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DISPUTES?

Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2006 1 SA 350 (T)

1 *Introduction*

The ambit of a real right, such as a mineral right, is determined by ascertaining the content thereof by identifying and listing its entitlements as well as identifying the limitations placed upon the exercise of such right. Once the ambit of a right (and/or competing rights) is determined, the relationship or possible conflict between parties holding different rights to the same legal object may be ascertained. This contribution is a discussion of the recent decision in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 1 SA 350 (T) in which the content of mineral rights in the context of the doctrine of lateral support was considered. A brief exposition of the relevant facts follows, whereafter the arguments entertained by the court is discussed. The court's decision on the ambit of mineral rights and the applicability of the property clause to the present case will then receive attention, before the general impact of the decision is discussed in more detail.

2 *Facts*

The facts of the decision may be summarised as follows: during 1962 Arthur Sulski was the registered owner and holder of mineral rights over a farm subject to the reservation of one-sixth share of all mineral rights in favour of Morris Sulski (357C-E). The property is situated on a portion of the Kriel

South Coal Field (358C). During 1968 Arthur Sulski ceded to African and European Investment Co Ltd ("AEIC") a five-sixth share in coal rights of the property (357E-F) subject to inter alia the following condition: "1 [AEIC] shall have all such rights as may be needed for proper mining and exploiting the coal in, on and under all of the said property" (355H).

Morris Sulski in turn ceded to AIEC a one-sixth share in the coal rights (357E), "including any mineral, clay and shale, either associated with coal seams or occurring separately within the limits of the coal measures in, on and under" the farm (356A-I), subject to *inter alia* the following conditions:

> "1(a) The cedent, to the extent to which he is entitled to do so, gives and grants to [AEIC] the following rights and privileges in perpetuity:
> (i) the right to search for, win, dig, mine and remove coal from the property and such coal raised make merchantable and fit for sale and carry away, sell and dispose of the same for the use and benefit of [AEIC];
> (ii) all such ancillary or other rights as the cedent may be possessed of, whether expressly or impliedly in terms of his entitlement to minerals or otherwise" (356I 357A).

Thus, after the abovementioned cessions Arthur Sulski remained the owner of the property (357G), whilst Morris Sulski retained no interest in the property in respect of coal rights. However, at 357G the court incorrectly indicated that Morris Sulski retained no interest in the property at all: in terms of the "Morris Sulski cession", Morris Sulski, as cedent, reserved (or retained) "the rights to all minerals, other than coal" (357A).

During 2001 AEIC ceded all its rights to coal in the property to Anglo Operations Ltd ("Anglo") (355D-E). The terms of the cessions by the Sulskis have been incorporated in the cessions by AEIC to Anglo. At the time of the application Anglo held all rights to coal in respect of the property (355D), whilst Sandhurst Estates (Pty) Ltd ("Sandhurst") was the registered owner of the property and conducted farming on the property (355C).

Anglo applied for an order that it is entitled to (a) utilise 60 295 hectares on the northern portion of Sandhurst's property for open-cast mining purposes; and (b) construct a diversion of a small stream on the property (355A-B, 358D-E). Anglo contended that factually it could not utilise its mineral rights over a portion of the respondent's property optimally by underground mining methods. Anglo contended it would be entitled to ensure optimal utilisation, namely to conduct open-cast mining. It was argued that it will be entitled to conduct open-cast mining because it will act reasonably with respect to the surface of the property (383C-B). Anglo contended that it was entitled to undertake the open-cast mining by virtue of: (a) its common law and statutory rights as holder of the mineral rights to coal; and/or (b) the ancillary rights conferred in terms of the cessions (358E).

Sandhurst disputed the applicant's entitlements to undertake the open-cast mining activities on the property (358D-F).

3 *Arguments submitted on behalf of the applicant*

In a nutshell, it was argued on behalf of the applicant that a holder of a mineral right has, beside the primary right to the mineral, also an ancillary right. By virtue of the ancillary right one is entitled to do anything whatsoever on the property of the owner of the land that is required for optimal utilisation of the

