34/98

REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 320/95

In the matter between :

THE MINISTER OF LAND AFFAIRS Appellant

and

RAND MINES LTD Respondent

Coram : Smalberger, Zulman, Streicher JJA **et** Melunsky, Farlam AJJA.

Heard : 9 10 and 11 March 1998

Delivered : 15 May 1998

JUDGMENT

FARLAM AJA/

FARLAM AJA:

On 13 April 1995 Comrie J in the Bophuthatswana Provincial Division granted an order in favour of respondent against appellant in the following terms:.

"1. That it be and is hereby declared that -

The Applicant is the holder of the full free and sole right and interest in and to:-

1.1 all forms of granite, including gabbro, norite, syenite, diorite, adamellite, monzonite, pyroxenite, dolerite, diabase, gneiss, schist, hornfels, quartzite, meta-conglomerate, micro-dolerite, micro-syenite, micro-diorite, basalt, felsite, fine-grained gneiss mylonite and serpentinite;

1.2 all forms of marble, including travertine, dolomite, limestone, carbonatite and serpentinite;

suitable for use as dimension stone, on, in and under:-

(a) the property previously known as Welbekend No. 738 situate in the district of Rustenburg and now known as Welbekend 117, registration division JQ, Bophuthatswana; and

(b) the property previously known as Boschpoort No. 16 situate in the district of Rustenburg and now known as Boschpoort 288, registration Division JQ, Boputhatswana."

He also ordered appellant to pay respondent's costs, including those occasioned by the employment of two counsel.

Appellant now appeals, with leave from the court *a quo*, against this order. Comrie J's judgment has been reported as *Rand Mines Ltd v President of the Republic of South Africa and Another*, 1996 (3) SA 425 (B).

Respondent,which was formerly known as The Transvaal Consolidated Land and Exploration Company Limited, is the holder of certificates of rights to minerals in respect of the two farms mentioned in the order, namely Welbekend and Boschpoort.

In 1917 respondent, which since 1899 had been the owner of Welbekend, sold the property to Rustenburg Estates Ltd. In the deed of transfer registered pursuant to the sale the rights to minerals on the property were reserved to the respondent. Simultaneously with the registration of the deed of transfer on 11 May 1917 a certificate of mineral rights was registered in favour of respondent, which

reads, in so far as it is relevant for the purposes of this case, as follows:

> "NOW THEREFORE I, the Registrar of Deeds hereby certify that the said TRANSVAAL CONSOLIDATED LAND AND EXPLORATION COMPANY, LIMITED is the registered holder of the full, free and sole right and interest in and to all minerals, mineral substances and metals, precious stones, oil and coal, on in and under the said property, without any exception, together with the sole right to deal with, alienate and dispose of the same at will, subject to the following conditions and entitled to the following rights upon the said property:
>
> (1) The Company has the sole and exclusive rights to prospect, exploit and mine for such minerals, mineral substances and metals, precious stones, oil and coal at any time located on, in and under the land, and to deal with and turn to account, alienate and dispose of such rights from time to time at pleasure. At the termination of prospecting operations all shafts and other open places made by the Company shall be properly filled up or fenced in by the Company at its own expense.
>
> ...
>
> (3) The Company has the right to take any of the land it may from time to time require for the erection of buildings, works, machinery and dwelling houses for depositing sites for ore and/or tailings for the storage of water, and for all other purposes directly or indirectly connected with prospecting exploiting or mining on the said land; the land so taken shall be re-transferred to the Company at its expense, and upon re-

transfer it shall pay to the Owner in respect of any such area a price to be mutually agreed upon provided that if any dispute shall arise as to the price to be so paid, the same shall be submitted to arbitration in the usual way. It is however distinctly understood that in the event of any dispute as above arising the arbitrator or arbitrators shall consider and decide upon only the agricultural value of any land which the Company may desire to retake, which agricultural value shall be taken to be in no way affected by the value of the mineral rights of the property.

(4) As far as possible the Company shall not interfere with the crops standing at the commencement of any prospecting operations on the property but should such interference be unavoidable, of which the Company shall be the sole judge, the Company shall compensate the Owner for all damage caused by such operations to the Owner's then standing crops, the amount of such compensation failing mutual agreement to be fixed by arbitration as herein provided for.

(5) The right to minerals held by the Company shall include all such rights as under the Precious and Base Metals Act 1908 (Transvaal) or any other act, appertain to the holder of mineral rights, but the Owners shall, in the event of proclamation for gold, be entitled to all such rights as under the said Act appertain to an Owner of the surface rights."

In 1922 Rustenburg Estates Ltd sold the property to the Hon F.S. Malan, "in

his capacity as Minister in charge of Native Affairs for the Union of South Africa, in trust for the Bafokeng Tribe under Chief August Moghatle."

The second property involved in this appeal, Boschpoort, was acquired by respondent in 1892 and sold by it to "the Minister in charge of Native Affairs, in trust for the Two Hundred Natives whose names are set out in [a] Schedule attached". In the deed of transfer registered pursuant to the sale the rights to minerals on the property were reserved in favour of respondent and, simultaneously with the registration of the deed of transfer on 27 April 1923, a certificate of mineral rights was registered in respondent's favour. This certificate of mineral rights is, as far as is relevant, identically worded to the certificate registered in respect of Welbekend except that it speaks of "the full free and sole right and interest in and to all minerals, mineral substances and metals, oils, precious stones and coal on, in and under ...."

Although respondent ceded some of the mineral rights it held under the

certificates to Samancor Ltd and Rustenburg Platinum Mines Ltd in 1992 those relating *inter alia* to dimension stone (a term whose meaning I shall discuss presently) are still held by it.

It is common cause that appellant is the present owner of the two farms in his official capacity as trustee, in so far as the case relates to Welbekend, for the Bafokeng tribe and, in so far as the case relates to Boschpoort, for the two hundred persons listed in the schedule to the deed of transfer, their heirs, executors or assigns.

Respondent applied for the order granted in the court *a quo* to confirm that it was the holder of the full, free and sole right and interest in and to all granite and marble, as fully described in the order quoted above, which are suitable for use as dimension stone and which may be found on, in or under Welbekend and Boschpoort. In what follows I shall refer to Welbekend and Boschpoort as "the properties".

The extent of respondent's rights to minerals on the properties, including its rights to granite and marble, depends on a proper interpretation of the terms of the two certificates of mineral rights to which I have referred. In the founding affidavit filed on its behalf respondent set out what were described as the surrounding circumstances to aid the interpretation of the certificates of mineral rights in so far as they might be found to be ambiguous. In the result neither party's counsel contended that the certificates were ambiguous and the surrounding circumstances were not relied on in argument to elucidate the meaning of the certificates. It is accordingly unnecessary for me to summarise the extensive material set out in the affidavits dealing with the circumstances surrounding the reservation by respondent in its own favour of the mineral rights set out in the certificates of title.

Before dealing with the interpretive questions which arise for consideration in this matter, it is necessary to say something about the meaning of the expression "dimension stone" which is used in the order granted in the court *a quo*. Dr David

Twist, a professional geologist, whose affidavit was filed in support of respondent's application, said the following in paragraph 4.8 of his affidavit:

> "4.8 Dimension stone is today considered to be rock (igneous, sedimentary or metamorphic) that can be separated profitably from the crude natural rock formation (as blocks, slabs or sheets) for use in architecture and monuments. Normal industrial practice and economic reality dictates that dimension stone quarries that cannot be exploited profitably will be closed down. For that reason, therefore, I am of the view that there is a clear economic connotation to the term, even though this is not explicitly stated in many definitions."

