appellant argued that an option was not a ‘specified asset’ as defined in section 2(1) of the Zimbabwean CGT Act and the legislature did not intend to include ‘*anything which could be classified as immovable property*’ in the meaning of a ‘specified asset’.
- The Commissioner of Taxes argued that ‘*the option was a right relating to immovable property and accordingly must itself be classified as immovable property*’.

The court referred to various writers with regards to the law of property⁶⁶ and that based on these authors, with specific reference to Wille in *Principles of South African Law* 7ed at page 166, ‘*incorporeals are classified as movable or immovable, depending upon the property to*

⁶⁴ 9 SATC 218.

⁶⁵ 59 SATC 79.

⁶⁶ Reference was made to Van der Keesel, Silberberg and Schoeman and Wille.

which they attach'. The court was, however, of the view that the authorities quoted in support of the submission did not support this fact. The principle which the court found to be applicable in this specific case was that articulated by Bristowe J in the *Master of the Supreme Court*⁶⁷ case at page 570 where he said:

'It seems to me that in these sections movable and immovable are used in a contradictory sense. Whatever is not movable is intended to be classed as immovable, and whatever is not immovable is intended to be classed as movable. The two in fact divide the world between them. Assuming then that the lease of a township stand falls under one of these heads, under which of them does it come? The answer to this question is, I think, furnished by Van der Keessel, who says (Thes 178 and 179) that although incorporeal things are not strictly either movable or immovable, yet it becomes necessary to refer them to one or other of these classes then praedial servitudes and actions in rem should be considered as immovables, and actions in personam should be reckoned as movables.'

Based on the above, the court was of the view that when the term 'immovable property' is considered, the starting position would be the proposition that an incorporeal right such as an option is not strictly movable or immovable property. The court held that where there is no clear indication in the Zimbabwean CGT Act that illustrates that the legislature intended for incorporeal property (such as an option) to be included in the term 'immovable property', that such incorporeal property should not be included. The court further stated that the imposition of a tax must be effected by plain words and referred to the principle in *Brunton v Stamp Duties Commissioners*⁶⁸ (at page 760) where Lord Atkinson stated:

'It is well established that one is bound, in construing Revenue Acts, to give a fair and reasonable construction to their language without leaning to one side or to the other, that no tax can be imposed on a subject by an Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of the statute must be adhered to, and that so-called equitable constructions of them are not permissible.'

In support of the above, and with reference to *Cape Brandy Syndicate v Inland Revenue*

⁶⁷ 1906 TS 563.

⁶⁸ 1913 AC 747.

*Commissioners*⁶⁹, the following concept expressed by Rowlatt J was quoted:

‘It is urged by Sir William Finlay that in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. It simply means in a taxing Act one has to look more at what is clearly said. There is no room for any intendment. There is no equity about a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.’

In light of the above, the court held that it could not find anything in the Zimbabwean CGT Act which clearly shows the intention to impose capital gains tax on the disposal of incorporeals. The Commissioner of Taxes was therefore ordered to amend the assessment to not include the disposal of the option as a capital gain.

In addition to the above, in *Berry v Mann (supra)* the court had to decide whether the subject matter of a contract was an interest in immovable property or not. In essence, the court had to determine whether the owner of immovable property could in fact purchase the option from another person which such a person has over the immovable property of the owner. This decision was based on the wording of Section 1 of Law 12 1884 (Natal) which read as follows:

‘No action shall be maintained in respect of any contract for the sale of any immovable property or any interest therein . . . unless and so far as such contract shall be evidenced by some writing signed by or on behalf of the person sought to be bound thereby.’

With reference to Pothier, *Contrat de Vente*, 1.2.8. and *Hopper v Cochran* (1934, TPD at p. 327),⁷⁰ the court held that a man cannot buy his own property. It could, however, be said that *‘if a certain person has rights against that property derogating from the rights of ownership he can buy out that person, but then he buys the rights that the person has in respect of that property’*. The respondent argued that the interest itself must be immovable property for such interest to in fact be regarded as immovable property. This argument was, however, rejected by the court. The reason for the court rejecting this argument could be articulated by the following:

‘If it were correct, the words “or interest therein” following “immovable property” would become redundant, because the interest, ex hypothesi, being immovable property itself, would be included in the term, “immovable property” and thus the words “or

⁶⁹ 1921(1) KB 64 at page 71.

⁷⁰ 7 SATC 90.

interest therein” would have been unnecessary. There can be no doubt that by using the words “or interest therein” in the alternative the Legislature must have intended to describe something different from immovable property.’

The above case law provides support that when considering the term ‘immovable property’ read with the phrase ‘any interest or right of whatever nature to or in immovable property’, it must be said that the two phrases must have different meanings, and therefore, that immovable property as used in paragraph 2 of the Eighth Schedule to the Act only refers to corporeal property.

4.2 Conclusion

To conclude on the discussion above, it can be said that the term ‘immovable property’ as used in paragraph 2 of the Eighth Schedule to the Act should be limited to only include corporeal property and not corporeal and incorporeal property.

4.3 Any interest or right to or in immovable property

Based on the view expressed in 4.1 above, the term ‘immovable property’ in paragraph 2 of the Eighth Schedule to the Act only refers to corporeal property. A similar approach to that adopted in 4.1 above needs to be taken in order to determine the meaning of the phrase ‘any interest or right of whatever nature to or in immovable property’ as referred to in paragraph 2 of the Eighth Schedule to the Act.

As discussed in detail in 3.1 above, one can distinguish between a real right and a personal right. A further distinction can be drawn between a real right which relates to one’s own property (*ius in re propria*) and a real right which relates to things belonging to someone else (*iura in re aliena*).⁷¹ Silberberg and Schoeman (*supra*) go further to say that an *iura in re aliena* (i.e. a right to something which belongs to someone else) is a limited real right due to the fact that it is a real right although there is no ownership and is a thing which is owned by another person which does not hold such right. It can therefore be said that the reference to the word ‘right’ in the phrase ‘any interest or right of whatever nature to or in immovable property’ would include a real right and a limited real right to corporeal property.

The approach to be followed in order to come to a view of what exactly is meant by the term

⁷¹ Silberberg and Schoeman (*supra*) page 56, paragraph 4.2.

‘interest’ is not as straightforward as the one followed above. One of the reasons why difficulty is experienced when conducting this analysis is due to the fact that in most of the authorities in which this term is discussed, reference is made to the term in the context of the statute in which it appears. However, in *Pito v Deeb*⁷² the words ‘interest direct or indirect in a...business’ was considered. The *Pito v Deeb* case (*supra*) dealt with the breach of a restraint of trade clause. In this case, Mr George Deeb (the respondent) sold a business to the applicant. Clause 7 of the deed of sale read as follows:

‘To protect the interests of the purchaser, the seller as well as the said George Deeb will not be entitled to open or have any interest direct or indirect in a café or restaurant business in the town of Lindley for a period of five (5) years as from date hereof.’

Without going into too much detail, the court ruled that Mr Deeb does not have a café or that it carries on a business as such. The court did, however, continue to consider whether Mr Deeb has ‘any interest direct or indirect’ (as provided in clause 7 of the deed of sale) in the said business and whether such a business is a café or not. Referring to *Olley v Maasdorp and Another*⁷³ and *Roopsingh v Rural Licensing Board for Lower Tugela and Others*⁷⁴, it was submitted that the meaning of the word ‘interest’ may differ depending on the interpretation of different statutes and that same will hold true upon the interpretation of contracts. Further reference was made to *Gophir Diamond Co. v Wood*⁷⁵ (which relied on *Smith v Hancock* 1894 (2) Ch. C. 377) in which it was held that where an employee is merely drawing a salary, that such an employee will not have an indirect pecuniary interest in the business.