primary right. The ancillary right would include the entitlement to conduct open-cast mining. The ancillary right was, however, subject to the proviso that it should be exercised *civiliter modo* with regard to the rights of the owner (361F). It was further argued, for purposes of the conflict between the exercise of a mineral right and ownership of land, that there was only one limitation on the mineral right holder's preferential right at common law to find and extract minerals from the land. This limitation required that the preferential right had to be exercised *civiliter modo* and in a manner least injurious to the property of the surface owner (364B-C). Support for this view was sought from the decision of *Hudson v Mann* 1950 4 SA 485 (T) 488E-G (362D), Franklin and Kaplan *The Mining and Mineral Laws of South Africa* (1982) 132 (364C) and section 5(1) of the Minerals Act 50 of 1991 (360I-361A). A distinction was also drawn in argument between the resolution of the conflict between neighbouring landowners (providing lateral support) and a holder of mineral rights and a landowner (providing surface support) (see 362I-363G). It was stated that, due to the precedent of *London SA Exploration Co v Rouliot* ((1891) 8 SC 74 92 94), the English law to lateral support was also part of Roman-Dutch law (363). It was further argued that the statement in *Coronation Collieries v Malan* (1911 TPD 577) that "the same principles apply to the right of vertical and to the right of lateral support" was incorrect (363G). In England, the doctrine of nuisance protects the right of lateral support. However, it was argued, in *Regal v African Superslate (Pty) Ltd* (1963 1 SA 102 (A)) the appellate division held that the tort of nuisance does not form part of our law (363H). It was thus argued that there was no basis for the contention that the doctrine of lateral support is part of our law by virtue of its importation of the English law of nuisance (363I). De Villiers J, however, disposed of counsel's arguments by deciding:

> "The applicant has not shown that the mineral rights holder has a preferential right under Roman or Roman Dutch law, or any other system of law. *Hudson v Mann* is the only authority quoted by the applicant. This case does not deal with support. It did not overrule *Rouliot* or *Coronation* with regard to support" (372E).

Due to the importance of *Hudson v Mann*, as *locus classicus*, the following dictum of Malan J is stated:

> "When the owners are able reasonably to enjoy their respective rights without any clashing of interests no dispute is, as a rule, likely to arise. The difficulty arises, as has happened in the present case, when the respective claims enter into competition and there is no room for the exercise of the rights of both parties simultaneously.
> The principles underlying the decisions appear to be that the grantee of mineral rights may resist interference with a reasonable exercise of those rights either by the grantor or by those who derive title through him. In case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploitation. The solution of dispute in such a case appears to me to resolve itself into a determination of a question of fact, viz., whether or not the holder of the mineral rights act *bona fide* and reasonably in the course of exercising his rights. He must exercise his rights in a manner least onerous or injurious to the owner of the surface rights, but he is not obliged to forego ordinary and reasonable enjoyment merely because his operations or activities are detrimental to the interests of the surface owner. The fact that the use to which the owner of the surface rights puts the property is earlier in point of time cannot derogate from the rights of the holder of mineral rights" (488D G).

In the *Rouliot* decision (89) the lateral support issue was formulated as follows

by De Villiers CJ: "[Is] the defendant entitled to remove ground from within his own claims with regard to the effect which such removal may have upon adjoining land belonging to the plaintiff company?" (see 364F). According to De Villiers J in the *Anglo* decision, the *Rouliot* decision concerned: (a) an analogous situation to neighbouring owners; (b) lateral support; and (c) removal of support which would have, but had not yet, resulted in damage to the plaintiffs land (364F-G). In deciding the lateral support issue, De Villiers CJ in effect decided two issues, the first founded in property law and the second in the law of contract (364H). On the property law issue it was decided that a neighbour was not entitled to remove support and thereby damage adjoining property. De Villiers CJ reasoned the landowner had a right to support from subjacent and adjacent land (93 at 364H-I). De Villiers CJ decided the law of contract issue by implying, *ex lege*, a term into the contract of lease that the surface owner did not waive or abandon his right of support (93-94 at 365A). The decisions of the other two judges in the *Rouliot* decision are also discussed by De Villiers J (see 364I-365). The conclusion of De Villiers J of the *Rouliot* decision will suffice: two of the three judges decided the property law issue on the basis that a surface owner had the right of enjoyment of the surface which could be protected against outsiders. The contract issue was decided on the basis of an implied term in favour or the surface owner (365E). This two-pronged approach in the *Rouliot* decision influenced the court in the *Anglo* decision. As to the origin of the duty to lateral support, the *Rouliot* decision was explained as follows by De Villiers J:

> "[The two judges] simply introduced, as Judge made law, a rule which they regard as common to all civilised systems of law because, as they perceived it a *lacuna* existed. The Judges did not concern themselves with the exact pedigree of the rule, nor with the question of whether the duty of support was absolute or not. The rule was introduced because it was regarded as just and equitable" (366B C).