On behalf of appellant there was filed an affidavit deposed to by Mr Johannes Verkes, a consulting geologist who has practised for his own account since 1988. He commented as follows on paragraph 4.8 of Twist's affidavit:

> "4.8 Ad 4.8
>
> Hierdie is die deponent se definisie. Op geen basis kan maatsteen op winsgewendheid geklassifiseer word. Die term maatsteenbedryf beskryf slegs die doel waarvoor ooreenkomste van natuurlike gesteentes gebruik gaan word. Die aanvaarding daarvan kan nie die fisiese eienskappe verander nie asook nie

die winsgewendheid van die ontginning daarvan nie. 'n Betrokke stof is 'n mineraal of 'n klip, of organiese stof soos steenkool, uit hoofde van die fisiese eienskappe daarvan en nie die ekonomiese suksesvolle ontginning daarvan nie. Dit sou beteken dat goudmyne wat teen 'n verlies werk, 'nie minerale' ontgin nie. Aldus die argument van die deponent beteken dit dat as graniet aanvanklik in die mark aanvaar word en aanvanklik winsgewend gemyn word en die mark verwerp dit later, dit dan 'n nie-mineraal word. Ek stem gevolglik nie saam met die definisie van die deponent nie. Maatsteen word in die publikasie bekend as Delfstowwe van Republiek van Suid-Afrika, 5de uitgawe, uitgegee deur die Departement van Mynwese en Geologiese opname op bl. 321, as volg gedefinieer: 'die benaming 'maatsteen' word bo 'bousteen' verkies omdat laasgenoemde so geïnterpreteer kan word dat dit gebreekte klip (aggregaat) of selfs bousand insluit. In 'The Dictionary of Mining, Mineral and Related Terms' van die United States Bureau of Mines, word 'dimension stone' soos volg beskryf: ('n vertaling). 'Natuurlik voorkomende rotsmateriaal gesny, gevorm of uitgesoek vir gebruik in blokke, plat stukke, plate of ander konstruksie eenhede met gespesifiseerde vorms of groottes, en gebruik vir buite- of binne dele van geboue, fondamente, beranding, plaveisel, plaveiklipwerk, bruê, keermure, of vir ander argiteks- of ingenieursdoeleindes. Hierdie term word ook gebruik vir klipblokke waarvan stukke met bepaalde afmetings gesny kan word. Marmer, graniet, kalksteen en sandsteen lewer die

> meeste maatsteen, hoewel leiklip, dioriet, basalt en diabaas ook daarby ingesluit word.' By hierdie gebruike kan gevoeg word dat sekere soorte klip, veral die donker stollingsgesteentes, in baie dele van die wêreld in gedenktekens, veral grafstene, gebruik word."

Comrie J (at p 427 H of his judgment) referred to the definition of dimension stone appearing in *The Shorter Oxford Dictionary*, viz stone "which is cut to specified dimensions".

In my opinion Verkes is correct in contending that it cannot be part of the definition of dimension stone that it be "separated profitably from the crude natural rock formation". (Indeed Twist conceded this in his replying affidavit.) Whether a profit is made or not will depend on economic factors which will from the nature of things vary from time to time. A decision as to whether material is a mineral or a mineral substance cannot depend on the state of the market or the cost of

exploiting a particular deposit thereof. In my opinion it must be accepted that the term dimension stone has the meaning given in *The Shorter Oxford Dictionary*. It is obvious, however, that granite and marble (to limit the discussion to the two substances which form the subject matter of this appeal) are only cut to specified dimensions, for use as blocks, slabs or sheets, in architecture and monuments, for purposes of profit: whether a profit is in fact made in respect of particular blocks, slabs or sheets so cut is neither here nor there.

Twist said in his affidavit that the rocks commonly used for dimension stone in South Africa include granite, marble, sandstone, quartzite, freestone and slate but, he added, the names used in the dimension stone industry for the various rocks require further definition, qualification and explanation. He then proceeded to deal more fully with each of these rocks. It is only necessary for me to quote the paragraphs dealing with granite and marble which read as follows:

"5.1 Granite:

5.1.1 In the field of geology, rock names are used extremely precisely with careful regard to the grain size, mineral contents, and chemical composition of the rock. In the strictly geological sense, a granite must satisfy several exacting requirements. It must, for example, contain:

(a) more than 20% of the mineral quartz

(b) more than 70% silica.

5.1.2 In the dimension stone industry, however, the geological names of rocks are used very loosely. Thus, the following rocks, although they are not granite in the strict geological sense, are all called 'granites', without regard to their mineral contents or chemical compositions:

(a) all coarsely crystalline igneous rocks such as gabbro, norite syenite, diorite, adamellite, monzonite, pyroxenite, dolerite and diabase;

(b) many coarsely crystalline metamorphic rocks such as gneiss, schist, hornfels, quartzite and meta-conglomerate;

(c) many finely crystalline igneous rocks such as micro-dolerite, micro-syenite, micro diorite, basalt, and felsite;

(d) many finely crystalline metamorphic rocks such as fine-grained gneiss, hornfels, quartzite, mylonite and serpentinite (the latter is also by some authorities considered to be a variety of marble).

5.1.3 If strict geological terms were universally applied, many

dozens of different names would be employed. Because the precise geological identification of a rock requires great knowledge and skill, geologists have long accepted the efficacy of the looser terminology for the non-geologists in the dimension stone industry.

5.1.4 The unifying characteristic of the loosely defined group of granites recognized in the dimension stone industry, is that the minerals they contain are predominantly hard: that is, most of the minerals would have a hardness of five or higher on Mohs' scale of hardness. This is an important concept because the hardness of the rock is proportional to the hardness of its component minerals, and this hardness has an important bearing on the costs and the equipment required, to quarry and process the rock into usable blocks, slabs and carved monuments."

(Verkes did not dispute what was said in these paragraphs except for the statement (in 5.1.3) that geologists have long accepted the efficacy of the looser terminology for the non-geologists in the dimension stone industry.)

In his reply Twist points out that Verkes himself uses the looser terminology in his affidavit, when speaking of "black granite" deposits near Belfast and

Machadodorp. He also gives examples of influential South African geologists who, for example, spoke of "Pretoria Granite" (which is technically norite, as pointed out by Twist in his earlier affidavit in a passage not challenged by Verkes.)

Twist then set out what he described as the characteristics of good dimension stone as follows:

> "6.1 It must be extractable in large blocks:
>
> 6.1.1 The economics of cutting and sawing make small blocks undesirable. Small blocks are, therefore, more difficult to sell and these command lower prices (on a equivalent volume basis) than large blocks.
>
> 6.1.2 Many granites and marbles are so cracked and veined that it is impossible to recover large blocks.
>
> 6.1.3 The size of the blocks that can be quarried influences the 'recovery' of the deposit. The recovery is the proportion of saleable material obtained to the proportion of waste that must be discarded. The recovery must be high enough to render exploitation profitable. Acceptable dimension stone quarries will typically yield recoveries of between 5 and 25% of the total volume extracted. The recovery that is acceptable is determined by individual operating costs and selling prices. If the recovery is too low, profitable exploitation cannot

continue. Poor recovery is one of the biggest factors contributing to the closure of uneconomic quarries.

6.2 The reserves must be substantial to justify the capitalization and marketing costs. A company will hardly bother to go to the time and trouble of developing a new market if the reserves are only sufficient for a few years. In most cases, companies require reserves that will last for at least a few decades before developing a new quarry.

6.3 The site must be relatively accessible and the infrastructure must be adequate. Few granites or marbles located in remote or inhospitable places can be exploited because the operating transport costs are prohibitive.

6.4 It must have an attractive appearance and be free of flaws:

6.4.1 Most granites, marbles and other stones are so bland or unattractive that they cannot be marketed at any price. Even if the rock is attractive, perfectly natural phenomena (such as white spots or crystals against a dark background) will be regarded (in the dimension stone industry) as flaws, making it impossible to sell the material.

6.4.2 Dimension stone is, therefore, attractive, or it would not find buyers at any price. Some dimension stones are extraordinarily beautiful, and could be displayed as pieces of art in their own right. Dimension stone normally appeals to those who love natural things, and it has a certain timeless or eternal quality - it existed long before man was born, and it will remain long after man

has gone. Compared to other construction materials like cement and wood, it is remarkably durable. Modern homes often incorporate polished granite kitchen tops instead of the more traditional wood with Formica veneers. Although such kitchen tops are expensive, this is off-set by the beauty and practicality of granite. It does not attract dirt and it can be cleaned with the most aggressive cleaning agents, it does not stain, it does not scratch, it requires no maintenance, and it lasts forever.

6.4.3 It must be uniform in colour and grain size. Buyers will not buy a stone that differs from block to block or from slab to slab. An architect does not want the colour of his building to vary from floor to floor. A client wishing to order a monument wants to know exactly what he is ordering. Many stones, including many deposits of granite and marbles, are so heterogeneous that they can never meet this requirement.