Erasmus J pointed out that Beyers J, in *Scheckter v Kolbe*⁷⁶, was ‘at a loss to understand’ why the judge in the *Gophir Diamond Company* case (*supra*) case should give the word ‘interested’ such a restrictive meaning. In the *Gophir Diamond Company* case (*supra*), Swinfen Eady J said:

‘If his remuneration in any way depended on the profits or gross returns, he would be “interested” in the business, but the mere fact that he is employed as a servant at a fixed salary gives him no such interest and constitutes no breach of his covenant.’

The court agreed with the view expressed in the *Scheckter* case (*supra*) that a distinction can be

⁷² 1967 1 SA (O).

⁷³ 1948 (4) SA 657 (AD) at page 665 to 665.

⁷⁴ 1950 (4) SA 248 (N) at page 259.

⁷⁵ (1902) 1 Ch. D. 950.

⁷⁶ 1955 (3) SA 109 (GW) at 112 and 113.

drawn between a person 'becoming interested' in a business and a person 'interesting himself' in a business. It was therefore held that in order for a person to have an 'interest in a business', such a person must have a proprietary right or a stake in the business. The mere fact that an employee only earns a salary from a business, without having a pecuniary interest in such business, cannot be regarded as having an indirect interest in the business. The ordinary meaning of the phrase 'interested in' is therefore only where a person has a proprietary right or a stake in the business.

4.4 Conclusion

Based on the above discussion, the conclusion can therefore be reached that the phrase 'any interest or right of whatever nature to or in immovable property' means that there must be a proprietary right or a stake in immovable property (i.e. corporeal property) and by implication, refers to incorporeal property (i.e. a right to corporeal property).

5 Chapter 4: The nature of prospecting rights and mining rights

5.1 Introduction

In the preceding chapters, it has been concluded that when considering the general legal meaning of the term ‘immovable property’, mining rights and prospecting rights would be regarded as immovable property in the ordinary sense thereof. Putting the general legal meaning aside and considering the provisions of paragraph 2 of the Eighth Schedule to the Act, mining rights and prospecting rights will not be regarded as immovable property as used in paragraph 2 of the Eighth Schedule to the Act as they are regarded as incorporeal property. This is based on the conclusion in Chapter 3 that the term ‘immovable property’, as used in Paragraph 2 of the Eighth Schedule to the Act, only refers to corporeal property. This does, however, not mean that mining rights and prospecting rights would not fall within the ambit of paragraph 2 of the Eighth Schedule to the Act as a result of those rights being regarded as incorporeal property, they could fall within the ambit of paragraph 2 of the Eighth Schedule to the Act based on the wording ‘any interest or right of whatever nature to or in immovable property’ which refers to incorporeal property.

5.2 Legal nature of prospecting rights and mining rights

When considering prospecting rights, and with reference to the *Vansa Vanadium* case (*supra*), it can be said that, based on the common law right to prospect, such a right would not be regarded as ‘any interest or right of whatever nature to or in immovable property’ to the extent that the right to prospect does not provide the option to lease or purchase the mineral right or land to which it relates. Dale⁷⁷ concludes that the common law concept ascribed to mineral rights have been, to an extent, abolished by the introduction of the MPRDA, more specifically, section 2(a) and 2(b) as well as section 3(1) and 3(2) of the MPRDA. This is due to mineral rights ceasing to exist within the transitional periods of 1, 2 and 5 years (based the aforementioned sections, including Schedule II to the MRPDA).

The rationale for the above statement is due to the wording that can be found in section 4 of the MPRDA. Section 4 of the MPRDA reads as follows:

⁷⁷ Dale, M.O. [*et al.*], 2005. *South African Mineral and Petroleum Law* at paragraph 98.1.2 on page 137.

‘(1) When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.

(2) In so far as the common law is inconsistent with this Act, this Act prevails.’

It is clear from the above wording that the MPRDA will take preference where there is a conflict between common law and the MPRDA. In this regard, Dale (*supra*) is of the view that section 4(2) of the MRPDA needs to be considered in light of the normal principle of statutory interpretation in that the legislature intends to depart from the common law as little as possible. Dale (*supra*) continues to state that this specific principle of statutory interpretation needs to be read with section 4(1) of the MPRDA. As a result of the of the MPRDA taking preference over the common law where inconsistencies exist, the nature of the rights granted under the MPRDA need to be considered to determine whether the nature would be similar to that established based on common law.

The first port of call in determining what is the nature of prospecting rights and mining rights would be section 5 of the MPRDA. The heading of section 5 of the MPRDA reads *‘Legal nature of prospecting right, mining right, exploration right or production right, and rights of holders thereof’*. In this regard, section 5 of the MPRDA provides the following:

‘5(1) A prospecting right, mining right, exploration right or production right granted in terms of this Act and registered in terms of the Mining Titles Registration Act, 1967, (Act No. 16 of 1967), is a limited real right in respect of the mineral or petroleum and the land to which such right relates.

(2) The holder of a prospecting right, mining right, exploration right or production 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.

(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may—

(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, mining, exploration or production, as the case may be;

- (b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;*
- (c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;*
- (cA) subject to section 59B of the Diamonds Act, 1986 (Act No. 56 of 1986), (in the case of diamond) remove and dispose of any diamond found during the course of mining operations;*
- (d) subject to the National Water Act, 1998 (Act No. 36 of 1998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and*
- (e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act.'*

In addition to the above, sections 19(1) and 25(1) of the MPRDA also provide for additional rights and obligations with regard to the holders of prospecting rights and mining rights respectively. In this regard, section 19(1) provides as follows:

'(1) In addition to the rights referred to in section 5, the holder of a prospecting right has—

- (a) subject to section 18, the exclusive right to apply for and be granted a renewal of the prospecting right in respect of the mineral and prospecting area in question;*
- (b) subject to subsection (2), the exclusive right to apply for and be granted a mining right in respect of the mineral and prospecting area in question; and*

(c) *subject to the permission referred to in section 20, the exclusive right to remove and dispose of any mineral to which such right relates and which is found during the course of prospecting.*

Section 25(1), with regard to the rights and obligations of holders of mining rights, states as follows:

(1) In addition to the rights referred to in section 5, the holder of a mining right has, subject to section 24, the exclusive right to apply for and be granted a renewal of the mining right in respect of the mineral and mining area in question.

The above sections in the MPRDA clearly stipulates that a mining right is a limited real right. In this regard, and based on the analogy set out earlier in this research report, a limited real right to property is incorporeal and accordingly, would not be regarded as immovable property as the term is used in paragraph 2 of the Eighth Schedule to the Act. Regardless of this, due to the fact that a mining right entitles the holder thereof to minerals which is situated in the land, such a right would be regarded as ‘any interest or right of whatever nature to or in immovable property’ as set out in paragraph 2 of the Eighth Schedule to the Act.

Similar reasons those stated above can be relied on to determine the nature of a prospecting right. The difference, however, is whether a prospecting right in fact entitles the holder to the minerals found in the land. The MPRDA regards a prospecting right as a limited real right as the MPRDA presumably regards a prospecting right as a right to the land on which the holder can prospect as well as the minerals situated in the land. It could, however, be argued that a prospecting right is a limited real right, but this will only be the case to the extent that a prospector is in fact entitled to remove the minerals from the land. Section 20 of the MPRDA contains the answer to this question. As set out above, section 19 provides for the rights of the holder of a prospecting right. Section 19(1)(c) of the MPRDA specifically provides that a holder of a prospecting right has ‘*the exclusive right to remove and dispose of any mineral to which such right relates and which is found during the course of prospecting*’, however, such an exclusive right is subject to section 20 of the MPRDA. Section 20 of the MPRDA provides that

(1) Subject to subsection (2), the holder of a prospecting right may only remove and dispose for his or her own account any mineral found by such holder in the course of

prospecting operations conducted pursuant to such prospecting right in such quantities as may be required to conduct tests on it or to identify or analyse it.