According to De Villiers J, the full bench in the *Coronation* decision held that the law with regard to lateral support, as laid down in the *Rouliot* decision, applied to subjacent support (366). The court also decided that a lease or transfer of mineral rights "even though accompanied by the widest powers of working, carries with it no power to let down the surface, unless such a power is granted either expressly or by necessary implication"(366F-G).

De Villiers J reasoned that the analysis of the aforegoing cases showed that the right of support was not imported because it was English, Roman, or Roman-Dutch law (366I/J). As will be seen, this perceived pragmatic approach of ignoring the pedigree of the rule also played an important role in the *Anglo* decision.

De Villiers J rejected the argument on behalf of the applicant that the *Regal* decision outlawed the source of the right to lateral support, namely English law of nuisance:

> "*Regal* did not outlaw the reference to English decisions on support. Nor did *Regal* contain a general prohibition against the use of English decisions. The essence of *Regal* was that the Roman Dutch authorities should first be considered because the two systems were not necessarily identical in all respects" (371E F).

According to De Villiers J, the fact that there is nothing in the *Regal* decision that compels the court to jettison the principle of support, whether one calls it a

"doctrine" or a "right," does not matter (372C). De Villiers J argued that even though the concept of a "right' to support was unknown in Roman law and Roman-Dutch law, the principles of Roman and Roman-Dutch law underlying the various remedies available for an injured neighbour would have produced the same results, as was accepted in the *Rouliot* and *Coronation* decisions under the "doctrine" of support (372D).

De Villiers J reasoned further that the *Rouliot* and *Coronation* decisions should be followed:

a These judgments have been "in operation" for more than a hundred years. A court should not readily disturb the older judgments (372F);
b The reason for the adoption in these judgments of the principle of support was not the pedigree of the rule. The motivation of the judges in deciding the property law issue in *Rouliot* was to lay down a rule because they thought it was just and equitable and the rule enjoyed universal recognition (372G-I); and
c The *Regal* decision does not require the *Rouliot* and *Coronation* decisions to be abandoned (372I).

4 *Decision on the ambit of mineral right*

The court's decision that relates to the ambit of mineral rights may be described, for the sake of convenience, as relating on the one hand to the right of lateral and surface support, and on the other hand to the diversion of water. These two aspects are now discussed in more detail.

4.1 Lateral and surface support

With the aforegoing arguments on behalf of the applicant out of the way, the application for an order that Anglo is entitled to conduct open-cast mining was dismissed by the court for the following reasons:

a it relied on a common law rule that does not exist;
b even if it is accepted that the applicant intended to rely on a legally implied term, it fails because no such term is implied in our law;
c the cession, which is conclusive, does not expressly or tacitly provide for open-cast mining; and
d the facts relied upon by the applicant do not reflect the knowledge of the parties at the time of concluding the cession (382H-383A).

In reliance upon *Elektrisiteitsvoorsieningskommissie v Fourie* (1988 2 SA 627 (T)), De Villiers J initially decided that the right to support is a shorthand description of the owner's entitlement to the use and enjoyment of the surface and to enforce the same against third parties (370E-F). Whether one uses Roman law or English law as a starting point was immaterial to De Villiers J (370F). The court analysed the *Eskom* decision and a case discussion thereof by Van der Vyver ("Expropriation, rights, entitlements and surface support of land" 1988 *SALJ* 1) (380H-382D). De Villiers J, with respect, incorrectly held that in terms of the doctrine of rights the "right to lateral support" is a capacity or competence (382E; see further, Badenhorst "Mineral law and the doctrine of rights: a microscope of magnification?" 2006 *Obiter* 000.

The court held that the starting point of the enquiry into the ambit of

common-law mineral rights must be the granting of mineral rights (375A). The intention of the parties has to be ascertained in the light of the knowledge of the parties at the time of the conclusion of the agreement (382G). The court drew a distinction between *implied terms* which are imported *ex lege* into an agreement and *tacit terms* which are imported into the actual or presumed intention of the parties (373H-I). Implied terms are imposed by law from without and do not originate in the consensus of the parties. Implied terms may derive from the common law, precedent, trade, usage, custom or statute (374A-B). A tacit term is an unexpressed provision of a contract that is based on the common or imputed intention of the parties and that is inferred from the express terms or the agreement and the surrounding circumstances (374).