6.5 A dimension stone must occupy its own unique market niche, or its price and qualities must be so competitive that it can penetrate the niche of another material. For example, pink granites are readily available for about $250 per cubic metre in the Mediterranean. This is not much greater than the transport costs from South Africa to the Mediterranean. Because of transport costs, South African pink granites cannot be sold in Mediterranean countries for $250. Therefore, a South African pink granite, no matter how attractive, would need a special feature (a unique niche) in order to convince Italian buyers to

pay a premium above the price of the local pink granite."

In so far as the statements related to granite and marble they were not disputed by Verkes although, in reacting to paragraph 6.1.3, he reiterated his standpoint that the economic exploitability of a rock or granite has nothing to do with the classification as to whether it is regarded as a dimension stone or not, a point on which I have already expressed my preference for his view.

In paragraph 7 of his affidavit Twist deals with the topic of exploitable dimension stone as follows:

"7.1 Granite and marble (and all other rock types) are extremely abundant in the earth's crust and are found on all the continental masses. Nevertheless stone which is suitable for exploitation as dimension stone is uncommon.

7.1.1 The reason why only very few deposits of stone are suitable for use as dimension stone is that dimension stone must exhibit some specific characteristics, such as those described in paragraph 6 hereof, that are far from abundant in most granites and marbles (and other rock types). It is the rather infrequent combination of these

favourable characteristics that renders an otherwise ordinary rock an economically viable dimension stone.

7.1.2 If suitable dimension stone was ubiquitously available, all quarries would be located adjacent or close to major cities. Where adequate transport and infrastructure are available some quarries can even be located in remote deserts, and others in freezing climates where it is impossible to work for more than a few months each year.

7.1.3 An abundance of stone suitable for dimension stone would also obviate the need for international trade in such stone. It would be astonishing for Italians to import 'African Red', (which is produced near Potgietersrus), 'African Juparana' (which is produced near Parys), 'Rustenburg Grey' (which is produced near Rustenburg) or 'Belfast Black' (which is produced near Belfast) from South Africa, if similar materials were available in Italy, or even in north Africa. However, ... in 1971 granite exports constituted the 11th largest mineral export of South Africa (excluding gold and platinum).

7.1.4 One of the best selling granites in the world, the so-called 'Blue Pearl', is quarried in Southern Norway. No similar granite has been discovered elsewhere. If similar granite could be exploited elsewhere, it is unlikely that 'Blue Pearl' would be exploited in Norway where labour costs are among the highest in the world.

7.2 Thus, exploitable dimension stone with the requisite

> characteristics is not common. For that reason, considerable expenditure is incurred in the exploration for new occurences, and all the major South African producers employ professional geologists to conduct this exploration. The exploration is not confined to South Africa. Local companies are known to have done considerable exploration in Namibia, Angola, and Zimbabwe. Some of the local companies have international links and are involved with the evaluation of dimension stone prospects on other continents."

Verkes does not dispute what is said in this paragraph save for repeating his standpoint regarding the irrelevancy of the economic exploitability of a rock in its classification as dimension stone.

In regard to the statement in paragraph 7.1.3 that "in 1971 granite exports constituted the 11th largest mineral export of South Africa (excluding gold and platinum)" Verkes denies that granite is a mineral, geologically or in ordinary speech and refers to a publication entitled *The Global Status of the South African Minerals Economy and Data Summaries of its Key Commodities*, by C F Vermaak, published by the Geological Society of South Africa, in which 21 key commodities

of the South African minerals economy were discussed and granite and marble were not mentioned.

In his replying affidavit Twist points out that Vermaak's work seems, as appears from its foreword, to be concerned with "commodities of the greatest *strategic* importance" and that it is accordingly understandable that no reference was made therein to dimension stone which is, as Twist puts it, "patently non-strategic". To refute the suggestion that dimension stone and in particular granite and marble are not regarded by eminent authorities as minerals he referred, *inter alia,* to official government statistics appearing in the *South African Yearbook* where the granite production figures for 1947 to 1950 appear under the heading "Mineral Sales of the Union of South Africa".

In paragraph 8 of his affidavit Twist dealt with the value of dimension stone as follows:

"Because of the rarity of stone which has the characteristics described

in paragraph 6 hereof, dimension stone has a value far in excess of other stone without those characteristics, but of identical geological nature and chemical composition.

8.1 One of the more expensive and widely used dimension stones is the 'Belfast Black', which is quarried near Belfast in the eastern Transvaal. This rock retails for around US $2000 or, at today's conversion rates, well over R6 000, per cubic metre, Free On Board, in Durban.

8.2 The Norwegian granite known as 'Blue Pearl', is also widely used and even more expensive than the 'Belfast Black'.

8.3 More common dimension stones produced in southern Africa sell in the price range US $400 to US $1000 per cubic metre, while the very cheapest dimension stones on the international market are probably available for about US $250 per cubic metre.

8.4 If the prices of dimension stones are compared to the retail prices of crushed aggregates, which may be made from stone with exactly the same chemical and geological composition but lacking the characteristics referred to in paragraph 6 hereof, and which are quoted in a few tens of rand per cubic metre, it is readily apparent that the value of dimensional blocks of granite is greatly in excess of their simple bulk value.

8.5 Moreover, considering that the prices quoted earlier in paragraphs 8.1 and 8.3 are in respect of blocks of granite in their raw form, those values are only a fraction of the final value that will be ascribed to the material once it has been processed into finished slabs and monuments."

Verkes replied to the introductory part of this paragraph as follows:

> "Ek stem nie saam met hierdie bewering nie. Wat die deponent moet sê is dat die een tipe graniet bv. swart graniet wat as maatsteen gebruik word, 'n hoër markwaarde het as bv. rooi graniet wat vir dieselfde doel aangewend word maar ook net op 'n bepaalde tydstip. Dit mag wees dat die mark verander en die situasie omgedraai kan word binne 'n paar jaar. Die pryse wat in 1993 behaal word deur bv. swart graniet is baie laer as die pryse wat in 1990 behaal is deur dieselfde produk. Dit is korrek dat verskillende tipe klip of gesteentes verskillende markwaardes het."

He agreed with paragraphs 8.1, 8.2, 8.3 and 8.5 and commented as follows on paragraph 8.4:

> "Die feit dat graniet vir maatsteen of as aggregaat gebruik word, verander nie die aard daarvan nie nl. dat dit 'n graniet is en bly. Waar 'n blok graniet bv. nie bemark kan word nie omdat die kleur bv. *onaanvaarbaar is, kan dit in aggregaat gemaal word en dan vir* padboudoeleindes aangewend word en 'n waarde verkry deurdat dit dan in kleiner stukkies opgebreek is. Ek stem saam met die bewerings mits die betrokke materiaal aanvaarbaar is in die mark. Soms word graniet fyn gemaak tot die grootte van growwe sout, hergesementeer en as panele vir buiteafwerking van geboue gebruik."

Twist's response to this comment reads as follows:

> "It is obvious that the ultimate application of the stone cannot change the nature thereof. However, if a block of granite lacks the correct colour, or is otherwise flawed, then it is not dimension stone and cannot be sold as such. The fact remains, and the Deponent seems to admit this, that granite which can be used as dimension stone has a value far higher than granite which can be used as aggregate and, therefore, has a value greatly in excess of its simple bulk value."

Twist's affidavit also contains a great deal of information about the historical development of the dimension stone industry both abroad and in South Africa. It is clear from this evidence that as far back as the beginning of the present century dimension stone (including granite and marble) was being exploited for profit in South Africa and that it had an intrinsic value apart from its weight and bulk.

At p 428 C Comrie J mentions that he was referred during the course of argument to two recent unreported judgments in cases bearing a close resemblance to the present matter, viz the judgment of Mynhardt J in *Rand Mines Ltd v (1) The*

Government of the Province of Northern Transvaal and (2) Lebowa Mineral Trust, a judgment delivered in the Transvaal Provincial Division on 15 September 1994 (the appeal against which was argued before us together with the appeal in the present matter) and the judgment of Fine A J in *Rand Mines Ltd v (1) Martinus Jacobus Potgieter, (2) Petrus Jacobus Joubert and (3) Hugomond (Pty) Ltd*, a judgment delivered in the same division on 14 September 1994. The main affidavits dealing with geological matters in those two cases were also deposed to by Twist and Verkes and contain substantially the same material as that contained in their affidavits filed in this matter.

