

Lateral and Subjacent Support

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Declaration

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Abstract

The first part of this thesis deals with the right of lateral and subjacent support and explains how it should be applied in South African law. The thesis illustrates how the neighbour law principles of lateral support were incorrectly extended to govern conflicts pertaining to subjacent support that arose in South African mining law. From 1911 right up to 2007, these two clearly distinguishable concepts were treated as synonymous principles in both academic writing and case law. The thesis plots the historical development of this extension of lateral support principles to subjacent support conflicts. In doing so, it examines the main source of South Africa's law of support, namely English law. The thesis then shows how the Supreme Court of Appeal in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) illustrated how the English law doctrine of subjacent support, with all its attendant ramifications, could not be useful in resolving disputes that arise between a land surface owner and a mineral rights holder in South African mining law.

The second half of the thesis investigates the constitutional implications of the Supreme Court of Appeal's decision in *Anglo Operations* in light of the systemic changes introduced by the Minerals and Petroleum Resources Development Act 28 of 2002. In terms of this new Act, all the mineral and petroleum resources of South Africa are the common heritage of the people of South Africa, and the state is the custodian thereof. This means that landowners are no longer involved in the granting of mineral rights to subsequent holders. In light of the *Anglo Operations* decision, landowners in the new dispensation of mineral exploitation face the danger of losing the use and enjoyment of some/all their land. The thesis therefore examines the implications of the statutory provisions in South African legislation (new and old) that have/had an impact on the relationship between landowners and mineral right holders with regard to the question of subjacent support, as well as the implications of the *Anglo Operations* decision for cases where mineral rights have been granted under the statutory framework.

Opsomming

Die eerste deel van die tesis handel oor die reg op sydelingse en oppervlakstut en hoe dit in die Suid-Afrikaanse reg toegepas behoort te word. Die tesis wys hoe die bureregbeginsele rakende sydelingse stut verkeerdelik uitgebrei is na konflikte rakende oppervlakstut wat in die Suid-Afrikaanse mynreg ontstaan het. Vanaf 1911 en tot in 2007 is hierdie twee duidelik verskillende konsepte in sowel akademiese geskrifte en in die regspraak as sinonieme behandel. Die tesis sit die historiese ontwikkeling van die uitbreiding van laterale stut-beginsels na oppervlakstut-konflikte uiteen. In die proses word die hoofbron van die Suid-Afrikaanse reg ten aansien van steun, naamlik die Engelse reg, ondersoek. Die tesis wys uit hoe die Hoogste Hof van Appèl in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) beslis het dat die Engelse leerstuk van oppervlakstut met al sy meegaande implikasies nie in die Suid-Afrikaanse reg sinvol aangewend kan word om dispute wat tussen die oppervlakeienaar van grond en die mineraalreghouer ontstaan, op te los nie.

Die tweede helfte van die tesis ondersoek die grondwetlike implikasies van die Hoogste Hof van Appèl se beslissing in *Anglo Operations* in die lig van die sistemiese wysigings wat deur die Wet op Ontwikkeling van Minerale en Petroleumhulpbronne 28 van 2002 tot stand gebring is. Ingevolge die nuwe Wet is alle mineraal- en petroleumhulpbronne die gemeenskaplike erfenis van alle mense van Suid-Afrika en die staat is die bewaarder daarvan. Dit beteken dat grondeienaars nie meer betrokke is by die toekenning van mineraalregte aan houerders daarvan nie. In die lig van die *Anglo Operations*-beslissing loop grondeienaars die gevaar om die voordeel en gebruik van al of dele van hulle grond te verloor. Die tesis ondersoek daarom die implikasies van verskillende bepalinge in Suid-Afrikaanse wetgewing (oud en nuut) wat 'n impak op die verhouding tussen die grondeienaar en die houer van die mineraalregte het, sowel as die implikasies van *Anglo Operations* vir gevalle waar mineraalregte onder die nuwe statutêre raamwerk en toegeken is.

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Chapter 1

The Right of Lateral and Subjacent Support

1.1 Introduction

The law pertaining to lateral support for land in South Africa may briefly be summarised in two propositions.¹ Firstly, that every landowner has a right to the lateral support which his land naturally derives from adjacent land. Secondly, where a subsidence of soil on his land occurs, as a result of excavations or operations otherwise lawfully carried out on adjacent land, the owner of the adjacent land will be liable in an action for damages irrespective of whether he was negligent or not.² A landowner's entitlement to excavate the soil on his land and in particular to build or carry out any other digging operations is thus limited by the duty not to withdraw the lateral support which the land affords adjacent land.

In *Demont v Akal's Investments*³ the court said that the duty of lateral support owed to an adjacent landowner corresponded with the neighbour's entitlement to such support. This means that the right to lateral support is reciprocal between neighbouring landowners. Every landowner is entitled to expect and require from land neighbouring his own such support as would be adequate to

¹ Kadirgamar L "Lateral Support for Land and Buildings - An Aspect of Strict Liability" (1965) 82 SALJ 210-231 213.

² *Gijzen v Verrinder* 1965 (1) SA 806 (D) 810. See further *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (D) 175; Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 SALJ 459-463 461; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 121.

³ *Demont v Akal's Investments (Pty) Ltd and Another* 1955 (2) SA 312 (N) 316.

maintain his land in a state of stability. In addition, the owner's entitlement to lateral support remains the same whatever he may choose to do with the land. A landowner may alter the condition of his land, for example by excavating or building, but cannot normally, by mere fact of doing so, acquire greater or different rights to lateral support.⁴

The right to lateral support has been described as an entitlement of ownership.⁵ A right of action accrues to a landowner who suffers damage as a result of the withdrawal or disturbance of lateral support, by a neighbouring landowner.⁶ It was held in *Demont v Akal's Investments*⁷ that in proceedings for relief, the plaintiff would have to allege that he has in fact suffered damage, as a result of the withdrawal or interference with the lateral support of his land by the defendant. Neither *culpa* nor *dolus* is a requirement for liability for damage caused by the withdrawal of lateral support. Therefore "reasonable precautions"⁸ by the defendant is not a defence against the plaintiff's claim for damages.

The foregoing is a summary of the rules governing the relationship between landowners of adjacent land. However, this thesis is primarily centred on the question whether these same rules apply where subjacent support is a

⁴ *Demont v Akal's Investments (Pty) Ltd and Another* 1955 (2) SA 312 (N) 316.

⁵ Van der Vyer JD "Expropriation, Rights, Entitlements and Surface Support of Land" (1988) 105 *SALJ*, 1-16 11. See *Elektrisiteitvoorsieningskommissie v Fourie* 1988 (2) SA 627 (T) 642.

⁶ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 120.

⁷ 1955 (2) SA 312 (N) 316.

⁸ *Grieves & Anderson v Sherwood* (1901) 22 NLR 225 227.

problem, in other words in support conflicts that pertain to the same piece of land, between the landowner and another user of his land. This is mostly a problem where a person who is not the landowner has the right to mine on the land. It seems that the rules of lateral support as spelt out in South African neighbour law were transplanted to this mining law relationship where, for example, a third party has a right to the minerals below the surface of a landowner's property. In such a situation, is it correct to say that a surface owner may expect the same level of support for his land (surface) from the miner as is usually afforded to a landowner from adjacent land? Subjacent support involves one piece of land, and lateral support involves two pieces of land, but the differences between the two situations have until recently been ignored or misconstrued in case law and academic writing.

1.2 Subjacent Support in South African Law

1.2.1 Introduction

The legal order in South Africa permits the separation of title to the land from that to the mineral rights in the land. Where mineral rights are severed from the title to the land, conflicts are bound to arise between the landowner and the holder of mineral rights when their respective interests come into competition. The concept of subjacent support explicitly refers to that relationship between a surface owner, and mineral rights holder in respect of one piece of land. When the owner of the surface and the holder of the mineral rights are able to reasonably enjoy their respective rights without any

clash of interests no dispute is, as a rule, likely to arise.⁹ However, the question has arisen in South African law whether a landowner has a natural right of subjacent support from the minerals beneath his surface, where mineral rights in respect of those minerals have been granted to a third party.

In the *a quo* decision in *Anglo Operations Ltd v Sandhurst Estates*,¹⁰ it was held that an owner of land was entitled to the natural right of subjacent support his land naturally derived from the minerals beneath the surface, and that a mineral rights holder in carrying out his operations had a duty to observe such right. This was because the law did not imply a term to the effect that the owner of land agrees to part with his right of subjacent support in favour of a mineral rights holder.¹¹ It was held further by the Transvaal Provincial Division in *Anglo Operations Ltd v Sandhurst Estates*¹² that an owner may not be deprived of subjacent support unless he or she has expressly or tacitly (consensually) agreed thereto. Waiver of a “right” to subjacent support by the owner is thus never implied by law, but has to be agreed upon by contract. This is because the right to subjacent support, like the right to lateral support, was seen by the court as a natural right of ownership.

⁹ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 114; see also Badenhorst, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 704, Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 55.

¹⁰ 2006 (1) SA 350 (T) 381.

¹¹ 2006 (1) SA 350 (T) 376.

¹² 2006 (1) SA 350 (T).

The respondent in *Anglo Operations*,¹³ in support of the contention that the right to subjacent support was an “inherent” entitlement of ownership, relied on *London and South Africa Exploration v Rouliot*.¹⁴ In that case De Villiers J incorporated the English law rule of lateral support, which provided landowners, as an intrinsic element of their ownership, with the right of adjacent support of their land into our law. This rule never formed part of our law before this decision. De Villiers J said that, although the principle of lateral support formed no part of Roman-Dutch law, it was a just and equitable principle that should best be incorporated into our law.¹⁵ He therefore argued that, if the right to lateral support existed as a natural right incident to the plaintiff’s land, the parties to the contract must be deemed to have contracted with a view to the continued existence of that right. In the absence of such a stipulation the presumption was in favour of an intention to preserve a well established natural right of property rather than to part with such a right.¹⁶ Therefore a landowner could never be deprived of his right of support without his express or tacit consent.

The next step to the respondent’s argument was based on the judgement of Bristowe J in *Coronation Collieries v Malan*.¹⁷ The legal question in that case was whether the underground miner owed the landowner a duty of vertical or subjacent support of the surface. In answering this question Bristowe J began by stating that, according to well settled principles of English law, the right to

¹³ 2006 (1) SA 350 (T).

¹⁴ (1890-1891) 8 SC 74.

¹⁵ (1890-1891) 8 SC 74 91.

¹⁶ (1890-1891) 8 SC 74 94.

¹⁷ 1911 577 TPD 590.

have the surface of land in its natural state supported by subjacent minerals is a right of property and not of easement; and that a lease or conveyance of the minerals, even though accompanied by the widest powers of working, carries with it no power to let down the surface, unless such power is granted either expressly or by necessary implication. Bristowe J thereafter acknowledged the fundamental conceptual differences between English Law and Roman-Dutch law,¹⁸ but nevertheless disregarded them. He concluded that these differences between the two systems of law did not affect the right of support. He relied on *London and South Africa Exploration v Rouliot*¹⁹ for the contention that, as regards the rights of support for land in its natural state, there was no difference between the English and the Roman-Dutch law. This same view was repeated by Badenhorst, Mostert and Pienaar.²⁰ This was the position that was consistently upheld in South African law until the *Anglo Operations* appeal decision.²¹

The Supreme Court of Appeal in *Anglo Operations*²² rejected this extension of the natural right of lateral support to the mining relationship of subjacent support. The conflict arising from the question of subjacent support was correctly placed under the law of servitudes. It was held that in South African law, the right to the minerals in the property of another was in the nature of a

¹⁸ *Butterknowle Colliery Co Ltd v Bishop Auckland Industrial Co-operative Co Ltd* [1906] AC 305.

¹⁹ (1890-1891) 8 SC 74.

²⁰ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 120.

²¹ 2007 (2) SA 363 (SCA).

²² 2007 (2) SA 363 (SCA) 372-373.

quasi-servitude over that property.²³ Therefore, as in the case of a servitude, the exercise of mineral rights would almost inevitably lead to a conflict between the right of the owner to maintain the surface and the mineral rights holder to extract the minerals underneath. In resolving this conflict, the answer did not lie in the adoption of the English law doctrine of subjacent support, but in invoking the principles applicable to servitudes developed by our law. Thus, in accordance with these principles, the owner of the servient property was bound to allow the holder of the servitudinal rights to do whatever was reasonably necessary for the proper exercise of his rights. The holder of the servitude was in turn bound to exercise his rights *civiliter modo*, that is, reasonably viewed, with as much possible consideration and with the least inconvenience to the servient property and its owner. In applying these principles to mineral rights it can be accepted that the holder of mineral rights is entitled to go onto the property, search for minerals and if, he finds any, to remove them. This must include the right on the part of the holder to do whatever is reasonably necessary to attain his ultimate goal as empowered by the grant. It was held further, that in terms of South African common law, in the absence of any express or tacit term to the contrary in a grant of mineral rights, the mineral right holder was entitled by virtue of a term implied by law to conduct open-cast mining, thereby withdrawing subjacent support if it was reasonably necessary to do so in order to extract the minerals.²⁴ However, this was to be done in a manner least injurious to the interests of the surface owner.

²³ 2007 (2) SA 363 (SCA) 373.

²⁴ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 373.

This is consistent with the statement on the scope of a mineral right holder's common law ancillary rights in *Hudson v Malan*,²⁵ where it was said that a mineral rights holder:

“[M]ay resist interference with a reasonable exercise of those rights either by the grantor or by those who derive title through him. In the case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploration. The fact that the use to which the owner of the surface rights puts the property is earlier in point and time cannot derogate from the rights of the holder of mineral rights.”²⁶

It has been held in further judicial pronouncements²⁷ that a holder of mineral or mining rights was entitled to enter the property to which his rights were attached to, search for minerals, and if he or she found any, to sever them and carry them away. A mineral rights holder is “entitled to exercise all such subsidiary or ancillary rights, without which he will not be able to effectively carry on his prospecting and/or mining operations.”²⁸ These so-called subsidiary rights flowed from terms implied by law or from consensual terms in a contract, either express or tacit.²⁹

²⁵ 1950 (4) SA 485 (T).

²⁶ 1950 (4) SA 485 (T) 488.

²⁷ *Hudson v Mann* 1950 (4) SA 485 (T) 488; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 520; *Ex Parte Pierce* 1950 (3) SA 628 (O) 634.

²⁸ *Hudson v Mann* 1950 (4) SA 485 (T) 488; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 520.

²⁹ 2006 (1) SA 350 (T) 376.

Although the Supreme Court of Appeal has set the record straight,³⁰ one of the objectives of this thesis is to sketch the historical development and the subsequent entrenchment of the extension of lateral support rules to the mining situation of subjacent support in South African law. To begin with, it will demonstrate how the Supreme Court of Appeal in *Anglo Operations v Sandhurst Estates* showed that the principle of lateral support is a concept of neighbour law, and how *Rouliot*³¹ was only concerned with the question of lateral support and not subjacent support. In that case it was held that a lessee of land for mining purposes could not *prima facie* withdraw support from the adjoining land of the lessor. The lease contemplated surface workings, but for Bristowe J the same principle would apply if the mineral rights holder's workings were subterranean and the support in question was subjacent.

Brand JA in the *Anglo Operations v Sandhurst Estates*³² appeal decision voiced his disapproval of the way the court in *Coronation Collieries* interpreted the judgement in *Rouliot*.³³ Bristowe J's reading of *Rouliot* was certainly curious. This is because, although the problem in *Rouliot* originated from mining activities, it did not relate to a conflict between the surface owner and the holder of mineral rights in respect of the same land. It was not against that backdrop that De Villiers J held that the principle of lateral support should best

³⁰ 2007 (2) SA 363 (SCA).

³¹ (1890-1891) 8 SC 74 91.

³² *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

³³ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74.

be incorporated into our law.³⁴ The claim in *Rouliot* was based on the alleged trespass by the defendant on the plaintiff's property. It is clear that the principle of lateral support was adopted in *Rouliot* as a rule of neighbour law. Therefore, this principle of neighbour law should have never been extended, as was done in the *Coronation Collieries* case, to govern the relationship between mineral right holders and the owners of the same land.³⁵

Prior to the *Anglo Operations* decision, there were South African authors³⁶ who agreed with the extension of the principles of lateral support to the issue of subjacent support. Kaplan and Dale³⁷ agree with the view that a mineral rights holder or person prospecting or mining with the surface owner's consent, is at common law entitled, in the conduct of his mining or prospecting activities, to broad ancillary rights in respect of the use of the surface for purposes necessary for or incidental to such activities. However, in their view the right to withdraw subjacent support is not included under the "broad ancillary" umbrella, although it is incidental to the prospecting or mining activities of a mineral rights holder. According to them the surface owner is required to expressly or tacitly waive his right to subjacent support as it is regarded as a natural right of property.³⁸ Of course, these views have now been overhauled by the *Anglo Operations* decision. Since the decision did not

³⁴ (1890-1891) 8 SC 74 91.

³⁵ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 373.

³⁶ See Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 114; Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 185; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 704-705.

³⁷ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 185.

³⁸ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 185.

consider the position under mining legislation, and especially new mining legislation that removes the granting of mineral and mining rights from the sphere of agreement between the landowner and the grantee, the remaining question is to determine the implications of *Anglo Operations* for surface support conflicts that arise out of mineral rights and mining grants that cannot be explained in terms of the *quasi-servitude* construction relied on in that decision.

In the process of showing that the extension of lateral support principles to subjacent support conflicts in South African law was inappropriate, the material conceptual difference between English law and our law in this regard was highlighted by the Supreme Court of Appeal in the *Anglo Operations* case. In English law it is possible for different horizontal layers of land to be owned by different persons. Based on this concept, the principle of subjacent support was succinctly stated as follows by Lord Macnaghten in *Butterknowle Colliery Co Ltd v Bishop Auckland Industrial Co-operative Co Ltd*:³⁹ “[T]he result seems to be that in all cases where there has been a severance in title and the upper and lower strata are in different hands, the surface owner is entitled of common right to support of his property in its natural position ...”. The fundamental principle in our law, on the other hand, is that the owner of the land is the owner not only of the surface, but of everything legally adherent thereto and also of everything above and below the surface. Therefore, in terms of our law it not possible to divide ownership into separate

³⁹ [1906] AC 305 313.

layers.⁴⁰ In English law the holder of mineral rights becomes owner of a particular layer below the surface. He becomes a “vertical neighbour” of the surface owner, so to speak. This does not happen in our law. “In accordance with what has now become a settled law principle, a right to minerals in the property of another is in the nature of a quasi-servitude over that property.”⁴¹ The owner of the servient property is bound to allow the holder of mineral rights to do whatever is reasonably necessary for the proper exercise of those rights. The holder of the servitude is in turn bound to exercise his rights *civilliter modo*, that is, reasonably viewed, with as much possible consideration and with the least possible inconvenience to the servient property and its owner. Therefore, if it is reasonably necessary for the mineral rights holder to let down the surface in carrying out his mining operations, he may do so, so long as he does so in a manner least injurious to the surface owner.

However, the question is whether this servitude construction can hold in cases where the mineral right or mining right was not granted by the landowner but by the state, acting in terms of the new regulatory powers created in the Mineral and Petroleum Resources Development Act of 2002. Whereas the first part of the thesis will describe the neighbour law character of the lateral support rule and subscribe to the *Anglo Operations* ruling that this principle does not fit into the relationship between landowner and mineral rights holder in so-called subjacent support conflicts, the second part will ask how this conclusion is affected by mining and minerals legislation.

⁴⁰ Except in the case of special legislation, for example the Sectional Titles Act 95 of 1986.

⁴¹ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 371.

1.2.2 The Impact of the Mineral and Petroleum Resources Development Act 28 of 2002

The relationship between a landowner and a mineral rights holder has been complicated by the promulgation of the Mineral and Petroleum Resources Development Act.⁴² *Anglo Operations v Sandhurst Estates* was decided in accordance with the principles that existed before the Act. Prior to 1 May 2004, mineral rights in respect of property formed part of the rights of the landowner. It was possible to sever the mineral rights from the surface rights and third parties could become holders of the mineral rights. These rights were freely transmissible and were valuable assets. The state could not force a mineral rights holder to start with the exploration of the minerals even if it would have been to the benefit of the public. Landowners could own valuable rights which they could sell to mining houses for lucrative amounts while retaining the surface rights.

The thesis will show how the new Act has added a new dimension to the conflict between a landowner and a mineral rights holder that was not considered in *Anglo Operations*. Under the new dispensation, it is now the state that administers mineral rights by granting them to miners and it is the state that receives royalty payments stemming from the exploitation of mineral rights. The thesis will consider the implications of the Mineral and Petroleum

⁴² 28 of 2002. S 3(1) implicitly abolishes the *cuis est solum* principle by declaring that all mineral and petroleum resources in South Africa are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans. The state now administers the mineral resources of the Republic. The state issues mining licences and permits as opposed to the landowner granting or reserving for himself the mineral rights attached to his land. This argument is explored in greater detail in chapter 3.

Resources Development Act⁴³ on the relationship between a landowner and a mineral rights holder in respect of the question of subjacent support. This will also necessarily require us to test constitutionality of the provisions of the Mineral and Petroleum Resources Development Act. In order to grasp the full implications of the 2002 Act for the *Anglo Operations* decision, it will be necessary to refer to earlier mining and mineral legislation that also affects the relationship between the landowner and the mineral rights holder.

1.3 Structure of the Thesis

Including this chapter, the thesis will be divided into five chapters. In the second chapter, my aim is to sketch out the principle of lateral support in South Africa. This will entail an overview of case law leading to the latest judicial pronouncements on the matter. At the end of this section, I will discuss the true nature of the right to lateral support, specifically whether it is a natural right inherent in the ownership of property, or whether it is in the nature of servitude.

The bulk of the thesis will, however, be devoted to the question of vertical or subjacent support. This question will be dealt with in chapter 3. The chapter will specifically investigate the true legal position of the landowner whose land subsides as a result of prospecting and mining operations carried out on his land. To begin with, the preliminary part of the chapter will define the right of subjacent support and distinguish it from the right of lateral support. Thereafter the focus of the section will be to establish, with reference to South

⁴³ Act 28 of 2002.

African and English case law and literature, whether the extension of lateral support principles to govern the relationship of a landowner and a mineral rights holder where subjacent support is at stake can be sustained in South African law. This will involve a probe into the respective legal systems' bodies of case law and academic writings on subjacent support. The most important court decision, for this purpose, is the Supreme Court of Appeal decision in *Anglo Operations*,⁴⁴ where it was decided that the right to the minerals on the property of another was in the nature of a quasi-servitude over that property. Accordingly, as in the case of a servitude, the exercise of mineral rights would almost inevitably lead to a conflict between the right of the owner to maintain the surface and the mineral rights holder to extract the minerals underneath. Therefore, the answer in resolving such a conflict did not lie in the adoption of the English law doctrine of subjacent support, but by applying the principles developed by our law in resolving the inherent conflicts between the holders of servitudal rights and the owners of the servient properties,⁴⁵ namely, that the owner of a servient property is bound to allow the holder to do whatever is reasonably necessary for the proper exercise of his rights. The holder of the servitude is in turn bound to exercise his rights *civiliter modo*, that is, reasonably viewed, with as much possible consideration and with the least possible inconvenience to the servient property and its owner.

The second half of the chapter will entail a legislative survey of South African mining legislation that may add to or subtract from the mineral right holder's position in respect of his so-called subjacent support obligation to the

⁴⁴ 2007 (2) SA 363 (SCA).

⁴⁵ 2007 (2) SA 363 (SCA) 373,

landowner. Although I will briefly survey some older legislation that had an effect on the relationship between landowner and mineral rights holder, I will specifically look at the Minerals Act⁴⁶ and the new Mineral and Petroleum Resources Development Act.⁴⁷ I aim to determine whether the relevant legislation provides support for the proposition that a mineral rights holder has as one of his ancillary rights the right to withdraw subjacent support where it is reasonably necessary. Dale says that the common law position was statutorily restated in s 5(1) of the Minerals Act, but submits that statutory obligations, such as those in ss 38 to 42 of the Minerals Act relating respectively to rehabilitation; environmental management programmes, removal of buildings, structures and objects; restrictions in relation to use of surface; and acquisition or purchase of land and payment of compensation, started to erode the common law predominance of the mineral rights holder.⁴⁸ The purpose of this second half of the chapter is to establish the implications of the *Anglo Operations* decision in cases where the mineral right or mining right was not granted by the landowner but by the state, acting in terms of the new regulatory powers created in the Mineral and Petroleum Resources Development Act of 2002. In such a scenario can it be said that the landowner is expropriated or arbitrarily deprived of his land where the miner makes use of open-cast mining which results in the withdrawal of subjacent support?

⁴⁶ 50 of 1991.

⁴⁷ Act 28 of 2002.

⁴⁸ Dale MO *South African Mineral and Petroleum Law* (2006) 136; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 706.

The penultimate chapter of the thesis will be a constitutional enquiry, focused on the question whether the provisions of s 25 of the Constitution of the Republic of South Africa, dealing with deprivation and expropriation of property, have any effect on the relationship between a mineral rights holder and a surface owner where subjacent support is at stake. The question would be whether, in allowing a mineral rights holder to withdraw subjacent support in the course of his operations where it is reasonably necessary, the landowner is arbitrarily deprived of property in terms of s 25(1) of the Constitution. This question is particularly important in light of the new regulatory system of mineral rights brought about by the new Mineral and Petroleum Resources Development Act, as it is no longer the landowner who severs mineral rights from the title to his land, but the state.⁴⁹

The thesis will be concluded by providing a summation of all my findings. The final chapter will provide answers pertaining to the questions of the true legal nature of the rights of lateral and subjacent support respectively. It will show how *Anglo Operations* conclusively rejected the extension, by Bristowe J in *Coronation Collieries v Malan*,⁵⁰ of the neighbour law principles of lateral support to the problem of subjacent support is sustainable in South African law. It will also show what the effect of the new Mineral and Petroleum Resources Development Act on what was decided in *Anglo Operations v Sandhurst Estates*,⁵¹ namely, that the right to the minerals on the property of another was in the nature of a quasi-servitude. The conflicts arising therefrom

⁴⁹ Act 28 of 2002.