(2) The holder of a prospecting right must obtain the Minister's written permission to remove and dispose for such holder's own account of diamonds and bulk samples of any other minerals found by such holder in the course of prospecting operations.'

The provisions of section 20(1) which, in addition to section 19, stipulate that the holder of a prospecting right may remove and dispose for its own account any minerals found while conducting prospecting operations, is also subject to the provisions of section 20(2). In terms of section 20(2), and as can be seen from the extract above, a prospecting right holder must firstly obtain the written consent from the Minister of the Department of Mineral Resources before minerals can be removed and disposed of for the holder's own account. In the recent amendment bill to the MPRDA⁷⁸, a proposed change is made to the wording of section 20(2). It is proposed that the section provides as follows:

'The holder of a prospecting right shall not without the prior written permission of the Minister remove bulk samples of any mineral from a prospecting area for any purpose subject to such conditions as the Minister may determine.'

Furthermore, it is also proposed that an additional sub-section to section 20, section 20(3), be inserted to the MPRDA. The proposed section 20(3) will read as follows:

'(3) Any person who applies for permission to remove and dispose of minerals in terms of this section must obtain an environmental authorisation if such person has not done so in terms of section 16 (4) (c) of this Act.'

When considering the MPRDA as it is currently worded, it is clear that the holder of a prospecting right must firstly obtain the approval from the Minister before it can remove and dispose of minerals found while conducting prospecting operations. On this score alone, a prospecting right should in fact not be regarded as a limited real right as provided in section 5 of the MPRDA as a prospecting right in itself does not entitle the holder thereof to land or minerals contained therein. Taking into account the proposed changes to the MPRDA, an additional approval from an environmental perspective and in terms of section 16(4) of the MPRDA is

⁷⁸ Mineral and Petroleum Resources Development Amendment Bill, 2013.

required before the prospecting right holder will be allowed to remove and dispose of minerals for its own account. It can therefore be said that due to the provisions of section 20(2) and the proposed section 20(3), the holder of a prospecting right does not have the unreserved right to any minerals found while conducting its prospecting operations and there is therefore not a limited real right to minerals as suggested in section 5(3)(c) of the MPRDA. It is submitted that a prospecting right does not give rise to a limited real right to minerals and therefore property. Although a prospecting right would be regarded as a limited real right in terms of common law and based on the MPRDA, a prospecting right would not be regarded immovable property or 'any interest or right of whatever nature to or in immovable property' as provided in paragraph 2 of the Eighth Schedule to the Act based on the analysis of immovable property in Chapter 2.

SARS, in its 'Comprehensive Guide to Capital Gains Tax' (Issue 4) ('the SARS CGT Guide'), does not agree with the view that a prospecting right should not be regarded as immovable property.⁷⁹ In the SARS CGT Guide, it is indicated that '*new order rights under the Mineral and Petroleum Resources Development Act 28 of 2002 comprise immovable property*'. When further considering SARS' CGT Guide it becomes apparent that the view that new order rights comprise of immovable property is based on section 5(1) of the MPRDA as well as specific reference to section 5(3) of the MPRDA. The SARS CGT guide provides that '*The holder of such a right is entitled to access the land [s 5(3)(a)], prospect, mine, explore or produce [s 5(3)(b)], and remove and dispose of any minerals found [s 5(3)(c)].*' The classification of new order rights (which includes prospecting rights and mining rights) as immovable property, is furthermore based on the characteristics of immovable property. In this regard, the SARS CGT Guide provides that a new order right and immovable property share the following characteristics:

'it is a real right (albeit limited),

it is 'in respect of' the mineral and the related land (these words imply a close causal connection with the mineral and the land),

the subject matter of the right can only be removed by causing damage to the land (the land has to be excavated to extract the mineral), and

it is not dissimilar to a long-term lease, a usufruct or a servitude, all of which are rights of enjoyment of immovable property.'

⁷⁹ SARS CGT Guide at paragraph 4.1.2.3 on page 37.

A question that can be asked is whether the SARS CGT Guide in fact considered a prospecting right in isolation and whether the above view would change should it be considered in isolation. Putting this question aside for the moment, although the view expressed in the SARS CGT Guide can be supported that a prospecting right and mining right are limited real rights and immovable property based on the common law, following from the analysis in Chapter 2, it cannot be said that a prospecting right and a mining right constitutes immovable property as this term is used in paragraph 2 of the Eighth Schedule to the Act.

5.3 Conclusion

The analogy set out above together with that in the previous chapters, leads to the following conclusions:

- A mining right granted in terms of the MPRDA should not be regarded as ‘immovable property’ as referred to in paragraph 2 of the Eighth Schedule to the Act and similarly, a prospecting right granted in terms of the MPRDA should also not be regarded as ‘immovable property’ as referred to in paragraph 2 of the Eighth Schedule to the Act.
- Due to the fact that a mining right is a limited real right which entitles the holder of such mining right to the minerals situated in the land over which the mining right was granted, a mining right issued in terms of the MPRDA would be regarded as ‘any interest or right of whatever nature to or in immovable property’.
- Two opposing views can be reached as to whether a prospecting right granted in terms of the MPRDA would be regarded as ‘any interest or right of whatever nature to or in immovable property’ or not. Firstly, should the above analogy be followed whereby it is contented that due to the approvals required from the Minister in terms of section 20 of the MPRDA, a prospecting right without such approvals would not be regarded as ‘any interest or right of whatever nature to or in immovable property’ as there is no right to minerals in the land on which it is conducting prospecting operations until such time as the approval has obtained or a mining right granted. Secondly, to the extent that the holder of a prospecting right granted in terms of the MPRDA also obtained the necessary approvals from the Minister as provided in section 20 of the MPRDA, such a prospecting right would be regarded as ‘any interest or right of whatever nature to or in

immovable property' as it also entitles the holder of such prospecting right to the mineral situated in the land on which it is conducting prospecting operations.

6 Chapter 5: Interpretation of paragraph 2(2) of the Eighth Schedule to the Act

It has now been established that although a prospecting right or mining right would not be regarded as immovable property as used in paragraph 2 of the Eighth Schedule to the Act, a mining right would be regarded as ‘any interest or right of whatever nature to or in immovable property’ and a prospecting right, to the extent that the consent from the Minister is obtained as provided in section 20 of the MPRDA, would also constitute ‘any interest or right of whatever nature to or in immovable property’. Paragraph 2(2) continues to expand on what is meant by the phrase ‘any interest or right of whatever nature to or in immovable property’. Paragraph 2(2) of the Eighth Schedule to the Act provides that:

‘(2) For purposes of subparagraph (1)(b)(i), an interest in immovable property situated in the Republic includes any equity shares held by a person in a company or ownership or the right to ownership of a person in any other entity or a vested interest of a person in any assets of any trust, if—

- (a) 80 per cent or more of the market value of those equity shares, ownership or right to ownership or vested interest, as the case may be, at the time of disposal thereof is attributable directly or indirectly to immovable property held otherwise than as trading stock; and*
- (b) in the case of a company or other entity, that person (whether alone or together with any connected person in relation to that person), directly or indirectly, holds at least 20 per cent of the equity shares in that company or ownership or right to ownership of that other entity.’*

The above section provides substance as to what the legislature intended when referring to the phrase ‘any interest or right of whatever nature to or in immovable property’ and it is therefore not necessary to determine what the meaning of this phrase is.