At pp 10-13 of his judgment Fine A J sets out a summary which was handed up to him during the course of argument of the salient points raised by both experts in relation to the history of the dimension stone industry. It was extracted from the affidavits before him and was accepted as a fair summary. In my view it can also be accepted as a fair summary of the main points in the affidavits of Twist and

Verkes filed in this matter dealing with the history of the dimension stone industry in this country. It reads as follows:

"1. In 1932, in a *memoire*, one A L HALL, an expert geologist dealing with extensive quarrying activities in the area immediately north of Pretoria, observed that Pretoria granite, today known as Rustenburg granite (which is technically norite), was present and was being quarried 'for more than 30 years'. [The] book was published in 1932, so that it seems that prior to 1902 dimensional blocks of granite of local origin had already been exploited and used in local building.

2. In an earlier publication on the geology of the Barberton district in 1918 Hall had described quarrying of a very attractive ornamental green granite, and there was a fair variety of rock suitable for ornamental purposes as regards appearance, consistency and good polish but, apart from granite, few occurrences were sufficiently large or uniform in quality to furnish a reliable industrial basis.

3. By 1919 it was already understood and accepted that good granite deposits needed to be consistent and uniform in quality, capable of taking a good polish, and attractive in appearance so as to be able to furnish a reliable industrial base.

4. In a 1920 *memoire* of Hall, he described a black granite being quarried for tombstones, and emanating from the Northern Transvaal.

5. In 1919 a geological survey by T G Trevor, a mining inspector, was published, dealing with marble deposits on the farms Marble Hall and Scherp Arabie, in the Transvaal. The report concludes with the observation that the deposits at Marble Hall were a great national asset and a future source of wealth for the government.

6. [In] 1919 dimension stone was recognised as an expensive material; it was sought after to decorate both monumental and construction applications, its value being not its bulk or availability but its strength and beauty, and the dimension stone industry was already an international import/export business.

7. In 1924 dimensional blocks of dark grey Pretoria granite were being quarried in the area north of Pretoria, and further quarries of red granite were being developed to the north-east of Pretoria.

8. By 1924 the value and beauty of dimension stone was already thoroughly appreciated. The Pretoria granite was being railed to much wider markets throughout the 'Union', and overseas markets were being sought.

9. By 1924 dimensional blocks of a different granite 'Pietersburg granite' were being exploited and mined in the Northern Transvaal. At the same time, [from] a report filed by one Wagner, reviewing the Geological Review of the Granite Dimension Stone in South Africa, it appears that technical aspects of the dimension stone business were well understood, both from the perspective of quarrying methodology

> and with regard to both the specific characteristics and aesthetic and other qualities of the rock itself."

At p 13 of his judgment Fine A J expressed the view, with which I agree:

> "The fair inference from all these facts is that dimension stone was, during the period under consideration, recognised as an expensive material and was sought after to decorate both monumental and construction applications, its value lying in its strength and beauty, not in its bulk, size or availability."

In his replying affidavit Twist drew attention to the final chapter in Hall's 1932 *Memoir on the Bushveld Complex* (referred to in paragraph 1 of the summary as quoted above). In this chapter, which is headed "Summary Account of the Mineral Resources of the Bushveld", are described gold, silver, platinum, tin, soda and various other substances which are clearly minerals on any definition, as well as "igneous building and ornamental stones" (granite, norite, etc), which, as Twist points out, would be classed as dimension stone in modern terminology.

In the course of his judgment Comrie J said (at p 431 D) that he would have

been prepared to hold, "given the wide language of the 1917 and 1923 grants" (by which I take it he meant the 1917 and 1923 reservations) that because granite and marble suitable for use as dimension stone presently qualify (so he was satisfied) as minerals or mineral substances, and because the evidence adduced did not indicate that in 1917 or 1923 there was a belief among interested parties that marble and granite suitable for use as dimension stone were not minerals, there was no reason to suppose that they intended to exclude granite and marble suitable for use as dimension stone or did not intend to include them. He was accordingly of the view that respondent should succeed on that basis even if it could not be found that in 1917 granite and marble suitable for use as dimension stone were regarded as minerals.

The learned judge's reasoning on the point is contained in the following extract from his judgment (at 430 A-E):

"It seems to me, with respect, that in many instances the grant of

mineral rights may be in terms which are so clear or so wide that it would be unnecessary, or even misleading, to attempt to fathom, perhaps many years after the event, what the parties to the grant or the community believed, or by inference probably believed, were minerals at the time.

I may illustrate this point by repeating two examples which, in simpler form, I put to counsel for the respondents in the course of argument. In the first example A sells his farm to B in 1920 but, thinking that there may be chrome on the property, reserves the mineral rights upon the same terms as were employed for Welbekend and Boschpoort. Decades later, after the mineral and surface rights may have changed hands several times, gold is discovered in exploitable quantities on the farm. Counsel had little hesitation in saying that the gold vests in the holder of the mineral rights for the reason that gold was a known mineral in 1920 and would presumably have been present to the minds of A and B when they agreed on the reservation of 'all minerals ... without any exception'. In the second example the facts are the same except that the substance which is discovered decades later is a brand new mineral, highly valuable in the computer industry, which mineral no one knew existed in 1920. Counsel felt that the answer on the changed facts might be different. I do not see why that should be so, given the wide language of the grant: '*all* minerals ... without *any* exception' (my emphasis). To hold otherwise arguably requires one to imply a qualification in every reservation of mineral rights such as: all minerals presently recognised as such."

He accepted (at 430 F-I) that it may be necessary to ascertain whether a substance was regarded as a mineral at the time of the reservation where there is real reason to suppose that the parties to the original reservation of mineral rights intended to exclude certain substances or did not intend to include them, for example, where they contracted on the basis that a certain substance was not a mineral because of a long line of judicial decisions to the effect it was not. Because, however, he was satisfied, as I have said, that the evidence did not indicate that interested parties in 1917 believed that marble and granite suitable for use as dimension stone was not a mineral, he considered that this factor did not play a rôle in this case.

Mr *Grobler,* who appeared for respondent, did not rely on this part of Comrie J's judgment. He conceded that it was necessary for respondent to establish that, in the case of Welbekend, granite and marble suitable for use as dimension stone were covered by the words "minerals" or "mineral substances" in

"the vernacular of the mining world, the commercial world and landowners at the time of the grant" (to use a phrase appearing in the judgment of James L J in *Hext v Gill* (1872) 7 Ch App 699 at 719 and approved by Lord Halsbury L C in *Lord Provost and Magistrates of Glasgow v Farie* [1888] 13 AC 657 (HL) at 669 and cited with approval many times since, both in the United Kingdom and South Africa - see, e g, *Bazley v Bongwan Gas Springs (Pty) Ltd,* 1935 NPD 247 at 261).

In my view this concession was correctly made. The point was actually considered by the Court of Session in a case decided in 1912, *Marquis of Linlithgow and Young's Paraffin Light and Mineral Oil Company Ltd v North British Railway Company* 1912 SC 1327. The facts were that a canal, which subsequently came to be owned by the railway company, was constructed in the early part of the 19th Century partly through lands belonging to Lord Linlithgow. It traversed the Linlithgow shale field. In 1818, when the original canal undertakers took possession of the land, shale was, as Lord Macmillan, who appeared in the

case, put it in a lecture he delivered in 1931, which is printed in his book *Law and Other Things*, (at p 157), "regarded merely as rubbish and of no value to anyone". The Union Canal Act which was passed in 1817 provided that the land to be taken and used for the canal should vest in the company but that the mines and minerals "within or under" the land should be reserved to the owner of the land who might work them. It gave the company the right to stop the working of any mines and minerals under or near the canal but provided that if it exercised this right it had to pay the owner of the mines and minerals the value thereof. As Lord Macmillan explained (op. cit. p 157) "mineral oil became known as a commercial commodity only after Young's famous patents, the pioneer patents of the great modern oil industry, were taken out" in the 1850's. Indeed Young's Paraffin Light and Mineral Oil Company Ltd leased the land in question from Lord Linlithgow and as mineral tenant joined him in instituting the action. The Court of Session held that the relevant date for deciding what minerals were reserved to the previous owner of the

land which vested in the canal company was 1818 when possession was transferred and as nobody knew in 1818 that oil shale (which by the middle of the 19th Century had "assumed its place among the commercial minerals" - to use the expression employed by the Lord President (Lord Dunedin) at 1352) could be worked to produce oil, it was not a mineral in 1818 and accordingly it was not reserved to the previous owner when the land on which the canal was built vested in the canal company.