⁵⁰ 1911 TPD 577 591.

⁵¹ 2007 (2) SA 363 (SCA) 373.

would be resolved in adopting the principles developed by our law in resolving the conflicts between holders of servitudal rights and the owners of servient properties.⁵² The aim of the thesis is therefore to establish the implications of *Anglo Operations* for cases where mineral rights no longer derive from an agreement between a landowner and a mineral rights holder.

⁵² 2007 (2) SA 363 (SCA) 373.

Chapter 2

The Right of Lateral Support

2.1 Introduction

Generally a landowner may, in the absence of any express law or servitude to the contrary, use and enjoy the property belonging to him in any way he pleases. According to Maasdorp and Hall, a landowner may alter the character of his land, and may even destroy it absolutely, subject only to the maxim *sic utere tuo ut alieum non laedas*, that is to say, provided such use, enjoyment, alteration, or destruction is not prejudicial or injurious to the legal rights of others.⁵³ Subject to this limitation, it is open to a landowner to use his property as he deems fit, even though actual inconvenience may thereby result to others, provided he does not interfere with their legal rights.⁵⁴ These principles apply to both movables and immovables.

According to Maasdorp and Hall, all land is by the very nature of things subject to certain obligations in regard to adjoining lands, and these

⁵³ Maasdorp AFS and Hall CG *Maasdorp's Institutes of South African Law: The Law of Things* (1959) 71. See further Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 111; Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 123.

⁵⁴ Maasdorp AFS and Hall CG *Maasdorp's Institutes of South African Law: The Law of Things* (1959) 71. See further Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 111.

obligations are sometimes spoken of by jurists⁵⁵ as natural servitudes or servitudes of necessity. Some of these so-called servitudes are of a negative and others are of a positive nature. Servitudes of the latter kind entitle the holder to exercise certain rights over a neighbour's land, such as a right of way of necessity, and are therefore regarded as servitudes proper.⁵⁶ Servitudes of the former kind, of which the prohibition of nuisances, the obligation of lateral support and of receiving water flowing naturally onto the land and restrictions upon the use of water streams are the most important, are mere limitations upon ownership in the common interest.⁵⁷ This chapter is specifically concerned with the obligation of lateral support.

2.2 Historical Background

2.2.1 The Civil Law

The South African law of lateral support to land is directly related to the discovery of diamonds in 1861. To track the development of the law of lateral support in South Africa, one has to examine the civil law approach to the subject.⁵⁸ Save for a few scattered texts, Roman law had no detailed rules regulating lateral support of land. The Romans did not develop the concept

⁵⁵ Maasdorp AFS and Hall CG *Maasdorp's Institutes of South African Law: The Law of Things* (1959) 72.

⁵⁶ Maasdorp AFS and Hall CG *Maasdorp's Institutes of South African Law: The Law of Things* (1959) 72.

⁵⁷ Maasdorp AFS and Hall CG *Maasdorp's Institutes of South African Law: The Law of Things* (1959) 72; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 111.

⁵⁸ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 201.

because they did not sever mineral rights from rights of ownership.⁵⁹ However, according to Van der Merwe the lack of authority for a right of lateral support in the Roman and Roman-Dutch sources does not mean that Roman law was totally devoid of remedies in the event of unlawful withdrawal of lateral or surface.⁶⁰ Milton identifies a passage in the *Digest* where it was stated that if “I should make an excavation on my land so deep that your wall cannot stand, the stipulation of indemnity against threatened injury will become operative.”⁶¹

An ancient law of Solon which lay down fixed rules stipulating the distances at which trenches and wells could be dug from a neighbouring property was also adopted and applied by the Romans.⁶² According to Kadirgamar, the *Code* forbade mining if it caused damage to buildings.⁶³ Milton submits that the Romans would have probably approached the question of lateral support from the premise that an owner was entitled to use his land in any way he chose so long as he did not infringe his neighbour’s rights.⁶⁴ Thus an owner would

⁵⁹ Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 201; Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 12.

⁶⁰ Van der Merwe D *Oorlas in die Suid-Afrikaanse Reg* (1982) 36-43.

⁶¹ Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 201; D39.3.24.12.

⁶² Kadirgamar L “Lateral Support for Land and Buildings - An Aspect of Strict Liability” (1965) 82 *SALJ* 210-231 212. See further Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 201.

⁶³ Kadirgamar L “Lateral Support for Land and Buildings - An Aspect of Strict Liability” (1965) 82 *SALJ* 210-231 212.

⁶⁴ Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 201. See further Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 12.

either have had the *operis novi nuntiatio*⁶⁵ or the *cautio damni infecti*⁶⁶ to prevent any excavations which would cause damage to his property.

Similarly, the Roman-Dutch law had very little to offer on the question of lateral support. The most notable contribution came from Voet, who stated that the *operis novi nuntiatio* would be available if a neighbour's "party wall cannot stand on account of the foundation being weakened" by excavations.⁶⁷ Milton points out that Voet's reason was that the city should not be "rendered unsightly ... by fallen buildings",⁶⁸ as opposed to concern about the infringing of the neighbour's rights.

This want of authority in Roman-Dutch law is attributable to the fact that the right of lateral support was never one of practical importance, due to the lack of mines in Holland and because the necessity for deep excavations seldom arose.⁶⁹ However, as was seen above, the fact that the development of the right of lateral support was deeply rooted in English law cannot overshadow the fact that Roman and Roman-Dutch law did in fact have remedies at hand

⁶⁵ If an owner or holder of a servitude was harmed by someone else's new construction, he could prohibit the builder from proceeding with his construction: Kaser M *Roman Private Law* 3rd ed (1980) 122.

⁶⁶ If a landowner anticipated damages from the ruinous condition of an adjacent building, the praetor, on application by the owner of the immovable threatened, ordered the neighbour to give security against the anticipated damage: Kaser M *Roman Private Law* 3rd ed (1980) 122.

⁶⁷ Kaser M *Roman Private Law* 3rd ed (1980) 122.

⁶⁸ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 201.

⁶⁹ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 91. See further Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 201; Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 12.

for a landowner who was threatened with or suffered loss from the withdrawal of lateral and surface support.⁷⁰

2.2.2 Development in South African Law

Owing to the dearth of authority in Roman and Roman-Dutch law, it can be argued that the field of mining law with its attendant principles of lateral support is largely a product of South African jurisprudence.⁷¹ The development of the right of lateral support in South Africa is directly linked to the discovery of diamonds in 1861. At the onset mining claims were allocated and diggings commenced with great enthusiasm. Milton gives us a vivid picture of the situation on the ground in the mine fields:

“Money and men began to flood the country. Land values boomed, especially on the diamond fields. There, hordes of eager diggers were allocated claims which they began to excavate. The diamonds were found in the throats of long extinct volcanoes. The vertical distribution of the gems in these ‘pipes’ gave a wide divergence to the value of claims, sometimes even where they were contiguous. The working of these claims became promiscuous, the industrious and the successful digger going ever deeper, the less fortunate or lazy lagging behind and often abandoning claims. To the novelist Trollope, the appearance of the mines in 1877 suggested that some diabolically ingenious architect had constructed a house with five hundred rooms, not one of which should be

⁷⁰ Van der Merwe D *Oorlas in die Suid-Afrikaanse reg* (1982) 36-43.

⁷¹ Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 201.

on the same floor, and to from none of which should there be a pair of stairs or a door or a window.”⁷²

The result of this haphazard working of claims was inevitable. Earth began to fall from higher claims into lower ones with ensuing damage and loss. In dealing with the resultant claims, courts were faced with the problem of whether to apply the rules of lateral support existing in other jurisdictions (England) or to disregard them in the interest of the convenience of the diggers.⁷³ The English rule of support stipulated that, where there was severance of title and the surface and minerals were in different hands, ownership of the land surface *prima facie* carried a natural right of support. This right was a right to have the surface kept in its natural position and condition, therefore a natural right incident to the ownership of the soil and not an easement.⁷⁴

The English law rule of support, if applied on the diamond fields of South Africa, would have led to a fatal outcome for the booming mining economy, because it was the very nature of the mining method employed in the diamond fields at the time to remove the lateral support of neighbouring claims for the sake of “digging down” as quickly and as far as possible.

⁷² Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 202.

⁷³ Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 202.

⁷⁴ Lord Mackay *Halsbury’s The Laws of England - Mines, Minerals and Quarries: Misrepresentation and Fraud* 31 4th ed (2003) para 103.

The first judgement on the matter was delivered by De Villiers CJ in *Murtha v Von Beek*,⁷⁵ where he said that he did not see how the principle of lateral support as embodied in English law could be made applicable to cases of this kind. The court therefore recognised an implied duty upon every claim holder, who held himself out as a digger to use reasonable diligence in working down his claims, and not to lag behind unnecessarily to the injury and detriment of his neighbours. The principle of lateral support could therefore not apply to cases where a person took a claim for the express purpose of digging.⁷⁶

The result the court in *Murtha* wanted to avoid at all costs was that, if the principle of lateral support as it stood in English law were to apply in the diamond fields, a claim holder far more conscientious than his counterparts would have to provide far-reaching lateral support for neighbouring claim holders, thereby leaving very little ground for him to work. The court correctly concluded that the principle of lateral support as defined in English law was not applicable to claims in a diamond field.

The result was that a distinction was drawn between owners and diggers. The diggers were regarded to some extent as a community by themselves.⁷⁷ What arose was a material difference between the position of the claim holders among themselves, persons who have leased claims in a mine for the express purpose of working them down, and the owners of the soil.

⁷⁵ *Murtha v Von Beek* (1862) 1 BAC 121 125.

⁷⁶ (1862) 1 BAC 121 125.

⁷⁷ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 100.

In *MacFarland v De Beers Mining Board*⁷⁸ it was confirmed that the rule pronounced in *Murtha*, namely that every claim holder who held himself out as a digger was expected to use reasonable diligence in working down his claims, and not to lag behind unnecessarily to the injury and detriment of his neighbours, was only applicable to matters arising from the relationship between diggers *inter se*. So, if a dispute concerned a digger and an owner or an owner and an owner, the rule was not applied.

In *MacFarland* the plaintiff was a digger who leased claims from an owner. Jones J held that the plaintiff could have no greater rights than the proprietor himself. As between the owners of the adjoining properties the common law right of lateral support would exist. Therefore the licence granted by the owner could not confer upon the plaintiff the right to mine so as to deprive the neighbouring proprietor of lateral support.⁷⁹

The rule in *Murtha* managed to survive for a period of thirteen years after its foundation, whereafter the circumstances under which the rule was created disappeared. The facts in *Burnett and Taylor v De Beers Consolidated Mines*⁸⁰ provide an indication of the shift in conditions that occurred during that thirteen year period. The plaintiffs and the defendants were neighbouring claim holders in the Du Toit's Pan Mine. The plaintiffs Burnett and Taylor were diggers and sub-lessees of a small block of claims near the middle of the mine. The defendants, on the other hand, leased virtually the rest of the mine,

⁷⁸ (1884) 2 HCG 398.

⁷⁹ (1884) 2 HCG 415.

⁸⁰ (1895) 8 HCG 15.

save for the portions being worked by the company which had leased to the plaintiffs the claims held by them. Before the plaintiffs began working their claims, the adjoining claims of the defendants were significantly higher than their own, because the defendants had left all their claims un-worked for about four years prior to the action. The work being done in the mine was partly open and partly underground.

When a collapse of reef occurred the plaintiff, relying on *Murtha*, sued for damages. It was held that the rule in *Murtha* could no longer apply. Solomon J held that he did not think that *Murtha v Von Beek* was intended to lay down an absolute rule for all times. In view of the fact that there was no longer a number of claim holders in the Du Toit's Pan mine all working down their claims in the open, but practically only a few large holders working partly in the open and partly underground, it could no longer possibly be said that open working was the general and approved method of working in that mine. The whole foundation upon which the principle of an implied obligation between the claim holders to work down the claims with reasonable diligence could be based was absent and the *ratio decidendi* of *Murtha v Von Beek* could not be taken to apply to the facts in *Burnett and Taylor*.⁸¹ The time had come when open workings had become impracticable and therefore no such implied obligation could be held to attach to the claim holders in the mine.⁸²

⁸¹ (1895) 8 HCG 14.

⁸² (1895) 8 HCG 15.

2.3 Content and Nature of Right of Lateral Support

2.3.1 Introduction

It was not until 1891 that the principle of lateral support was definitively enunciated in South Africa in the case of *London and South African Exploration Company v Rouliot*.⁸³ Before then it was always assumed (mainly because they found it necessary to formulate an exception to it for diamond claims, as in *Murtha*⁸⁴) that the principle formed part of South African law. The rule was specifically referred to in *MacFarland v De Beers Mining Board*, but Milton says that the court seems to have accepted as axiomatic that the right of lateral support existed.⁸⁵ In *Rouliot* Buchanan J pointed out that judges previously merely assumed that the right existed.⁸⁶

In incorporating this rule of English law into South African law, De Villiers CJ said that, although the principle of lateral support did not form part of Roman-Dutch law, it was a just and equitable principle that should best be integrated into our law.⁸⁷ Thus the right was accepted into our jurisprudence.

The law pertaining to lateral support for land in South Africa may briefly be summarised in two propositions. Firstly, every landowner has a right to the

⁸³ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74.

⁸⁴ *Murtha v Von Beek* (1862) 1 BAC 121 125.

⁸⁵ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 203.

⁸⁶ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 99; Kadirgamar L "Lateral Support for Land and Buildings - An Aspect of Strict Liability" (1965) 82 *SALJ* 210-231 214. Kadirgamar submits that the argument adduced for the recognition of an absolute right of lateral support for land in Roman and Roman-Dutch law is, in the absence of unambiguous authority in support of it, essentially speculative in character.

⁸⁷ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 94.

lateral support which the land naturally derives from adjacent property. Secondly, where a subsidence of soil on land occurs as a result of excavations or operations otherwise lawfully carried out on adjacent land, the owner of the adjacent land will be liable in an action for damages irrespective of whether he was negligent or not.⁸⁸

It seems that the right of lateral support has been given two conflicting constructions in South African law.⁸⁹ Firstly, it has been suggested that the right of support is in fact a servitude. Secondly, it has also been argued that the right of lateral support is in fact a right incidental to the ownership of property.⁹⁰ As was seen in the introduction to this chapter, the right of lateral support is generally viewed as a natural right inherent in the ownership of property in South African law. To help us understand the implications of these two conflicting views, the two sub-headings that follow will examine both theories in detail.

2.3.2 Servitude

Generally speaking, a servitude is a limited real right or *ius in re aliena* which entitles its holder to the use and enjoyment of another person's property or to

⁸⁸ Kadirgamar L "Lateral Support for Land and Buildings - An Aspect of Strict Liability" (1965) 82 SALJ 210-231 213. See further Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 119-120; Maasdorp AFS and Hall CG *Maasdorp's Institutes of South African Law: The Law of Things* (1960) 79-80.

⁸⁹ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 200; Anonymous "Natural Rights and Natural Servitudes" (1892) 9 *Cape LJ* 225-231 230; Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 SALJ 459-463 461.

⁹⁰ Van der Vyver JD "Expropriation, Rights, Entitlements and Surface Support of Land" (1988) 105 SALJ 1-16 11.

insist that such other person shall refrain from exercising certain entitlements flowing from his ownership over and in respect of his property which he would have but for the servitude.⁹¹ A servitude is constituted in favour of the dominant tenement against a servient tenement. According to an anonymous writer there are three possible ways a servitude may be constituted in favour of one property against another, namely, by grant, by prescription, and by natural situation.⁹²

However, according to this same anonymous writer,⁹³ there is another class of servitudes, namely natural servitudes, which have been almost entirely neglected by the text-book writers on Roman-Dutch law. The right of lateral support to land is one of these so-called natural servitudes. On the boundary of adjacent properties, every portion of the soil of the one naturally supports every portion of the soil of the other immediately above it. A natural servitude exists on either property in favour of the other to support the other. This continues to any depth; each property is therefore absolutely entitled to the lateral support naturally afforded by the other.⁹⁴

Milton explains that the above relationship between the two adjoining properties is servituted, because of the fact that when there are two adjacent

⁹¹ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 321.

⁹² Anonymous "Natural Rights and Natural Servitudes" (1892) 9 *Cape LJ* 225-231 229; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 332-333.

⁹³ Anonymous "Natural Rights and Natural Servitudes" (1892) 9 *Cape LJ* 225-231 230.

⁹⁴ Anonymous "Natural Rights and Natural Servitudes" (1892) 9 *Cape LJ* 225-231 230; Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 199.

properties the actual mass of earth comprising these properties, is, in the eyes of the law, divided.⁹⁵ It is the nature of the earth to press downwards and sideways until adequately resisted. To describe the right of lateral support as a natural servitude is thus an obvious way of explaining the rights the law imputes to this situation, namely to say that one property dominates and imposes upon another a positive and constant burden, the sustenance of which by the servient tenement is necessary for the safety and stability of the dominant tenement.⁹⁶

However, it is clear that there is in fact no dominant or servient property, for the burden and its sustenance are reciprocal and inseparable from each other, thus making it irrelevant which sustains and which imposes. In the case of reciprocal servitudes, all the tenements are at once dominant and servient.⁹⁷

To consider the right of lateral support as a servitude brings about important consequences. The most important consequence is that the right will exist only in respect of land itself and not in respect of artificial erections on the

⁹⁵ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 199; Anonymous "Natural Rights and Natural Servitudes" (1892) 9 *Cape LJ* 225-231 230.

⁹⁶ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 199. See further Emden ACR *The Law Relating to Building* (1980) 256.

⁹⁷ Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 120. See further Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 199; *Demont v Akal's Investments (Pty) Ltd* 1955 (2) SA 312 (D) 316.

land. In short, it will be a servitude of support of land by land and not of buildings by land.⁹⁸

A further consequence of regarding the right of lateral support as a servitude is that any breach of it will be dealt with by proprietary remedies. An example would be the *actio confessoria* in Roman and Roman-Dutch law.⁹⁹ Liability of the defendant will arise from the withdrawal of support and not from any damage which such withdrawal causes and in consequence prospective damages cannot be claimed.

2.3.3 Natural Right Incidental in the Ownership of Things

The second school of thought regards the right of support as a natural right of property, protected by the doctrine of nuisance.¹⁰⁰ In *Gijzen v Verrinder*¹⁰¹ the court regarded the right of lateral support as a natural right of property, given in the nature of things. The court took the view that it is a right to the integrity

⁹⁸ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 199.

⁹⁹ Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 462.

¹⁰⁰ Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 462; Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 210; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 121.

¹⁰¹ 1965 (1) SA 806 (D). See further *John Newmark & Co (Pty) Ltd v Durban City Council* 1959 (1) SA (D) 175; *Municipal Council of Johannesburg v Robinson Gold Mining Co Ltd* 1923 WLD 99 115.

of the land, a natural and necessary incident of the ownership of land which ensures its full use and enjoyment.¹⁰²

The central question in *Gijzen* was whether a subsidence of land, in the sense of a collapse, was an essential requirement of an action for the removal of lateral support. In 1956, the defendant Verrinder had levelled his land for the purpose of building a house. The excavations were made up to the boundary between his land and that of the plaintiff. In 1964 the plaintiff initiated an action, alleging that the excavations had deprived his land of the necessary lateral support and that as a result it had subsided, causing him damage. The plaintiff claimed prospective damages and, in the alternative, an order requiring the defendant to provide artificial support for his land.

Henning J found that there had been no actual subsidence of the plaintiff's land. However, what had happened was that over the years the action of rainwater had eroded away forty square feet of the plaintiff's soil. Milton points out that Henning J relied on a passage from Maasdorp,¹⁰³ which he regarded as correctly setting out the law relating to lateral support in South Africa.¹⁰⁴ According to this passage, every owner of land was entitled to demand that the natural surroundings of his ground to be left undisturbed in so far as their

¹⁰² *Gijzen v Verrinder* 1965 (1) SA 806 (D) 810. See further *Elektrisiteitvoorsieningskommissie v Fourie* 1988 (2) SA 627 (T) 627; Van der Vyver JD "Expropriation, Rights, Entitlements and Surface Support of Land" (1988) 105 *SALJ* 1-16 11.

¹⁰³ Maasdorp AFS and Hall CG *Maasdorp's Institutes of South African Law: The Law of Things* (1960) 80.

¹⁰⁴ Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 459.

continued existence was essential to the stability of his own land and to the proper and reasonable enjoyment by him of his rights of ownership, and among these surroundings the lateral support which ground receives from all adjacent ground was one of the most important. A man could, therefore, dig upon his own ground to any depth he pleased, provided he did not remove the natural support to which his neighbour's ground was entitled or, if he did, he provided some other equally efficient artificial support.

When considering the matter of subsidence, Henning J was unable to find authority to the effect that to succeed in an action for removal of lateral support it was necessary to establish a subsidence in the sense of a "falling-down or caving-in."¹⁰⁵ The right to support exists not only in respect of solid soil but also in respect of semi-liquid substances such as silt. The court accordingly held that the defendant was liable for damage caused as a result of the excavations on his land,¹⁰⁶ but no order was made in respect of the claim for prospective damage.

An important aspect of the *Gijzen* decision is the fact that the court regarded the right of lateral support as a natural right of property given in the nature of things, thus adopting the view that the right is a right to the integrity of the land. It is a natural and necessary incident of the ownership of land which ensures its full use and enjoyment. According to Milton this view is to be "distinguished from the view that the right is a natural servitude of support

¹⁰⁵ *Gijzen v Verrinder* 1965 (1) SA 806 (D) 810.

¹⁰⁶ 1965 (1) SA 806 (D) 811.

from the adjoining land”,¹⁰⁷ and apparently he is vindicated by the court’s refusal to award prospective damages. If the right to lateral support is regarded as a right to the integrity of the land, it is only when this integrity is violated that liability arises. Only where a subsidence has occurred and actual damage has been suffered can it be said that the right of support has been violated.¹⁰⁸ So it is clear that the damage, and not the withdrawal of support, is the cause of action. Prospective damages cannot be recovered, as there is no cause of action in respect of them.

It seems harsh to expect the plaintiff to sit by and await further damage to his property before he can bring an action. However, the rule that the removal of lateral support is not a continuing wrong alleviates his position to a degree. In terms of this rule, each successive subsidence, although emanating from the original act or omission, gives rise to a fresh cause of action.¹⁰⁹ The result of the rule is virtually to force the defendant to take steps to restore lateral support unless he is prepared to face a series of actions for each future

¹⁰⁷ Milton JRL “The Lateral Support of Land: A Natural Right of Property” (1965) 82 *SALJ* 459-463 460. See further Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 210.

¹⁰⁸ *Gijzen v Verrinder* 1965 (1) SA 806 (D) 810. See further *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (D) 175; Milton JRL “The Lateral Support of Land: A Natural Right of Property” (1965) 82 *SALJ* 459-463 461; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman’s the Law of Property* 5th ed (2006) 121.

¹⁰⁹ *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (D) 175; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman’s the Law of Property* 5th ed (2006) 121; Milton JRL “The Lateral Support of Land: A Natural Right of Property” (1965) 82 *SALJ* 459-463 461.

subsidence.¹¹⁰ In addition, it is open to the plaintiff to take the positive step of seeking an interdict directing the defendant to prevent future subsidences.¹¹¹ To succeed, the plaintiff would merely have to establish a clear right, a reasonable apprehension of damage and the absence of any other satisfactory remedy.¹¹²

Milton offers some insight as to why the court in *Gijzen* and in general favoured the approach that the right of support is a natural right of property which is part and parcel of ownership. If the courts had favoured the notion that the right is servituted, it would have then followed that any excavation which had the effect of removing support would give rise to liability, even if no subsidence or damage occurred. "The result will be that an owner could not excavate on his land without being liable to an action even if he avoided causing actual damage by providing an alternative means of support."¹¹³ He goes on to point out that this is in every respect contrary to the general principle that an owner can use and enjoy his land as he pleases so long as he does not cause injury to his neighbour's land in doing so.¹¹⁴ On the whole this approach adopted by the courts in South Africa seems more practical and

¹¹⁰ Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 461.

¹¹¹ *Municipal Council of Johannesburg v Robison Gold Mining Co Ltd* 1923 WLD 99.

¹¹² *Municipal Council of Johannesburg v Robison Gold Mining Co Ltd* 1923 WLD; *Setlogelo v Setlogelo* 1914 AD 221 227.

¹¹³ Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 461. See further Van der Vyver JD "Expropriation, Rights, Entitlements and Surface Support of Land" (1988) 105 *SALJ* 1-16 11.

¹¹⁴ Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 462.

realistic. As was mentioned above, the right of lateral support is generally viewed as a natural right inherent in the ownership of land.

The approach that was followed in *Gijzen* is compatible with what was established in the *locus classicus* that expressly incorporated the right of lateral support into South African law. In *Rouliot*,¹¹⁵ the view that the right of lateral support is a natural right incidental to the ownership of the property, and not servitudinal in nature, was established. What happened in *Rouliot*, in short, was that the defendant (Rouliot) leased a claim in the Du Toit's Pan Mine from the plaintiff company. The defendant made use of the open-cast method of mining in conducting his operations. Over the years a sloping buttress of diamondiferous ground was left by Rouliot to support the adjoining un-leased portion belonging to the plaintiff, forming the periphery of the mine. Rouliot then decided to mine the buttress, but before doing so, he removed a quantity of ground from the un-leased property, because he considered that the working of the buttress would cause a fall of the reef into his land. The removal of the earth allegedly constituted a trespass.

In the court of first instance¹¹⁶ it was held that the legal basis for the plaintiff's claim was that, by common law, it had a right of lateral support for its property and that this right had not been given up by the lease. The judge decided that, since open-cast mining had been contemplated by the parties, the plaintiff must indeed be taken to have given up its right to lateral support for its adjoining property. It was subsequently decided that the defendant had acted

¹¹⁵ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 99.

¹¹⁶ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 75.

lawfully in removing ground on the adjoining un-leased land before he exercised his right to remove lateral support. Cast in this mould, the right to lateral support is quasi-servituted. A landowner can be deprived of lateral support where it is reasonably necessary for an adjoining landowner to carry out his operations.