Paragraph 2(2)(a) provides that ‘any interest or right of whatever nature to or in immovable property’ firstly includes any equity shares and that, secondly, in order for ‘any interest or right of whatever nature to or in immovable property’ to exist, 80% or more of the market value of such equity shares needs to be attributed to immovable property. It becomes apparent that the requirement is for 80% of the market value of the equity shares to be attributed to ‘immovable

property’ and not ‘any interest or right of whatever nature to or in immovable property’. It could therefore be said that, based on the analysis’s in Chapter 3 which determined what is meant by the term ‘immovable property’ as used in paragraph 2 of the Eighth Schedule to the Act, the value of the equity shares must be attributed to corporeal property and not any rights to or in such corporeal property.

Based on the discussion in Chapter 4 where it was concluded that prospecting rights granted under the MPRDA do not constitute corporeal property and therefore not immovable property as used in paragraph 2 of the Eighth Schedule to the Act, a view is put forward that the value of prospecting rights held by the holder should not be attributed to immovable property as referred to in paragraph 2(2)(a) of the Eighth Schedule to the Act when conducting the 80% analysis. A similar view can be taken when considering mining rights. As concluded in Chapter 4, a mining right is a limited real right which entitles the holder of such mining right to the minerals situated in the land over which the mining right was granted and it would therefore constitute ‘any interest or right of whatever nature to or in immovable property’. Following the above analysis, the 80% requirement provided for in paragraph 2(2)(a) of the Eighth Schedule to the Act should only be conducted with regards to immovable property as the term is used in paragraph 2 of the Eighth Schedule to the Act. The value attributed to a mining right granted in terms of the MPRDA should therefore not be attributed to immovable property as a mining right is regarded incorporeal property and immovable property, as used in paragraph 2 of the Eighth Schedule to the Act, only refers to corporeal property.

In addition to the above, the reference to the words ‘directly or indirectly’ indicates that consideration should not only be given to immovable property held by the company in which a shareholder holds shares, but also to any immovable property held by any other company in which such a company holds a shareholding. This view is also illustrated in the SARS CGT Guide which supports the fact that a ‘look through’ approach needs to be adopted.⁸⁰

The view expressed above that the value of mining rights and prospecting rights should not be included when conducting the 80% analysis could be seen as a robust interpretation. The reason being is that taking such a view could be regarded as ignoring the intention of the legislature and taking such a view could potentially give rise to a result which is unfair, unjust or unreasonable. A question which can be asked is whether the legislature inserted paragraph 2 of the Eighth Schedule to the Act whilst having the direct or indirect disposal of prospecting rights or mining rights in mind. In order to potentially provide an answer to this question,

⁸⁰ SARS CGT Guide, page 47 example 2.

consideration could be given to the explanatory memorandum to Act 19 of 2001 which inserted paragraph 2(2) of the Eighth Schedule to the Act.⁸¹

The Explanatory Memorandum Taxation Laws Amendment Bill, 2001⁸² states as follows regarding paragraph 2(2) of the Eighth Schedule to the Act:

'The paragraph proposes a distinction between a resident, which is a defined word in section 1, and a non-resident. It is proposed that-

- *a resident be subject to CGT on the disposal of any asset whether in the Republic or outside,*
- *a non-resident be subject to CGT on the disposal of-*
 - (i) any immovable property or any interest or right in immovable property situated in the Republic,*
 - (ii) any asset of a permanent establishment of the non-resident through which a trade is carried on in the Republic.*

It is proposed that the term "an interest in immovable property situated in the Republic" which is held by a non-resident, be broadened. It is proposed that it include a direct or indirect interest of at least 20 per cent held by a person (together with a connected person in relation to that person) in the equity share capital of a company or other entity, where 80 per cent or more of the market value of the net asset value of the company or other entity at the time of disposal is attributable to immovable property situated in the Republic.'

The above part of the Explanatory Memorandum Taxation Laws Amendment Bill, 2001 does not provide any additional insight into paragraph 2 of the Eighth Schedule to the Act than what is already provided in the Act. It is therefore not clear from the above extract whether, at the time when paragraph 2 of the Eighth Schedule to the Act was inserted, consideration was given to the direct or indirect disposal of prospecting rights or mining rights. The analysis on what exactly the intention was of the legislature when paragraph 2 of the Eighth Schedule to the Act was inserted and whether such an intention in actual fact considered the direct or indirect disposal of prospecting rights or mining rights is dealt with below.

⁸¹ Refer to note below paragraph 2(2) of the Eighth Schedule to the Act.

⁸² Refer to Clause 38 on page 34.

6.1 Conclusion

To conclude on the above analysis and by taking into account any arguments put forward in the previous chapters, the following conclusions could be reached:

- Both prospecting rights and mining rights granted in terms of the MPRDA would not be regarded as immovable property as that term is used in paragraph 2 of the Eighth Schedule to the Act.
- Due to a mining right being regarded as ‘any interest or right of whatever nature to or in immovable property’ and a prospecting right, at best, being regarded as the same (to the extent that approvals required from the Minister in terms of section 20 of the MPRDA is granted), the direct or indirect disposal of a prospecting right or mining right could fall within the ambit of paragraph 2 of the Eighth Schedule to the Act.
- Although a prospecting right and mining right would be regarded as ‘any interest or right of whatever nature to or in immovable property’ when conducting the 80% analysis provided for in paragraph 2(2)(a) of the Eighth Schedule to the Act, a robust interpretation is that the value of a mining right or prospecting right would not be attributed to immovable property as provided in paragraph 2(2) of the Eighth Schedule to the Act.
- A conservative approach could, however, be adopted to include and attribute the value of a mining right to immovable property as provided in paragraph 2(2) of the Eighth Schedule to the Act.

7 Chapter 6: Prospecting right and prospecting information

In Chapter 5 above, it was concluded that a prospecting right granted in terms of the MPRDA would firstly not be regarded as immovable property as provided in paragraph 2 of the Eighth Schedule to the Act and secondly, that the value of prospecting right should not be attributed to immovable property as provided in paragraph 2(2) of the Eighth Schedule to the Act when conducting the 80% analysis. To the extent that it is argued that a prospecting right is in fact immovable property as envisaged in paragraph 2 of the Eighth Schedule to the Act and its value would therefore be included in the 80% analysis, consideration should be given as to how to determine the value of a prospecting right.

The market value of a prospecting right would, based on case law,⁸³ be regarded as the amount which a willing seller and a willing buyer of such a prospecting right would agree to if they negotiated on an equal footing and to the extent that both parties were fully informed of the advantages and disadvantages of the potential of the prospecting right and the underlying land to which the prospecting right relates. It should also be noted that when the value of a prospecting right is being determined, consideration should be given to the value of the prospecting right itself, as well as the information gained while conducting prospecting operations. One leading case which has been followed in many subsequent decisions is the case of *Loubser en Andere v Suid-Afrikaanse Spoorwee en Hawens*⁸⁴.

The *Loubser* case (*supra*) dealt with an issue regarding expropriation in which the court had to decide whether the value of information regarding the minerals (in this case, clay), which was obtained by virtue of conducting extensive tests, could be used to determine the value that should be paid to the owner of the land on which the minerals were situated. In the *Loubser* case (*supra*), the parties made two different submissions to the court. Firstly, the owner of the land which was being expropriated was of the view that all the information obtained through the extensive tests should be taken into account to determine the value which should be paid to him as the information related to the value of the clay situated on the land. The owner was further of the view that the fact that this information was obtained after expropriation is irrelevant. On the other hand, the view was put forward that the information should not be taken into account to determine the value to be paid to the owner of the land. The reason for this view is due to the

⁸³ *Pietermaritzburg Cooperation v South African Breweries Limited* 1911 AD at 510, 515 and 516, *Minister of Water Affairs v Mostert & Others* 1966 (4) SA 690 AD at 722, 726 and 727 and *Sekretaris van Binnelandse Inkomste v Connan* 36 SATC 87.