If it is accepted that the concept "mineral" is not a static one, as this Court accepted in the case (to which I shall refer later) of *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein, and Others* 1985 (4) SA 773 (A) at 803 E - 804 B, then it must follow, as I see it, that a person who sells his or her property, subject to a reservation of the rights to the minerals thereon, must be taken (in the absence of contrary indications) to have retained only those substances which were regarded as minerals at the time of the transaction and not those which at some

uncertain date in the future may enter into the class of minerals because of advances in knowledge. Any other conclusion could work great inconvenience and inequity for a person who buys a property which contains a substance which is not yet regarded as a mineral but becomes one later.

In addition to holding that respondent was entitled to succeed because "granite and marble suitable for use as dimension stone ... presently qualify as minerals in the common parlance meaning of the word" Comrie J went on to hold that in 1917 and 1923 what he called granite and marble dimension stone was regarded as a mineral in the then common parlance meaning of the word. His reasons for so holding appear from the following passage in his judgment (at 431 E - 432 C):

> "I agree with my learned Brethren in the Transvaal Provincial Division that the answer to that question as at 1919, 1942 and 1947 is in the affirmative. The evidence discloses that granite, and especially marble dimension stone, has been quarried around the world for centuries and as is general knowledge,

they form part of or adorn several famous buildings. Furthermore, granite has been quarried in our own country since at least the early years of this century, while the extraction of marble began in the area now known as Marble Hall in about 1916. The significance of a substance's value, apart from its mere bulk and weight, to which Hoexter JA adverted in *Finbro Furnishers (supra)*, is not new to the concept of a mineral, as appears from some of the decided cases to which the learned Judge of Appeal referred. It seems to me that in 1917 and 1923, granite and marble suitable for use as dimension stone (then known as building stone) would have been regarded as minerals 'in the vernacular of the mining world, the commercial world and landowners' in this country. It is interesting to observe in this connection that, writing in 1932, the noted geologist A L Hall regarded certain 'quarry products' (norite, red granite, syenite, foyaite-porphyry, South African jade, serpentinised dolomite, marble and limestone) as constituting part of the 'mineral resources' and 'mineral deposits' and 'mineral occurrences' of the bushveld.

Counsel for the respondents accepted that in present times the quarrying of granite and marble for dimension stone has grown into a substantial industry in South Africa, and he was inclined to concede that granite and marble suitable for use as dimension stone would today probably be regarded as minerals in common parlance. He pointed out however that the position was different in 1917 and 1923, when quarrying of these substances took place on a limited scale to which the

description 'industry' would not have been apt. He submitted that in 1917 and 1923 it was too early for dimension stone to have been recognised or accepted as a mineral in the popular connotation of the word. But the quarrying of dimension stone is not a 20th century phenomenon. One should, I think, credit the local mining, commercial and landowning communities of that day with some general knowledge. Many of them would have known, I believe, that suitable stone had been quarried from ancient times in other lands. And many of them would have known too that suitable stone was imported before it was discovered here. Upon the discovery and exploitation of first granite and then marble, I consider that those communities would immediately have recognised and accepted that they were minerals. I conclude therefore that in 1917 and 1923 marble and granite, suitable for use as dimension stone, fell within the common parlance meaning of minerals."

Earlier in his judgment he said that the affidavits of Twist and McIver, a geologist who agreed with the views expressed by Twist, were preferable to those of Verkes and Dr Von Below, a geologist who agreed with the views and conclusions expressed by Verkes. The learned judge added that he shared the views of Mynhardt J and Fine A J that, on close analysis, the affidavits of Verkes

and Von Below did not reveal material disputes of fact.

He then dealt with a submission that the reservations of mineral rights now under consideration should be given a narrow interpretation, which would lead to the finding that granite and marble suitable for use as dimension stone are not included among the minerals covered thereby, as follows (at 432 C - 433 A):

> "Counsel for the respondents further submitted that the reservations of mineral rights now under consideration should be given a narrow interpretation for two reasons. First, he relied upon the words of inclusion ('and metals, precious stones, oil and coal'). Inverting the reasoning in the *Finbro Furnishers* case *supra* at 802, counsel submitted that the presence of these words of inclusion was indicative of the narrow meaning which the parties themselves attached to the expression 'minerals, mineral substances'. Secondly, counsel submitted that a reservation of mineral rights, which involves a subtraction from the landowner's *dominium*, was akin to a servitude and should therefore be interpreted restrictively. Even supposing that dimension stone was popularly regarded as a mineral by 1917, thus the argument, the parties themselves, on a narrow or strict constuction of 'minerals, mineral substances', did not intend to include such stone. I am not sure that the reasoning in *Finbro* carries as much force when applied in reverse and to different language. It will be noted that in that case the words of exclusion were preceded by words of inclusion

and that the word 'minerals' was itself qualified by 'of whatsoever nature'. The wide import of the grant, and the broad meaning of minerals which the parties must have intended, was confirmed by the express exclusion of sand and clay. In the present matter we also have wide language ('all minerals, mineral substances ... without any exception') together with words of inclusion. I do not think that one can infer from the presence of the words of inclusion that the parties had a particularly narrow meaning of minerals and mineral substances in mind.

In *Loubser*'s case [*Loubser en Andere v Suid-Afrikaanse Spoorweë en Hawens*, 1976 (4) SA 589 (T)] Botha J (as he then was) referred at 595 F to the reservation of mineral rights as 'die serwituut'. At 596 G the learned Judge said:

> ' Die algemene benadering tot die uitleg van 'n serwituutakte en die beginsels wat daarby van toepassing is, is uiteengesit in die uitspraak van Appèlregter Wessels in *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 (A). in die passasies op 301G tot einde en 302C-303E, en dit is onnodig om dit hier te herhaal. Die probleem is net om dit op die omstandighede van die huidige geval toe te pas.'

I am not satisfied, with respect, that it is appropriate generally to interpret reservations of mineral rights as though they were servitudes. I can find little support for a generally restrictive interpretation in the decided cases. Be that as it may, in this particular instance I do not think that a strict interpretation narrows the meaning of 'minerals, mineral substances' so as to exclude dimension stone."

As can be seen from the passage from his judgment quoted above Comrie J

expressed his agreement with the conclusion to which Mynhardt J and Fine A J came in the two unreported cases to which he was referred. In his judgment in *Rand Mines Ltd v The Government of the Province of Northern Transvaal and Lebowa Mineral Trust*, Mynhardt J said:

> "I am of the view that the decision of HOEXTER, JA, in the Finbro case now for the first time gave positive content to the ordinary or common parlance meaning of the word 'mineral'. This positive content is to be found in the requirements that a substance must have a value apart from its mere bulk and weight and that there must be a possibility of exploiting the substance profitably before any substance can be classified as a mineral."

Later in his judgment he said that earlier decisions in which it was held that substances like clay, sand and stone are not minerals should be re-appraised in the light of the decision in the *Finbro* case.

Comrie J also rejected a submission which was advanced before him by counsel for appellant to the effect that "dimension stone" is too vague to qualify as

a mineral. He referred in this regard to the following passage in the judgment delivered by Mynhardt J in the *Northern Transvaal* case:

> "One submission of Mr Burman remains to be dealt with. He contended that the term 'dimension stone' is too vague to qualify as a 'mineral'. This submission is based on the evidence of Mr Verkes who says that the notice of motion is vague and confusing (sic). Mr Verkes says that if an order is granted in the form in which it is couched in the notice of motion it would lead to confusion in the industry. The main objection to the relief sought by the applicant is that substances are included under the generic names of 'granite' and 'marble' that are, geologically speaking, different rock types. I do not think that there is substance in this objection raised by Mr Verkes. According to the evidence of Professors Twist and McIver, which I accept, the terms 'granite' and 'marble' are used loosely in the dimension stone industry. The fact that rock types such as gabbro, for instance, are included under a generic name would not cause confusion in the industry and geologists would still be able to distinguish scientifically between the various kinds of rock."