Chief Justice De Villiers in the appeal case¹¹⁷ disagreed with the decision *a quo* and argued that if the right to lateral support existed as a natural right incident to the plaintiff's land, as in his opinion it did, the parties to the contract must be deemed to have contracted with a view to the continued existence of that right. "If they had intended that the plaintiff should be deprived of this right ought not the defendant to have stipulated to that effect?"¹¹⁸ In the absence of such a stipulation the presumption is in favour of an intention to preserve a well-established natural right of property rather than to part with such a right. This rule was further qualified in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*,¹¹⁹ where Brand J made it clear that the right of lateral support was accepted as a rule of neighbour law, and therefore the right was incidental to the landowner's ownership. This is consistent with what was said in the introduction of this chapter. Accordingly, a landowner could only be deprived of it with his consent, be it express or tacit, but never to be implied by law.

¹¹⁷ (1890-1891) 8 SC 74.

¹¹⁸ (1890-1891) 8 SC 74 93.

¹¹⁹ 2007 (2) SA 363 (SCA) 371.

2.4 Lateral Support for Buildings and other Artificial Structures on Land

The applicability of the right of lateral support to buildings on land depends on which of the above two theories our courts find to be authoritative. If the right is in the nature of a natural servitude, it will not extend to buildings or artificial erections that increase the burden of support of land. It will be a servitude of support of land by land and not of buildings by land. On the other hand, if the right to lateral support is a right incidental to the ownership of a piece of property, then the right extends to buildings and any other artificial structures permanently erected and that have therefore acceded to the land. This is because it will be regarded as a natural and necessary right of ownership which ensures the full use and enjoyment of land.

Gregorowski supported the view that Roman law was more correct and consistent with our law than English law because the former extends the right of support not only to the surface, but to a wall built upon it, the erecting of a wall falling under the ordinary user.¹²⁰ In addition, an anonymous writer pointed out that in consequence of the favour with which erected buildings were regarded in Roman law, not only the soil itself but also the buildings upon it were protected against any interference with their stability arising from withdrawal of lateral support from land.¹²¹

¹²⁰ Gregorowski J “Miners Obligations” (1887) 4 *Cape LJ* 155-167 158. See further Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 205.

¹²¹ Anonymous “Natural Rights and Natural Servitudes” (1892) 9 *Cape LJ* 225-231 230.

The first authoritative judicial statement on this debate came courtesy of Morice J in *Johannesburg Board of Executors v Victoria Building Company*.¹²²

The plaintiff and the defendant were owners of adjoining stands in Johannesburg. In 1888 the plaintiff erected a double storey building on his stand. At that point in time, there was a small building on the defendant's stand, which was pulled down in 1893 to make room for a large double storey building. The foundations of the new building were excavated in the immediate vicinity of the plaintiff's building. At about the same time when the western wall of the defendant's building was finished, the eastern adjoining wall of the plaintiff began to crack and subsequently, on account of this, it had to be pulled down and rebuilt. The plaintiff attributed this to the fact that the foundations of the defendant's building were much deeper than those of his own building.

The court favoured the view that lateral support was owed to both land and buildings. It was held that owners of adjoining erven were mutually obliged to refrain from doing anything that would result in the necessary support for buildings on neighbouring properties being removed. Morice J found that there was no trace to be found in Roman law of the distinction, adopted in English law, between lateral support for the ground and lateral support for the buildings on the ground.¹²³ Thus it was held that in South Africa, the duty of lateral support extended to both the land in its natural state and to land encumbered by buildings.

¹²² (1894) 1 Off Rep 43.

¹²³ (1894) 1 Off Rep 43 46.

The same view was reiterated in *Phillips*.¹²⁴ In that case the first defendants employed the second defendant to erect a building on their property. In the course of the building operations the second defendant made certain excavations close to the plaintiff's building, as a result of which it collapsed. De Villiers AJ held that the Roman-Dutch law recognised a right of lateral support for land and buildings as between adjoining tenements.¹²⁵ He accordingly held that the plaintiff's building would not have collapsed if ordinary precautions had been taken by the defendants, and because the second defendant had acted in accordance with the contract between himself and the first defendants, they should be held jointly and severally liable in damages to the plaintiff.

The case of *Municipal Council of Johannesburg v Robinson GMC*¹²⁶ provides further support for the view that the right of support is a natural right incidental to the ownership of property and thus extends to buildings and other artificial structures permanently affixed to the land, although indirectly. The important facts in *Robinson GMC* were that the plaintiff expropriated a portion of the defendant's land for the purposes of laying a sewer through it. The defendants, who were miners, withdrew the lateral and subjacent support for the sewers in the course of their operations. Krause J referred to the English decisions in *Dalton v Angus*¹²⁷ and *Backhouse v Bonomi*¹²⁸ which established

¹²⁴ *Phillips v South African Independent Order of Mechanics and Fidelity Benefit Lodge and Brice* 1916 CPD 61.

¹²⁵ 1916 CPD 61 62.

¹²⁶ 1923 WLD 99.

¹²⁷ (1881) 6 AC 740.

¹²⁸ (1861) 9 HL 503.

the rule that a right to support for buildings could exist if acquired by an easement, usually by the elapse of a prescriptive period of twenty years. On the strength of these two judgements, Krause J found that the defendants were bound to provide support for the plaintiff's sewer. Krause J then concluded that "what is said here about the right of the owner of land applies equally to the owner of a building or other structures, like a sewer, when once the right of support has been acquired."¹²⁹

Milton is of the opinion that Krause J erred in reaching this conclusion, because English law does not extend the right of support to buildings on land.¹³⁰ English law simply provides that a right to support for buildings can be acquired by a servitude. This is different from a natural right of support for buildings, which was said in *Victoria*¹³¹ to exist in Roman-Dutch law. Milton believes that Krause J may have based his argument essentially on the fact that the council had expropriated the ground, so that failure by the defendants to provide lateral support amounted to a derogation from the grant. He concludes that in this sense this decision would be in harmony with English authorities.¹³² Milton found it worth noting that Krause J did not refer to any South African authorities in reaching his decision.

¹²⁹ *Municipal Council of Johannesburg v Robinson GMC* 1923 WLD 99 113.

¹³⁰ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 206.

¹³¹ (1894) 1 Off Rep 43.

¹³² Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 208.

What was said in the *Victoria* decision was seemingly repudiated in 1947, in *Douglas Colliery v Bothma*.¹³³ The applicant was the holder of mineral rights over two adjoining properties and the respondent was the owner of the surface of one of the properties. The respondent had erected a permanent dwelling house on the property and had permitted his servant to build a hut; on another portion of the farm a wattle and clay structure had also been constructed. The applicant complained that he would be precluded from carrying on mining operations under or within a horizontal distance of three hundred feet from the buildings, by reason of regulation 2 of Chapter 2 of the Mines and Works Regulations. This amounted to a gross interference with the applicant's mining operations that would occasion a considerable loss in revenue.

Neser J held that while the holder of mineral rights is obliged to leave support for the surface in its natural state when conducting his mining operations, the owner of the surface is obliged to desist from doing anything on the surface which would interfere with the mineral right holder's right to sever and remove the minerals.¹³⁴ It was held in that case that there was no right of support for that which is artificially constructed on land.

Milton was at pains to make the point that the *Douglas* decision was essentially concerned with mining law, and as shall be seen, different provisions exist in South African law regarding rights to land used essentially

¹³³ 1947 (3) SA 602 (T).

¹³⁴ 1947 (3) SA 602 (T) 612.

for mining purposes.¹³⁵ He submits that a clear distinction must be drawn between the right of support as existing in private property law and as existing in mining law; and that in the former field the view that the right of support is owed both to land and buildings is to be preferred. The *Douglas* decision did not purport to alter the law relating to lateral support, but rather to define the right of support in the special field of mining law.¹³⁶

Franklin and Kaplan indicate that other South African authors also heed this distinction drawn by Milton, namely between the right of support as existing in private law of property and the right of support as existing in mining law.¹³⁷ Franklin and Kaplan, like Milton, favour the view that the right of support is extended to buildings in South African law¹³⁸ and that the *Douglas* case did not purport to alter the law relating to lateral support in private law of property, but simply defined the rights of support in mining law.

¹³⁵ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 208. See further Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123. This will be discussed in greater detail in Chapter 3.

¹³⁶ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 210-211. See further Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123.

¹³⁷ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123; citing Viljoen and Bosman *A Guide to Mining Rights in South Africa* (1979) 12; Van der Merwe CG *Sakereg* 2nd ed (1989) 198-199. According to Franklin and Kaplan above, Van der Merwe refers to both lines of cases, but refrains from expressing a preference for either. However, he states that the reason why the duty to provide support in urban areas appears to be unimportant, is because such matters are adequately regulated by building and other regulations. This will be discussed in greater detail below.

¹³⁸ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123.

In *East London Municipality v South African Railways and Harbours*¹³⁹ it was held that the right to lateral support only extended to land in its natural state. The pertinent facts in that case were that the landowner had granted to the municipality and the public in general a public road over his property. The municipality laid high tension electric cables along the road. The defendant, in carrying out his quarrying operations, removed the lateral support and caused a subsidence. Reynolds J found that in regard to artificial constructions on land our law was substantially the same as the law of England. He could not see how on principle a right of support for all buildings, even those increasing the natural burden of support, could exist. He concluded that the right of support to land in its natural state rests upon principles common to all jurisprudence; hence on principle there can be no right of support for an artificial construction which did not exist in nature.¹⁴⁰ However, Reynolds J defines “land in its natural state” as meaning that:

“[T]he land to be supported is in such a state at the time of the withdrawal of support that no extra burden artificially there (ie not placed there by nature) increases the amount of support it requires beyond the amount it would require if the artificial burden were not there so as itself to cause subsidence which would not otherwise have occurred if the land was without the burden.”¹⁴¹

¹³⁹ 1951 (4) SA 483 (E).

¹⁴⁰ 1951 (4) SA 483 (E) 484.

¹⁴¹ 1951 (4) SA 483 (E) 484.

So, if the supporting earth would have escaped in the same way in the absence of the burden in the form of for example a building, damages will be awarded.

Milton explains that the factor that caused Reynolds J to come to this verdict was that the plaintiff company had acquired the land as a result of a grant by the defendant. It is an elementary principle of law that every grant carries with it all that is necessary for the enjoyment of the subject matter granted. He concludes that failure thus to provide lateral support as a necessary incident to the rights granted to the plaintiff would have rendered the grant futile.¹⁴²

In *Gordon v Durban City Council*,¹⁴³ the plaintiff was the owner of a piece of land known as 17, Churchill Road, Durban. One end of his land adjoined on to Churchill Road and the other on to an unnamed lane and, next to the lane, a shed or garage building existed on the plaintiff's land at all material times. The plaintiff alleged that, during the month of December, 1952, the defendant by its servants, acting within the course and scope of their employment, excavated a trench along the unnamed lane in a direction parallel to the back wall of this garage or shed, and at a distance from that wall of approximately 3 feet, and thus caused soil, which was supporting the wall, to slip and/or gradually to flow away, and that in consequence the footing of part of the wall, and a part of the floor-slab of the garage, subsided.

¹⁴² Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 209.

¹⁴³ 1955 (1) SA 634 (N).

The decision in *East London Municipality*¹⁴⁴ was uncritically accepted by Selke J. He said he took the common law regarding support applicable as between contiguous properties to be as indicated in *East London Municipality v SAR & H*,¹⁴⁵ namely, that as between contiguous properties the equivalent of reciprocal real servitudes exist, as it were *ex jure naturae*, by virtue of which each property is *prima facie* entitled as against the other to a continuance of that amount of lateral support which the last-mentioned property provided in its natural state. By “natural state,” Selke J specifies that he meant “the condition in which the land was when unchanged and unaffected by the activities of man,”¹⁴⁶ thereby effectively excluding buildings and other artificial constructions from the scope of the right of lateral support in South African law.

As was seen above, South African courts have adopted the theory that explains the right of lateral support as a natural right inherent in the ownership of property. The right of lateral support was received in *Rouliot*¹⁴⁷ as a natural right incidental to the ownership of the property and not as a servitude or easement. This view was endorsed by the decision in *Johannesburg Board of Executors v Victoria Building Company*.¹⁴⁸ In that case it was found that the right of lateral support was not only available to land in its natural state but also to land that was encumbered by buildings and other artificial fixtures. This was only possible because the right of lateral support was seen as

¹⁴⁴ *East London Municipality v South African Railways and Harbours* 1951 (4) SA 483 (E).

¹⁴⁵ 1951 (4) SA 483 (E).

¹⁴⁶ *Gordon v Durban City Council* 1955 (1) SA 634 (N) 638.

¹⁴⁷ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 99.

¹⁴⁸ (1894) 1 Off Rep 43.

shorthand for saying that a landowner had a right to use and enjoy his property.¹⁴⁹ After the *Victoria*¹⁵⁰ case a few cases¹⁵¹ followed, confirming the same view that the right of lateral support was a natural right inherent in the ownership of property. *Douglas Colliery v Bothma*,¹⁵² constituted the only decision that decided that the right of support was in the nature of a servitude, by saying that it did not extend to buildings on land. According to this view lateral support is only available to people where there is an agreement of easement to that effect. However, as was seen above, this case was a mining law case and it was explained that different provisions exist in South African law regarding rights to land essentially used for mining purposes. Milton submit that a clear distinction must be drawn between the right of support as existing in private property law and as existing in mining law; and that in the former field the view that the right of support is owed both to land and buildings is to be preferred.¹⁵³ The exclusion of built-up land was clearly influenced by English law.

¹⁴⁹ Van der Vyver “Expropriation, Rights, Entitlements, and Surface Support of Land” (1988) 105 *SALJ* 1-16 3, 11.

¹⁵⁰ *Johannesburg Board of Executors v Victoria Building Company* (1894) 1 Off Rep 43.

¹⁵¹ *Phillips v South African Independent Order of Mechanics and Fidelity Benefit Lodge and Brice* 1916 CPD 61, *Municipal Council of Johannesburg v Robinson GMC* 1923 WLD 99.

¹⁵² 1947 (3) SA 602 (T).

¹⁵³ Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 208. See further Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123. This will be discussed in greater detail in Chapter 3.

2.5 English Law of Support

2.5.1 Extent of the Right of Support in English Law

In English law, landowners have certain “natural rights,” protected by the law of torts, which come into being automatically and that are not the subject of any grant.¹⁵⁴ The right to support for land is one such right. Every landowner has a right to enjoy his own land in its natural state and is therefore entitled to have his land physically supported by the lateral thrust provided by his neighbour’s land.¹⁵⁵ Interference with this right gives rise to strict delictual liability in the neighbour.

As was pointed out above, every landowner has a natural right that the lateral thrust exerted on his soil by his neighbour’s land should not be removed, for example by mining or excavation operations carried out on adjacent land. This natural right to support includes an entitlement to support from a neighbour’s subjacent minerals and from any adjacent bed of wet sand or running silt.¹⁵⁶ However, this natural right of support does not extend to any claim that land should be supported by subterranean water present in adjacent land, with the result that no action lies in respect of a neighbour’s extraction of such water and consequent subsidence.¹⁵⁷ The natural right does not imply an obligation upon the neighbouring landowner to preserve his own land in its natural state.

¹⁵⁴ Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 19.

¹⁵⁵ Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 19.

¹⁵⁶ Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 19.

¹⁵⁷ Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 18.

2.5.2 English Law of Support for Buildings

It is at this juncture in the development of the right to support for buildings, that Milton finds it appropriate to examine the English law of support. He begins by citing Halsbury's *Laws of England*, where it is clearly stated that the owner of land has no natural right to support for buildings or additional weight which the buildings cause: "Support for that which is imposed on land cannot exist *ex jure naturae*, because the thing supported does not itself exist."¹⁵⁸

In *Wilde v Minsterley*¹⁵⁹ an extract from an early abridgement of the common law was quoted with approval. The extract held that where a neighbour B removed support from land and so caused a house on the neighbouring property of A to collapse, no action lies at the suit of A against B, because this was the fault of A himself that he built his house so near to the land of B, for he could not by his act hinder B from making the most profitable use of B's own land.

This rule was justified as follows in *Wyatt v Harrison*:¹⁶⁰ "if I have laid an additional weight upon my land, it does not follow that he (ie a neighbour) is to be deprived of the right of digging his own ground, because mine will then become incapable of supporting the artificial weight which I have laid upon it." In *Humphries v Brodgen*¹⁶¹ it was said that this rule stands on natural justice,

¹⁵⁸ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 207; Lord Mackay Halsbury's *The Laws of England - Mines, Minerals and Quarries: Misrepresentation and Fraud* 31 4th ed (2003) para 102.

¹⁵⁹ (1639) 2 Roll Abr 564.

¹⁶⁰ 3 B & A 875 876.

¹⁶¹ [1884] 12 QBD 739 744.

and that it is essential for the protection and enjoyment of the property in the soil. However, in *Dalton v Angus*¹⁶² Lord Penzance conceded, although *obiter*, that the rule does work some injustice. The judge said:

“If the matter were *res integra*, I think it will be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a house upon it, the owner of the adjacent soil could not be allowed to deal with his own soil by excavation as to bring his neighbour’s house to the ground. It would be, I think, no unreasonable application of the principle *sic utere tuo ut alienum non laedas* to hold that the owner of adjacent soil should take reasonable precautions, to prevent the excavation from disastrously affecting his neighbour.”¹⁶³

This, however, is not the law of England, as Lord Penzance immediately admitted. There is no duty on an owner in carrying out his excavations to consider his neighbour, and thereby take reasonable precautions to prevent him from suffering damage.¹⁶⁴

According to Gray and Gray, the decision in *Dalton* has always been viewed as providing venerable authority for the proposition that the natural right of support avails land only in its original state unencumbered by buildings or

¹⁶² (1881) 6 AC 740.

¹⁶³ (1881) 6 AC 740 804.

¹⁶⁴ (1881) 6 AC 740 804; *Peyton v London Corporation* (129) 9 B & C 725 735; Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 21.

other constructions.¹⁶⁵ So, if excavations or demolitions on neighbouring land cause a landowner's house to collapse, the landowner normally has no remedy in the absence of either nuisance, negligence or a duly acquired easement of support. An action in nuisance will therefore exist where the acts or omissions of an adjoining landowner unduly interfere with the neighbouring landowner's comfortable and convenient enjoyment of the demised property.¹⁶⁶

It is important to note that this rule of English law does not apply to all artificial constructions on land. In Halsbury's it is qualified by saying that the mere fact that there are buildings on land does not preclude a right of support, so long as the buildings do not "materially affect the question, or their additional weight" does not cause the subsidence that follows the withdrawal of support.¹⁶⁷ So, if the building did not increase the pressure on the land then it is "as if the model stood there, the weight of which bore so small a proportion to that of the soil as practically to add nothing to it."¹⁶⁸

In recent years, there has been a growing criticism of the confinement of the natural right to support to undeveloped land in English law. It has been criticised as being incompatible with the high intensity use of land in urban areas.¹⁶⁹ Moreover, according to Gray and Gray the dogmatic restriction of

¹⁶⁵ Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 21.

¹⁶⁶ Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 443.

¹⁶⁷ Halsbury's *The Laws of England - Mines Minerals and Quarries: Misrepresentation and Fraud* (2003) para 116.

¹⁶⁸ *Brown v Rubins* 4 H & N 186 193.

¹⁶⁹ Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 21.

this ancient rule leaves uncomfortable anomalies in its wake. A landowner's land, if left undeveloped, commands a strict duty of support from his neighbour's soil, but if the landowner invests in the developing his land, the neighbour may immediately excavate with impunity on his side, thereby causing the landowner's new building/s to crumble.¹⁷⁰ Furthermore, the neighbour's freedom to disregard the landowner's need of support for buildings on his land is rather oddly transformed, after the effluxion of a 20 year prescription period, into a positive duty of support in respect of the landowner's buildings.¹⁷¹

Gray and Gray cite a decision of the Singapore Court of Appeal as an example to be followed by other common law jurisdictions.¹⁷² It was held in *Xpress Print Pte Ltd v Monocrafts Pte Ltd and L & B Engineering (S) Pte Ltd*,¹⁷³ that it is "inimical to a society which respects each citizen's property rights' that, within the prescriptive period, a landowner could 'excavate his land with impunity, sending his neighbour's building and everything in it crashing to the ground.'"¹⁷⁴ Instead, the court appealed to the maxim *sic utere tuo ut alieum non laedas* to uphold, on behalf of an injured party, a right of support in respect of his buildings by neighbouring lands from the time such buildings are erected.

¹⁷⁰ Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 21.

¹⁷¹ *Dalton v Angus & Co* (1881) 6 App Cas 740 804.

¹⁷² Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 22, citing *Xpress Print Pte Ltd v Monocrafts Pte Ltd and L & B Engineering (S) Pte Ltd* [2000] 3 SLR 545.

¹⁷³ [2000] 3 SLR 545.

¹⁷⁴ [2000] 3 SLR 545 562.

2.5.3 Differences from South African Law

The English law rule as to lateral support owed to buildings on land seems to stem from the application of the natural servitude construction of the right of lateral support. By contrast, the natural right in the ownership property basis of the right to lateral support seems to have prevailed in Roman law and it should thus apply in South African law. The natural right in the ownership of property basis, as illustrated above, does not draw a distinction between support for land in its natural state and support for buildings burdening the land. As was indicated above, Milton and other noteworthy authors in South African law submit that on principle the *Victoria* approach is preferable for South African law.¹⁷⁵

South African authors attribute the failure of modern South African law to acknowledge the *Victoria* doctrine to two facts.¹⁷⁶ The first is the existence of bye-laws and building regulations in urban areas that guarantee that buildings will not be rendered dangerous or caused to collapse by the removal of lateral support afforded by neighbouring properties.¹⁷⁷ Milton rightfully submits that

¹⁷⁵ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 209. See further Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123; Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 12; Van der Merwe CG *Sakereg* 2nd ed (1989) 198.

¹⁷⁶ Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 210. *Gordon v Durban City Council*. See further Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123; Van der Merwe CG *Sakereg* 2nd ed (1989) 198.

¹⁷⁷ Van der Merwe CG *Sakereg* 2nd ed (1989) 198. See further Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 210; Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123.

these statutory regulations have made it unnecessary for courts to evolve rules dealing with removal of lateral support in urban areas.¹⁷⁸

The second fact is the development of a new body of law regarding mines and mining which has significantly influenced the law of lateral support.¹⁷⁹ South African mining law draws a distinction between the rights of surface owners and those of mineral right holders. Where these rights come into conflict, our law subordinates the use of the surface to mineral exploration.¹⁸⁰ This influence of mining law will be developed in the next chapter, dealing with subjacent support. For now, suffice it to say that the mining industry is the backbone of the South African economy. The interests of mineral right holders are thus likely to be given preference. Those exploiting the mineral wealth of a nation should not be called upon to provide more support for the surface than necessary. Thus the erection of buildings on the surface is accordingly restrained.¹⁸¹

The current position in English law, namely that the right of lateral support only extends to land in its natural state and not to buildings, is in fact in

¹⁷⁸ Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 210.

¹⁷⁹ Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 210. See further Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123; Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 56.

¹⁸⁰ *Hudson v Mann* 1950 (4) SA 485 (T) 488. See further Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman’s the Law of Property* 5th ed (2006) 705.

¹⁸¹ *Witbank Colliery v Malan and Coronation Colliery Co Ltd* 1910 TPD 667; *Coronation Collieries v Malan* 1911 TPD 577; *Witbank Colliery v Lazarus* 1929 TPD 529; *Douglas Colliery v Bothma* 1947 (3) SA 602 (T).

conflict with the very clear choice for the inherent incident of ownership theory that is accepted as the basis of the lateral support rule as illustrated above.

2.6 The Action for Failure to Provide Lateral Support

2.6.1 English Law

In English law, as is the case in South African law, the natural right to support is only infringed where the excavation of the adjacent land of a neighbour causes actual damage to the surface of the claimant's land.¹⁸² Therefore, a cause of action only accrues to a landowner upon the occurrence of actual physical damage. The mere apprehension of future damage or a mere loss of stability is not sufficient to found a cause of action, thereby precluding the possibility of recovering prospective damages.

In *Bonomi v Backhouse*¹⁸³ it was held that no cause of action arose until the subsidence took place. In his judgement, Willes J in the Exchequer Chamber said that:

“We think that the right which a man has to enjoy his own land in the state and condition which nature placed it, and also to use it in such a manner as he thinks fit, subject always to this: that, if his mode of it does

¹⁸² *Dalton Angus* (1881) 6 App Cas 740 806; Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 20; Halsbury's *The Laws of England - Mines Minerals and Quarries: Misrepresentation and Fraud* (2003) para 116.

¹⁸³ (1861) 9 HL 503.

damage to his neighbour, he must make compensation. Applying these two principles to the present case, we think that no cause of action accrued for the mere excavation by the defendant in his own land, so long as it caused no damage to the plaintiff; and that the cause of action did accrue when the actual damage first occurred.”¹⁸⁴

The House of Lords confirmed this decision and reiterated that the right of lateral support was a right to the ordinary use of land: until that ordinary enjoyment was interfered with, no cause of action accrued.¹⁸⁵ Milton comments that this statement of law is consistent with the premise that the right of support is not a natural servitude but is in fact a natural right in the ownership of property, that is, the right to the use and enjoyment of land. If the right was seen as a natural servitude or easement, the mere removal of support would have given rise to an action for damages, even where the plaintiff had suffered none.

In *Darley Colliery v Mitchell*¹⁸⁶ it was held that each recurring subsidence, although following from the same original act of withdrawal of lateral support, formed a new and independent cause of action. This is so because the defendants would have permitted the state of things to continue without taking any steps to prevent the occurrence of future injury. A fresh subsidence took place, causing a new and further disturbance of the plaintiff’s enjoyment, which gave him a new and distinct cause of action.¹⁸⁷

¹⁸⁴ (1861) 120 ER 643 659.

¹⁸⁵ *Backhouse v Bonomi* (1861) 9 HL 503.

¹⁸⁶ (1886) 11 HL 127.

¹⁸⁷ (1886) 11 HL 127 133.