The court regarded so-called "common law rights" of a mineral right holder as examples of terms that our courts have implied *ex lege* into the agreement or grant, if it contains no stipulation to the contrary (375A). The so-called "ancillary rights" can be stated to flow from the terms implied by law (rules of law) or from consensual terms in a contract, either expressly or tacitly (376H-I).

Regarding implied terms of an agreement, the court found that the applicant's position must be that, by implication of law, it would have all the ancillary rights that are directly necessary for the enjoyment of the right granted. This would only be the position if nothing to the contrary appears from the cession of mineral rights (375B-C). However, the court was of the view that the position is fundamentally different in the case of open-cast mining (375C and 380G). The law does not, according to the court, imply a term that the owner of land agrees to "part" with his right to support (375G and 380F). De Villiers J held that parting with the right to support is not a *naturalia* of a grant of a mineral right. It is not an ancillary right based on any term implied by law (375G). If, however, the term is implied that the owner is retaining his support of the surface, a conflict situation between the mineral right holder and the owner of land is absent, according to the court (373E).

The court rejected the view that the right to use open-cast mining is one of the ancillary rights which can be implied on the basis it is directly necessary to enable the grantee to exercise his primary right (see 377B-380E). The court found that the applicant has failed to prove that optimal utilisation of the coal reserves may only be achieved by open-cast methods and that open-cast methods are therefore reasonably necessary under the circumstances (see 383B-387I). The court found that the applicant did not prove that it would be acting reasonably in conducting open-cast mining operations on the property (390E).

De Villiers J decided that the common law does not imply a term in the cession that the applicant is entitled to mine "optimally" (389B-C). The court reasoned that in the decisions of *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* (1996 4 SA 499 (A)) and *Hudson v Mann*, the references to "subsidiary or ancillary rights" of a mineral right holder did not include a reference to any entitlement to "optimally" carry on mining operations (389C-E; see also, 397F). The stated cases were interpreted by the court as meaning "that the law is that the mineral rights holder is only entitled to 'ordinary and reasonable enjoyment', not 'optimal' enjoyment of his mineral rights". The court reasoned that this legal rule is in accordance with the *civiliter modo* principle of the law relating to servitudes (389F). The court correctly pointed out that "optimal utilisation" is not a common law concept, but a notion derived from the Minerals Act 50 of 1991 (388A; see also 397G).

The court held that the Minerals Act also did not imply a term in the cession that the applicant is entitled to "optimally utilise" its mineral rights (389A-B). It was confirmed that the provisions of the Minerals Act did not add to or subtract from common law mineral rights (388I; see also 390C). The court correctly explained that the Minerals Act was a regulatory act that regulated, *inter alia,* the exercise of mineral rights, which were obtained by agreement or otherwise under the common law (388D). Section 5(1) of the Minerals Act reaffirmed the entitlements of a mineral right holder that accords substantially with the primary entitlements of the common law, but the exercise thereof was subject to the regulatory provisions of the Minerals Act (see 388D-I 394E). Section 5(1) of the Minerals Act by implication recognised a memorial of the holder's ancillary rights as supplemented by the residual provision of the common law (394F).The court also rejected the assumption made by applicant that upon granting of a mining licence and approval of an environmental management programme (EMPR) in terms of the Minerals Act, it could exploit the minerals on the property in any manner that may be necessary for optimal exploitation of the minerals, subject only to limitations imposed by its mining licence and the EMPR (see 390B).