The same submission was made on appeal. I agree, for the reasons given by Mynhardt J, that it is without substance.

The arguments advanced on appeal dealing with the rejection of the

evidence of appellant's expert witnesses, Verkes and Von Below and the application of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1983 (3) SA 623 (A) need not detain us for long. While it may be that Comrie J erred in expressing a preference for the evidence of one set of expert witnesses, as set out in the affidavits deposed to by them, over the evidence of the opposing set of experts, as set out in their affidavits, nothing turns on the point, in my view, because the differences of opinion set out in the opposing sets of affidavits were more apparent than real as will be clear from my summary of the material portions of Twist's affidavits and that of Verkes.

The main arguments advanced on appeal are covered, in my opinion, by the two questions which Mr *Burman*, who appeared for appellant, posed at the outset of his argument, viz:

(1) What is the correct interpretation of the two reservations of mineral rights in the present matter?

(2) What was the ordinary meaning of the expressions "minerals" and "mineral substances" in 1917 and 1923?

A good deal of the argument before this Court related to the question as to what was decided by this Court in the *Finbro* case, *supra*, and whether what was held in that case applied to a case such as the present which concerns the interpretation of two contractual provisions.

Mr *Burman* contended that Mynhardt J and Comrie J, who expressed his agreement in the main with what Mynhardt J had said, should have found that the ratio in the *Finbro* case relating to the meaning of the word mineral in section 3(1)(m) of the Deeds Registries Act, 47 of 1937, was limited to the interpretation of statutes and did not also apply to ordinary agreements. He submitted further that the court in the *Finbro* case did not lay down a test of intrinsic value for the interpretation of the word "mineral", which was binding for the interpretation of contractual provisions such as those presently under consideration.

He argued further that a distinction should be drawn between decisions in previous cases dealing with contractual matters on the one hand and statutory matters on the other and that decisions in the latter category should not be relied on when contractual provisions had to be interpreted.

Mr *Burman* submitted that an analysis of the South African decisions on the meaning of the word "mineral" reveals that the South African courts over a long line of cases from 1895 to the present have assigned a narrow or restricted meaning to the word when used in common parlance, particularly when it appears in a contract. On the other hand the word is given a wide meaning when used in statutes.

In support of his contention that a narrow or restricted meaning is given to the word when it appears in a contractual context he referred to such cases as *Donovan v The Turffontein Estate Co.* (1895) 2 O R 218 (in which applying the intention of the parties and the ordinary meaning of the words "mineraal" and "delfstof" it was held that clay was not included), *Loubser en Andere v Suid-*

Afrikaanse Spoorweë en Hawens, 1976 (4) SA 589 (T) (in which it was held that a reservation of "minerals" and "mineral substances" in a servitude did not cover ordinary brick clay because according to the common meaning of the word "minerals" ordinary brick clay was not included) and *Van Waveren v Swart*, 1994 (1) SA 579 (T) (in which it was held that the usual or everyday meaning of the word "mineral" did not include ordinary sand or stone).

Mr *Burman* submitted that decisions given on the meaning of the word "mineral" in a statutory context should be used with caution where the meaning of that word in a contract is being considered. He argued in this regard that the meaning given to the word "mineral"in a statute is usually a wide one to provide certainty, protection and policing. This is because, so he contended, the purpose of statutes dealing with minerals is normally to control or police the exploitation of minerals as defined, in particular the safety and rehabilitation aspects thereof and thus as many substances as possible should be encompassed. He argued further that

the effect of giving the word "mineral" a wide meaning in a statutory context is to give greater protection to the public and to individuals, *inter alia*, because, so he said, a wider provision usually creates more certainty. He also referred to the accepted rule, referred to in the *Finbro* case (at 805 G to 806 A), that "for purposes of judicial construction of a more recent statute an examination of earlier statutes dealing with like topics affords a useful aid" so that "in seeking to construe the word 'mineral' in section 3(1) (m) of the [Deeds Registries] Act, 47 of 1937, the definitions of that word to be found in earlier relevant statutes constitute not merely a permissible but an essential source of guidance".

In the *Finbro* case it was held that the word "minerals" as used in a notarial deed of cession of mineral rights was wide enough to include stone. The Court also held that as the stone there in issue had a value apart from its mere bulk and weight and could be quarried for the purposes of profit the registrar of deeds was legally obliged to register the notarial deed of cession in question in terms of section 3 (1)

(m) of Act 47 of 1937, which provided for the registration of "notarial cessions, leases or sub-leases of rights to minerals ...," there being no definition of the word "minerals" in the Act.

The judgment of the Court in the *Finbro* case was delivered by Hoexter J A, with whom Kotze, Joubert, Trengove and Botha JJ A concurred. In the course of his judgment Hoexter J A examined a number of cases decided in our courts over the previous 90 years, in which, as he put it "in a diversity of contexts the meaning of the word 'mineral' in scientific, popular and legal language [was] discussed". His analysis of all these cases renders it unnecessary for me to re-examine them in detail.

As I have said two main points arose for decision, the first being the construction of the relevant clause in the notarial deed of cession. The material portion of the clause in question read as follows:

"That the term 'mineral rights' aforesaid shall include: All rights to

> *minerals of whatsoever nature, including precious and base metals,* precious stones and mineral oils other than the rights to sand and clay in, on, under ...."

The learned judge said (at 802 F-G) that the "specific exclusion of sand and clay indicates that on the wide meaning which the parties themselves assigned to the phrase 'minerals of whatsoever nature' the parties appreciated that sand and clay, unless specifically excluded therefrom, would be included thereunder".

It is thus clear, in my opinion, that the first part of the judgment on the merits in the *Finbro* case turned, not on the ordinary meaning of the word "mineral" but on the meaning which the parties to the contract there under consideration had themselves clearly assigned to it. As was pointed out earlier in the judgment (at 791 D-G, where the position in English law as summarised in Halsbury, *Laws of England*, 4th ed, vol 31 at 11, para 8, is quoted) the word 'mineral' is one of fluid content, admitting of a variety of meanings, with no general definition. It is

"capable of limitation or expansion according to the intention with which it is used". Whether the meaning the parties assigned to the word was the ordinary meaning of the word, or a meaning expanded according to their intention as manifested in the deed did not have to be considered by the Court.

In deciding the second point, i e, the meaning of the word "minerals" in section 3 (1) (m) of Act 47 of 1937, Hoexter JA had regard to a number of factors. Among them was the fact (mentioned at 803 E - 804 A) that the word "minerals" is not "a static or rigid concept, having an immutable content".

> "Here a few general observations on the 'popular' or 'usual' meaning, in common parlance, of the word 'minerals' may not be out of place. One must guard, perhaps, against an assumption that in colloquial speech the word 'minerals' is a static or rigid concept, having an immutable content. To a particular community at a particular stage of its history and development the ambit of that word in colloquial language will be governed by a number of considerations, not the least significant among which are likely to be the intrinsic value and the possibility of commercial exploitation of the various non-organic substances to be found in the soil of the country in which the community lives. In one age a non-organic substance derived from

the earth's crust may be regarded by the man in the street as insignificant and worthless. In a later era scientific and technological advances may have led the average citizen to recognise that the same substance, formerly despised, is a valuable commodity capable of successful commercial exploitation. In this way the range of the popular meaning assigned to the word 'minerals' may with the passage of time undergo evolutionary change; and the compass of its usual meaning may be enlarged. Such an evolutionary process is not only probable but inevitable in a country such as the Republic of South Africa. Although large tracts of our land are unsuitable for intensive agricultural development our soil has been endowed with mineral resources which are at once both vast and varied. These include a number of base minerals vital to the industries (I use the word in its widest sense) of major foreign powers. We live in a country in which the exploitation of minerals represents an important part of the economy and a substantial portion of the national product. According to the latest (1984) *Official Yearbook of the RSA* some 85% of the production of the minerals industry, involving the exploitation of more than 50 different minerals, is exported. There are doubtless today generally accepted as 'minerals' in the ordinary sense of the word many non-organic substances bearing exotic names whose very existence - let alone the possibility of their profitable commercial exploitation - were undreamt of by the worthy members of the old Transvaal Volksraad."