Furthermore, the natural right of support in English law cannot obligate a neighbour to take active steps to maintain lateral support. Gray and Gray submit that in reality the right of support entails no positive right at all, but merely a right not to have lateral support withdrawn by a neighbour's positive actions. What is prohibited is an active interference with the support which causes damage.¹⁸⁸ Therefore an accidental slippage of land on a neighbouring piece of land constitutes no breach of the right to support. In such a case, however, the neighbour may be liable on the alternative grounds of negligence and nuisance, as there is a duty of care to prevent danger to higher land from lack of support caused by natural erosion. Under these circumstances, liability only arises where the owner or occupier of the lower land knows or is presumed to know of a patent defect in his land which could reasonably and foreseeably cause damage to higher land.¹⁸⁹

It follows that violation of a landowner's right to support gives rise to liability in the form of damages and may even be the subject of a mandatory injunction. However, the natural right to support is not infringed if the land which has been excavated and the neighbouring land from which lateral support has thereby been removed are both, at

¹⁸⁸ Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 20; *Xpress Print Pte Ltd v Monocrafts Pte Ltd and L & B Engineering (S) Pte Ltd* [2000] 3 SLR 545 563.

¹⁸⁹ Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 20.

the date of excavation, within the common ownership of one person.¹⁹⁰

A subsequent purchaser of the portion of land from which lateral support has been removed cannot claim any violation of his natural right in the event of a later collapse of his land, but may be able to sue in negligence.¹⁹¹

2.6.2 South African Law

A landowner may lawfully dig upon his own soil to any depth as he desires. In doing so, he may not cause injury to the rights of his neighbour or the public at large by digging so near to the neighbour's ground or to any road or other public place as to endanger its stability. If he causes injury to his neighbour or any person lawfully on or using the public road or space he may not only be interdicted, but held liable for any damage endured thereof.¹⁹²

Milton submits that South African authority¹⁹³ classically restates English law,¹⁹⁴ and in *John Newmark & Co (Pty) Ltd v Durban City Council*¹⁹⁵

¹⁹⁰ Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 20.

¹⁹¹ An action for loss of support may lie against the person withdrawing support even though he has since ceased to own the land adjoining that from which support was withdrawn. The successor in title of the person who withdrew the support is not liable for the acts of his predecessor. See Gray K and Gray SF *Elements of Land Law* 5th ed (2009) 21 fn 4.

¹⁹² Maasdorp AFS and Hall CG *Maasdorp's Institutes of South African Law: The Law of Things* (1959) 80. See further Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 111; Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 119; Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 68.

¹⁹³ *Coronation Colliery v Malan* 1911 TPD 577 596; *Demont v Akal's Investments* 1955 (2) SA 312 (N) 316; *Gijzen v Verrinder* 1965 (1) SA 806 (D); *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (D) 175.

Henochsberg J said that “it is clear that in our law, as in English law, where there is a removal of lateral support ..., each successive subsidence, although proceeding from the original act or omission gives rise to a fresh cause of action apart altogether from the question of negligence.”¹⁹⁶

As to the question of *culpa* or *dolus* in subsidence cases, our law is consistent with the English law. In proceedings for relief, it would be sufficient for the plaintiff to allege that the defendant has in fact withdrawn or interfered with the lateral support of his land to an extent which infringes his entitlements and that this has produced damage.¹⁹⁷ Neither negligence nor intention is a requirement for liability for damage caused by the withdrawal of lateral support. It was accordingly held in *Grieves & Anderson v Sherwood*¹⁹⁸ that “reasonable precautions” by the defendant is not a defence against the plaintiff’s claim for damages. Neither the care nor the skill with which the work may have been done, nor the unstable nature of the soil, nor the difficulty of propping it up, will form any defence to the action. However, Maasdorp and Hall add to this that if an aggrieved landowner can prove that he suffered pecuniary loss through the *dolus* or *culpa* of the wrongdoer, he can likewise

¹⁹³ 1959 (1) SA 169 (D) 175.

¹⁹⁴ Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 212.

¹⁹⁵ *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (D) 175.

¹⁹⁶ 1959 (1) SA 169 (D) 175.

¹⁹⁷ For this point see *Demont v Akal’s Investments (Pty) Ltd and Another* 1955 (2) SA 312 (N) 316; *Gijzen v Verrinder* 1965 (1) SA 806 (D) 811; *Foentjies v Beukes* 1977 (4) SA 964 (C) 966; *Oslo Land Co Ltd v Union Government* 1938 AD 584 592; *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (D) 175.

¹⁹⁸ (1901) 22 NLR 225 227.

recover damages in delict by virtue of the *Lex Aquilia*.¹⁹⁹ The fact that liability is not dependant on the presence of *dolus* or *culpa* and that it only follows where withdrawal of support has caused damage on neighbouring land illustrates that the right of support is a natural right in the ownership of property. This is in line with what was said in the introduction to this chapter above.

In *Oslo Lands Co Ltd v Union Government*,²⁰⁰ a distinction between an action based on negligence and one based on the withdrawal of support was tendered. It was said that in negligence cases the cause of action is an unlawful act plus damage, so that as soon as the damage has occurred all the damage from the unlawful act can be recovered, including prospective damage and depreciation in market value. By contrast, in subsidence cases there is no unlawful act; the cause of action is damage and damage only. It follows from this that depreciation in value of property owing to risk of future subsidence cannot be recovered in such actions.²⁰¹ A similar statement to that effect, namely that in subsidence cases there is usually no unlawful act and that the cause of action is damage and damage alone, was made by Henning J in *Gijzen v Verrinder*.²⁰²

¹⁹⁹ Maasdorp AFS and Hall CG *Maasdorp's Institutes of South African Law: The Law of Things* (1959) 81.

²⁰⁰ 1938 AD 584 592.

²⁰¹ 1938 AD 584 592; *Gijzen v Verrinder* 1965 (1) SA 806 (D) 811; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 111; Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 fn 326.

²⁰² *Demont v Akal's Investments (Pty) Ltd and Another* 1955 (2) SA 312 (N) 316.

Milton is of the opinion that this statement may be misleading.²⁰³ He explains that there was in fact an unlawful act in that there had been a substantial interference with adjoining land that caused damage. He concludes by saying that it is the presence of damage which converts a normally lawful act (digging upon one's land) into an unlawful act.²⁰⁴ In other words, what begins as a lawful and harmless activity becomes unlawful when lateral support is withdrawn from a neighbour's land and the latter suffers actual physical damage to his land.

2.7 Conclusions

It is clear from the above that in South African law, the view that the right of lateral support is a natural right incidental in the ownership of property is the theory that convincingly explains the nature of the right of lateral support. Milton states that the natural right theory has deeper significance, and that the servitudal theory has given rise to uncertainty as to the true nature of the right.²⁰⁵ However, he submits that most writers include this right in their discussion of servitudes while simultaneously stating that it is a natural right of property.²⁰⁶

²⁰³ Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 459.

²⁰⁴ Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 459. See further Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 120.

²⁰⁵ Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 462.

²⁰⁶ Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 462; Hall CG Kellaway EA *Servitudes* 2nd (1957) 91; Anonymous "Natural Rights and Natural Servitudes" (1892) 9 *Cape LJ* 225-231 230.

As was explained above, the theory that describes the right of lateral support as a natural right inherent in the ownership of property therefore informs the nature of the remedies available to a landowner whose property subsides as a result of the withdrawal of lateral support caused by the activities of the neighbouring landowner. Thus, he could either claim damages via the neighbour law action of nuisance, or by way of a delictual action.

It was held in *Demont v Akal's Investments*²⁰⁷ that in proceedings for relief, it will be sufficient for the plaintiff to allege that the defendant has in fact:

“[W]ithdrawn or interfered with the lateral support of his land to the extent which infringes his basic rights, and that this has produced damage. It is unnecessary for him to allege any specific details of negligence.”²⁰⁸

The fact that the plaintiff need not prove *culpa*, or *dolus* for that matter, indicates that the action for withdrawal of support is a real action based on nuisance. This is distinguishable from the personal action based on delict where an aggrieved landowner would be required to show fault, either in the form of *culpa* or *dolus*.²⁰⁹

Viljoen and Bosman submit that it is clear that the right to support derives from the law of neighbours, although it should be added that this branch of

²⁰⁷ 1955 (2) SA 312 (N)

²⁰⁸ 1955 (2) SA 312 (N) 316.

²⁰⁹ *Foentjies v Beukes* 1977 (4) SA 964 (C) 966.

law has had a very unsystematic treatment in South African law.²¹⁰ It has been submitted that if lateral support of land is removed, the basic measure of damage is the reasonable cost to provide support to the property in question.²¹¹ Viljoen and Bosman submit that when a landowner has not suffered damage but a neighbour has interfered with or has threatened to interfere with the landowner's reasonable enjoyment of his property, he is entitled to an interdict or abatement or both.²¹² In claiming an interdict, the affected landowner simply has to show a clear right, that no other remedy is available to him and that his enjoyment of his property is being threatened or disturbed.

²¹⁰ Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 68.

²¹¹ Erasmus HJ, Gauntlett JJ and Visser PJ "Damages" in Joubert WA, Faris JA and Harms LTC (eds) *LAWSA* 7 (2007) 3-93 para 74; *Grieves v Anderson*; *Grieves v Sherwood* (1901) 22 NLR 225; *Municipal Council of Johannesburg v Robinson Gold Mining Co Ltd* 1923 WLD 99 112; *East London Municipality v South African Railway and Harbours* 1951 (4) SA 466 (E) 480 483; *John Newmark & Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (D) 175; *Gijzen v Verrinder* 1965 (1) SA 806 (D) 811; *Foentjies v Beukes* 1977 (4) SA 964 (C) 966.

²¹² Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 68. The authors here fail to satisfactorily highlight the difference between an interdict and an abatement order. See further Church J and Church J "Nuisance" in Joubert WA, Faris JA and Harms LTC (eds) *LAWSA* 19 (2007) 116-143 para 197, where it said with regard to abatement orders that local authorities or certain public officers are authorised under national and regional legislation to order owners or occupiers of land to abate nuisances upon their property. Therefore, abatement orders only extend to conditions or state of affairs defined as nuisances by relevant legislation. However, it is stipulated in the same paragraph that such statutory nuisances commonly include typical private nuisances. Where such is the case, the victim of the nuisance may apply to the local authority for the issue of an abatement order. Paragraph 198 says that an interdict on the other hand may serve to restrain an offender from establishing a threatened nuisance or from continuing an existing nuisance. Likewise, the interdict may direct the offender take certain specified steps in order to abate a nuisance.

In a real action based on nuisance, the successful plaintiff who has suffered damage because of the withdrawal of lateral support would claim compensation for the cost of repairing the damage caused by the withdrawal of lateral support. A neighbouring owner cannot with impunity excavate on his land, if such activities would have the effect of reducing the above-mentioned quantum of lateral support.²¹³

If a plaintiff opts to pursue the *Aquilian* (delictual) action based on the *actio legis Aquiliae*, he will have to prove that he suffered actual pecuniary (financial) loss caused deliberately or negligently by the defendant.²¹⁴ If he is successful he will be able to recoup what he actually lost as a result of the removal of subjacent support. The *lex Aquilia* accordingly aims at restoring to a successful plaintiff the difference between his *universitas rerum* as it was after the act causing loss, and as it would have been if the act had not been committed.²¹⁵

As is evident from the above, South African courts have preferred the theory that explains the right of lateral support as a natural right inherent in the ownership of property over the servitudal theory. The right of lateral support was clearly received in *Rouliot*²¹⁶ as a natural right incidental to the ownership

²¹³ *Demont v Akal's Investments* 1955 (2) SA 312 (N) 316. See also *Foentjies v Beukes* 1977 (4) SA 964 966.

²¹⁴ Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 68.

²¹⁵ *Union Government (Minister of Railways & Harbours) v Warneke* 1911 AD 657 665. See also Erasmus HJ, Gauntlett JJ and Visser PJ "Damages" in Joubert WA, Faris JA and Harms LTC (eds) *LAWSA* 7 (2007) 3-93 para 62.

²¹⁶ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 99.

of the property and not as a servitude or as an easement. From the discussion of buildings and the right of lateral support, it was seen that the natural rights theory was endorsed by the decision in *Johannesburg Board of Executors v Victoria Building Company*.²¹⁷ In holding that the right of lateral support was not only available to land in its natural state but also to land that was encumbered by buildings, the court in *Victoria* upheld the natural rights theory. The right of lateral support was seen as shorthand for saying that a landowner had a right to use and enjoy his property,²¹⁸ hence its availability to buildings and other permanent fixtures erected on land. Subsequent to the *Victoria*²¹⁹ case a few other cases²²⁰ confirmed the same view that the right of lateral support was a natural right inherent in the ownership of property. *Douglas Colliery v Bothma*,²²¹ constituted the only decision that decided that the right of support was in the nature of a servitude, by saying that it did not extend to buildings on land. This was because lateral support would only be available to buildings where there was an agreement of easement to that effect. However, as was emphasized above *Douglas Colliery v Bothma* was a mining law case, therefore different provisions existed/exist in South African law regarding rights to land essentially used for mining purposes. For that reason, a clear distinction must always be drawn between the rights of support as existing in private property law and as existing in mining law; and

²¹⁷ (1894) 1 Off Rep 43.

²¹⁸ Van der Vyver "Expropriation, Rights, Entitlements, and Surface Support of Land" (1988) 105 *SALJ* 1-16 3, 11.

²¹⁹ *Johannesburg Board of Executors v Victoria Building Company* (1894) 1 Off Rep 43.

²²⁰ *Phillips v South African Independent Order of Mechanics and Fidelity Benefit Lodge and Brice* 1916 CPD 61, *Municipal Council of Johannesburg v Robinson GMC* 1923 WLD 99.

²²¹ 1947 (3) SA 602 (T).

that in the former field the view that the right of support is owed both to land and buildings is to be preferred.²²²

From the above, it is clear that in South African law, the right of lateral support is generally accepted as being a natural right inherent in the ownership of property, and is only available in a neighbour law setting. This premise was repeated in *Anglo Operations*,²²³ where the Supreme Court of Appeal in distinguishing the concept of subjacent support from that of lateral support demonstrated that the right of lateral support was received as a neighbour law principle by *Rouliot*.²²⁴ In doing so, the Supreme Court of Appeal removed any doubt as to the true legal nature of the right of lateral support. It is now settled law that the right of lateral support is a natural right inherent in the ownership of land.

²²² In this regard see Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 208. Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123. This will also be discussed in greater detail in Chapter 3.

²²³ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) 363 (SCA) 372.

²²⁴ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 99.

Chapter 3

The Right of Subjacent Support

3.1 Introduction

The preliminary section of this chapter will specifically show how the neighbour law principles of lateral support (as discussed in chapter two above) were extended to govern the conflict pertaining to subjacent support that arises between a landowner and a mineral rights holder in South African mining law. Thereafter, the chapter will illustrate how the Supreme Court of Appeal in *Anglo Operations v Sandhurst Estates*²²⁵ rejected this extension, by clearly distinguishing between lateral support and subjacent support. They held that the right to minerals on the property of another was in the nature of a quasi-servitude, and therefore all conflicts arising therefrom were to be resolved in accordance with the principles of servitudes developed by our law.²²⁶ Therefore, in applying these principles of servitude to mineral rights, the court found that the landowner was bound to allow the holder of mineral rights to do whatever was reasonably necessary to attain his ultimate objectives. In the absence of an express or tacit term to the contrary in the grant of minerals, this would include on the part of the mineral rights holder the right to employ the open-cast method of mining. They added that the mineral rights holder was in turn bound to exercise his rights *civilliter modo*,

²²⁵ 2007 (2) SA 363 (SCA).

²²⁶ 2007 (2) SA 363 (SCA) 373.

that is, reasonably viewed, with as much possible consideration and with the least possible inconvenience to the landowner.

The possible effect of legislation with regard to the question of subjacent support will be discussed. Firstly the implications of the *Anglo Operations* decision in light of the systemic changes of mineral ownership and administration brought about by the new Act,²²⁷ will be examined. The question is whether this servitude construction can hold in cases where the mineral right or mining right was not granted by the landowner but by the state, acting in terms of the new regulatory powers created in the Act. The effect of older legislation in this regard (mainly the Minerals Act 50 of 1991) on the relationship between a landowner and a mineral rights holder will also be considered. This will help us establish the extent of the new Act's impact on the landowner.

Secondly, in addition to the above, the general effect of legislation (old and new) on the relationship of between a landowner and a mineral rights holder with regard to the question of subjacent support will also be investigated.

3.2 The Origin and Development of the Subjacent Support Problem in Case Law and Academic Writing

3.2.1 Introduction

Traditionally, the legal position in South Africa was that the mineral rights holder was obliged to leave sufficient subjacent support for the landowner on

²²⁷ The Mineral and Petroleum Resources Development Act 28 of 2002.

whose property his mining operations were being carried on and lateral support for the neighbouring landowner.²²⁸ Kaplan and Dale submit that a mineral rights holder or person prospecting or mining with the surface owner's consent is entitled, at common law, to broad ancillary rights in respect of the use of the surface for purposes necessary for or incidental to such activities.²²⁹ However, the right to withdraw subjacent support is not included under the "broad ancillary rights" umbrella, although it is incidental to the prospecting or mining activities of a mineral rights holder. The surface owner was required to expressly or tacitly waive his right to subjacent support as it was regarded as a natural right inherent in the ownership of property. Viewed in this light, the right of subjacent support, like the right to lateral support, was shorthand for the right to use and enjoy property (a natural right inherent in the ownership of property).²³⁰ Depriving a landowner of this right would have been tantamount to him losing all value and beneficial use of his property. So the law would have never implied a term to that effect. The landowner would have been required to expressly or tacitly waive the right of subjacent support before a mineral rights holder could withdraw subjacent support even under circumstances that demanded such withdrawal.

²²⁸ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 114. See further Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 185; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The Law of Property* 5th ed (2006) 704-705.

²²⁹ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 185.

²³⁰ Van der Vyver JD "Expropriation, Rights, Entitlements, and Surface Support of Land" (1988) 105 *SALJ* 1-16 3, 11; Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 462; Anonymous "Natural Rights and Natural Servitudes" (1892) 9 *Cape LJ* 225-231 230.

The practice of treating subjacent support and lateral support as synonymous concepts can be traced back to the case of *Witbank Colliery v Malan and Coronation Collieries*.²³¹ This practice was maintained right up to the *Anglo Operations*²³² *a quo* decision. The facts of the former case were as follows. Witbank Colliery acquired from Malan, the owner of the land, the right to mine for coal under a portion of his land. They concluded a notarial agreement registered against the title in 1898. Thereafter a third party by the name of Coronation Colliery constructed a railway siding across that same portion granted to Witbank Colliery to connect their workings with the main line of railway by virtue of a contract, of which they were the cessionaries, granted to the cedent by Malan in 1896. The contract was notarial and registered in the Deeds Office, but not against the title, and its existence was unknown to Witbank Colliery at the time of the contract in 1898. The existence of a railway siding caused the Government Mining Engineer to prohibit, in terms of a regulation, the Witbank Colliery from mining under it, by directing that a pillar of coal be left vertically under the siding for its whole length and for a specified distance on each side of it.

It was held by the Transvaal Provincial Division that the rights of Witbank Colliery, conferred by a notarial deed duly registered against the title, ranked in priority over those conferred by the contract of 1896 which was not registered against the title. Coronation Colliery was held to be liable in damages to Witbank Colliery, the measure of damages being the value of the coal under the siding which could not be mined, less the cost of extraction. It

²³¹ 1910 TPD 667.

²³² *Anglo Operations Ltd v Sandhurst Estates* 2006 (1) SA 350 (T).

was held further that the owner of the land, Malan, was not liable in damages since he himself had done nothing to violate the rights of the Witbank Colliery.

This case set the scene for the crucial decision by the same court in *Coronation Collieries v Malan*.²³³ The plaintiff sought to recover from Malan, the owner of the surface who had granted the Witbank Colliery the right to mine on it, damages which the court in the 1910 case had awarded against it. The central question in that case for our purposes was whether the underground miner owed the landowner a duty of vertical or subjacent support of the surface. In answering this question Bristowe J began by saying:

“It is well settled in England that the right to have the surface of land in its natural state supported by the subjacent minerals is a right of property and not an easement; and that a lease or conveyance of minerals, even though accompanied by the widest powers of working, carried with it no power to let down the surface, unless such power is granted either expressly or by necessary implication.”²³⁴

In this regard he cited a few English law authorities.²³⁵ He then went on to draw the distinction between English and South African law in this regard. In South Africa there can be no lease or cession of mineral rights. Horizontal layers of the earth’s surface cannot, as they can in England, be separately

²³³ 1911 TPD 577.

²³⁴ 1911 TPD 577 591.

²³⁵ See *Davis v Treharne* 6 AC 460; *New Sharlston Colliery Co v Earl of Westmoreland* 1904 2 Ch 443; *Hext v Gill* 7 Ch App 713-714; *Love v Bell* 9 AC 286; *Butterknowle Colliery C v Bishop Auckland Industrial Co-operative Co* 1906 AC 313.

owned. He then cited Innes CJ in *Van Vuuren v Registrar of Deeds*,²³⁶ who said that every grant or reservation of mineral rights is in truth the constitution, by the owner of the property affected, of a quasi-servitude in favour of the grantee.²³⁷ Bristowe J then inexplicably went on to say that:

“...this difference between the two systems of law does not affect the right of support, and that the case of *London and South African Exploration Co. v Rouliot*,²³⁸ shows that as regards the right of support of land in its natural state, there was no difference between the English law and the Roman-Dutch law. In that case it was held that a lessee of land for mining purposes cannot *prima facie* withdraw support from the adjoining land of the lessor. There it was only lateral support that was in question, because the lease contemplated surface workings, but the same principle would apply, if his workings were subterranean and the support in question was vertical. In giving judgement, De Villiers CJ, said ‘If the right to lateral support exists as a natural right incident to the plaintiff’s land, as in my opinion it does, the parties to the contract must be deemed to have contracted with a view to the continued existence of that right... I am of the opinion that, in the absence of such a stipulation, the presumption is in favour of an intention to preserve a well-established natural right of property rather than to part with such a right.’²³⁹

This above passage forms the basis for the view that a landowner may not be deprived of vertical support which his property naturally derives from the

²³⁶ 1907 TS 289.

²³⁷ 1911 TPD 577 591.

²³⁸ (1890-1891) 8 SC 74.

²³⁹ 1911 TPD 577 592.

minerals below the surface, without his express or tacit consent. It constitutes the foundation of the respondent's contention in *Anglo Operations*.²⁴⁰

Several noteworthy South Africa authors subscribe to this view.²⁴¹ Viljoen and Bosman discuss the right of lateral support and the right of subjacent support under the heading "The Rights of the Landowner." They refer to *Rouliot*²⁴² and fail to appreciate that it specifically dealt with lateral support and not subjacent support. Kaplan and Dale make the same oversight.²⁴³

Since the extension of this rule of neighbour law to govern the relationship of landowners and mineral rights holders in respect of the same land in 1911 by Bristowe J, there was no clarity as to whether the ancillary rights of mineral right holders included the right to withdraw subjacent support in carrying out his mining operations.

3.2.2 Development of Subjacent Support in English Law

3.2.2.1 Introduction

The material conceptual difference between English law and South African law is that in English law it is possible for different horizontal layers of land to

²⁴⁰ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

²⁴¹ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 114. See further Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 185; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 704-705.

²⁴² (1890-1891) 8 SC 74.

²⁴³ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 185. See further Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 67.

be owned by different persons. One of the most basic principles of South African law, on the other hand, is that the owner of the land is the owner of the whole of the land, including the air space above the surface and everything below it.²⁴⁴ This principle finds expression in the maxim *cuis est solum eius est usque ad caelum et usque ad inferos*. In *Coronation Collieries*²⁴⁵ Bristowe J said that this difference between the two systems of law did not affect the right of support.²⁴⁶ This cannot be true in light of the above fundamental conceptual difference between the two systems of law in the field of mining law. *Coronation Collieries v Malan*,²⁴⁷ clearly followed English law cases of support.

3.2.2.2 Development of Concept of Subjacent Support in English Case law

In the leading English decision of *Harris v Ryding*,²⁴⁸ the owner of the land (the defendant) transferred ownership of the freehold but reserved for himself all the mines beneath the surface. The plaintiff alleged that the defendant had wrongfully and injuriously, and without leave and licence, carelessly and negligently failed to provide sufficient support. By working the mines which were underground, near and contiguous to premises that were partly in the

²⁴⁴ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 4. See further Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 7; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 672.

²⁴⁵ *Coronation Collieries v Malan* 1911 TPD 577.

²⁴⁶ 1911 TPD 577 591.

²⁴⁷ 1911 TPD 577.

²⁴⁸ (1839) 5 M & W 60.

possession, and partly in the reversion of the plaintiff, the defendants had withdrawn lateral and subjacent support. The ensuing result was damage to the houses, garden and land of the plaintiff. The substance of the defendant's defence was that when he sold the surface to the plaintiff he reserved for himself the mines, with a certain liberty of working them, and such liberty extended to all the mines and minerals. The defendant's attitude was that the exception in the grant enabled him to extract the coal in any manner he pleased. The court rejected this submission.

The court held that in all cases of exception out of grants, there was an implied agreement between the parties that the owner of the minerals would use the thing excepted in a fashion that would not prejudice the grantee in the enjoyment of the subject matter of the grant. The exception was always interpreted in favour of the lessee, and against the lessor. It is a rule that what will pass by words in a grant will be excepted by the same words in an exception. Such a construction should be made of the words in a deed as is most agreeable to the intention of the grantor; the words are not the principal things in a deed, but the intent and design of the grantor.²⁴⁹ It was concluded on the facts that the parties could never have intended a right to work the mines to an extent that rendered the surface totally useless. There was an implied covenant to work the mines in the usual way. It must have been necessary to leave support for the surface, whether there were houses or not. Therefore the defendant was bound to work them in the ordinary usual mode which provided subjacent support to the surface owner.

²⁴⁹ (1839) 5 M & W 60 74.

It was also contended on behalf of the defendant that he had a right to use every means he pleased to work the mines and extract the minerals, so long as he paid reasonable compensation as agreed in their contract. However, it was held that the true meaning of the clause was that he should pay compensation for necessary injuries to crops growing upon the surface. The clause did not contemplate damage arising from working the mines in an improper way.