One must note in passing that the decision in *Anglo* was delivered on 23 September 2004 when the Minerals Act had already been repealed by section 110 of the Minerals and Petroleum Resources Development Act 28 of 2003. An amendment of the applicant's notice of motion to refer to its mining authorisation granted in terms of the Minerals Act as "read with a definition of 'old order rights' in item 1 of Schedule II" of Act 28 of 2003 was granted by the court (361E). The commencement of the act on 1 May 2004 does not, however, impact on what was decided by the court. In terms of item 7(1) of Schedule II an "old order mining right" (which includes a mineral right in the bundle of rights, permissions and permits) remains in force for 5 years until 30 April 2009. The "old order mining right" remains subject to its terms and conditions under which it was granted. In other words, the terms regarding ambit of the "old order mining right" remains unchanged, unless they are contrary to a provision of the Constitution of the Republic of South Africa (item 7(4)). Upon conversion of an "old order mining right" into a new mining right the terms regarding the ambit thereof would probably remain the same. As a matter of fact, the impact of the *Anglo* decision on the parameters of mineral rights is important during the transitional period when old order rights have been converted into new mining rights. Case law on the conflict between owners of land and holders of mineral rights or mining rights in terms of the common law (see Franklin and Kaplan ch iii and iv) will by analogy be important in resolving the conflict between owners of land and holders of (new order) mining rights to minerals in terms of Act 28 of 2003 (Dale *et al South African Mineral and Petroleum Law* (2005) 136). The reader is referred to the resolution of such conflicts by section 54 of the Mineral and Petroleum Resources Development Act. Section 54 provides that if a holder of a mining right is denied access to commence with mining on the land by the owner (or lawful occupier) due to refusal or unreasonable demands being made by the owner (or lawful occupier) or difficulty in tracing the owner, the regional manager can follow a process leading up to the parties being requested by the regional manager to reach an agreement for loss or damage. Alternatively, the regional manager can under certain circumstances recommend to the minister of miner-

als and energy the expropriation of ownership of the land in terms of section 55 of the Mineral and Petroleum Resources Development Act. In the absence of reaching an agreement for loss or damage, compensation has to be determined by arbitration in accordance with the Arbitration Act 42 of 1965 or by a competent court. The impact of the provisions of section 54 in a case like the present one will, however, not be dealt with further in this discussion.

On the authority of the *Rouliot* and *Coronation* decision, De Villiers J held that the owner of the land should not be deprived of the support without expressly or tacitly agreeing thereto (373C-D). The court explained that parting of support by a landowner has to be specifically agreed upon either expressly or tacitly (375G and 380G). If the owner did not expressly or tacitly waive his rights with regard to support of the surface the conflict rules, like the rule in *Hudson v Mann*, are according to the court not applicable (373E). A waiver of right to vertical support is never presumed (see 382E-G). The court found that the respondent did not expressly or tacitly waive his rights with regard to the support of the surface of the land (373E).

The court found that the right to conduct open-cast mining operations was not granted in express terms in the cessions. In other words, the cession contained no express waiver of the surface owner's right to support the surface (391D-E). With reference to the Arthur Sulski cession the court found that the intention of the parties was clear that mining would take place underground. In addition, the owner as cedent specifically reserved the right to live and farm on the surface of the property (392G; as to the interpretation of the terms of the cession, see 391E-392G and 392H-393A). The court found that the wording of the cession is not such that it unequivocally conveys the impression that open-cast mining was intended (394B).

De Villiers J indicated that *Hudson v Mann* did not concern subjacent or lateral support (396C). The court reasoned that the *dictum* from *Hudson v Mann* has to be read against the background of the facts of the case. It involved a claim by a miner to have access to a shaft which had been sunk on the property by a previous mineral right holder for purposes of exploration and mining (396C and 397A). According to De Villiers J the *Hudson* decision does not justify the argument that open-cast mining is a subsidiary or ancillary right without which the holder of a mineral right is unable to effectively carry on mining operations (396F). De Villiers J distinguished the *Hudson* decision (which involved a case of irreconcilable conflict) from the instant case. According to the court such irreconcilable conflict between the parties was absent in the present case: "The applicant has no entitlement to let down the surface and the respondent, on the other hand, is entitled, as owner of the surface, not to have the surface let down" (397F).

4.2 Decision on the diversion of the stream of water

The court decided that the applicant did not make out a case on the facts that the reserves it intended to mine by open-cast mining methods on the property would be sterilised by the stream of water. It did, therefore, not show that it was reasonably necessary to conduct open-cast mining operations on the property (399H-I). The applicant, therefore, did not hold the common law right to divert the tributary on the respondent's property (400G).

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5 *Section 25 of the constitution*

The court also paid brief attention to the impact of section 25 of the constitution on its decision. According to the court, if the argument of the applicant regarding the implied term that deprived the owner of surface support was upheld, it would result in an implied term that had the effect of depriving the owner, without his consent, of the final aspect of his ownership that is of practical value to him (see 398B-D). According to De Villiers J such deprivation of an owner without his consent constitutes a deprivation in terms of section 25(1) of the constitution (398E 398G). This deprivation, according to the court, is not an expropriation because the state does not acquire use of the surface (398E). If such term is implied in all contracts of cession of mineral rights it would, according to the court, constitute a "law of general application", as is envisaged in section 25. According to the court, the provisions of section 36 of the constitution would then have to be considered (398H). The court was of the opinion that the present case does not comply with section 36(1)(e) of the constitution, namely that there should not be less restrictive means to achieve the purpose (398I). The court concluded that there is no room to facilitate optimal exploitation by reading into the cession of mineral rights terms which deprives the owner of the use of the surface. The court reasoned that section 25, read with section 36 of the constitution, prohibits it in the light of the less stringent remedy available (399A-B).