Another factor to be considered was the inevitability that the ordinary sense

of the word would be influenced and moulded by the various legislative enactments governing "minerals" (see 804 B-D).

A further factor to be borne in mind was that in construing the word "mineral", the matter was not to be approached "through the eyes of a reader who is entirely ignorant of or completely unschooled in the subject-matter of section 3(1)(m)" (see 804 F).

Reference was also made, as has been mentioned earlier, to the principle that when construing a more recent statute "an examination of earlier statutes dealing with like topics affords a useful aid"(at 805 H). In this context HoexterJA referred to a number of statutory provisions in which minerals are defined very broadly: indeed in one, section 1 of the Mineral Law Amendment Act, 36 of 1934, the definition of "base metals" in the Transvaal Gold Law was replaced by a definition so broad that water had to be expressly excluded (see the reference thereto at 805 E).

At 806 B-H the judge made the point that the value of the substance in question is almost invariably employed as one of the criteria in the process of trying to decide what non-organic substances are to be ranked as "minerals": in this regard reference was made to statutory definitions and judicial pronouncements quoted earlier in the judgment. Among these were certain dicta by Fletcher Moulton L J in *Great Western Railway Co v Carpalla United China Clay Co Ltd* [1909] 1 Ch 218 at 231, which were described by Dowling J in *Glencairn Lime Co (Pty) Ltd v Minister of Labour and Minister of Justice*, 1948 (3) SA 894 (T) at 898 as constituting "a useful test of what is a mineral in the ordinary and popular sense of the word". Fletcher Moulton LJ's "useful test" reads as follows:

> "If I were rash enough to venture a definition of 'mineral' I should say that it is any substance that can be got from within the surface of the earth which possesses a value in use, apart from its mere possession of the bulk and weight which make it occupy so much of the earth's crust. I should not think that what in engineering cases is usually known as 'contractor's muck' is a mineral. To dig out ballast and crushed stone and earth, a mere mixture of heterogeneous portions of

> the earth's crust, for the purpose of making embankments, where the material goes from one position in the earth's crust to another without modification or being submitted to any process of manufacture, does not seem to me to be making use of minerals, although no doubt the things that you are handling were originally within the earth's crust. Such materials have not a value in use apart from their bulk and weight, and they are only used as being capable of forming a portion of the earth's crust in a new position. On the other hand, everything that has an individual value in use appears to me to be fairly called a mineral. Limestone may vary from a poor quality that is only worth burning into lime up to the very finest Carrara marble, but all those gradations have a value in use, either for building, or statuary, or for the manufacture of lime. Ironstone for the purpose of obtaining the iron, slate for its numerous uses, to which I need not refer - all these things seem to me to be properly called minerals, because from their properties they have a value in use."

(The above quotation is more extensive than that given by Dowling J at the place cited.)

It seems to me that the *Finbro* judgment is not authority for the proposition that the ordinary meaning of the word "mineral" is wide enough to include such stone as has a value apart from its mere bulk and weight and which is obtained from

the crust of the earth for purposes of profit.

It follows that in my opinion Mynhardt J was not correct in the *Northern Transvaal* case in holding that the decision in the *Finbro* case "for the first time gave positive content to the ordinary and common parlance meaning of the word 'mineral'" and that the decisions to the effect that substances like ordinary clay, sand and stone are not minerals "should be reappraised in the light" of the *Finbro* case.

Although the decision in the *Finbro* case does not contain a binding ratio which will aid in the solution of the points arising for decision in this case I am satisfied, for the reasons that follow, that Comrie J in the case presently under consideration and Mynhardt J in the *Northern Transvaal* case correctly held that granite and marble suitable for use as dimension stone were minerals within the meaning of the relevant clauses of the certificates of mineral rights now under consideration and that the ordinary meaning of the words "minerals" and "mineral

substances" in 1917 covered granite and marble suitable for use as dimension stone. (Whether granite and marble not suitable for such use are to be regarded as minerals is not presently under consideration and nothing that I shall say in what follows is intended to express an opinion thereon.)

I have already referred when discussing the *Finbro* case to the fact that the word "mineral" is of fluid content. Its meaning in particular contexts has been much debated in our courts, the main cases on the point up to 1985 being discussed in the judgment in the *Finbro* case. As is pointed out in the *Finbro* case (at 791 E) the "same problem of definition has often arisen in English Courts" and, one may add, in Scotland, elsewhere in the Commonwealth and in the United States.

Most of the British cases on the point were discussed by Slade J in *Earl of Lonsdale v Attorney-General and Another*, [1982] 1 WLR 887 (Ch D): see also *Waring v Foden* [1932] 1 Ch 276 (C A), where the authorities were also extensively canvassed and the legal position in England was expounded by Lord

Hanworth M R and Lawrence and Romer L JJ, and *Borthwick-Norton v Gavin Paul and Sons Ltd*, 1947 SC 659, a decision of the Second Division of the Inner House of the Court of Session.

In *Glencairn Lime Co (Pty) Ltd v Minister of Labour and Minister of Justice, supra*, on 899-900, a case concerning the meaning of the word "minerals" in a war measure, Dowling J said that it is "legitimate to take into account the views of English courts as to the ordinary meaning in English of the term 'mineral', provided that cautious regard is had to the fact that the statutes and instruments under consideration in the English cases are different from the war measure now under consideration". I agree with this comment (subject to the further caution that, as was pointed out, e g in the *Donovan* case, where and if South African usage is different it must prevail). In my opinion the same applies also where contracts concluded in this country fall to be interpreted. I also think that Scottish and American cases on the point may be looked at for guidance, subject again to the

proviso that local usage, in case of conflict, must obviously prevail.

Many of the British cases arose for decision under section 70 of the Railway Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict c 33) and section 77 of the Railway Clauses Consolidation Act, (1845) (England) (8 & 9 Vict, c 20) or similar legislation, the scheme of which was similar to that of the Canal Act considered in the *Linlithgow* case to which I referred earlier, that is to say, the statutory undertaking, such as the railway company, became owner of the land over which its railroad was built but the minerals thereunder were reserved to the previous owner, which meant that the railway company did not have to pay for such minerals as might be on the land. If there were minerals and the party to whom they were reserved wished at some later stage to work them, the railway company could be called upon either to allow the minerals to be worked or to compensate the party to whom they were reserved for not being allowed to work them. The cases decided under these statutes are known as "code" cases. The House of Lords has

held that there is no reason to conclude that "the statutory reservation of minerals means anything different from a reservation of minerals in a private deed" (see *Lord Provost and Magistrates of Glasgow v Farie, supra, at* 672, per Lord Halsbury LC).

In *Waring v Foden, supra,* at 294 Lawrence L J, in a passage cited with approval by Hathorn J in *Bazley v Bongwan Gas Springs Pty Ltd, supra,* at 261-2, said:

> "The two main principles to be gathered from these pronouncements are, first, that the word 'minerals' when found in a reservation out of a grant of land means substances exceptional in use, in value and in character (such as, for instance, the china clay in *Great Western Ry. Co. v. Carpalla United China Clay Co.,* [1910] A.C. 83) and does not mean the ordinary soil of the district which if reserved would practically swallow up the grant (such as, for instance, the sandstone in the *Budhill* case, [*North British Railway Company v Budhill Coal and Sandstone Company*] [1910] A.C. 116); and, secondly, that in deciding whether or not in a particular case exceptional substances are 'minerals' the true test is what that word means in the vernacular of the mining world, the commercial world and landowners at the time of the grant, and whether the particular substance was so regarded as a

mineral: see *per* LORD LOREBURN, L.C. in the *Budhill* case.

Further, it is to be noted that the fact that certain substances can be worked for the purpose of profit may have a bearing upon the question whether they have been recognised as included in the term 'minerals', but does not necessarily determine that they have been ordinarily understood to be so included: see *per* LORD GORELL in the *Budhill* case.