In English law the right of support is not affected by the nature of the strata, or the difficulty of propping up the surface, or the comparative values of the surface and the minerals.²⁵⁰ Further, it is impossible to measure out degrees to which the right may extend.²⁵¹ Thus, a surface owner's right is not modified by the fact that the obligation not to cause damage by subsidence renders the effectual working of the subterranean minerals impossible, as where the extent of the pillars needed to maintain the surface is such as to make the remaining minerals unprofitable to work.²⁵² In regard to this principle it is submitted in Halsbury's *Laws of England* that it appears to have been assumed that the minerals could always be worked commercially, to some extent, without letting down the surface, so that it may have seemed

²⁵⁰ *Humphries v Brodgen* [1843-1860] All ER 779 783.

²⁵¹ [1843-1860] All ER Rep 779 783. See further *Wakefield v Duke of Buccleuch* (1867) LR 4 HL 377.

²⁵² (1867) LR 4 HL 377.

reasonable to infer an intention at the time of severance that they could be worked to that extent but no further.²⁵³

On the strength of the above authorities, the principle of subjacent support was concisely stated as follows by Lord Macnaghten in *Butterknowle Colliery Co Ltd v Bishop Auckland Industrial Co-operative Co Ltd*:²⁵⁴

“[T]he result seems to be that in all cases where there has been a severance in title and the upper and lower strata are in different hands, the surface owner is entitled of common right to support of his property in its natural position.”²⁵⁵

In *Humphries v Brodgen*²⁵⁶ an action was brought by the plaintiff, alleging that he had been deprived of subjacent support for his land by the mining operations of the defendant. The plaintiff was possessed of diverse closes of pasture and arable land,²⁵⁷ what we would term pasture land and cropping land in South African law. The defendant was the owner of the subterranean minerals beneath these pasture and cropping lands belonging to the plaintiff. The plaintiff alleged that the defendant wrongfully, carelessly, negligently, improperly, and without leaving any proper or sufficient pillars of support, and contrary to the custom and course of practice of mining used and, approved of

²⁵³ Lord Mackay *Halsbury's The Laws of England - Mines, Minerals and Quarries: Misrepresentation and Fraud* 4th Ed (2003) Vol 31 para 116 fn 2.

²⁵⁴ [1906] AC 305.

²⁵⁵ [1906] AC 305 313.

²⁵⁶ [1843-1860] All ER 779.

²⁵⁷ [1843-1860] All ER 779 782.

in the country where the mines are situated, worked certain coal mines under and contiguous to the said closes. As a result the plaintiff's pasture and cropping lands subsided and he suffered damage.

The question before the court was whether, when the surface of land (the soil lying over the minerals) belonged to one man, and the minerals belonged to another, and there was no evidence of title appearing to regulate or qualify their respective rights of enjoyment, the owner of the minerals could extract them without leaving support sufficient to maintain the surface in its natural state.

The court began by distinguishing the then contemporary state of affairs regarding the legal position of the right to subjacent support from adjacent support. Campbell CJ began by saying that where portions of the freehold, lying over another, perpendicularly belong to different individuals and constitute, as it were, separate closes, the degree of support to which the upper is entitled from the lower has, as yet, by no means been distinctly defined, but in the case of adjoining closes, which belong to different persons from the surface to the centre of the earth the law of England has long settled the degree of lateral support which each may claim from the other.²⁵⁸ He went on to say that examining the principle of lateral support might be useful in reaching a solution for the question of subjacent support.

²⁵⁸ [1843-1860] All ER 779 782.

The right to lateral support from adjoining soil, he said, was not like the support of one building upon another, supposed to be gained by grant, but was a right passing with the soil. For example, if the owner of two adjoining properties conveyed away one of them, the receiver, without any grant for the purpose, was entitled to the lateral support afforded by the other property the instance the conveyance was executed. Immediately after saying this Campbell J said that where there were separate freeholds, the surface of the land and the minerals belonging to different owners, they were of the opinion that “the owner of the surface, while unencumbered by buildings, and in its natural state, is entitled to have it supported by the subjacent mineral strata.”²⁵⁹ The owner of the minerals remains entitled to remove them, so long as he leaves sufficient support for the owner of the surface. If the surface subsides as a result of the removal of that mineral stratum, though, the operations were not carried out negligently or contrary to the custom of the country, the owner of the surface has an action against the owner of the minerals for the damage sustained by the subsidence. The court explained that, but for this right of support from subjacent minerals, which corresponds with the lateral support from adjoining properties, the surface cannot be enjoyed as property, and under certain circumstances, as where the mineral strata approach the surface, and are of great thickness, it might be entirely destroyed.²⁶⁰

Campbell J subsequently summed up by stating that they likewise thought that the rule giving the right of support to the surface which was above the

²⁵⁹ [1843-1860] All ER 779 782.

²⁶⁰ [1843-1860] All ER 779 782.

minerals, in the absence of any express grant, reservation, or covenant, should be laid down generally, without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals.²⁶¹

This is the same line of reasoning adopted by Bristowe J in *Coronation Collieries*,²⁶² when he said that the differences between English law and South African law in this regard did not affect the right of support, thereby extending the principles governing lateral support between two adjoining properties to the mining context where a third party had a right to the minerals beneath the surface of another's property.

So it follows that in English law, where there has been a severance of title and the surface and the minerals are in different hands, ownership of the land surface *prima facie* carries a natural right of support which is a right to have the surface kept in its natural position and condition.²⁶³ The right is not an easement but a natural right incident to the ownership of the soil.²⁶⁴ This is the same construction that is given to the right of lateral support in South African law. The right of lateral support is described as a natural right intrinsic or

²⁶¹ [1843-1860] All ER 779 783.

²⁶² 1911 TPD 577 591.

²⁶³ Lord Mackay *Halsbury's The Laws of England - Mines, Minerals and Quarries: Misrepresentation and Fraud* 4th Ed (2003) Vol 31 para 116. See further *Humphries v Brodgen* (1850) 12 QB 739; *Bonomi v Backhouse* (1859) EB & E 646; Ex Ch (affd 1861) 9 HL; *Butterknowle Colliery Co Ltd v Bishop Auckland Industrial Co-Operative Co Ltd* [1906] AC 305.

²⁶⁴ *Butterknowle Colliery Co Ltd v Bishop Auckland Industrial Co-Operative Co Ltd* [1906] AC 305. See further *Bonomi v Backhouse* (1859) EB & E 646, Ex Ch (affd 1861) 9 HL.

inherent in the ownership of property.²⁶⁵ In short, the right of lateral support can be described as a landowner's entitlement to the use and enjoyment of his property.

It is further submitted that there exists no natural right of support for anything artificially erected on the land; "such a right cannot exist *ex jure naturae* because the thing itself did not do so."²⁶⁶ This means that any right of support of such an artificial erection can only be acquired as an easement. Accordingly, rights and obligations in regard to support may be varied by the instrument of severance of the surface and minerals or by a separate instrument.²⁶⁷

In English law the principles that apply in respect of support from subjacent mines which are severed from the surface are similar to those which regulate the mutual rights and liabilities of the owners of adjacent closes in respect of lateral support. These same principles also apply to the support of an underground stratum by a deeper stratum and to the support of the surface

²⁶⁵ Van der Vyver JD "Expropriation, Rights, Entitlements and Surface Support of Land" (1988) 105 *SALJ* 1-16 11. See further Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 460; Milton JRL "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123-254 210; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 121; *Gijzen v Verrinder* 1965 (1) SA 806 (D) 810; *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (D) 175.

²⁶⁶ Lord Mackay *Halsbury's The Laws of England - Mines, Minerals and Quarries: Misrepresentation and Fraud* 4th Ed (2003) Vol 31 para 117. See further *Dalton v Angus & Co* (1881) 6 HL 286 293.

²⁶⁷ Lord Mackay *Halsbury's The Laws of England - Mines, Minerals and Quarries: Misrepresentation and Fraud* 4th Ed (2003) Vol 31 para 103. See further *Harris v Ryding* (1839) 5 M & W 60; *Humphries v Brogden* [1843-1860] All ER 779.

land from mines under adjacent land, the reason being that English law does not recognise the *cuis est solum* principle. The principles governing lateral support and subjacent support are synonymous.²⁶⁸ Therefore, horizontal strata on the same land can be owned by different persons, and their relationship is that of neighbours.

In Halsbury's *Laws of England* it is added that the application of the common law principles is subject to statutory provisions. By the effect of such provisions or of subordinate instruments, rights and obligations in regard to support may be created, overridden or varied, or new remedies may be established where the withdrawal of support has caused subsidence damage.²⁶⁹

3.3 The Distinction between the Right of Subjacent Support and the Right of Lateral Support

3.3.1 The Legal Nature of Mineral Rights

Unlike most other legal concepts, the legal nature of mineral rights cannot usefully be described by a comparison with the corresponding concepts in Roman and Roman-Dutch law.²⁷⁰ Roman law did not develop the concept of mineral rights because they did not sever mineral rights from rights of ownership in land. In Holland at the time of the reception of Roman law, the

²⁶⁸ *Humphries v Brogden* [1843-1860] All ER 779 782.

²⁶⁹ Lord Mackay *Halsbury's The Laws of England - Mines, Minerals and Quarries: Misrepresentation and Fraud* 4th Ed (2003) Vol 31 para 104.

²⁷⁰ Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 12; Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* (2008) 1-3; Van der Merwe CG *Sakereg* 2nd ed (1989) 554.

mining of minerals was insignificant in the economic activity of the land. This is why Viljoen and Bosman submit that the concept of mineral rights, as we know it today, is largely a product of South African jurisprudence.²⁷¹ Further, judges who were initially confronted with conflicts and practical problems stemming from mining activities frequently had an English training. This resulted in some English legal influence on the shaping of the law.

In *Lazarus and Jackson v Wessels and Others*²⁷² Innes J, when confronted with the question of what the true legal nature of mineral rights was, confessed to have initially encountered considerable difficulties in classifying them. He explained that these rights were peculiar to the circumstances of South Africa, and thus did not readily fall under any of the classes of real rights discussed by the commentators. At first blush, they seemed to him to be very much of the nature of personal servitudes; but then they were freely assignable. But what was decisive for him was that to be valid against third parties, mineral rights had to be registered, so he regarded them as real rights. The further fact that the holder of the mineral rights was entitled to enter upon the property of another and exercise privileges which were generally attached only to rights of ownership (taking away and appropriation of part of the realty) led Innes J to conclude that they were real rights in the nature of a servitude. However, they differed from personal servitudes in that they were freely assignable.²⁷³

²⁷¹ Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 12.

²⁷² 1903 TS 499.

²⁷³ 1903 TS 499 510.

The next significant step in the development of the concept of mineral rights came courtesy of the same court, but in the case of *Van Vuuren and Others v Registrar of Deeds*.²⁷⁴ The right to minerals was again regarded as being in the nature of personal servitude, but freely assignable.²⁷⁵ The court then referred to an important principle that stated that the owner of the land remained the owner of the minerals therein until the minerals were severed from the land. The result of this was that, in order to transfer the ownership in a particular mineral or minerals not yet severed, the *dominium* in the land itself had to be transferred.²⁷⁶ If A sold to B his farm reserving the mineral rights thereon, such a reservation may be affected by a provision duly inserted in the transfer of the farm which was passed to B. However, the true nature of such a transaction is that A transfers the ownership of the property to B, on condition that B, when he takes transfer, constitutes a personal quasi-servitude in favour of A.²⁷⁷ The point is that servitudes, whether real or personal, must originate from the *dominus* of the land affected by them. They cannot be constituted by any person except the owner.²⁷⁸

²⁷⁴ 1907 TS 289.

²⁷⁵ 1907 TS 289 294.

²⁷⁶ 1907 TS 289 294. See further Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 5-6.

²⁷⁷ *Van Vuuren and Others v Registrar of Deeds* 1907 TS 289 295.

²⁷⁸ Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 13. See further Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 323.

This classification of a reservation of mineral rights as constituting a quasi-servitude was since adopted in a large number of decisions.²⁷⁹ The conclusion that was reached in *Webb* was that if a servitude was created in favour of land, it was praedial, and if it was created in favour of an individual person, it was personal. A praedial servitude is not transferable apart from the land to which it attaches, and ordinary personal servitudes are not transferable.²⁸⁰ Unlike ordinary personal servitudes, the quasi-servitude of mineral rights if it is personal, is transferable and it is for this reason that it is described as a quasi-servitude.²⁸¹

There are crucial differences between mineral rights and servitudes. Mineral rights are always attached to a person and not to a dominant tenement. They are capable of being alienated separately from the land to which they relate. They are divisible and no fusion takes place when the mineral rights and the ownership of the land they relate to come under one person.²⁸² They differ from personal servitudes in that they are freely assignable.²⁸³ They persist

²⁷⁹ *Rocher v Registrar of Deeds* 1911 TPD 311. See further *Coronation Collieries v Malan* 1911 TPD 577; *Webb v Beaver Investments (Pty) Ltd and Another* 1954 (1) SA 13 (T); *Nolte v Johannesburg Consolidated Investments Co Ltd* 1934 AD 295 305-306; *South African Railway and Harbours v Transvaal Consolidated Land and Exploration Company Ltd* 1961 (2) SA 467 (A) 490-491, 481-482; Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* (2008) 3-6.

²⁸⁰ Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* (2008) 1-3. See further Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 323 338.

²⁸¹ *Webb v Beaver Investments (Pty) Ltd and Another* 1954 (1) SA 13 (T) 24-25.

²⁸² Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 20.

²⁸³ *Van Vuren v Registrar of Deeds* 1907 TS 289. See further *Rocher v Registrar of Deeds* 1911 TPD 311; *Webb v Beaver Investments (Pty) Ltd and Another* 1954 (1) SA 13 (T). This is why they are described as "quasi" servitudes.

beyond the lifetime of the holder and, minerals being consumable in nature, are not exercised *salva rei substantia*, that is, preserving their essential attributes excepting ordinary wear and tear.

*Ex parte Pierce and Others*²⁸⁴ is the one case that did not ascribe the quasi-servitudal construction to a reservation or grant of mineral rights. On the facts a testator had stipulated in his will that if minerals were found on any of his three farms, the profits derived therefrom should be divided among his five children equally. The registrar of deeds refused to register the notarial cessions of mineral rights in favour of the beneficiaries because he was of the opinion that the right to share in profits was a personal right and therefore not registrable in the Deeds Registry. An *ex parte* application for an order declaring that the rights to share in the profits were real rights, capable of registration, and not merely personal rights was brought before Brink J. Making reference to Innes J's judgement in *Van Vuuren*²⁸⁵ he said that mineral rights had been alluded to as personal quasi-servitudes, and not praedial servitudes because they were not constituted in favour of any *praedium*, and that they differed from personal servitudes in so far as they did not expire upon the death of the holder and were freely transferable. He concluded by saying that there could be no doubt, however, that a grant of mineral rights conferred real rights, because it entitled the holder to go on to the property of another to search for minerals and to remove them. From this he concluded that there was clearly a subtraction from the full *dominium* of the owner of the land concerned, thus perhaps it was correct to say that mineral

²⁸⁴ 1950 (3) SA 628 (O).

²⁸⁵ 1907 TS 289.

rights constituted a class of real rights *sui generis*.²⁸⁶ This construction failed to take root in South African jurisprudence. In the recent decision of the Supreme Court of Appeal in *Anglo Operations*²⁸⁷ it was held that it is now a settled principle of law that a right to the minerals in the property of another is in the nature of a quasi-servitude over that property.

3.3.2 Implications for the Concept of Subjacent Support

3.3.2.1 Introduction

In light of the above, the concept of subjacent support explicitly refers to the relationship between a surface owner, and a mineral rights holder in relation to a single piece of land. The said piece of land derives vertical support from the minerals beneath the surface that are the subject matter of a mineral right holder's rights. Therefore the question of subjacent support only becomes important upon the severance of mineral rights from the title to the land. The landowner's interest to preserve the integrity of the surface is threatened where a mineral right holder's mining operations entail the removal of the minerals that provide vertical support for the surface. In severing the mineral rights related to his property from the land and granting them to another person, a landowner constitutes a personal quasi-servitude in favour of the mineral rights holder.

²⁸⁶ *Ex Parte Pierce and Others* 1950 (3) SA 628 634 (O).

²⁸⁷ 2007 (2) SA 363 (SCA).

3.3.2.2 Common Law Ancillary Rights of a Mineral Rights holder

Of all the *dicta* dealing with the conflicts that may arise between a mineral rights holder and a landowner handed down in our courts, none is as widely acknowledged and cited as the passage delivered in *Hudson*²⁸⁸ by Malan J:

“The grantee of the 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 the case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploitation. The solution of a 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 acts *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 his use is earlier in point of time cannot derogate from the rights of the holder of mineral rights.”²⁸⁹

It has been held in further judicial pronouncements²⁹⁰ that a holder of mineral or mining rights is entitled to enter the property to which these rights are

²⁸⁸ *Hudson v Mann* 1950 (4) SA 485 (T). See further Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 76; Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 114; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 705 fn 566.

²⁸⁹ *Hudson v Mann* 1950 (4) SA 485 (T) 488.

²⁹⁰ 1950 (4) SA 485 (T) 488. See further *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 520; *Ex Parte Pierce* 1950 (3) SA 628 (O) 634.

attached, to search for minerals, and if he or she finds any, to sever them and carry them away. Moreover, a mineral rights holder is entitled to exercise all such subsidiary or ancillary rights without which he will not be able to effectively carry on his prospecting and/or mining operations.²⁹¹ This is because the right held by the mineral rights holder, namely to go upon the property of a third party to search for minerals, and if he finds any to extract and carry them away has been treated by our courts as being in the nature of a quasi-servitude over that land.²⁹² Once this quasi-servitude has been established, all things necessary for its exercise are considered to have been granted, at the same time.

In *West Witwatersrand Areas Ltd v Roos*,²⁹³ Curlewis ACJ cited with approval a passage from Broom in which the author dealt with the maxim *cuicumque aliquis quid concedit concedere videtur et id sine quo res ipse non potuit*, meaning that whosoever grants a thing is deemed also to grant that without which the grant itself would be of no effect. Therefore these rights do not only extend to his actual prospecting and/or mining operations, but to all activities that could be viewed as reasonably necessary for the exercise of the mineral rights.²⁹⁴

²⁹¹ *Hudson v Mann* 1950 (4) SA 485 (T) 488. See further *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 520.

²⁹² Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 131. See further Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 14.

²⁹³ 1936 AD 32.

²⁹⁴ 1936 AD 32 62. See further Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 76; Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 131.

It follows that these so-called subsidiary rights flow from terms implied by law or from consensual terms in a contract, either express or tacit.²⁹⁵ Therefore, if a landowner leases his land and all the mines therein, where there are no open mines the mineral rights holder may dig for the minerals, and where minerals rights are granted the presumption is that they are to be enjoyed and that a power to extract them is also granted by necessary implication.²⁹⁶ The manner in which the minerals are extracted depends entirely on the nature of the minerals in question and the depth at which they occur. The problems concerning their extraction are primarily of a technical, scientific and economic nature.²⁹⁷ However, during the extraction process the holder of mineral rights has to remove a certain amount of soil and/or to reach the minerals in respect of which he holds the rights. It is submitted that the holder of the mineral rights becomes the owner of all the stone, soil and clay that is removed during *bona fide* mining operations and is entitled to sell these.²⁹⁸

Therefore, it would seem that a holder of mineral rights is generally entitled to erect buildings and equipment and to construct the necessary roads, railways and power lines, pipelines, reservoirs, pump houses, engine houses, vertical shafts, housing for employees, and as well as to apply for water rights.²⁹⁹ The holder of the mineral rights is entitled to use the surface not only for the

²⁹⁵ *Anglo Operations Ltd v Sandhurst Estates* 2006 (1) SA 350 (T) 376. See further *Van Vuuren and Others v The Registrar of Deeds* 1907 TS 289.

²⁹⁶ 1907 TS 289 295.

²⁹⁷ Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 55. See further Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 135.

²⁹⁸ Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 56. See further *Bezuidenhout v Worcester Gold Mining Company* (1894) 1 OR 249.

²⁹⁹ Franklin BLS and Kaplan M *the Mining and Mineral Laws of South Africa* (1982) 132.

purpose of sinking boreholes and shafts to mine the minerals, but also for all purposes which are necessary for the proper exploitation of the mineral deposits.³⁰⁰ He is entitled to restrict a land owner from doing anything that may impede or burden him in carrying out his mining operations. If any dispute should arise as to the extent of holder's rights, the courts will be called upon to decide the matter on the facts of each case.³⁰¹

However, *Coronation Collieries v Malan*³⁰² incorrectly held that the right of subjacent support, like the right to lateral support, was in the nature of a natural right incidental to the ownership of land. This was consistent with the English law position, where the right of the landowner to insist on subjacent support was a right incidental to the ownership of the property and not an easement.³⁰³ This erroneously implied that in South Africa the surface owner could never be deprived of this right without his express or tacit consent, because the law could never imply a term that had the effect of depriving a landowner of all the (beneficial) use and enjoyment of his property.³⁰⁴

From the discussion about the legal nature of mineral rights above, it was made clear that the right to minerals on the property of another was in the nature of a quasi-servitude. Therefore, the legal nature of mineral rights

³⁰⁰ *West Witwatersrand Areas Ltd v Roos* 1936 AD 62 72.

³⁰¹ Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 55. See further Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 114.

³⁰² 1911 TPD 577.

³⁰³ See further *Butterknowle Colliery Co Ltd v Bishop Auckland Industrial Co-Operative Co Ltd* [1906] AC 305; *Bonomi v Backhouse* (1859) EB & E 646, Ex Ch (affd 1861) 9 HL.

³⁰⁴ See the Transvaal Provincial Division decision in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 398.

should have determined how the right of subjacent support should have developed in South Africa. This is because the concept of subjacent support is an aspect of the relationship between a mineral rights holder and a landowner.

Therefore if the rights to the minerals on the property of another are in the nature of a quasi-servitude over that property, according to the principles of servitude, in the absence of an express or tacit term in the grant of the servitude, the owner of the servient property is bound to allow the holder of the servitudinal rights to do whatever is reasonably necessary for the proper exercise of those rights. Therefore if it is reasonably necessary for the mineral rights holder to let down the surface in carrying out his mining operations, he may do so, so long as he does so in a manner least injurious to the surface owner.³⁰⁵

3.4 Rejection of the Extension of the Lateral Support Principles to Subjacent Support Conflicts

3.4.1 Introduction

As was seen above, a principle of fundamental importance in South African law is that the owner of the land is not only the owner of the surface, but of everything legally adherent thereto and also of everything above and below the surface. In terms of our law it is thus not possible to divide ownership of

³⁰⁵ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 373.

land into separate layers,³⁰⁶ whereas in English law the holder of mineral rights becomes the owner of that particular layer below the surface. In English law the person entitled to the minerals below the earth becomes a “vertical neighbour” of the surface owner, so to speak. This does not happen in South African law.

3.4.2 The decision in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*³⁰⁷

The question as to whether the principles of lateral support were correctly extended to the mining question of subjacent support came to a head in the recent case of *Anglo Operations Ltd v Sandhurst Estates*.³⁰⁸ In that case the appellant held all the coal rights in respect of several adjoining properties, one of which was a farm owned by the respondent, on which coal mining had been conducted for many years. The dispute between the parties arose when the appellant decided to conduct its mining operations on the farm by way of open-cast mining and to divert a stream on the farm to facilitate these operations. The grant of the mineral rights in favour of the appellants did not refer, either expressly or tacitly, to open-cast mining. The appellant applied to the Transvaal Provincial Division for orders firstly allowing it to conduct open-cast mining as opposed to underground mining on a portion of the property,

³⁰⁶ Except in the case of special legislation, for example the Sectional Titles Act 95 of 1986.

³⁰⁷ 2007 (2) SA 363 (SCA).

³⁰⁸ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T); *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

and secondly permitting the diversion of an existing stream on the property in order to facilitate those open-cast mining operations.

The respondents objected to open-cast mining because it is generally seen as the more invasive method of mining. This technique of mining is also known as open-pit mining or strip mining. It refers to a method of extracting rock or minerals from the earth by their removal from an open pit or burrow. The term is used to differentiate this form of mining from other extractive methods that require tunneling into the earth. Open pit mines are used when deposits of commercially useful minerals or rock are found near the surface; that is, where the overburden (surface material covering the valuable deposit) is relatively thin or the material of interest is structurally unsuitable for tunneling (as would be the case for sand, cinder, and gravel). For minerals that occur deep below the surface — where the overburden is thick or the mineral occurs as veins in hard rock — underground mining methods are used to extract the valued material.³⁰⁹ Franklin and Kaplan point out that the use of this invasive method has increased following the introduction of machinery which removes the over-burden, allowing minerals at shallow depths, such as coal, to be extracted. “Strip and open-cast mining ordinarily deprives the surface owner of the use of substantial portions of his property, either permanently or for long periods of times. Even if the land is ultimately returned to him, its character and usefulness are likely to be materially altered.”³¹⁰

³⁰⁹ http://en.wikipedia.org/wiki/Open-pit_mining 06/06/09.

³¹⁰ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 138; Badenhorst PJ, Mostert H and Dendy M “Mineral and Petroleum” in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 78.

The court *a quo* in *Anglo Operations* held that an owner of land is entitled to require subjacent support of land from holders of mineral or mining rights conducting mining operations on their land.³¹¹ In spite of the broad statement of the rights of mineral right holders in *Hudson*,³¹² the right to let down the surface in carrying out his mining operations was not included in the absence of the landowner's express or tacit consent. The court concluded that an owner could not be deprived of subjacent support unless he or she has expressly or tacitly (consensually) agreed thereto. Waiver of a "right" to subjacent support by the owner was thus never implied by law, but had to be agreed upon by contract. This was because the right to subjacent support was a natural right inherent in the ownership of property.³¹³

The court *a quo* and the respondent in *Anglo Operations*³¹⁴ relied on *Coronation Collieries v Malan*³¹⁵ for this proposition that the right of subjacent support was a natural right incidental in the ownership of property, and therefore could not be waived without the landowner's express or tacit consent. As was seen above, the central question in *Coronation Collieries* was whether the underground miner owed the landowner a duty of vertical or subjacent support of the surface. It was also seen that in answering this question Bristowe J began by acknowledging that in English law, the right to

³¹¹ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 376. See also Badenhorst PJ, Pienaar JM and Mostert H "*Silberberg and Schoeman's the Law of Property*" 5th (2006) 120, 705.