⁸⁴ 1976 (4) SA 589 T.

argument that a willing buyer and willing seller would not be aware of this information at the time of expropriation. Botha R rejected both these views and held:

‘...op die getuienis, dat nòg 'n denkbeeldige koper nòg 'n denkbeeldige verkoper in die normale loop van sake in die ope mark voor die sluiting van 'n koopkontrak ten aansien van die betrokke grond die toetse op die klei sou laat uitvoer het van die soort wat die eisers ná die onteiening laat doen het in omstandighede waaronder die resultate daarvan enige invloed sou gehad het op die vasstelling van die koopprys van die grond....derhalwe, dat die resultate van sodanige toetse buite beskouing gelaat moes word...’

Botha J decided that where a transaction is contemplated between a willing buyer and a willing seller regarding the disposal of land for the purpose of exploiting the clay situated on such land, such a willing buyer and willing seller would insist on tests to be conducted on the clay to determine the value thereof. The results of such tests would thereafter be considered by the willing buyer and willing seller when the purchase price of the land is determined. What was, however, held in this specific case was that the test conducted in that instance was of such a magnitude from a scope and cost perspective that, in all probability, no willing seller or willing buyer would go through so much time, effort and expenses to conduct similar tests. The result of the test was therefore not included in determining the amount payable to the owner of the land.

The principle that can be drawn from the above case is that where there a holder of a prospecting right intends to dispose of such a prospecting right, and the holder is also privy to knowledge of the nature and value of minerals situated on a specific piece of land, a purchaser would in all probability be willing to pay more to acquire such a prospecting right and the information attached thereto. A question that may be asked is whether the value of such knowledge should be attributed to the prospecting right where such knowledge is not available in the public domain. In *Lynell and Another v Inland Revenue Commissioners*⁸⁵ it had to be decided whether confidential information not known to the public could be used in order to determine the value of a deceased estate for purposes of determining estate duty. In the *Lynell and Another* case (*supra*) it was held that:

‘...facts that would be unknown to the hypothetical purchaser should be left out of account in assessing the value of shares pursuant to s 7(5) of the Finance Act, 1894, and in the present case the company’s accounts for the financial year ending 31 July

⁸⁵ (1968) 3 All E.R. 330.

1962, and the chairman's speech at the annual general meeting on 7 June 1962, should be disregarded, as they would not have been known to the hypothetical purchaser at Mrs L's death in May, 1962...'

It is therefore clear from the above that confidential information which is not known to the public should not be included when valuing the shares of a company.

It can be seen from the above two cases that the information which is attached to an asset (i.e. in the first case attached to the land and in the second case attached to the shares) can have a significant impact on the value of the actual asset itself. When this analogy is applied to a prospecting right, a conclusion can be drawn that the information which is gathered while conducting prospecting information would be extremely valuable and therefore contribute to the overall value of the prospecting right itself. What also becomes evident is that in this instance, two assets can be identified. Firstly, the prospecting right itself and secondly the information gathered while conducting prospecting activities. The question which now arises is what exactly the nature of this additional asset (i.e. the information) would be and whether this asset could be regarded as immovable property as provided in paragraph 2 of the Eighth Schedule to the Act.

When the nature of information or data is considered, it can be said that information is not something that can be physically felt or touched. The only part of the information or data which can be physically felt or touched is the object on which the information or data is stored. This could include, *inter alia*, paper, a memory stick, a compact disc (i.e. a CD) etc. Considering the principles of Roman law, corporeal property was regarded as thing that could be felt or touched while intangible things were regarded as incorporeal property.⁸⁶ It can therefore be said that intellectual property (i.e. data and knowledge), or also known as immaterial property, would be regarded as incorporeal property. This is confirmed by Silberberg and Schoeman (*supra*)⁸⁷ where it was said that '*Rights such as real rights, personal rights and immaterial property rights are examples of incorporeals.*'

It was already concluded in Chapter 3 that, following the analysis of *Ex Parte Master of the Supreme Court*⁸⁸, incorporeal property can be divided into movable property and immovable property. The classification of incorporeal property between movable property and immovable property is based on the nature of the object to which the incorporeal right relates (refer to the

⁸⁶ Silberberg and Schoeman (*supra*) page 14, paragraph 2.4.1.1 and references cited therein.

⁸⁷ At page 33, paragraph 3.3.2.1 with reference to *Sunnyface Marine Ltd v Hitory Ltd (Trans Orient Steel Ltd and Another Intervening) Sunnyface Marine Ltd v Great River Shipping Inc* 1992 (2) SA 653 (C) at 656A-B; *Desai v Desai* 1993 (3) SA 874 (N) at 879C-D.

⁸⁸ 1906 TS 563 at 565 – 566.

discussion in Chapter 3). In applying this to intellectual (or immaterial) property, it cannot be said that the object of the immaterial property is something that can be regarded as corporeal. It is further said that immaterial property is the tangible expression of human skills, or inventions of the human mind, embodied in a tangible form and which is, by law, owned by the author thereof.⁸⁹ As mentioned above, the only part of information or data (i.e. intellectual property) which can be physically felt or touched is the object on which the information or data is stored. It can further be said that, based on the above reference to what constitutes immaterial property, where intellectual property is contained on a tangible device (i.e. a memory stick, CD etc.) the value of such intellectual property cannot be ascribed to the tangible device but should be ascribed to the actual information contained on such a device. The above discussion leads to the conclusion that intellectual property would be regarded as incorporeal property, however, the nature of the object of such incorporeal property cannot be ascribed to either movable or immovable property. It can therefore be concluded that intellectual property would not be regarded as ‘immovable property’ as that term is used in paragraph 2(2)(a) of the Eighth Schedule to the Act.

In applying the above to a prospecting right, it was stated above that a prospecting right consists of the actual right itself as well as the information gathered whilst conducting prospecting operations. The information gathered whilst conducting prospecting information would therefore not be regarded as ‘immovable property’ as that term is used in paragraph 2(2)(a) of the Eighth Schedule to the Act.

Considering the above, the possibility exists that a prospecting right can be sold without the prospecting information or the prospecting information without the prospecting right. Instances where this may occur is where a prospector conducts prospecting operations and sells the prospecting information obtained through conducting prospecting operations to a person who is interested in conducting the actual mining operations. The purchaser will then either apply for a transfer of the current prospecting right, apply for a separate prospecting right over the same area on which prospecting operations is conducted or, to the extent possible, apply for a mining right over such an area. In order for this to occur, the current prospecting right holder would need to distance itself from such a prospecting right in order for the purchaser to apply for same. This is required due to a prospecting right not being granted over the same area to two respective prospectors and that the current holder of the prospecting right having the exclusive right to apply for a mining right. The converse to this scenario is where a person is interested in acquiring a prospecting right over a prospecting area, but prefers to conduct its own prospecting

⁸⁹ Strauss, S.A., *Huldigingsbundel vir W A Joubert* at 231.

operations. In such an instance, the holder would only dispose of the prospecting right and not the prospecting information gained whilst conducting prospecting operations. In both these instances, it should be noted that a section 11 consent in terms of the MPRDA would be required and furthermore, where both the prospecting right and prospecting information is acquired or in the event of only one of the two being acquired, a valuation would need to be conducted in order to attribute the purchase consideration between the prospecting right and the prospecting information gained.