Regarding the expropriation of the right of surface support, one should be mindful of the *Eskom* decision. *Eskom* wanted to expropriate the right to lateral and surface support that an owner of land had retained by express reservation and enforced against a joint venture of mining companies that intended to conduct open-cast mining operations. Eskom was an outsider because the mining companies merely supplied it with coal in terms of an agreement of sale. The court held that the right to lateral and surface support was not an independent right or a right that could be separately expropriated (see 636I-639A/B). According to Kriegler J, the detached and abstract right to allow the withdrawal of the surface support was not capable of separate existence or acquisition by Eskom insofar as the right was irrefutably linked to the legal relationship between the owner and holder of mineral rights (see 639B-D). Because the right to surface support was not needed by Eskom itself (but the miner), the power to expropriate in terms section 43 of the Electricity Act 40 of 1958 was held to be lacking (see 639D-G).

6 *Discussion*

The court's decision regarding the nature of a "right to surface" should have been that it is an entitlement and not a competence. The court's focus on the ambit of rights by ascertaining the entitlements of competing rights in order to resolve the conflict between parties is to be welcomed.

To summarise the court's decision on the ambit of a mineral right, the entitlements of a mineral right are implied by law, whereas the ancillary entitlements can arise by law or from express or tacit terms of the contract. Ancillary entitlements are those entitlements that are directly necessary for the enjoyment of a mineral right. The entitlement to conduct open-cast mining is, however, not implied by law. The "right" to conduct open-cast mining is also not an ancillary entitlement that is directly necessary to enable the holder

of a mineral right to exercise a mining right or to mine optimally. The right to open-cast mining can only be acquired by the holder of a mineral right if the owner of the land has agreed expressly or tacitly thereto. In other words, the owner of the land is not deprived of the surface support, without expressly or tacitly agreeing thereto. Section 5(1) of the Minerals Act only re-affirmed the primary entitlements of the common law. The exercise of entitlements by virtue of a mineral right was, however, subject to the limitations imposed by the Minerals Act.

The entitlements of a mineral right could in light of (and for purposes of) the *Anglo* decision be formulated as follows, namely the entitlement of:

(a) *use*, which entails the entitlement to use the land for the purposes of exploitation of minerals to which the mineral rights relate. The entitlement includes the following: (i) the entitlement to enter upon the land for purposes of prospecting for and mining of minerals; (ii) the entitlement to prospect for minerals; and (iii) the entitlement to mine the minerals by underground mining only;
(b) *disposition*, which entails the entitlement to decide what may and what may not be done on the land for purposes of the exploitation of minerals;
(c) *alienation*, which entails the entitlement to cede the mineral rights in respect of the land to another person or to grant a prospecting right or mining right in respect thereof;
(d) *encumbrance*, which entails the entitlement to grant a limited real right (such as a usufruct or mortgage bond) with regard to the mineral right;
(e) *resistance*, which entails the entitlement to resist any unlawful interference with the exercise of the mineral right;
(f) *reversionary* or *minimum entitlement*, that is, the entitlement to regain any of the above entitlements if they have been transferred for a fixed period and the period has lapsed or terminated, or the entitlement to exercise an entitlement which has been restricted, after removal of the restriction. (Badenhorst "Minerale regte en eiendomsreg – skeiding en samesmelting" 1989 *De Jure* 379 390; Badenhorst and Van Heerden "Betekenis van die woord mineraal" 1989 *TSAR* 452 459; Badenhorst "The revesting of state-held entitlements to exploit minerals in South Africa: privatisation or deregulation?" 1991 *TSAR* 113 115; Badenhorst and Roodt "Artikel 5(1) van die Mineraalwet 50 van 1991: 'n herformulering van die gemenereg?" 1995 *THRHR* 1 10; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* (first published 2004) (Rev Service 2) 3-11 to 3-12; as to the reversionary entitlement, see Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin in die Suid-Afrikaanse Reg* (1992 thesis UP) 164-182.)