³¹² *Hudson v Mann and Another* 1950 (4) 485 (T).

³¹³ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 376.

³¹⁴ 2006 (1) SA 350 (T).

³¹⁵ 1911 TPD 577.

have the surface of land in its natural state supported by the subjacent minerals was a right of property and not an easement; and that a lease or conveyance of minerals, even though accompanied by the widest powers of working, carried with it no power to let down the surface, unless such power was granted either expressly or by necessary implication.³¹⁶

He then went on to draw the distinction between English and South African law in this regard. In South African law there can be no lease or cession of mineral rights. Horizontal layers of the earth's surface cannot, as they can in England, be separately owned. He then cited Innes C J in *Van Vuuren v Registrar of Deeds*,³¹⁷ who said that every grant or reservation of mineral rights is in truth the constitution, by the owner of the property affected, of a quasi-servitude in favour of the grantee.³¹⁸ Bristowe J then unaccountably relied on De Villiers CJ's judgement in *London and South Africa Exploration v Rouliot*.³¹⁹ As was established in the preceding chapter, De Villiers J incorporated the English law rule of lateral support, which provided landowners, as an intrinsic element of their ownership, with the right of adjacent support for their land into our law. De Villiers J said although the principle of lateral support formed no part of Roman-Dutch law, it was a just and equitable principle that should best be incorporated into South African law.³²⁰ So as the argument goes, if the right to lateral support existed as a natural right incident to the plaintiff's land, the parties to the contract must be

³¹⁶ 1911 TPD 577 591.

³¹⁷ 1907 TS 289.

³¹⁸ *Coronation Collieries v Malan* 1911 TPD 577 591.

³¹⁹ (1890-1891) 8 SC 74.

³²⁰ (1890-1891) 8 SC 74 91.

deemed to have contracted with a view to the continued existence of that right. In the absence of such a stipulation the presumption was in favour of an intention to preserve a well-established natural right of property rather than to part with such a right.³²¹ Therefore a landowner can never be deprived of his right of support without his express or tacit consent. Bristowe J founded his judgement in *Coronation Collieries v Malan*³²² on the strength of these utterances by De Villiers CJ in *Rouliot*.³²³

Counsel for the respondent and the Transvaal Provincial Division in *Anglo Operations*³²⁴ failed to appreciate the conceptual distinction between the principle of lateral support and the principle of subjacent support. The latter refers to a situation where a mineral right holder has rights to the uncovered minerals under the surface of a landowner. Accordingly, the question arises whether such a mineral rights holder has a duty to uphold the surface to which his rights relate. The landowner for practical reasons has an interest in maintaining the integrity of the surface by resisting operations of a mineral rights holder that will lead to a subsidence of the surface.

Lateral support, on the other hand, refers to a situation where an adjacent (neighbouring) land surface owner has an interest in maintaining the integrity of his land against the activities of a neighbouring property owner or holder of mineral rights on the neighbouring property.

³²¹ (1890-1891) 8 SC 74 94.

³²² *Coronation Collieries v Malan* 1911 TPD 577 591.

³²³ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 94.

³²⁴ 2006 (1) SA 350 (T).

It is fundamental that this distinction be drawn in our law. The reason lies in the historical reception of the rule of lateral support into South African law. If one carefully reads the facts of the *locus classicus*³²⁵ in which the rule of lateral support was imported into our law, the respondent's argument in *Anglo Operations* fails.

In *Rouliot*, the defendant leased a claim in the Du Toit's Pan Mine from the plaintiff company. The defendant made use of the open-cast method of mining in conducting his operations. Over the years, a sloping buttress of diamondiferous ground was left by Rouliot to support the adjoining un-leased portion belonging to the plaintiff, forming the periphery of the mine. Rouliot then decided to mine the buttress, but before doing so, he removed a quantity of ground from the un-leased property, because he considered that the working of the buttress would cause a fall of the reef into his land. The removal of the earth is what constituted the alleged trespass.

In the court of first instance³²⁶ it was held that the legal basis for the plaintiff's claim was that, in terms of common law, it had a right of lateral support for its property and that this right had not been given up by the lessor. The judge in that case then decided that, since open-cast mining had been contemplated by the parties, the plaintiff must indeed be taken to have given up its right to lateral support for its adjoining property. It was subsequently decided that the

³²⁵ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74.

³²⁶ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 75.

defendant had acted lawfully in removing ground on the adjoining un-leased land before he exercised his right to remove lateral support.

Although the problem in *Rouliot* originated from mining activities, it did not relate to a conflict between the surface owner and the holder of mineral rights in respect of the same land. It was not against that backdrop that De Villiers J held that the principle of lateral support should best be incorporated into our law.³²⁷ The claim in *Rouliot* was based on the alleged trespass by the defendant on the plaintiff's property. It is clear that the principle of lateral support was adopted in *Rouliot* as a rule of neighbour law, and that De Villiers CJ did not at that time, expressly or by necessary implication envisage the situation contemplated in *Anglo Operations* in delivering his judgement.

Evidently there is a material difference between the facts in *Rouliot* and the facts in *Anglo Operations*. *Rouliot* is clearly concerned with the question of lateral support as explained above, whereas *Anglo Operations* specifically deals with the question of subjacent support. Different rules should therefore apply to these two distinguishable concepts. Thus Brand JA rightfully points out in the *Anglo Operations* appeal judgement that, unlike the court of first instance, he did not believe that the question regarding the continued recognition of the principle of lateral support was the one the court should concern itself with, but that the real legal question before the court was whether that principle of neighbour law was correctly extended, to govern the

³²⁷ (1890-1891) 8 SC 74 91.

relationship between mineral rights holders and the owners of the same land.³²⁸

Once the distinction between lateral and subjacent support is understood, it becomes clear that the extension of the neighbour law principle of lateral support to the mining question of subjacent support was illogical in the South African context. Brand JA correctly said in the *Anglo Operations* appeal judgement that “the extension of the lateral support rule in *Coronation Collieries* to the relationship between owner and mineral rights holder was founded in a substructure that cannot be sustained,”³²⁹ and that *Rouliot* simply did not provide authority for the proposition on which the judgment by Bristowe J was built.

The Supreme Court of Appeal in *Anglo Operations v Sandhurst Estates*³³⁰ finally settled the matter when it held that a right to minerals in the property of another was in the nature of a quasi-servitude over that property.³³¹ Thus, as in the case of a servitude, the exercise of mineral rights will almost inevitably lead to a conflict between the right of the landowner to maintain the surface and the mineral rights holder to extract the minerals underneath.³³² Therefore the correct approach in resolving this conflict did not lie in adopting the English law doctrine of subjacent support. This inherent conflict had to be resolved in accordance with the principles developed by our law to resolve

³²⁸ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 373.

³²⁹ 2007 (2) SA 363 (SCA) 372.

³³⁰ 2007 (2) SA 363 (SCA).

³³¹ 2007 (2) SA 363 (SCA) 373.

³³² 2007 (2) SA 363 (SCA) 372.

conflicts between the holders of servitudal rights and owners of servient properties.³³³ Therefore, the owner of the servient property was bound to allow the holder of the servitudal rights to do whatever is reasonably necessary for the proper exercise of those rights. The holder of the servitude is in turn bound to exercise his rights *civilliter modo*, that is, with as much as possible consideration and with the least possible inconvenience to the servient property and its owner. In applying these principles to mineral rights, the holder was entitled to go onto the property, search for minerals and, if he found any, to remove them and carry them away. This had to include the right on the part of the holder of mineral rights to do whatever was reasonably necessary to attain his ultimate goal.³³⁴ And in terms of South African common law, in the absence of any express or tacit term to the contrary in the grant, the mineral rights holder was entitled by virtue of a term implied by law to conduct open-cast mining. Therefore in the absence of such a term, if it was reasonably necessary for the mineral rights holder to let down the surface in carrying out his mining operations, he could do so, so long as he did so in a manner that was least injurious to the surface owner.

3.4.3 Conclusion

Minerals are by their nature usually found under the surface of the land. The right granted to the holder of mineral rights to extract and remove the minerals can generally only be exercised by excavating the land. Damage to the surface of the land is inevitable and so is the curtailment or even deprivation

³³³ 2007 (2) SA 363 (SCA) 373.

³³⁴ 2007 (2) SA 363 (SCA) 373.

of the rights of use normally enjoyed by the owner of the surface. The difference between the various methods of mining, be it underground or open-cast mining, lies in the degree of such disturbance and not in whether damage will be occasioned. Even in the case of underground mining the degree of disturbance to the surface, and hence to any right on the part of the owner of the land to preserve the surface, must depend upon the location and extent of the reserves to be mined.³³⁵

Therefore, the exercise of mineral rights will almost always inevitably lead to a conflict between the rights of the landowner to preserve the surface and the mineral rights holder to extract the minerals underneath. How is this inherent conflict to be resolved? In our law, the answer cannot be based on *Coronation Collieries*,³³⁶ which inappropriately incorporated the English law doctrine of subjacent support into our law. The correct approach in South African law would be to invoke the principles developed by our law in resolving the inherent conflicts between the holders of servitudal rights and owners of servient properties. This is because the right to minerals in the property of another is in the nature of a quasi-servitude over that property.³³⁷

Further, it was established in the preceding chapter that if the right of support was treated as a natural right incidental to ownership of land, one of the consequences would be that the right would extend to buildings and other artificial fixtures erected on land. This construction will have serious

³³⁵ 2007 (2) SA 363 (SCA) 372.

³³⁶ *Coronation Collieries v Malan* 1911 TPD 577 591.

³³⁷ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 363-364.

ramifications if applied to the question of subjacent support in South African mining law. There are numerous cases in South African law that laid down the principle that a surface owner is obliged to use the surface with due regard to the possibility that as a result of his user of the surface the holder of the mineral rights might be impeded in his mining operations.³³⁸ The holder of mineral rights is entitled to be protected against a user of the surface that will prevent the exploitation of the minerals. Buildings and other permanent artificial fixtures were clearly envisaged when these principles were enunciated. Therefore to hold that the right of subjacent support is a natural right inherent in the ownership of things will have unacceptable results in South African mining law.

The owner of minerals in England does not appear to be protected as extensively as the holder of mineral rights in South Africa. This is because he is put on the same footing as a land surface owner. Both are owners and are treated as such. They are neighbours (vertical neighbours so to speak), and the principles of neighbour law are applied to their relationship without any prejudice or favour to any of the parties.

The *Anglo Operations*³³⁹ decision illustrated that the law pertaining to subjacent support as it stood before the Supreme Court of Appeal handed

³³⁸ See *Witbank Colliery v Malan and Coronation Colliery Co Ltd* 1910 TPD 667; *Coronation Collieries v Malan* 1911 TPD 577; *Transvaal Property & Investments Co Ltd and Reinhold & Co v SA Townships Mining & Finance Corp Ltd and the Administrator* 1938 TPD 512; *Witbank Colliery Ltd v Lazarus* 1929 TPD 529; *Yelland and Others v Group Areas Development Board* 1960 (2) SA 151 (T); *Hudson v Mann and Another* 1950 (4) 485 (T).

³³⁹ 2007 (2) SA 363 (SCA).

down its judgement was not in line with the principles of South African mining law. This discord was evident in both South African case law and academic writings. The Supreme Court of Appeal in deciding *Anglo Operations* set the record straight,³⁴⁰ but an in-depth enquiry into the implications of the decision is imperative, especially in light of the changes in the ownership of mineral rights that have been brought about by the Mineral and Petroleum Resources Development Act.³⁴¹

*Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*³⁴² was decided by the Transvaal Provincial Division on the 23rd of September 2004, and on the 29th of November 2007 by the Supreme Court of Appeal, and yet neither considered the impact of the Mineral and Petroleum Resources Development Act.³⁴³ However, the Act has important implications for the question of subjacent support. It further complicates the relationship between a landowner and mineral rights holder by abolishing the system of private mineral rights and introducing a new order of state controlled mining rights.

Therefore it is necessary to establish whether and how the conclusion that was reached in *Anglo Operations* is affected by the new Act. The effect of older legislation such as the Minerals Act of 1991 will also be examined to establish whether and how it too would have affected the conclusion that was reached in *Anglo Operations*. The Mineral and Petroleum Resources

³⁴⁰ 2007 (2) SA 363 (SCA).

³⁴¹ Act 28 of 2002.

³⁴² *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T).

³⁴³ 28 of 2002.

Development Act certainly makes a difference, in light of the fact that new order mineral rights are granted to the holder by the state and not the landowner. Although the Minerals Act recognised the private ownership of mineral rights, it too had provisions that interfered with the landowner's common law contractual powers to exclude certain mining activities by the mineral rights holder. For this reason it will be seen that the interference by the new Act, with the common law contractual capacity of the landowner in constituting a quasi-servitude in favour of a third party is not groundbreaking but is merely the continuation and extension of a tradition that had already begun in previous statutory enactments.

The section on legislation will thereafter be concluded by examining the general effect of old and new legislation alike on the question of subjacent support. Provisions in both the old and the new Act dealing with the optimal utilization of mineral rights and rehabilitation of the surface by the mineral rights holder upon completion of his operations will be discussed.

3.5 The Impact of Statutory Enactments on Subjacent Support

3.5.1 Introduction

Before the promulgation of the Mineral and Petroleum Resources Development Act,³⁴⁴ mineral rights in respect of property formed part of the

³⁴⁴ S 3 (1) implicitly abolishes the *cuis est solum* principle by declaring that all mineral and petroleum resources in South Africa, are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans. The state now administers the mineral resources of the Republic. The issues mining licences and

rights of the landowner.³⁴⁵ It was open to the landowner to sever the mineral rights from the surface rights and grant them to a third party. The third party would in turn pay the landowner royalties or some other form of compensation provided for in the contract between them. Further, the landowner could protect himself by withholding certain rights and privileges that normally accrued to a mineral rights holder under the common law, or by imposing obligations on the mineral rights holder in the deed of grant. Therefore, the exploitation of minerals was arguably advantageous to the surface owner because of the monetary benefits which he could derive, and the measure of control he had in defining the extent of the mineral right holder's rights. For that reason, conflicts between himself and a mineral rights holder were minimal. However, it must be added that there was legislation in place at the time, which did in fact have a bearing on the quasi-servitudinal relationship between the landowner and the mineral rights holder. As stated above the extent of the interference by this legislation on the common law rights of a landowner versus those of a mineral rights holder will be investigated below. This will reveal whether and to what extent the legislation was consistent with or deviated from what was decided in *Anglo Operations*.

Nevertheless, the new licensing regime introduced by the Mineral and Petroleum Resources Development Act, presents difficult questions when the

permits as opposed to the landowner granting away or reserving for himself the mineral rights attached to his land.

³⁴⁵ *Agri South Africa (Association incorporated under Section 21) v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* unreported case no 55896/2007; 10235/2008 (10 February 2009) 7.

interests of the landowner and the mineral rights holder enter into competition. *Anglo Operations v Sandhurst Estates*³⁴⁶ only dealt with the common law position, where there was conflict between a landowner and a mineral rights holder with regard to the question of subjacent support. Within that context it was the landowner who granted the mineral rights to a third party, and in doing so had the opportunity to determine the manner in which the third party exploited the minerals. In this way a landowner could have insisted that a mineral rights holder leaves subjacent support for the surface. The first half of this chapter dealt with this question. In short, *Anglo Operations* established that because the right to the minerals in the property of another is in the nature of a quasi-servitude, the solution in resolving any conflict that arose between the respective parties lay in the adoption of the principles developed by our law to resolve the inherent conflicts between holders of servitudinal rights and owners of servient properties.³⁴⁷ Therefore, in the absence of any express or tacit term to the contrary in the grant of mineral rights, the mineral right holder was entitled by virtue of a term implied by law to withdraw subjacent support where it was reasonably necessary to do so in order to remove the minerals.³⁴⁸

In light of the above, there are two reasons why older legislation and the new Act are relevant to this thesis. The first is that, older legislation, like the new Act contains specific provisions that regulate the relationship between the landowner and the mineral rights holder; and the question is whether and how

³⁴⁶ 2007 (2) SA 363 (SCA).

³⁴⁷ 2007 (2) SA 363 (SCA) 373.

³⁴⁸ 2007 (2) SA 363 (SCA) 373.

they affect the decision in *Anglo Operations*. Secondly, the decision in *Anglo* is definitely affected by the fact that the servitude construction becomes problematic under the new order rights created by the new Act. This is because new order mining rights and permits are now not granted by the landowner to the subsequent holder, but by the state. The question is whether the servitude construction expressed in *Anglo Operations* can hold in cases where the mineral right or mining right was not granted by the landowner but by the state, acting in terms of the new regulatory powers created in the 2002 Act.

3.5.2 Section 3(1) of the Mineral and Petroleum Resources Development Act and Section 68(5) of the Minerals Act

The advent of the Mineral and Petroleum Resources Development Act³⁴⁹ heralded a new era in the development of mineral rights in South Africa. The Mineral and Petroleum Resources Development Act repealed the system of private mineral rights and replaced it with a new order of state-controlled mineral and petroleum rights.³⁵⁰ Writing in 2006, Van der Schyff states that s 3(1) of the Mineral and Petroleum Resources Development Act can be regarded as one of the most controversial legislative clauses promulgated during the last five years.³⁵¹ The said provision stipulates that the mineral and

³⁴⁹ Act 28 of 2002.

³⁵⁰ Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (Unpublished LLD Thesis, NWU Potchefstroom 2006) 237. See also Van den Berg HM "Ownership of Minerals Under the New Legislative Framework for Mineral Resources" (2009) 3 *Stell LR* 139-158 139.

³⁵¹ Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (Unpublished LLD Thesis, NWU Potchefstroom 2006) 237. See

petroleum resources found in the Republic are the common heritage of the nation and that the state is the custodian thereof.

There has been disagreement amongst contemporary academic writers in South Africa as to the true meaning and effect of the above provision. According to Badenhorst and Mostert the legislature borrowed from the law of the sea in crafting s 3(1).³⁵² In terms of this construction, mineral resources became *res publicae* and accordingly became vested in the people of South Africa at the inception of the Act.

Dale strongly disagrees with Badenhorst and Mostert's interpretation of s 3(1), and submits that the Mineral and Petroleum and Resources Development Act did not change the common law principle that un-severed minerals belong to the owners of the land in which the minerals are situated.³⁵³ He argues that what s 3(1) did was to merely demolish the legal institution of the rights of a landowner to deal with and exploit his minerals. The basis for this argument he says, is founded on the wording of the s 3(1). The wording refers to the

also Van den Berg HM "Ownership of Minerals Under The New Legislative Framework For Mineral Resources" (2009) 3 *Stell LR* 139-158 139.

³⁵² Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* (2008) 13-4. See also Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (Unpublished LLD Thesis, NWU Potchefstroom 2006) 237; Van den Berg HM "Ownership of Minerals Under The New Legislative Framework For Mineral Resources" (2009) 3 *Stell LR* 139-158 139; 141.

³⁵³ Dale MO *South African Mineral and Petroleum Law* (2006) 120-123. See further Van den Berg HM "Ownership of Minerals Under The New Legislative Framework For Mineral Resources" (2009) 3 *Stell LR* 139-158 143; Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (Unpublished LLD Thesis, NWU Potchefstroom 2006) 237-236.

collective wealth, as opposed to the minerals *in situ* on individual properties. In addition, no provision purporting to vest minerals *in situ* on individual properties in anyone else other than the owner of the land can be found in the rest of the Act. Thus an interpretation that suggests that the well-entrenched common law principle of “*cuis est solum*” was abrogated is not warranted.

Dale contends further that the nation is not endowed with juristic personality and therefore ownership cannot legally vest in the nation. He rounds off his argument by stating that the formulation of custodianship does not fit a private law interpretation that ownership of minerals *in situ* vests in the state.

Van der Schyff advances a third viewpoint. She submits that s 3(1) is placed into perspective by reading it in context with other provisions of the Act. She commences her argument by looking at the preamble of the Mineral and Petroleum Resources Development Act. From the preamble of the Act, she deduces amongst other things an intention by the legislature to acknowledge that South Africa’s mineral and petroleum resources belong to the nation and that the state is the owner thereof. This intention of the legislature again comes through in s 2 of the Act. Section 2 of the Mineral and Petroleum Resources Development Act contains the objects of the Act. Van der Schyff identifies the first four objects contained in s 2 as directly reinforcing the legislature’s intention to acknowledge that South Africa’s mineral and petroleum resources belong to the nation and that the state is the custodian thereof.³⁵⁴ According to Van der Schyff these objectives together with the

³⁵⁴ Section 2 provides that the objects of the Act are to-

intention of the legislature as set out in the preamble of the Act set the scene for s 3(1) which explicitly states that the mineral and petroleum resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans.³⁵⁵

Van der Schyff's argument is taken further by s 4(1) and s 4(2) of the Act. Section 4(1) provides that when interpreting a provision of the Mineral and Petroleum Resources Development Act, any reasonable interpretation which is consistent with the objects of the Act must be preferred over any other interpretation which is inconsistent with such objects. Section 4(2) provides that in so far as the common law is inconsistent with the Act, the Act prevails.

Van der Schyff's line of contention culminates in the provision contained in s 5(1) where the legislature determines that a prospecting right, mining right, exploration right or production right granted in terms of the Act is a limited real right in respect of the mineral or petroleum and the land to which such rights relate. This is further enhanced by Item 11 of Schedule 2 of the Mineral and

-
- a) Recognise the internationally accepted right of the state to exercise sovereignty over all the mineral and petroleum resources within the Republic;
 - b) Give effect to the principle of the state's custodianship of the nation's mineral and petroleum resources;
 - c) Promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
 - d) Substantially and meaningfully expand opportunities for historically disadvantaged persons... to benefit from exploiting the nation's mineral and petroleum resources.

³⁵⁵ Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (Unpublished LLD Thesis, NWU Potchefstroom 2006) 237-242. See further Van den Berg HM "Ownership of Minerals Under The New Legislative Framework For Mineral Resources" (2009) 3 *Stell LR* 139-158 145.

Petroleum Resources Development Act which stipulates that contractual royalty payments will generally only be made to the holder of the common law mineral right until the old order mining right ceases to exist, whereafter royalties will be paid to the state.

Through the interaction of the above provisions Van der Schyff argues that the “Public Trust Doctrine” finds application in South African jurisprudence. She states that the public trust doctrine is the legal vehicle for transporting the notion that mineral resources are the common heritage of the nation- even though the nation is not an entity clothed with legal personality.³⁵⁶ The public trust doctrine seeks to develop a comprehensive legal approach to resource management problems. It is based of the premise that the public’s interest in certain natural resources is a property right that subrogates private ownership rights in favour of public use rights and curtails the sovereign’s power over these resources.³⁵⁷

Whether one subscribes to Badenhorst and Mostert’s *res publicae* argument, or Dale’s contention that the Act never changed the common law principle that un-severed minerals belong to the owners of the land in which the minerals are located but merely obliterated the legal institution of the rights of an owner to deal with and exploit his minerals, or Van der Schyff’s public trust doctrine

³⁵⁶ Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (Unpublished LLD Thesis, NWU Potchefstroom 2006) 239.

³⁵⁷ Van den Berg HM “Ownership of Minerals Under The New Legislative Framework For Mineral Resources” (2009) 3 *Stell LR* 139-158 146. See further Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (Unpublished LLD Thesis, NWU Potchefstroom 2006) 241.

formulation; what is clear is that mineral rights have been taken away from the private domain.

Prior to 1 May 2004, mineral rights in respect of property formed part of the rights of the landowner. It was possible to sever the mineral rights from the surface rights and third parties could become holders of the mineral rights. These rights were freely transmissible and were valuable assets. The state could not force a mineral rights holder to start with the exploration of the minerals even if it would have been to the benefit of the public.³⁵⁸ Landowners could own valuable rights which they could sell to mining houses for lucrative amounts while retaining the surface rights.³⁵⁹ For this reason conflicts between the landowner and the mineral rights holder were minimal. However, since the inception of the Mineral and Petroleum Resources Development Act the position of landowners has increasingly become precarious.

The Act has placed the conflict between a landowner and mineral rights with regard to the question of subjacent support in a new light. In the old system of private mineral rights, it was the landowner who granted the mineral rights to the subsequent holder. In doing so, as was noted earlier, he could protect himself by defining the extent of the rights of the holder of mineral rights. He could also provide for royalty and compensation payments. Under the new

³⁵⁸ *Agri South Africa (Association incorporated under Section 21) v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* unreported case no 55896/2007; 10235/2008 (10 February 2009) 7.

³⁵⁹ *Agri South Africa (Association incorporated under Section 21) v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* unreported case no 55896/2007; 10235/2008 (10 February 2009) 7.

dispensation, it is now the state that grants and administers mineral rights. However, it is still the landowner whose right of use and enjoyment is affected by the exploitation of the minerals. The question is whether the servitude construction within which Brand JA explained the right of surface support in *Anglo Operations* still fits these changed circumstances.

Under the new dispensation introduced by the new Act, a landowner who stands to lose the use and enjoyment of his land because of the proposed operations of a mining right holder is provided with a platform to raise objections or claim compensation. In terms of s 54(1), if a mining right holder's efforts to commence operations are frustrated by a landowner or occupier, the former must in accordance with the Act notify the relevant regional manager.³⁶⁰ In terms of s 54(1), preventing commencement of operations must be due to the fact that the landowner or occupier had refused entry to, posed unreasonable demands in return for entry by the holder or could not be found in order to apply for access. Refusal by the owner or occupier is unlawful, as the holder of the permit or right to mine has a statutory right to gain access to the land.³⁶¹

However, in terms of s 54(1), the landowner is given an opportunity to be heard and, accordingly, to raise objections. Subsequently, if in the opinion of the regional manager the owner or the occupier has suffered or is likely to suffer loss or damage as a result of the proposed operations, he must request

³⁶⁰ S 54(1).

³⁶¹ Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 149.

the conflicting parties to enter into negotiations aimed at agreeing to the payment of compensation for such loss or damage.³⁶² In my opinion the right to withdraw subjacent support is implicitly included in this provision. By requiring the parties to enter into negotiations aimed at the payment of compensation to the landowner, the provision subordinates the landowner's claim to that of the mining right holder, but at the same time provides him (the landowner) with some reparation for the loss he will suffer.

