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A REVIEW OF THE GOVERNMENT GAZETTE AND NEW DEVELOPMENTS IN LAW

Vanishing rights challenged

Radically different mineral legal system introduced by new law under scrutiny

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THE Mineral and Petroleum Resources Development Act of 2002, which was passed into law on May 1 2004, had a profound effect on the legal institution of mineral rights in SA.

The now repealed Minerals Act of 1991 had the effect of reinstating the common law relating to mineral rights in respect of all classes of minerals. The essence of the common law and of the Minerals Act of 1991 was encapsulated in section 5(1), which says that "...the holder of the right to any mineral in respect of land or tailings, as the case may be, or any person who has acquired the consent of such holder in accordance with section 6(1)(b) or

9(1)(b), shall have the right to enter upon such land or the land on which such tailings are situated ... together with such persons, plant or equipment as may be required for purposes of prospecting or mining and to prospect and mine for such mineral on or in such land or tailings, as the case may be, and to dispose thereof".

The Mineral and Petroleum Resources Development Act (development act) introduced a radically different mineral legal system and without even mentioning the term "mineral rights" or its elimination as a concept in the body of the act, the legislation recognised and recorded that the mineral and petroleum resources of SA are the common heritage of all the people of the SA and that the state thereafter shall be the custodian thereof for the



benefit of all South Africans. As custodian of SA's mineral and petroleum resources, the state was to grant, issue, refuse, control, administer, and manage the various types of prospecting, mining and other rights and permits it was authorised to issue as concessions under the act.

The first but as yet unreported judgment dealing with the effect of the development act on mineral rights as that legal institution was understood until April 30 2004 was handed down recently by Judge Hartzenberg, in the Pretoria North High Court.

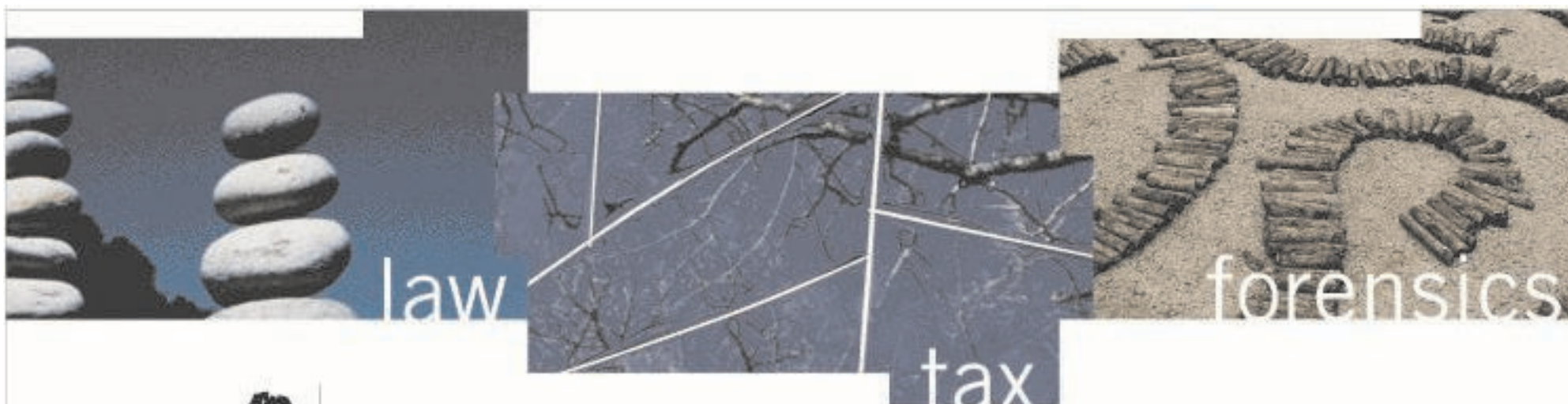
The judgment dealt with exceptions (preliminary legal challenges)

raised by the minerals and energy minister in two cases brought against her by plaintiffs who were previously owners of coal rights and clay rights respectively and who claimed compensation on the grounds that these rights had ceased to exist after May 1 2004. The minister excepted to the claims on two grounds, one of which was that the development act did not provide for the expropriation of the plaintiffs' rights and that insufficient facts had been alleged by the plaintiffs rendering their claims vague and embarrassing.

In his judgment, Judge Hartzenberg sought to compare the rights which the plaintiffs held before May 1

2004, namely, freely transferable real rights, which allowed the holder to prospect or mine for the particular types of minerals to which the rights related. These rights had considerable commercial value and could, he pointed out, be bequeathed or sold and, furthermore, the holder was under no obligation immediately to exploit his rights. The judgment goes on to describe how the position changed on and after May 1 when the state came to acquire and exercise sovereignty over all mineral and petroleum resources within SA. The judge considered item 8

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