The existence of some of the abovementioned entitlements are, however, now subject to the provisions of the Mineral and Petroleum Resources Development Act, the limitations of which will not be discussed here.

To the above list of primary entitlements can be added ancillary entitlements. A grant (or reservation) of a mineral right by implication includes all ancillary entitlements incidental to the grant (or reservation), being those entitlements that are directly necessary to the enjoyment of the right granted (*Trojan* decision 520D-E). Ancillary entitlements flow from terms implied by law or from consensual terms in a contract, either express or tacit (*Anglo* decision 376H-I). The law does not imply a term that the owner of land agrees

to part with his right of subjacent support in favour of a mineral right holder (*Anglo* decision 375G). An owner may not be deprived of subjacent support unless he or she has expressly or tacitly (consensually) agreed thereto (373D; see 380E). What is necessarily ancillary depends on the facts of each case (*Trojan* decision 520F). Ancillary entitlements do not include the entitlement to remove from the land more than is granted to him (*Trojan* decision 521E). The entitlement to mine a type of mineral does not authorise the taking of another type of mineral with which it was found in association (*Trojan* decision 522F).

Although it is true that the *Hudson* decision did not deal with surface support, it still dealt with the conflict between the owner of land and the holder of mineral rights exercising their respective rights. It is submitted that the sound principles laid down in the *Hudson* decision can still be applied to the exercise of either primary or secondary entitlements by virtue of mineral rights, or nowadays "old order mining rights".

As concerns the court's brief flirtation with constitutional property law, the current discussion will not attempt a detailed analysis of its implications. Yet the following is interesting: neither of the parties raised the issue of the constitutionality of the implied term in contracts of cession of mineral rights. However, the court still deemed it necessary to consider the potential impact of its decision on the constitutional protection of property. In order to do so, the court first distinguishes deprivation from expropriation based on the consideration of state acquisition of ownership in the land at stake. Since the state does not acquire anything under the present circumstances, so the argument goes, the action at stake must be a deprivation of property, rather than an expropriation.

The court's second step is to cull some of the requirements for constitutional protection of property from the relevant constitutional provisions, in order to underscore its decision not to uphold the argument that all cessions of mineral rights by implication incorporate the cession of ancillary rights (in particular lateral and surface support). In doing so, a number of issues are raised. One issue relates to the court's understanding of the requirement of a "law of general application". Authors on constitutional property law agree that this requirement refers primarily to the fact that, to be constitutional, limitations on property should derive from original and delegated legislation, rather than administrative policy. (See eg Roux "Property" in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 458 and Roux "Section 25" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2003) ch 12, 28-32, in reliance upon *Park-Ross v The Director, Office for Serious Economic Offences* 1995 2 SA 148 (C) 167B; Van der Walt *Constitutional Property Law* (2005) 144; Blaauw-Wolf "The 'balancing of interests' with reference to the principle of proportionality and the doctrine of *Güterabwägung* – a comparative analysis" 1999 *SAPR/PL* 178 ff; Gildenhuys *Onteieningsreg* (2001) 93.) Most of these authors also assume that common law and customary law would constitute laws of general application, although Van der Walt (144) has indicated that it would be unlikely for rules of common law or customary law to raise issues of arbitrariness to the extent of invoking the provisions of section 25(1).

What the court seems to intend is to view its duty to develop the common law and customary law as against other fundamental rights and freedoms, in

this case at least against the right to property. The argument essentially is that when a court develops the common law or customary law, such judicially driven development may amount to a "law of general application" that should then be tested against the particular provisions of the bill of rights. Unfortunately, this argument is abandoned before it blossoms: instead of then considering whether its potential decision to read an implied term of cession of ancillary mineral rights into contracts of this sort may pass the non-arbitrariness requirement of section 25(1), the court moves straight ahead to its second culling: the proportionality inquiry of the general limitations clause, section 36 of the constitution.

The construction of a link between constitutional development of ordinary law and general applicability of laws could have provided authors speculating about the issue of what a generally applicable law would mean in the context of common or customary law with a much-needed example (see Van der Walt *Constitutional Property Law* 144). However, the argument remains tenuous. The problem is that the court here does not consider – at least not expressly – whether and to what extent there is horizontal applicability of the constitutional property clause in disputes such as the present. It is assumed that there is (of course!) horizontal applicability. It is discounted, however, that the structure and targets of the constitutional property clause may not render it as readily applicable between private parties as some of the other fundamental rights. In this regard, Roux's observations – which may have shed light on the matter – are not considered. Roux indicated convincingly that the two basic concepts of "deprivation" and "expropriation" developed in terms of the constitutional property clause technically relate to actions undertaken in the exercise of state powers. Where these powers are exercised by private persons or institutions, their actions will be ascribed to the state. The acknowledged meaning of "deprivation" thus relates to the regulation of property by the state. (Roux "Section 25" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2003, original service) ch 46, 6-8. *Cf* Van der Walt *Constitutional Property Law* (2005) 48.)