In terms of s 54(4) of the Mineral and Petroleum Resources Development Act, if the parties fail to reach an agreement, compensation must be determined by arbitration in terms of the Arbitration Act³⁶³ or by any competent court. If, after considering all the issues raised by all the respective parties and recommendations by the Regional Mining Development and Environmental Committee, the regional manager concludes that any further negotiations may be detrimental to some of the objects of the Act, he may recommend to the Minister that such land be expropriated in terms of s 55 of the Act.³⁶⁴ If the regional manager determines that failure to reach an agreement is the fault of the holder of the mining right or permit, the regional manager may in writing prohibit commencement or continuation of the mining operations until the dispute is resolved by a court of law. This power is invoked in terms of s 54(6) and has been dubbed a "Draconian Power."³⁶⁵ This to my mind is consistent

³⁶² S 54(3).

³⁶³ Act 42 of 1965.

³⁶⁴ S 54(5). See further Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 150.

³⁶⁵ Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 150.

with the proposal that the right to withdraw subjacent support should be available to a mining right or permit holder where “reasonably necessary.” The mining right holder can only be allowed to withdraw subjacent support where it is reasonably necessary for exercise of his rights. This provision was enacted solely to protect a landowner who is now in danger of losing all use and enjoyment of his land.

However well meaning this provision may be, it still falls short of the protection the landowner had under the old common law dispensation of private mineral rights. Under that old system it was open to him to prevent open-cast mining in the grant of mineral rights.

Although the Minerals Act recognised the principle that mineral rights in respect of property formed part of the rights of the landowner, it made provision for the removal of legal or contractual impediments or other difficulties that frustrated its stated object of optimal utilization of the Republic’s natural resources in s 68(5). This section provided that the Act would not be affected by any term or condition in any agreement, whether such agreement was entered into before or after the commencement of the Act. The effect of the Mineral and Petroleum Resources Development Act on what was said in *Anglo Operations*³⁶⁶ may already have begun under the Minerals Act of 1991. Section 68(5) of the Minerals Act had the same effect of limiting the landowner’s right to define the extent of a mineral rights holder’s powers in carrying out his mining operations. Thus a term in a grant of

³⁶⁶ 2007 (2) SA 363 (SCA).

minerals to the effect that a mineral rights holder could not carry out open-cast mining could have been overridden by invoking this provision.³⁶⁷

Section 68(5) of that Act, had the effect of diminishing the common law contractual powers of the landowner to prevent certain detrimental mining practices. This is evidence of the fact that the relationship between a landowner and a mineral rights holder was never completely unaffected by legislation. Therefore, the promulgation of the Mineral and Petroleum Resources Development Act did not introduce the regulatory eroding of a landowner's contractual powers to limit a mineral right holder's operations. Older legislation with a similar effect did in fact place extensive limitations on the common law contractual freedom of the landowner when he constituted the quasi-servitude by granting mineral rights to a third party. The Minerals Act was one such piece of legislation. However, its impact was not as far reaching as the new Act's, in that the landowner still had a say as to who and when mineral rights relating to his land were granted.

Under the new Act, the landowner no longer has a say in this regard. What was said in *Anglo Operations*, namely that the right to the minerals on the property of another was in the nature of a quasi-servitude was completely thrown out and replaced by a new state regulated process in terms of s 54 of the new Act as outlined above.

³⁶⁷ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 163.

The following section will now consider how specific provisions in legislation over the years have generally always affected the relationship between a landowner and a mineral rights holder. Provisions relating to restrictions on surface use in older *ad hoc* legislation will be discussed first. Then provisions relating to the optimal exploitation of minerals and the rehabilitation of the surface in both the Minerals Act,³⁶⁸ and the Mineral and Petroleum Resources Development Act³⁶⁹ will be looked at.

3.5.3 The General Effect of Older Legislation

3.5.3.1 Introduction

Dale³⁷⁰ submits that the common law position was statutorily restated in s 5(1) of the Minerals Act, but submits that statutory obligations, such as those in ss 38 to 42 of the Minerals Act relating respectively to rehabilitation; environmental management programmes, removal of buildings, structures and objects; restrictions in relation to use of surface; and acquisition or purchase of land and payment of compensation, started to erode the common law predominance of the mineral rights holder.³⁷¹

The equivalent of s 5(1) of the Minerals Act is contained in s 5(3) of the Mineral and Petroleum Resources Development Act. It provides that any holder of a prospecting right, a mining right, exploration right or production

³⁶⁸ Act 50 of 1991.

³⁶⁹ Act 28 of 2002.

³⁷⁰ Dale MO *South African Mineral and Petroleum Law* (2006) 136.

³⁷¹ Dale MO *South African Mineral and Petroleum Law* (2006) 136. See further Badenhorst PJ, Pienaar JM, and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 706.

right may enter the land to which such right relates. Such a holder may bring on to such land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of their operations, as the case may be. They may also prospect, mine, explore or produce, as the case may be, for their own account, on or under that land for the mineral for which their right has been granted. Further, they may remove and dispose of any such mineral found during the course of the prospecting or mining processes. Subject to the National Water Act,³⁷² they may also use water from any natural spring, lake, river or stream, situated on or flowing through such land or from any excavation previously made and used for prospecting, mining, exploration or production purpose, or sink a well or borehole required for use related to their activities. Finally, they may also carry out any other activity that is incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of the Act.

With regard to the Mineral and Petroleum Resources Development Act, it is important to note that it has been stated that the concept of mineral rights was abolished by ss 2(a) and (b) and ss3(1) and (2), read with Schedule 2 of the Act, which provides for transitional periods of 1, 2 and 5 years.³⁷³ Therefore, Dale says that the pertinent question is whether and to what extent the

³⁷² Act 36 of 1998.

³⁷³ Dale MO *South African Mineral and Petroleum Law* (2006) 137. See further Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* (2008) 3-1; Van der Walt AJ *Constitutional Property Law* (2005) 381-383; Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (Unpublished LLD Thesis, NWU Potchefstroom 2006) 249.

common law rights and obligations of a mineral rights holder can also be attributed to the holders of prospecting rights, mining rights, exploration rights and production rights granted in terms of the Mineral and Petroleum Resources Development Act.³⁷⁴

In the old case of *Turffontein Estates Ltd v Mining Commissioner Johannesburg*,³⁷⁵ Innes CJ discussed the history of a statutory prohibition on a mineral rights holder. For many years it had been the policy of the legislature to prohibit prospecting and mining on or under certain surface areas which it was considered should either for public or for sentimental reasons remain intact. “As far back as 1885 roads, railways, cemeteries, streets and public squares in townships were placed upon the reserved list... [u]nder all the enumerated areas, whether situated on a proclaimed field or not, prospecting and mining were absolutely forbidden.”³⁷⁶ From this provision emerged the principle that a surface owner was obliged to use the surface with due regard to the possibility that as a result of his user of the surface the holder of the mineral rights could be restricted in his mining operations, and that if such restriction occurred the surface owner could either be restrained from so using the surface or be held liable in damages to the holder of the mineral rights.³⁷⁷

³⁷⁴ Dale MO *South African Mineral and Petroleum Law* (2006) 137.

³⁷⁵ 1917 AD 419.

³⁷⁶ 1917 AD 419 430. See further Viljoen PH and Bosman HP *A Guide to Mining Rights in South Africa* (1979) 59-69.

³⁷⁷ *Douglas Colliery Ltd v Bothma and Another* 1947 (3) SA 602 (T) 616.

What follows are examples of the above common law principles (now contained in legislation) as they were applied in South African case law and bolstered by *ad hoc* legislation. The conflicts in these cases *inter alia* involved the construction of railway lines, tramways, buildings, and the development of townships, agricultural holdings, waterworks, dams and lakes by the land surface owners, contrary to the interests of the mineral right holders.

3.5.3.2 Railway Lines, Tramways and Railway Sidings

*Witbank Colliery v Malan and Coronation Colliery Co Ltd*³⁷⁸ was one of the earliest cases decided under this heading. The plaintiff brought an action against the second defendant after the latter had constructed and begun to use a certain railway siding and tramline on the farm Blesboklaagte. He alleged that such siding and tramline were a derogation of certain rights to mine for coal under the said siding granted to the Witbank Colliery Company by the first defendant. The existence of a railway siding caused the Government Mining Engineer to prohibit, in terms of a regulation, the Witbank Colliery from mining under it, by directing that a pillar of coal be left vertically under the siding for its whole length and for a specified distance on each side of it. The court gave judgement against the second defendant for the value of the coal which the Witbank Colliery Company had been required by the Government Mining Engineer to leave under the land on which the siding or line had been constructed.

³⁷⁸ 1910 TPD 667. See also Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 118.

The principle was recognised in the *Witbank Colliery* case that the holder of the mineral rights is entitled to be protected against a user of the surface that will prevent the exploitation of minerals. This principle was approved in the case of *Transvaal Property & Investments Co Ltd and Reinhold & Co v SA Townships Mining and Finance Corp Ltd and the Administrator*.³⁷⁹ Schreiner J acknowledged that the facts in *Witbank Colliery* were substantially different from those of the latter case. But the same principle that recognised the holder of the mineral rights' entitlement to be protected against a user of the surface that would prevent the exploitation of the minerals is applicable to the facts that were presented in *Transvaal Property & Investments*. There the owner had parted with the ownership of the land and retained the mineral rights, whereas in *Witbank Colliery* the mineral rights had been granted away by the owner. Schreiner J held that no valid distinction could be drawn between the cases on this ground, for the applicant's claim was founded on the interference with their proprietary rights and not on any doctrine of derogation from a grant.

3.5.3.3 Buildings on the Site

The principles applied in disputes arising from the construction of railway lines, tramlines and railway sidings have also been applied to other structures on land, such as buildings erected for the purposes of a trading site, and a substantial dwelling house together with a hut and a wattle and clay structure.

³⁷⁹ 1938 TPD 512. See also Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 121-122.

In *Witbank Colliery Ltd v Lazarus*,³⁸⁰ the court impliedly approved the principle recognised in *Witbank Colliery v Malan*. However the court dismissed the plaintiff's claim for damages flowing from the inability to mine coal under or near buildings which had been erected on a trading site leased to the defendant's predecessor in title. The trading site had been altogether omitted from the area in respect of which the plaintiff had acquired the mineral rights.

In *Douglas Colliery v Bothma*,³⁸¹ the applicant was the holder of the mineral rights over two adjoining properties and the respondent was the owner of the surface of one of the properties. The surface owner had erected on the property a permanent dwelling house and had permitted his servant to build a hut; on another portion of the farm a wattle and clay structure had also been constructed. The applicant argued that when undermining those portions of the farm on which the buildings had been erected it would be obliged to refrain from carrying on any mining operations under or within a horizontal distance of 300 feet from the buildings, also to leave thousands of tons of coal un-mined as support. This amounted to a serious interference with the applicant's mining operations and would occasion considerable loss of revenue. The applicant sought an order declaring that the respondent was not entitled to erect buildings on his property and thus restraining him from erecting further buildings.

The respondent's contention was that as the owner of the surface he was entitled to reasonable use and that the applicant was obliged to carry out its

³⁸⁰ 1929 TPD 529.

³⁸¹ 1947 (3) SA 602 (T).

mining operations so that the respondent could make reasonable use of the surface. The court rejected this argument and Neser J questioned whether the owner of the land was entitled to do anything on or to the surface of the land which would interfere with the rights of a mineral rights holder, even if the use to which the owner of the land made of the surface could be described as the normal and reasonable user of the land.³⁸²

The court concluded that while the holder of mineral rights was obliged to conduct his mining operations so as to leave support for the surface in its natural state,³⁸³ the owner of the land was obliged to do nothing on the surface that would interfere with the holder's right to sever and remove the minerals.

As to the phrase "the surface in its natural state," Franklin and Kaplan highlight the fact that there is considerable controversy as to whether the right of support is confined, as in English law; to land in its natural state or whether it extends to such buildings as might reasonably be put upon the land.³⁸⁴ This contentious issue is discussed in Chapter Two.

Franklin and Kaplan comment that *Douglas Colliery* is an example of the lengths to which the courts will resort in order to protect the interests of the holder of the mineral rights and to prevent any interference with the

³⁸² 1947 (3) SA 602 (T) 610.

³⁸³ 1947 (3) SA 602 (T) 612.

³⁸⁴ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123. See further Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 67.

exploitation of those mineral rights. They also point out that the decision is authority for the proposition that a surface owner is obliged to use the surface with due regard to the possibility that as a result of his user of the surface the holder of the mineral rights may be restricted in his mining operations, and that if such restriction occurs the surface owner may either be restrained from so using the surface or be held liable in damages to the holder of the mineral rights. It follows that the owners of the surface are bound to use the surface with due regard to the implications to the right of lessees or holders of mineral rights to carry out their prospecting and mining operations without interference in the sense referred to above.³⁸⁵

3.5.3.4 Townships

Conflict is bound to arise where a township is proposed to be established on land in respect of which the landowner has parted with the mineral rights. This question was first dealt with, although *obiter*, in *Coronation Collieries Ltd v Malan*.³⁸⁶ Innes J discussed the same statutory prohibition that was discussed in *Turffontein Estates Ltd v Mining Commissioner Johannesburg*.³⁸⁷

In *Transvaal Property*,³⁸⁸ Schreiner J granted an interdict restraining the establishment by the surface owner of a township, on the ground that it would deprive the mineral rights holders of any opportunity of exploiting their mineral

³⁸⁵ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123. See further Viljoen HP and Bosman PH *A Guide to Mining Rights in South Africa* (1979) 72.

³⁸⁶ 1911 TPD 577.

³⁸⁷ 1917 AD 419.

³⁸⁸ 1938 TPD 512.

rights, in spite of the fact that, on the evidence, the prospects of finding payable minerals under the land were extremely remote. The establishment of the township would have automatically operated to deprive the holders of the mineral rights permanently of the right to prospect and mine for precious minerals, which right was a fundamental part of their title. The fact that the mineral right holders had not exercised their rights since they had acquired them was of no consequence to the court. Schreiner J went as far as saying that “it is possible that they may never exercise them at all. But there is no obligation upon them to prospect at any particular time, or within any particular period. No user of the surface by the owner is defensible which has the effect of taking away the right of the holder of the mineral rights, when he decides to do so, to prospect for precious metals and if they are found to mine for them.”³⁸⁹

In *Nolte*,³⁹⁰ Tindall J commented that the court in *Transvaal Property* may have gone too far. He distinguished the facts in *Transvaal Property* from the facts in *Nolte*. On the facts before him in *Nolte*, prospecting had already taken place and there was evidence that minerals existed in payable quantities.

In *Yelland and Others v Group Areas Development Board*,³⁹¹ where the establishment of a township was proposed on land in respect of which the owner had parted with the mineral rights, the court regarded the prospect of payable minerals in the ground as a factor relevant to the exercise of its

³⁸⁹ 1938 TPD 512 519.

³⁹⁰ *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295 308.

³⁹¹ 1960 (2) SA 151 (T).

discretion. Although the mineral rights holder had not yet carried out any prospecting or mining operations, the court found that the applicant had made out a *prima facie* case that minerals existed in payable quantities.

3.5.3.5 Agricultural Holdings

In *Nolte's* case,³⁹² the applicant succeeded in obtaining an interdict against the surface owner who had proposed the establishment of agricultural holdings on land that was subject to the mineral rights of the applicant. Tindall JA said that in respect of both precious and base metals “common law principles must be applied in reconciling the conflicting interests of the holder of mineral rights and the owner of the land.”³⁹³ With regard to the relevant common law principles, he held that it was not advisable to attempt to lay down a comprehensive rule defining limits of the restriction on the owner’s use of the surface to which such owner is subject when he has made a grant of mineral rights. It seemed impossible to do so, for in many cases a question of degree may be involved. The likelihood that minerals exist in payable quantities in the land in question may also be an important factor. That being the case, the facts in each particular case would determine whether the court will come to the assistance of the holder of the mineral rights. He stressed the point that from the view of the rights of the holder of mineral rights it did not follow that, by refraining from prospecting, he could hold up for an unlimited period the development of the surface by the owner of the land, whether such

³⁹² 1943 AD 295. See also Franklin BLS and Kaplan M *The Mineral and Mining Laws of South Africa* (1982) 126.

³⁹³ 1943 AD 295 315.

development be in the course of the ordinary use of the land (having regard to the user at the time of the severance of title) or not.³⁹⁴

Tindall JA explained the above passage in the *Zuurbekom* case.³⁹⁵ In his view, all that the relevant passage in the judgement meant was that it did not follow that, when a clash of interests between the owner of the land and the holder of the mineral rights actually occurred, the latter could by refraining from prospecting hold up for a period without limit the development of the surface by the owner of the land. It did not mean that the mere abstention from prospecting by the holder of the mineral rights for a long period disentitled him from interdicting the owner of the land when a clash of interests subsequently occurred.³⁹⁶

3.5.3.6 Waterworks

In *Hudson v Mann and Another*,³⁹⁷ the holder of the mineral rights applied for and was granted an interdict prohibiting the landowner from preventing him from having access to a shaft sunk on the property and using it for prospecting and mining purposes. The court rejected the surface owner's argument that the applicant's prospecting and mining operations would have the effect of destroying his waterworks, thus rendering valueless a valuable irrigation project.

³⁹⁴ 1943 AD 295 316.

³⁹⁵ *Zuurbekom Ltd v Union Government* 1947 (1) SA 514 (A).

³⁹⁶ 1947 (1) SA 514 (A) 532.

³⁹⁷ 1950 (4) SA 485 (T).

The implications of *Hudson v Mann* appear to be that the grantee of mineral rights may resist interference with the reasonable exercise of those rights either by the grantor or by those who derive title through him. In the event of irreconcilable conflict the courts will subordinate the use of the surface to mineral exploration. The fact that the use to which the owner of the surface rights puts the property is earlier in point of time does not detract from the rights of the holder of the mineral rights.³⁹⁸

3.5.3.7 Dams or Lakes

In the *Free State Gold Areas*³⁹⁹ case, the owners of the land had granted the respondents the right to pump water from their mines into a pan overlying a part of the area over which the applicants held the mineral rights. The effect of such pumping would have been to increase the pan, which was a natural depression of approximately 280 morgen in size. The pan had never held more than three or four feet of water, and was normally dry for a number of months each year. The right to pump water into the pan would lead to the formation of a lake covering 820 morgen with an ultimate depth of approximately seventy feet. This lake would have had the effect of flooding at least 14 per cent of the surface, thereby preventing any possible future mining lease area. The applicant sought and obtained an interdict prohibiting the pumping of water into the pan. Williamson J, in deciding whether or not to

³⁹⁸ 1950 (4) SA 485 (T) 488. See further Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 114.

³⁹⁹ *Free State Gold Areas Ltd v Merriespruit (OFS) GM Co Ltd & Another* 1961 (2) SA 505 (W). See also Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 127.

grant an interdict, referred to the passage in *Zuurbekom*⁴⁰⁰ explaining a point made in *Nolte*.⁴⁰¹ He held that the court could take into account the fact that the applicant had taken no steps or inadequate steps to determine whether the mineral rights had any value or potentiality that demanded protection.

He went on to conclude that from the decisions in *Nolte* and *Zuurbekom*, this right of prospecting could come into conflict with the owner's right to use the surface, and that the holder of mineral rights could not permanently hold up the full use of the surface by the owner. Nonetheless this did not suggest that the owner of the surface or persons deriving title from him could dictate where and how the right to prospect could be exercised by subjecting the mineral rights holder with a *fait accompli* of changed conditions on the surface.⁴⁰²

3.5.4 The General Effect of the Minerals Act and the Mineral and Petroleum Resources Development Act

3.5.4.1 Introduction

Under the common law, as was established above, the mineral rights holder mostly prevailed in instances of conflict between himself and the landowner. The mineral rights holder was endowed with wide powers of working, which in most cases were exercised at the expense of the land-surface owner.⁴⁰³

⁴⁰⁰ 1947 1 SA 514 (A).

⁴⁰¹ 1943 AD 295.

⁴⁰² 1961 (2) SA 505 (W) 528.

⁴⁰³ See in this regard *Hudson v Mann* 1950 (4) SA 485 (T) 488; *Witbank Colliery v Malan and Coronation Colliery Co Ltd* 1910 TPD 667; *Transvaal Property & Investments Co Ltd and Reinhold & Co v SA Townships Mining and Finance Corp Ltd and the Administrator* 1938 TPD 512; *Witbank Colliery Ltd v Lazarus* 1929 TPD 529.

According to Dale, this common-law state of affairs was restated in s 5(1) of the old Minerals Act.⁴⁰⁴

However, Kaplan and Dale submit that this ostensible statutory restatement of the common law in terms of s 5(1) of the Minerals Act did not actually restate the common law comprehensively but that the section was in fact deemed, in accordance with the principle of interpretation of statutes, not to interfere with or detract from the common law unless the legislature expressly intended to do so.⁴⁰⁵ They therefore submit that the section did not interfere with or detract from the common law position. Therefore, because the Minerals Act of 1991 did not have any provisions dealing specifically with the question of subjacent support, conflicts pertaining to this question, were resolved in terms of the common law.

Although the Minerals Act did not have provisions specifically dealing with the question of support, it had provisions that had important implications for the question of support. These provisions included the optimal exploitation provisions and the rehabilitation of the surface provisions contained in Chapter 4 and Chapter 6 of the Act respectively. The Mineral and Petroleum Resources Development Act also contains similar optimal utilization provisions and environmental management provisions, although both are couched in the 4th chapter of the Act. The following section will discuss the

⁴⁰⁴ Dale MO *South African Mineral and Petroleum Law* (2006) 136. See further Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 183.

⁴⁰⁵ Kaplan and Dale *A Guide to the Minerals Act 1991* (1992) 183.

optimal utilization and exploitation provisions of both the Minerals Act and the Mineral and Petroleum Resources Development Act.

3.5.4.2 Optimal Exploitation and Utilization of Minerals and the Right of Support

In terms of the long title to the Minerals Act of 1991, one of its objects was to regulate the optimal exploitation, processing and utilization of minerals. According to Kaplan and Dale, this was to be achieved in a twofold manner; firstly by a system of authorizations that vested control over the method and manner of mining in the responsible officers, and secondly by making provision for the removal of legal or contractual impediments or other difficulties that could frustrate the stated object of optimal utilization of the Republic's natural resources.⁴⁰⁶

In terms of s 5(1) of the old Act the right to prospect and mine for minerals and to dispose thereof was re-vested in the common law holder of the rights to such minerals. However, this common law right was qualified by s 5(2) of the Minerals Act, requiring the said holder to obtain the necessary authority to prospect or mine. According to Kaplan and Dale, this authorization system, in contrast to the conferral system of the common law, reflected the object of optimal exploitation by stipulating, as a prerequisite to the granting of such authority, that the regional director should be satisfied with regard to various criteria relating to optimal utilization.⁴⁰⁷ Thus, in terms of s 6(2)(b), an

⁴⁰⁶ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 133.

⁴⁰⁷ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 135.

application for a prospecting permit and particulars about the manner in which the applicant intended to prospect was required. More significantly, s 9(3)(a) and 9(3)(c) provided that, before a mining authorization was granted, the regional director had to be satisfied with the manner in which and the scale on which the applicant intended to mine the mineral concerned optimally, and further that he had the capacity or could make the necessary provision to do so. In terms of s 14, the Minister also had the power to suspend or cancel any such authority to prospect or mine if the holder failed or contravened any provisions of the Act, in this case the obligation to mine optimally.

However, despite the objects stated in the long title of the Minerals Act there was no provision in the Act itself that imposed an obligation on the holder of a prospecting or mining authorization to prospect or mine optimally. Nor was there a provision to oblige such holders to comply with the representations made by them in regard to prospecting or mining optimally as part of their applications for such permits or authorization. Thus, according to Kaplan and Dale, s 14 of the Minerals Act, which provided for the suspension or cancellation of a prospecting permit or mining authorization, could not operate.⁴⁰⁸

Nevertheless, as was mentioned, s 9(3)(a) and 9(3)(c) required the regional director to be satisfied with the manner in which and the scale on which the applicant intended to mine for minerals (optimally and safely) and, if he was not satisfied, the regional director would not issue the authorization. However,

⁴⁰⁸ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 135.

having issued the authorization, the regional director could not require the applicant to mine in accordance with the manner and scale covered in his application. However, s 22 provided for steps that the Minister could take against an underperforming mining right holder. Section 22 provided that, if the holder of any mining authorization conducted his operations in a manner and on a scale which, in the Minister's opinion, was detrimental to the object of the Act in relation to the optimal exploitation of any mineral, the Minister could cause an investigation to be held in the matter; and after consideration of the result of the investigation, the Minister could issue a direction ordering such holder to take such rectifying steps, within a period specified in the direction, as was required by the Minister.

According to Kaplan and Dale, s 22 was in fact the policing provision that ensured optimal exploitation of minerals.⁴⁰⁹ It operated in regard to mining authorizations and not prospecting. As there were no regulations regarding "optimal" utilization of minerals in the Act, s 22 ensured the best exploitation of minerals to keep in step with the objects of the Minerals Act.

Section 22 of the Minerals Act was further reinforced by s 23 and s 24 of the same Act. In terms of s 23, if any person intended to exercise or exercised the surface rights contrary to the object of optimal exploitation of minerals and the Minister was of the opinion that such use would be detrimental to the object of the Act in relation to the optimal exploitation of any mineral which occurred in economically exploitable quantities in or on such land or in tailing on such

⁴⁰⁹ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 136.

land, the Minister could issue a direction ordering such a person to make rectifying steps within a period specified in the direction.

Section 24 bestowed upon the Minister the power to expropriate surface or mineral rights if he deemed it to be in the public interest. The section did not specifically provide that this power to expropriate could be invoked by the Minister because the optimal exploitation object of the Act was being impeded. However, the fact that this provision was contained in Chapter 4 of the Act, which dealt with optimal exploitation of minerals, suggests that the power to expropriate was only exercisable under those circumstances.