The valuation of the prospecting right versus the prospecting information would also be dependent upon the status of both assets. This statement can be illustrated by the following examples:

- Where a prospector has the intention of selling prospecting information which has been obtained by such a prospector by virtue of conducting prospecting operations, the value of such prospecting information would be dependent on the status of the prospecting right.
- To the extent that the prospecting right has lapsed and the prospector did not apply for an extension of such a prospecting right whilst another party already applied and has been granted a prospecting right over the prospecting area, the prospecting information would be of little value.
- The reason for this is due to the fact that the prospecting information is applicable to a specific prospecting area and without having access to the prospecting area, the prospecting information cannot be utilised.
- On the other hand, the quality of the data will depend on the extent of the prospecting activities that has been conducted. To the extent that the prospecting information is of a high quality and extensive prospecting operations have been conducted which will provide a potential buyer with sufficient information as to the type of quality of the minerals contained in the prospecting area, the value of the prospecting right would in all probability increase.
- The reason for the increase in the prospecting right could indirectly be ascribed to the value of the minerals which could be extracted from the prospecting area. This would, by implication, increase the value of the right to apply for a mining right which can only be obtained once you are the holder of a prospecting right.

Although there are various ways in which assets could be valued, the above examples and analogy with regard to the value of a prospecting right and prospecting information is merely

illustrative and based on common sense and general business principles. The valuation of prospecting rights and prospecting information (and mining rights for that matter) fall outside the scope of this research report and has therefore not been considered in further detail. Due to the specialised nature of valuations, it would in any even be prudent to obtain the input from an expert valuator before a value is ascribed to a prospecting right, prospecting information or a mining right.

7.1 Conclusion

In order to conclude and summarise the above analysis, the following findings can be put forward:

- It is possible to distinguish a prospecting right and prospecting information as two separate and distinct assets.
- Prospecting information would be regarded as intellectual property, the object of which cannot be ascribed to either movable or immovable property. Accordingly, prospecting information would not be regarded as ‘immovable property’ as that term is used in paragraph 2(2)(a) of the Eighth Schedule to the Act.
- The value of a prospecting right and prospecting information is dependent on the status of both assets. In order to attribute an accurate value to either asset, the opinion of an expert valuator would be required.

8 Chapter 7: Conducting the 80% analysis

As referred to in Chapter 5 above, paragraph 2(2) of the Eighth Schedule to the Act provides that an ‘interest in immovable property’ would exist where *‘80 per cent or more of the market value of those equity shares, ownership or right to ownership or vested interest, as the case may be, at the time of disposal thereof is attributable directly or indirectly to immovable property held otherwise than as trading stock...’*

In order to break down the above, it can be said that paragraph 2(2) of the Eighth Schedule to the Act will be applicable if:

- 80% or more of the market value of those equity shares, as at the time of the disposal thereof by the non-resident, ‘is attributable directly or indirectly to immovable property’ situated in South Africa and held as a capital asset (i.e. otherwise than as trading stock); and
- such non-resident directly or indirectly holds at least 20% of those equity shares.

It should be noted that all of the following requirements need to be met before a non-resident will be subject to capital gains tax in South Africa:

- the non-resident must directly or indirectly hold at least 20% of the equity shares being sold;
- there must be immovable property situated in South Africa; and
- 80% or more of the market value of those equity shares must be attributable directly or indirectly to such immovable property at the time of the disposal thereof.

Based on the above, to the extent that any of the above requirements are not met, the provisions of paragraph 2(1)(b)(i) and paragraph 2(2) of the Eighth Schedule to the Act will not apply.

The methodology to be followed in how to value equity shares to determine whether the 80% requirement would be met is not stipulated in either the Act or the Eighth Schedule to the Act. Some guidance is however provided in the SARS CGT Guide. The SARS CGT Guide refers to the following principles with reference to paragraph 2(2) of the Eighth Schedule to the Act⁹⁰:

- In the case of multi-tier structures the 80%+ test is determined at the top of the chain;

⁹⁰ SARS CGT Guide paragraph 4.2 on page 47 and 48.

- The gross market value of the assets of the applicable company must be analysed instead of the market value of its net assets (i.e. any debt in the companies should be ignored);
- The gross assets so valued must be split between movable and immovable assets to determine the ratio between the two broad asset classes; and
- The value of vested rights in a trust should be included.

The SARS CGT Guide provides that when the 80% analysis is conducted to determine whether 80% or more of the value of shares in a company is directly or indirectly attributable to immovable property in South Africa ‘any liabilities in the company must be disregarded’.⁹¹ It is indicated that this approach is in line with the Organisation for Economic Co-operation and Development’s (‘OECD’) interpretation 156 of article 13(4) of the OECD model treaty, which provides as follows⁹²:

‘4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.’

On page 49 of the SARS CGT Guide, it is further provided that:

‘For accounting purposes self-generated goodwill is not reflected in the financial statements of an entity.’⁹³ However, it is an asset forming part of the market value of the interest in an entity and should not be lost sight of when determining whether or not 80% or more of an entity’s assets comprise immovable property.’

From the above it is clear the any asset not necessarily reflected on the balance sheet of a company (i.e. goodwill) must be taken into account when determining whether 80% or more of the value of shares in a company are directly or indirectly attributable to immovable.

The types of interest which are regarded as constituting immovable property in South Africa consist of any equity shares held by a person in a company, the ownership or the right to ownership of a person in any other entity and a vested interest of a person in any assets of any trust.⁹⁴ The SARS CGT Guide stipulates that *‘The reference to ownership or a right to ownership in any other entity is designed to bring within the ambit of the provision interests in foreign entities such as the Liechtenstein stiftung and anstalt.’*

⁹¹ SARS CGT Guide paragraph 4.2 on page 48.

⁹² SARS CGT Guide paragraph 4.2 on page 48.

⁹³ IAS 38 (AC 129) in paragraph 48.

⁹⁴ SARS CGT Guide paragraph 4.2 on page 48, table 1.

Although the SARS CGT Guide provides that there will be no exception for the instances where shares are held in a listed South African company, it does, however, stipulate that the provisions of any application double tax agreement must be considered before a conclusion is made on whether the disposal by a non-resident will be subject to capital gains tax in South Africa⁹⁵ (i.e. as provided in paragraph 2 of the Eighth Schedule to the Act). Although the implications of any double tax agreement does not specifically form part of this research report, the general principles of a double tax agreement will be considered in order to provide context to the statement made in the SARS CGT Guide that the application of any double tax agreement must be considered before concluding on whether the disposal by a non-resident will be subject to capital gains tax in South Africa.

The wording, and therefore application of double tax agreements are dependent on the country with which the double tax agreement has been entered into. A number of countries, including South Africa, currently utilises the OECD's Model Tax Convention ('OECD MTC') as a framework for double tax agreements, thereby resulting in many double tax agreements having a similar structure and containing similar meanings to the different concepts. In general, Article 13 of a double tax agreement contains the rules regarding capital gains tax. In order to illustrate what is referred to in the SARS CGT Guide, specific reference to the provisions of the double tax agreement between South Africa and Cyprus will be made.⁹⁶ Article 13(1) of the double tax agreement between South Africa and Cyprus provides for the direct disposal of immovable property, article 13(2) provides for the disposal of movable property which forms part of the business property of a permanent establishment, article 13(3) provides for the disposal of ships, aircraft or road transport vehicles while article 13(4) provides for the disposal of any other property than that referred to above. Article 13(4) of the double tax agreement between South Africa and Cyprus reads as follows:

'4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3, shall be taxable only in the Contracting State of which the alienator is a resident.'

Based on general legal principles, and as confirmed in the SARS CGT Guide, shares are movable and would therefore not be regarded as immovable property.⁹⁷ Thus, based on the above summary of the respective sub-articles contained in article 13 of the double tax agreement

⁹⁵ SARS CGT Guide paragraph 4.2 on page 49.

⁹⁶ Although the double tax agreements between South Africa and Mauritius (as it currently reads), Luxembourg and the Netherlands read similarly.