Nevertheless, the court here acknowledges that a decision to uphold one party's argument that it is entitled to particular rights will result in a deprivation of the other party, who is the owner of the property to which such rights relate. As the court indicates, the influence of one person's rights over the property of another will then nearly always be seen as a deprivation rather than an expropriation because "the state does not acquire anything". The court thus affords primacy to the characteristic of state acquisition of property in distinguishing between expropriation and deprivation. This approach discounts all other factors that may distinguish deprivation from expropriation (see Van der Walt *Constitutional Law* (2005) 130-131 and Mostert and Badenhorst "Property" in *Bill of Rights Compendium* (2006) 3FB-41 ff). Simultaneously, the court asserts the horizontal applicability of the constitutional property clause by regarding its own decisions as some form of "state action" that should be evaluated on the same basis as legislative activity.

The non-arbitrariness requirement is not mentioned in the court's short analysis at all, which means that the court does not get to answer the question of whether there is a *sufficient reason* for a specific infringement, judged on a complexity of relationships between the owner and the property, the right holders and the property and the owner and the right holders, among others.

(See *First National Bank of South Africa Ltd t/a Westbank v Commissioner, South African Revenue Service* 2002 4 SA (CC) par 100 and the subsequent application of this test of non-arbitrariness in, eg *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing in the Province of Gauteng* 2005 1 SA 530 (CC) par 35.) However, the proportionality of infringements on private property (in terms of s 36(1)) receives attention. The court chooses to focus on the fact that there were less restrictive means available to achieve the intended purpose (of engaging in specific mining activities).

Under the circumstances, it would probably not have influenced the outcome of the dispute much if a "thinner" arbitrariness test was employed, rather than the "thicker" proportionality test. (See Roux "Property" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2003, original service) ch 46: 9; Van der Walt *Constitutional Property Law* (2005) 145 ff.) Applying an arbitrariness test would probably have highlighted the anomalies of a court's attempt at self-restriction through horizontal applicability of the fundamental right to property much sooner than where a court considers questions such as less restrictive means and balancing of competing interests under a proportionality enquiry.

7 *Conclusion*

An owner's "right to surface support" should be construed as an entitlement of ownership of land. In terms of the *Anglo* decision a mineral right implicitly has as its content the entitlement to mine by underground operations. The entitlement to mine by open-cast mining is, however, not a *naturalia* of the grant of a mineral right. The right to open-cast mining can only be acquired by the holder of a mineral right if the owner of the land has expressly or tacitly agreed thereto. According to the court in the *Anglo* decision, deprivation of an owner's surface support is not possible without his or her express or tacit consent and such deprivations may even constitute a deprivation for purposes of section 25(1) of the constitution.

The problem of deprivation of surface support in the *Anglo* decision could have been resolved with application of property law or the law of contract. Reliance on the property clause was probably unnecessary under the circumstances. The fact that the court did consider the applicability of the constitutional property clause to the relevant case places the question about the horizontality of section 25 in a different perspective.

The real value of the decision lies, however, in the determination of the ambit of a mineral right. This part of the *Anglo* decision will remain important for purposes of the ambit of "old order mining rights" and the grant of new mining rights by the state in terms of the Mineral and Petroleum Resources Development Act in respect of land owned by the private owners. The state as future grantor of mining rights should take note of the *Anglo* decision, which seems to provide protection to owners of land insofar as the entitlement to undertake open-cast mining has not been regarded as an automatic given in a grant of mining rights. The relationship between the owner of land, the state as grantor of new rights and miners would be more complex than previously, because the owner (or his predecessor in title) may, unlike in the past, not have had any part in demarcating the parameters of the new mining right against the background of ownership. Apart from the protection granted to

an owner of land by section 54 of the Mineral and Petroleum Resources Development Act, constitutional protection against expropriation of the owner's entitlement to surface support (or the use of the surface in general) in terms of section 25 of the constitution may then indeed become relevant and useful.

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