It follows from the decisions in the *Budhill* and *Glenboig* [[1911] A C 290] cases that the question whether a given substance is or is not a 'mineral' within the meaning of the instrument in which it is mentioned is a question of fact to be decided according to the circumstances of the particular case: see *Symington v Caledonian Ry. Co.*, [1912] A.C. 87."

As can be seen from the extract just quoted the substance considered in the *Budhill* case was sandstone. In his speech in the *Budhill* case the Lord Chancellor (Lord Loreburn L C) said (at 126-7):

"Now, the leading purpose being to lay the permanent way, how are we to regard this exception of minerals? It cannot be better put than in a single sentence which I quote from Lord Ardwall's opinion. He says: 'Any provision inconsistent with the leading purpose for which railway companies are empowered to take land must be viewed as introducing an exception, and falls to be construed strictly, and not

extended beyond what the words of exception clearly cover.' I apply that to the present case. In many parts of England and Scotland sandstone forms, as here, the substratum of the soil, with, no doubt, other kinds of rock intermixed. If it be a mineral, then what the railway company bought was not a section of the crust of the earth subject to a reservation of minerals, but a few feet of turf and mould, with a right to lay rails upon it, and liable to be destroyed altogether, unless the company chose on notice to buy the ordinary rock lying beneath it. For no one pretends that there is anything exceptional in this sandstone, either in point of higher value or rarity. It was agreed at the Bar that this was the ordinary freestone or sandstone. If the respondents are entitled to work this substance under this railway, the same must be true of chalk, or clay, or granite, or any other rock which forms the crust of the earth. I am aware that there are expressions of great judges favourable to such a contention. There are also other expressions in a diametrically opposite sense. Speaking for myself, I will not adopt so startling a conclusion unless I am compelled by a decision of this House, from which there is no escape. There is no such decision.

No doubt a railway company is not entitled to support from minerals, as an ordinary purchaser would be. No doubt, also, it is an advantage to railway companies that on acquiring lands for their enterprise they are not compelled to purchase minerals lying thereunder, and may wait and enjoy the support until the mineral owner requires them either to purchase the minerals or to take the risk of forfeiting the support. But it seems to me that these circumstances do not affect the separate question, What, in fact, are the minerals

> so reserved? I cannot believe Parliament ever intended that the common rock of the district should be included in these words of reservation. If that were intended, I can see no need for inserting such words as 'mines or coal, ironstone, slate, or other minerals.' The Act is throughout consistent with the view which, with all respect, appears the obvious and commonsense view, that the railway company is by the conveyance to acquire the land in general, and the reservation is only what is exceptional, as Lord Ardwall clearly says."

It is clear that the granite spoken of in the passage just cited (which was in any event an *obiter dictum* as far as granite was concerned) was the "common rock of the district". The reason it was excluded appears clearly from what Lord Loreburn L C said. I do not think that the same considerations apply here where it is clear that the purchasers of Welbekend and Boschpoort bought the land in question from respondent for use as farming land, subject to the power on the part of respondent to take part of the land back if it required it for any of the purposes set out in clause 3, against payment of a price mutually agreed to or fixed by arbitration.

In any event I do not think appellant can rely in this case on what Lord Loreburn L C said in this regard because in another English case on the point, where the considerations mentioned by Lord Loreburn L C did not apply, the Court of Appeal held that the word "minerals" covered granite: see *The Attorney-General v The Welsh Granite Co Ltd* (1887) 3 TLR 573 (C A).

Furthermore I agree with the view expressed by Lord Salvesen in the *Glenboig* case when it was before the Court of Session (*Caledonian Railway Co v Glenboig Union Fireclay Co* 1910 SC 951 at 963), approved by Lord Jamieson in the *Borthwick-Norton* case *supra,* at 691, that "exceptional" in the formulation quoted by Lawrence L J "... is not used in an absolute sense but relatively to the other constituents of the earth's surface in the district in which the question arises".

The *Welsh Granite Co* case was followed by the Court of Appeals of New York in *Armstrong v Lake Champlain Granite Co,* (1895) 42 NE 186.

As far as judicial determinations of the ordinary meaning of the words

"marble" and "limestone" are concerned I have already quoted the passage from Fletcher Moulton L J 's judgment in the *Carpalla United China Clay Co* case, in which he expressed the view that limestone, including marble, is a mineral. In the United States of America the Circuit Court of Appeals for the Third Circuit held in *Phelps v Church of Our Lady, Help of Christians* (1902) 115 Fed Rep 882 that marble in place is a mineral, with the result that the title thereto does not pass by a conveyance of the land which excepts and reserves to the grantor all mines and minerals which may be found therein.

The meaning of "mineral" in its ordinary and popular sense propounded by Fletcher Moulton L J in the *Carpalla United China Clay* case, quoted above, was described by Fieldsend P, sitting in the Federation of Rhodesia and Nyasaland Special Court in Income Tax Case No 909, (1960) 24 SATC 97 at 99 as "the most useful authority of the many I was referred to" He continued:

"That this was in fact the common meaning of the word as understood

> in the Federation is to my mind apparent from a consideration of the approach of the mining legislation of the three Territories to the substances which each considers to fall within its terms."

I have already referred to the passage from Halsbury *Laws of England* in which the position in English law is set out, which was quoted with approval in the *Finbro* case at 791 E-G. In this passage after referring to the fact that the word "minerals" is "capable of limitation or expansion according to the intention with which it is used" the following is said:

> "this intention may be inferred from the document itself or from consideration of the circumstances in which it was made."

It appears from the contractual documents under consideration in this case that the parties intended minerals to have a wide rather than a narrow meaning. I say this because clause 3 provides, as has already been pointed out, for respondent

to buy back any of the land transferred that may be required, *inter alia*, for exploiting the minerals thereon and that if the parties cannot agree on the price of the land so repurchased the price is to be fixed by arbitration and that the arbitrator or arbitrators is or are to "consider and decide upon only the agricultural value of any land which the [respondent] may desire to retake, which agricultural value shall be taken to be in no way affected by the value of the mineral rights of the property".

Assume coal had been found on a portion of the land sold. Respondent would have been entitled to re-purchase this portion of land from its purchaser and would have been obliged only to pay for the portion of land so purchased as if it were agricultural land. It follows that if a valuable deposit of granite or marble had been known to have been on the land so repurchased respondent's purchaser would not have been paid for it. This in my view is a strong indication that the most expanded meaning of the expression "minerals" was present to the minds of the

contracting parties in 1917 and 1923. If marble and granite suitable for use as dimension stone was capable of being covered by the expression "minerals", and the British and American cases I have quoted indicate it was so capable, then in my view granite and marble capable for use as dimension stone would have been included in the reservation, unless there is reason to believe that South African word usage would lead one to a different conclusion.

All the South African cases show, however, in my opinion, is that ordinary clay, sand and stone are not covered by the normal meaning of the expression "minerals". There is nothing uniquely South African about that. A number of the British cases may also be cited as authority for the proposition that ordinary clay, sand and stone are generally not included in a reservation of minerals. Mr *Burman* was not able to refer us to any South African authority in which it was said that granite and marble suitable for use as dimension stone are not covered in ordinary

parlance in South Africa by the word "minerals".

The evidence adduced by respondent that in 1932 the noted geologist A L Hall listed certain quarry products which would today be regarded as dimension stone as among the mineral resources of the Bushveld, entitles one to hold, in my opinion, that the word "minerals" in the vernacular of the mining world and commercial world and landowners in 1917 would have covered granite and marble suitable for use as dimension stone.

In my opinion Mr *Burman's* submission that because a contractual provision has to be interpreted a narrow meaning must be given to the word "minerals" cannot be accepted in a case such as the present where, as I have endeavoured to show, the contractual provisions themselves indicate quite unmistakably that the parties themselves had a wide meaning in view and not a narrow one.

In the circumstances I am satisfied that Comrie J was correct in granting an order in terms of paragraph 1 of the notice of motion in this case. In the result the

appeal is dismissed with costs, including those occasioned by the employment of two counsel.

I G FARLAM
Acting Judge of Appeal

Smalberger JA)
Zulman JA)
Streicher JA)
Melunsky AJA) Concur