⁹⁷ SARS CGT Guide paragraph 4.1.2.4 page 38 with reference to Section 35(1) of the Companies Act 71 of 2008.

between South Africa and Cyprus, the disposal of shares would fall within the ambit of article 13(4) of the double tax agreement between South Africa and Cyprus.⁹⁸ This will result in the disposal of the shares, regardless of whether it is attributed to immovable property or not, not being taxable in South Africa to the extent that the person disposing of such shares is a resident in Cyprus for tax purposes. It is for this precise reason that many offshore investors prefer to enter the South African market through favourable tax jurisdictions like Cyprus, Mauritius, Luxembourg or the Netherlands. It should however be noted that South Africa is in the process of re-negotiating and amending various DTAs which will, if implemented, result in the taxing right being granted to South Africa where a disposal in a property rich company is involved. The DTA as it reads on the day of disposal should therefore be considered.

To apply the above principles to the 80% analysis, a view exists that when the market value of the company has been calculated, such a market value is attributed to each asset held by the company (excluding any debt claim such a company would have) in the same ratio as the asset as that asset relates over the total assets. The assets to which the market value has been attributed is thereafter split between movable assets and immovable assets. Up until this point, the method seems to be very similar to the guidance provided in the SARS CGT Guide. The above method goes further to the guidance provided in the SARS CGT Guide and attributes any 'excess' amount left over after a value has been attributed to all the assets to the mining right, prospecting right or prospecting information, as the case may be. The flaw in this method is that the excess amount attributed to either the mining right, prospecting right or prospecting information might not be the true reflection of the actual value of such mining right, prospecting right or prospecting information and that the value would only be obtained once a thorough valuation has been conducted on these assets. Due to the novel nature of these calculations and the fact that the method followed in conducting these calculations has not been adjudicated by our courts, it is difficult to provide a firm view as to the correctness of this approach and whether it would be accepted in a court of law.

8.1 Conclusion

Based on the above analysis, although there is not a prescribed method which could be implemented when determining whether 80% or more of the value of shares in a company is directly or indirectly attributable to immovable, the SARS CGT Guide provides some general guidelines. What again becomes apparent is that in order to conduct the 80% analysis, the

⁹⁸ And by implication the double tax agreement between South Africa and Mauritius (as it currently stands), Luxembourg and the Netherlands.

market value of the assets (of the gross assets based on the SARS CGT Guide) is required which, by implication, requires a valuation to be conducted. As concluded in Chapter 6 above, the opinion of an expert valuator would be required when attempting to establish and attribute values to assets (with specific reference to prospecting right, mining rights and prospecting information). The applicability of any relevant double tax agreement should also be borne in mind before the 80% analysis is conducted.

9 Chapter 8: Conclusion

The chapters in this research report have undertaken a technical review of the various forms of rights in terms of Roman law (and Roman Dutch law) in order to determine the common law meaning of the word ‘immovable property’. This led us to the subsequent interpretation of the term ‘immovable property’ as well as the phrase ‘any interest or right of whatever nature to or in immovable property’ as used in paragraph 2 of the Eighth Schedule to the Act. This was necessary in order to determine whether a prospecting right, prospecting information or a mining right would be regarded as immovable property as provided in paragraph 2 of the Eighth Schedule to the Act which, if true, could result in non-resident shareholders disposing of shares in South African companies holding prospecting rights, mining rights or a combination of both being subject to South African capital gains tax upon the disposal of their interests.

To summarise the conclusions reached in the respective chapters of this research report, it can be said that ‘immovable property’ is generally regarded as land and everything which is attached to such land, either by way of natural or artificial means, and which cannot be removed from such land without causing damage to that land or without that land losing its identity.⁹⁹ When considering the meaning of the word ‘immovable property as used in paragraph 2 of the Eighth Schedule to the Act, such a term refers to corporeal property and would not include any incorporeal property. Although a prospecting right and a mining right would be regarded as a limited real right, neither a prospecting right nor a mining right would be regarded as immovable property as that term is used in paragraph 2 of the Eighth Schedule to the Act. A mining right would, however, be regarded as ‘any interest or right of whatever nature to or in immovable property’. A prospecting right on the other hand, could be regarded as ‘any interest or right of whatever nature to or in immovable property’ depending on the consents obtained from the Minister of the Department of Mineral Resources. Prospecting information would not be regarded as ‘immovable property’ or ‘any interest or right of whatever nature to or in immovable property’.

Although a mining right and potentially a prospecting right would be regarded as ‘any interest or right of whatever nature to or in immovable property’ and by implication result in the application of paragraph 2(1)(b)(i) of the Eighth Schedule to the Act, consideration would firstly be given to the 80% analysis. The fact that a prospecting right or mining right could be regarded as ‘any interest or right of whatever nature to or in immovable property’ would not by

⁹⁹ LAWSA (*supra*) paragraph 224, Silberberg and Schoeman (*supra*) page 40, paragraph 3.2.2.2 (a).

implication result in the 80% requirement being met. The possibility exists that when an analysis is conducted on the assets of a company and a split is done between movable assets and immovable assets, more than 20% of the market value of the shares of a company could be attributed to movable property, resulting the 80% requirement not being met (regardless of the presence of a prospecting right or mining right). It is for this reason imperative that a valuation is obtained from an expert and that such a valuation is accurately attributed to the respective assets owned by the company.

To the extent that the 80% requirement is in fact met, a further possibility exists that, depending on the jurisdiction of the non-resident shareholder, a favourable double tax agreement could be in place between South Africa and such a jurisdiction. This could therefore result in South Africa not being awarded the taxing right upon the disposal of shares where 80% or more of the market value of the shares in the company is attributed to immovable property situated in South Africa.

The applicability of paragraph 2 of the Eighth Schedule to the Act to the disposal by non-resident shareholders of shares in a South African company which hold a prospecting right, mining right or a combination of both is therefore dependent on the result of the 80% analysis as well as the application of any applicable double tax agreement.

9.1 Recommendation for further studies

The analysis in this research report left a couple of unanswered question which could be explored in more detail in order to obtain further clarity regarding the interpretation and application of paragraph 2 of the Eighth Schedule to the Act. One such question is the intention of the legislature when paragraph 2 of the Eighth Schedule to the Act was inserted. It might be worthwhile to explore the nature of the mischief the legislature intended to catch by the insertion of paragraph 2 of the Eighth Schedule to the Act. Of particular interest is whether the legislature in fact considered the nature and the disposal of prospecting rights and mining rights when this paragraph was inserted. Could it be that paragraph 2 of the Eighth Schedule to the Act was inserted without the disposal of a prospecting right and a mining right in mind and that a view was subsequently provided in the SARS CGT Guide which led to both these rights being regarded as immovable property, thereby resulting in the direct or indirect disposal of both these rights falling within the ambit of paragraph 2 of the Eighth Schedule to the Act? Based on the short length of the section in the SARS CGT Guide addressing this issue, it would further be

worthwhile to ascertain the extent of the research done before this view was put forward in the SARS CGT Guide.

In addition to the above, another question, not specifically mentioned in this research report, which could be explored is the exact nature of what a mining right entitles the holder thereof to. In general, a mining right entitles the holder thereof with the right to mine and to extract minerals from the mining area. The question which could be explored is whether there is an argument which could be put forward that a mining right only entitles the holder to the minerals, which is movable, and not the land in which it is found. Although the SARS CGT Guide classifies a mining right as immovable based on the definition provided in LAWSA (*supra*) as well as the characteristics which a mining right shares with immovable property¹⁰⁰, it could be explored whether sufficient reasons exist that, although minerals are immovable due to the land in which they are situated, the minerals can only be processed and sold once it is severed from the earth. As long as the minerals are situated in the earth, it cannot be applied or sold in the necessary form to achieve the desired objective of mining. The question therefore arises whether it should not be regarded that a mining right in actual fact only entitles the holder thereof to the mineral once it is severed from the earth, which would then be regarded as a movable asset.

¹⁰⁰ SARS CGT Guide paragraph 4.2 on page 37.

10 Reference List

10.1 Statutes

- Alienation of Land Act 68 of 1981.
- Companies Act 71 of 2008.
- Deeds Registries Act 47 of 1937.
- Mineral and Petroleum Resources Development Act 28 of 2002.
- Administration of Estates Act 66 of 1965.
- Income Tax Act 58 of 1962.

10.2 Books

- Badenhorst, P.J., Pienaar, J.M., Mostert, H., van Rooyen, M., 2006. *Silberberg and Schoeman's: The Law of Property*. 5th ed. South Africa: LexisNexis Butterworths South Africa.
- Badenhorst, P.J. Mostert, H., 2004. *Mineral and Petroleum Law of South Africa: Commentary and Statutes*. Claremont: Juta & Co Ltd.
- Dale, M.O. [et al.], 2005. *South African Mineral and Petroleum Law*. Durban: LexisNexis.
- De Ville, J.R., 2000. *Constitutional and Statutory Interpretation*. Cape Town: Interdoc Consultants (Pty) Ltd.
- Lee, R.W., Honore, A.M., Erasmus, H.J., 1983. *Family, Things and Succession*. 2nd ed. Durban: Butterworths.
- Franklin, B.L.S., Kaplan, M., 1982. *The Mining and Mineral Laws of South Africa*. 2nd ed. Durban: Butterworths.
- Joubert, W.A. (ed.), 2001. *The Law of South Africa. Vol. 25(1)*. 2nd ed. Durban: Butterworths.
- Joubert, W.A. (ed.), 1987. *The Law of South Africa. Vol. 27*. 1st reissue. Durban: Butterworths.
- Strauss, S.A., 1988. *Huldigingsbundel vir W A Joubert*. Durban: Butterworths.
- Van der Keessel, D G, 1961-1975. *Praelectiones Iuris Hodiernie Grotii Introductionem ad Iurisprudentiam Hollandicam* (Van Warmelo Cronin, Pont). Amsterdam/Cape Town. Balkema.
- Voet, J., Percival, P., 1955. *The selective Voet being the Commentary on the Pandects [Paris edition of 1829] by Johannes Voet [1647 - 1713] and the supplement to that work by Johannes van der Linden [1756 - 1835]*. Durban: Butterworths.

10.3 Cases

- *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421.
- *Bazaars Ltd v Chandler's Ltd* 1947 2 All SA 233 (A).
- *British South Africa Company v Bulawayo Municipality* 1919 AD 84.
- *Brunton v Stamp Duties Commissioners* 1913 AC 747.
- *Cape Brandy Syndicate v Inland Revenue Commissioners* 1921(1) KB 64.
- *Cape Coast Exploration Ltd v Registrar of Deeds* 1935 CPD 200
- *Coronation Collieries v Malan* 1911 TPD 577.
- *Cullinan v Pistorius* 1903 ORC 33.
- *Desai v Desai* 1993 (3) SA 874 (N).
- *Ditcher v Denison* 11 Moore P.C. 325.
- *Estate Napier v Trustee Estate Weir* 1927 SR 33.
- *Ex parte Geldenhuys* 1926 OPD 155.
- *Ex Parte Master of the Supreme Court* 1906 TS 563.
- *Ex parte the Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466.
- *Ex parte Zunckel* 1937 NPD 295.
- *Gophir Diamond Co. v Wood* (1902) 1 Ch. D. 950.
- *Government of the Republic of South Africa v Oceana Development Investment Trust Plc* 1989(1) SA 35 T.
- *Hollins v Registrar of Deed* 1904 TS 603.
- *Hopper v Cochran* (1934) 7 SATC 90.
- *Israelsohn v Commissioner for Inland Revenue* 1952 3 All SA 427 (A).
- *ITC 321* 8 SATC 236.
- *Kotze v Civil Commissioner of Namaqualand* (1900) 17 SC 37.
- *Lazarus and Jackson v Wessels, Oliver, and the Coronation Freehold Estates, Town, and Mines Ltd* 1903 TS 499 at 510.
- *Loubser en Andere v Suid-Afrikaanse Spoorwee en Hawens* 1976(4) SA 589.
- *Lynell and Another v Inland Revenue Commissioners* (1968) 3 All E.R. 330.
- *Master of the Supreme Court* 1906 TS 563.
- *Michell v De Villiers* (1900) 17 SC 85.
- *Minister of Water Affairs v Mostert & Others* 1966(4) SA 690.
- *Olley v Maasdrorp and Another* 1948 (4) SA 657 (AD).
- *Ovenstone v Secretary for Inland Revenue* 1980 2 All SA 25 (A).

- *Pietermaritzburg Cooperation v South African Breweries Limited* 1911 AD 501.
- *Pito v Deeb* 1967 (1) SA (O).
- *Principal Immigration Officer v Hawabu* 1936 AD 26.
- *R v Herman* 1937 AD 168 174.
- *R v Standard Tea & Coffee Co (Pty) Ltd* 1951 4 All SA 265 (A).
- *Rocher v Registrar of Deeds* 1911 TPD 311.
- *Roopsingh v Rural Licensing Board for Lower Tugela and Others* 1950 (4) SA 248 (N).
- *Scheckter v Kolbe* 1955 (3) SA 109 (GW).
- *SANTAM Versekeringsmpy Bpk v Kemp* 322.
- *S v Makandigona* 1981 4 All SA 626 (ZA).
- *Sekretaris van Binnelandse Inkomste v Connan* 36 SATC 87.
- *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Edms) Bpk* 1966 4 SA 434 (A).
- *Smith v Hancock* 1894 (2) Ch. C. 377.
- *South African Transport Services v Olgar and Another* 1986(2) SA 684A.
- *Sunnyface Marine Ltd v Hitory Ltd (Trans Orient Steel Ltd and Another Intervening) Sunnyface Marine Ltd v Great River Shipping Inc* 1992 (2) SA 653 (C).
- *Van den Berg v SAS&H* 1980 3 All SA 156 (T).
- *Van der Hoven v Cutting* 1903 TS 299.
- *Van Vuren and Others v Registrar of Deeds* 1907 TS 289.
- *Vansa Vanadium SA Limited V Registrar of Deeds and Others* 1979(2) SA 784.
- *Wellworths Bazaars Ltd v Chandler's Ltd* 1947 2 All SA 233 (A).

10.4 Online Resources

- Forget Oil: 15 Countries Sitting On a Fortune Of Metals And Minerals - Gus Lubin, available at <http://www.businessinsider.com/15-resources-rich-countires-2010-4?op=1>. [Accessed 28 March 2013].
- The World's Top 5 Mining Countries - Cori O'Donnell, available at <http://www.wealthwire.com/news/global/2372>. [Accessed 28 March 2013].
- Tax Quotes, Funny Tax Quotes That Unravel the Mystery of Income Tax - Simran Khurana, available at <http://quotations.about.com/od/moretypes/a/taxquotes1.htm>. [Accessed 28 March 2013].

10.5 Guides

- South African Revenue Services, *Comprehensive Guide to Capital Gains Tax Guide*, Issue 4.

10.6 Journals

- Badenhorst, P.J., Olivier, N.J.J., 1997. Die aard van regte ingevolge n propsekteerkontrak – Vansa Vanadium SA Ltd v Registrar of Deed. *Journal of South African Law*, 583, 594.

10.7 Other

- Explanatory Memorandum Taxation Laws Amendment Bill, 2001.
- International Accounting Standards 38.
- Mineral and Petroleum Resources Development Amendment Bill, [B15-2013].