The Mineral and Petroleum Resources Development Act contains similar provisions dealing with the optimal utilization and exploitation of minerals. However, due regard must be had to the different contexts within which these seemingly similar provisions operate/operated. It was seen above that under the old Minerals Act, the landowner was also the owner of mineral rights. Accordingly he was under no obligation to grant them to a third party. Therefore the landowner was only affected by the optimal utilization provisions of the Minerals Act once he had on his own accord granted the rights to the minerals on his property to a third party. Whereas, under the new Act, all the mineral and petroleum resources in South Africa are the common heritage of all South Africans, and the state is the custodian thereof.⁴¹⁰ Therefore it is the state that grants mineral rights, and not the landowner, thus the optimal utilization provisions of the new Act operate against him even if it

⁴¹⁰ S 3(1).

was the state that granted the mineral rights to a third party. It is important to keep this distinction in mind, as it has a bearing on the prejudice suffered by the landowner under the new Act. This will be discussed in chapter 4 below.

Nevertheless, In terms of s 51(1) of the Act, a specialised board⁴¹¹ may recommend that the Minister should direct a holder of a mining right to take corrective measures if the said board establishes that the holder is not mining optimally in accordance with his mining work programme. In terms of the same provision, if the same board establishes that continuation by the mining right holder of his mining practice will detrimentally affect the object of the Act, the board will make the same recommendation to the Minister. If the Minister agrees with the recommendation, he will issue a notice in terms of s 51(3), requiring the holder of the mining right to take corrective measures. Failure to comply with the notice may result in the cancellation or suspension of the mining right in terms of s 51(4)(a) and (b).⁴¹²

In terms of s 53, any person who intends to use the surface of any land in any way that could be contrary to any object of the Act or that is likely to impede any such object must apply to the Minister for approval. The Minister may direct the person to take necessary corrective measures within a specified period.⁴¹³ According to Dale, the administrative remedy provided by s 53 is in addition to, and does not supplant, the judicial remedies that avail to mining

⁴¹¹ S 1 defines the board as the Minerals and Mining Development Board established by s 57.

⁴¹² Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 131.

⁴¹³ Badenhorst PJ and Mostert M *Mineral and Petroleum Law of South Africa* (2008) 18-4; Dale MO *South African Mineral and Petroleum Law* (2006) 433.

right/permit holders. Therefore s 53 should be considered in the light of the primary and ancillary rights accorded to holders of prospecting, mining, exploration and production rights by s 5(2) and (3) and to holders of mining permits by s 27(7). He also says that those rights are accordingly subject to the corollary that the landowner or occupier may not do anything which would impede or restrict the exercise of the rights afforded by the foregoing sections. Accordingly, although the remedies now flow from the statutory rights accruing to holders of rights and permits in terms of the Act, Dale submits that the main judicial remedy available to a holder remains an interdict against adverse surface use.⁴¹⁴ Prior to the Mineral and Petroleum Resources Development Act the remedies flowed from common law ancillary surface use rights accorded to the holders of common law mineral rights.

Furthermore, s 55(1) of the Act affords the Minister the power to expropriate property for the purposes of prospecting and mining. This power will be invoked if it is necessary for the achievement of the objects referred to in s 2(d), (e), (f), (g), and (h). The Minister may in accordance with s 25(2) and (3) of the Constitution,⁴¹⁵ expropriate any land or any right therein and pay compensation in respect thereof.⁴¹⁶

All the above provisions bring to the fore the question of the possible methods of mining that the holders of the prospecting or mining rights could possibly

⁴¹⁴ Dale MO *South African Mineral and Petroleum Law* (2006) 434.

⁴¹⁵ The Constitution of the Republic of South Africa 1996.

⁴¹⁶ Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* (2008) 18-8; Dale MO *South African Mineral and Petroleum Law* (2006) 451.

employ. This question inevitably has implications for the issue of support, as some methods of mining are more invasive and detrimental to the rights of a surface owner. The respondents in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*⁴¹⁷ objected to open-cast mining because it is generally seen as the more invasive method of mining. Open-cast mining, as was defined above, refers to a method of extracting rock or minerals from the earth by their removal from an open pit or burrow. Extractive methods of mining, on the other hand, require tunneling into the earth and are therefore less detrimental to the rights of land surface owner.⁴¹⁸ Franklin and Kaplan point out that the use of this invasive method has increased following the introduction of machinery which removes the over-burden, allowing minerals at shallow depths, such as coal, to be extracted. "Strip and open-cast mining ordinarily deprives the surface owner of the use of substantial portions of his property, either permanently or for long periods of times. Even if the land is ultimately returned to him, its character and usefulness are likely to be materially altered."⁴¹⁹

In light of the optimal utilization objects that were contained in the Minerals Act it can be argued that the use of the open-cast method of mining, although more detrimental to the land surface, was acceptable under the Minerals Act. The right to withdraw subjacent support was implicit in the legislative scheme of the Minerals Act. As was seen above, the legal vehicle that allowed a

⁴¹⁷ See *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T); *Anglo Operations v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

⁴¹⁸ http://en.wikipedia.org/wiki/Open-pit_mining 06/06/09.

⁴¹⁹ Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 138. See further Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 78.

mineral rights holder to carry out open-cast mining and thereby withdraw subjacent support where necessary was contained in s 68(5) of the Minerals Act. The section provided that the provisions of the Minerals Act were not to be affected by any term or condition in any agreement entered into before or after the commencement of the Act. According to Kaplan and Dale, the provisions of the Minerals Act could be invoked to override any contractual restriction or limitation that could have been an impediment to the optimal utilization of any mineral resource.⁴²⁰ Therefore, a miner confronted by a contractual term (preventing him from carrying open-cast mining) agreed to by his predecessor (or even by himself) could rely on s 68(5). Consequently, a landowner could not by way of contract preclude a mineral rights holder from employing the open-cast method of mining where it was reasonably necessary.

The Mineral and Petroleum Resources Development Act does not appear to have an equivalent provision. The closest would be s 4(2) of the Act, which provides that insofar as the common law is inconsistent with the Act, the latter prevails. Under the common law the landowner could, by way of contract, prevent the mineral rights holder from doing certain things on his land.

The following section will discuss a provision that has provided some measure of protection to a landowner by limiting the predominance of mineral right holders. This provision is the rehabilitation and environmental management

⁴²⁰ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 163.

scheme of the Minerals Act.⁴²¹ It will be cross referenced with the equivalent provision in the Mineral and Petroleum Resources Development Act.⁴²²

3.5.4.3 Statutory Obligations of a Mineral Rights Holder

3.5.4.3.1 Introduction

Prospecting for and mining of minerals can cause environmental damage, pollution or ecological degradation.⁴²³ To overcome these problems, the legislature has over the years adopted environmentally related legislation that also governs prospecting and mining operations. According to Badenhorst, Mostert and Dendy,⁴²⁴ the Mineral's Act⁴²⁵ was the first mining statute to contain provisions aimed at the protection of the environment and rehabilitation of the surface of land during and after prospecting for and mining of minerals. They add that the Mineral and Petroleum Resources Development Act⁴²⁶ continued this tradition and added even more comprehensive measures to ensure the protection of the environment during and after operations.⁴²⁷

⁴²¹ Act 50 of 1991.

⁴²² Act 28 of 2002.

⁴²³ Dale MO *South African Mineral and Petroleum Law* (2006) 331. See further Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 210.

⁴²⁴ Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 204. See further Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's the Law of Property* 5th ed (2006) 706.

⁴²⁵ 50 of 1991.

⁴²⁶ 28 of 2002.

⁴²⁷ Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 209.

3.5.4.3.2 Rehabilitation and Environmental Management Obligations of Mineral Right Holders

Chapter 6 of the Minerals Act dealt with the rehabilitation of the surface following the operations of a prospecting or mineral rights holder. Section 38 provided that the rehabilitation of the surface of the land following prospecting or mining operations was to be carried out by the holder of the prospecting permit or mining authorization. Such rehabilitation could either be carried out in accordance with a rehabilitation programme approved in terms of s 39 of the Act if any; or could be integral to the prospecting or mining operations concerned; or could be undertaken simultaneously with the operations, unless determined otherwise in writing by the regional director. As was seen above Dale argues that, the predominance of the mineral rights holder under common law was eroded by statutory obligations such as those in ss 38 to 42 of the Minerals Act relating respectively to rehabilitation; environmental management programmes, removal of buildings, structures and objects; restrictions in relation to use of surface; and acquisition or purchase of land and payment of compensation.⁴²⁸

The same could be said about the effect of the Mineral and Petroleum Resources Development Act. The only difference between the old Act and the new Act is that the latter has as one of its objectives the duty to give effect to the environmental rights enshrined in the Constitution.⁴²⁹ According to

⁴²⁸ Dale MO *South African Mineral and Petroleum Law* (2006) 136.

⁴²⁹ S 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or well being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that

Badenhorst, the Mineral and Petroleum Resources Development Act seeks to ensure that South Africa's mineral resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development. The Act achieves this by a combination of "command-and-control" and "management planning" regulatory techniques, creating relatively stringent environmental management and protection obligations throughout the life-cycle reconnaissance, prospecting and mining operations.⁴³⁰ The Act prohibits the commencement of any operations in relation to minerals, or the commencement of any work incidental to those activities, without an approved environmental management programme or plan, as the case may be.⁴³¹

Section 38(1)(d) creates a duty to rehabilitate the environment to its natural or predetermined state. In terms of this section, the right or permit holder is required to rehabilitate the environment affected by his operations to its natural or predetermined state as far as reasonably practicable or to a land use which conforms to the generally accepted principle of sustainable development. According to Dale, this is the first time the phrase "as far as reasonably practicable" has been used in the context of environmental management.⁴³²

prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

⁴³⁰ Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South African* (2008) 17-1; Dale MO *South African Mineral and Petroleum Law* (2006) 329.

⁴³¹ S 5(4)(a).

⁴³² Dale MO *South African Mineral and Petroleum Law* (2006) 329.

With regard to the phrase rehabilitate to its “natural state”, Dale submits that it is not clear whether “natural” state means original state or previous condition, for example where its natural state may have been fallow land, but prior to mining the land may have been used for agricultural/grazing purposes. He says it should be noted that the environmental management programme and closure plan require details of what end use is contemplated and how this will be achieved. Although no reference is made in s 38(1)(d) to the programme or closure plan, this must have been intended, as the very object of these documents is to manage the rehabilitation process until the end of the project concerned and presumably the Minister would not approve the programme or plan if the proposed end use in such documents was unacceptable or not sustainable.⁴³³

Badenhorst, Mostert and Dendy⁴³⁴ describe a mining practice in Gauteng where gold mines are mining gold-bearing rock which is overlain by dolomitic formations containing large quantities of water. These formations would be divided into compartments, each consisting of a layer, some thousands of feet deep, of porous rock containing water, bounded by solid dykes of impervious rock which for practical purposes prevents the underground movement of water from one compartment to another. Where the gold-bearing strata underlying such a compartment are mined, the existence of the vast quantity of water contained in the compartment above the workings may constitute a

⁴³³ Dale MO *South African Mineral and Petroleum Law* (2006) 330.

⁴³⁴ Badenhorst PJ, Mostert H and Dendy M “Mineral and Petroleum” in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 204.

potential danger, particularly if fissures exist or develop through which water can seep into the workings. For this reason certain mines have embarked, where the sizes of the compartments concerned have not made it impractical, on a policy of pumping the water out of the compartments overlying their workings. The resulting lowering of the water table has led to the drying up of boreholes on land adjoining the mines concerned and damage to the land itself and surface installations on it, such as buildings, roads and railways. The question has therefore arisen as to the liability of the mines concerned to landowners on land situated in the same water compartment for damage resulting from the drying up of boreholes on their land or depressions and sinkholes caused by subsidences on their land.⁴³⁵

In terms of the Mineral and Petroleum Resources Development Act, a holder of a mining right or permit or a holder of an old order prospecting right or an old order mining right, is strictly responsible for any environmental damage, pollution or ecological degradation occurring as a result of his operations.⁴³⁶ Being responsible for environmental damage implies delictual liability for non-compliance with the provisions of s 38(1) of the Act. According to Dale, responsibility for environmental damage, pollution or ecological degradation contemplated by the s 38(1)(e) is interpreted to arise if, by negligence or

⁴³⁵ Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 204.

⁴³⁶ S 38(1)(e). Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 204.

intent, the holder has not complied with the requirements of s 38(1).⁴³⁷ The responsibility is accordingly in the form of civil liability. Section 38(1)(e) may therefore give rise to delictual liability on the basis of a civil action, founded on the breach of a statutory duty.⁴³⁸

3.6 Conclusion

As was seen above, minerals are by their nature usually found under the surface of the land. The right granted to the holder of mineral rights to extract and remove the minerals can generally only be exercised by excavating the land. Damage to the surface of the land is inevitable and so is the curtailment or even deprivation of the rights of use normally enjoyed by the owner of the surface. The difference between the various methods of mining, be it underground or open-cast mining, lies in the degree of such disturbance and not in whether damage will be occasioned. Even in the case of underground mining the degree of disturbance to the surface, and hence to any right on the part of the owner of the land to preserve the surface, must depend upon the location and extent of the reserves to be mined.⁴³⁹

Therefore, the exercise of mineral rights will almost always inevitably lead to a conflict between the rights of the landowner to preserve the surface and the

⁴³⁷ Dale MO *South African Mineral and Petroleum Law* (2006) 331. See further Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 210.

⁴³⁸ Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 210. See further Dale MO *South African Mineral and Petroleum Law* (2006) 331.

⁴³⁹ 2007 (2) SA 363 (SCA) 372.

mineral rights holder to extract the minerals underneath. How is this inherent conflict to be resolved? In terms of our common law, the answer cannot be based on *Coronation Collieries*,⁴⁴⁰ which inappropriately incorporated the English law doctrine of subjacent support into our law. The correct approach in South African law is to invoke the principles developed by our law in resolving the inherent conflicts between the holders of servitudinal rights and owners of servient properties. This is because the right to minerals in the property of another is in the nature of a quasi-servitude over that property.⁴⁴¹

The *Anglo Operations*⁴⁴² decision illustrated that the law pertaining to subjacent support as it stood before the Supreme Court of Appeal handed down its judgement was not in line with the principles of South African mining law. This discord was evident in both South African case law and academic writings. The Supreme Court of Appeal in deciding *Anglo Operations* set the record straight,⁴⁴³ by holding that the neighbour law principles of lateral support were inappropriately extended to govern the conflict of subjacent support which arose where mineral rights were severed from the title to the land.⁴⁴⁴ They held that subjacent support referred to the relationship between a landowner, and a mineral rights holder in respect of a single piece of land whereas lateral support necessarily involved two pieces of land. Therefore it could not be said that the right of subjacent support like the right of lateral support was in the nature of a natural right inherent in the ownership of

⁴⁴⁰ *Coronation Collieries v Malan* 1911 TPD 577 591.

⁴⁴¹ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 363-364.

⁴⁴² 2007 (2) SA 363 (SCA).

⁴⁴³ 2007 (2) SA 363 (SCA).

⁴⁴⁴ 2007 (2) SA 363 (SCA) 372.

property, but was an aspect of the quasi-servitudal relationship between a landowner and a mineral rights holder. Accordingly where a conflict pertaining to subjacent support between a landowner and a mineral rights holder arose, the solution to such a dispute lay in adopting the principles of servitudes developed by our law.

However, as was seen above, an in-depth enquiry into the implications of the decision in *Anglo Operations* was still necessary, because of the new order of state issued and controlled mining rights and permits. To place the effect of the new Act into context, old legislation and the old Minerals Act in particular was examined to establish whether its provisions would have had an impact on the quasi-servitudal construction discussed in *Anglo Operations*. This impact that the old Minerals Act would have had on the quasi-servitudal construction that was described in *Anglo Operations* above was compared to and contrasted with the impact of the Mineral and Petroleum Resources Development Act.⁴⁴⁵ The second half of this chapter illustrated how the new Act removed mineral rights from the private domain. The relationship between the landowner and the mineral rights holder has been complicated, by this new regime of state controlled mineral rights. The quasi-servitude construction described in *Anglo Operations* was thrown out and replaced by a comprehensive statutory scheme that determines the rights and duties of landowners and mineral rights holders respectively. A landowner under the new dispensation does not have the opportunity to preclude, by contract, the possibility of open-cast mining being conducted by a mineral rights holder,

⁴⁴⁵ Act 28 of 2002.

whereas under the common law system of private mineral rights he could do so. This is because it is now the state that grants mineral rights and not the landowner. However, as was seen above, the new Act's impact on the landowner's common law contractual capacity in constituting the quasi-servitude in favour of the mineral rights holder should not be seen as revolutionary. As was seen above, the Minerals Act had provisions that had a similar effect on the quasi-servitodal relationship of landowner and a mineral rights holder, although not as far reaching as the new Act's.

Although the Minerals Act recognised the principle that mineral rights in respect of property formed part of the rights of a landowner, it made provision for the removal of legal or contractual impediments or other difficulties that frustrated its stated object of optimal utilization of the Republic's natural resources in s 68(5). The section provided that the Act would not be affected by any term or condition in any agreement, whether such agreement was entered into before or after the commencement of the Act. It is conceivable that the effect of the Mineral and Petroleum Resources Development Act on what was said in *Anglo Operations*⁴⁴⁶ may already have begun under the Minerals Act of 1991. Section 68(5) of the Minerals Act had the same effect of limiting the landowner's right to define the extent of a mineral rights holder's powers in carrying out his mining operations. Thus a term in a grant of minerals to the effect that a mineral rights holder could not carry out open-cast mining could have been overridden by invoking this provision.⁴⁴⁷

⁴⁴⁶ 2007 (2) SA 363 (SCA).

⁴⁴⁷ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 163.

The next chapter will commence by briefly illustrating what was said by Brand JA in *Anglo Operations* about the constitutionality of what was decided in *Anglo Operations v Sandhurst Estates*,⁴⁴⁸ namely that in the absence of a provision to the contrary in a grant of mineral rights, a holder may conduct open-cast mining where it is reasonably necessary even if it means that the landowner is deprived of subjacent support. More importantly, the constitutionality of the Mineral and Petroleum Resources Development Act's effect on the landowner will be investigated, in light of the fact that he no longer has the opportunity to protect himself against open-cast mining. As was seen above, the landowner previously had this right. He could do so in the grant of mineral rights to a mineral rights holder, by stipulating that the latter was precluded from carrying out open-cast mining. The constitutionality of the Minerals Act's effect as described above on the landowner's common law rights will also be considered. Although it is no longer in force, its effect was described above to show that the new Mineral and Petroleum Resources Development did not introduce the limitation on the landowner's common law rights relating to subjacent support.

⁴⁴⁸ 2007 (2) SA 363 (SCA).

Chapter 4

The South African Constitution and the Right of Subjacent Support

4.1 Introduction

In chapter 3 above, it was established that a principle of fundamental importance in South African law was that the owner of the land was the owner not only of the surface, but of everything legally adherent thereto and also of everything above and below the surface.⁴⁴⁹ Therefore, in terms of South African law, it is not possible to divide ownership into separate layers.⁴⁵⁰ It was also seen that where rights to minerals were severed from the rights to the surface, the two respective parties, namely the land surface owner and the mineral rights holder, do not become “vertical neighbours” as was suggested by Bristowe J in *Coronation Collieries*.⁴⁵¹ The Supreme Court of Appeal correctly described the relationship between the mineral rights holder and the land surface owner, when mineral rights were severed from the ownership of the land by saying that:⁴⁵² “[I]n accordance with what has now become a settled principle of our law, that a right to minerals on the property of another is in the nature of a quasi-servitude over that property.”⁴⁵³ For that

⁴⁴⁹ *Cuis est solum eius est usque ad caelum et usque ad inferos*.

⁴⁵⁰ Except in the case of special legislation, for example the Sectional Titles Act 95 of 1986.

⁴⁵¹ 1911 TPD 577 590.

⁴⁵² *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

⁴⁵³ 2007 (2) SA 363 (SCA) 371.

reason, the owner of the servient property is bound to allow the holder of the servitudinal rights to do whatever is reasonably necessary for the proper exercise of those rights. The holder of the servitude is in turn bound to exercise his rights *civilliter modo*, that is, reasonably viewed, with as much possible consideration and with the least possible inconvenience to the servient property and its owner.⁴⁵⁴

Applying these principles to mineral rights, the holder is entitled to go onto the property, search for minerals and, if he finds any he is entitled to remove them.⁴⁵⁵ Further, in accordance with the Latin maxim translated as “whosoever grants a thing is deemed also to grant that without which the grant itself would be of no effect,”⁴⁵⁶ that must include the right on the part of the holder of mineral rights to do whatever is reasonably necessary to attain his ultimate goal as empowered by the grant. Therefore, in the absence of an express or tacit term in the grant to the contrary, if it is reasonably necessary for the mineral rights holder to let down the surface by withdrawing subjacent support in carrying out his mining operations, he may do so, so long as he does so in a manner least injurious to the surface owner. If the landowner wants to reserve certain aspects of his use and enjoyment of the land surface, for instance to preserve the land surface from invasive strip mining, he must reserve that right in the grant of mineral rights.

⁴⁵⁴ 2007 (2) SA 363 (SCA) 372.

⁴⁵⁵ *Hudson v Mann* 1950 (4) SA 485 (T) 488. See further *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 509.

⁴⁵⁶ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 373. See also *West Witwatersrand Areas Ltd v Roos* 1936 AD 62 72.

In contrast, the position in English law is that the holder of mineral rights becomes owner of a particular layer below the surface. Such an owner becomes a “vertical neighbour” of the surface owner, so to speak. This is why the court in *Humphries v Brogden*⁴⁵⁷ said that the principle of lateral support governing the relationship between two adjacent landowners would be useful to the court in deciding the question of subjacent support that was before it. In English law, the right of subjacent support is therefore, like the right of lateral support, in the nature of a natural right inherent in the ownership of land. Therefore, conflicts between the landowner and a mineral stratum owner in English law are resolved in accordance with principles of neighbour law. In view of the *Anglo Operations* decision, this solution is now clearly impossible in South African law, where the relationship is governed by the principles of servitude law.

Minerals are by their nature usually found under the surface of the land. The right granted to the holder of mineral rights to extract and remove the minerals can generally only be exercised by excavating the land.⁴⁵⁸ Damage to the surface of the land is inevitable and so is the curtailment or even deprivation of the rights of use normally enjoyed by the owner of the surface. It was therefore concluded in chapter 3 that, in the absence of an express or tacit term to the contrary in a grant of minerals, the right to withdraw subjacent support should exist and form part of the common law subsidiary or ancillary rights of the mineral rights holder in carrying out his operations. However, this

⁴⁵⁷ [1843-1860] All ER 779 3.

⁴⁵⁸ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 372.

submission comes with the qualification that this right can only be exercised where and in so far as it is reasonably necessary.

However, it was also established in chapter 3 above that the decision in *Anglo Operations v Sandhurst Estates*⁴⁵⁹ was only concerned with the pre-Mineral and Petroleum Resources Development Act position.⁴⁶⁰ The Supreme Court of Appeal in delivering its judgement only concerned itself with old order mineral rights which were granted to a holder by a landowner by way of contract. The court did not consider the new order mining rights created by the Mineral and Petroleum Resources Development Act. Under this new order, as was discussed above, rights to the minerals on a landowner's property are not granted to the subsequent holder by the landowner himself but by the state in its capacity as custodian of all the mineral and petroleum resources of the nation.⁴⁶¹ As was pointed out in chapter 3, this places the conflict between a landowner and a mineral rights holder with regard to the right of subjacent support in a new light. Before, a landowner had the opportunity to protect himself through the deed of grant, by stipulating that the holder of mineral rights was precluded from withdrawing subjacent support. However, now it is not the landowner who contracts his mineral rights, but it is the state that issues licences in respect of those minerals, and consequently

⁴⁵⁹ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

⁴⁶⁰ Act 28 of 2002.

⁴⁶¹ S 3(1) of the Mineral and Petroleum Resources Development Act 28 of 2002. See further Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (Unpublished LLD Thesis, NWU Potchefstroom 2006) 237; Van den Berg HM "Ownership of Minerals Under the New Legislative Framework for Mineral Resources" (2009) 3 *Stell LR* 139-158 139; Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* (2008) 13-4.

the landowner is arguably left exposed and without protection when a miner withdraws subjacent support (unless the Act provides otherwise). That is because the quasi-servitude formulation of the *Anglo Operations* decision is no longer applicable under the new regime of state controlled mining rights and permits.

The first part of this chapter will investigate the constitutionality of the finding made in *Anglo Operations v Sandhurst Estate*⁴⁶² that, in the absence of any express or tacit term to the contrary in the grant of mineral rights, the mineral rights holder was entitled by virtue of a term implied by law to conduct open-cast mining (thereby withdrawing subjacent support) where it was reasonably necessary in the course of his operations. This first section will consider whether the above proposition is in fact an arbitrary deprivation of the landowner's property as meant by s 25(1) of the Constitution. The second part of this chapter will then ask the question whether a landowner under the new system of state controlled mineral rights is expropriated or arbitrarily deprived of his property where a miner withdraws subjacent support in the course of his operations, even if it was reasonably necessary. The would-be constitutionality of the Minerals Act's provisions that would have affected the quasi-servitudal relationship between a landowner and a mineral rights holder, had the Act still be force will be discussed alongside the new Act.

⁴⁶² *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

4.2 Section 25(1) of the Constitution and the *Anglo Operations*⁴⁶³

Decision: Brand JA's Judgement

Section 25(1) of the Constitution⁴⁶⁴ provides that no person may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. It can be argued that permitting a mineral rights holder to withdraw subjacent support when carrying out his mining operations is tantamount to depriving a landowner of the use and enjoyment of his land. All beneficial use of his land (farming and other developments) is lost to him when the surface is destroyed, at least as far as the affected piece of land is concerned. Therefore the question that has to be considered is whether this amounts to an arbitrary deprivation of property as contemplated in s 25(1) of the Constitution.

In *Anglo Operations*⁴⁶⁵ the respondent argued that the implied term contended for by the appellant, namely that the mineral rights holder could destroy the surface if it was necessary for mining, was in conflict with the guarantee against arbitrary deprivation of property afforded by s 25(1) of the Constitution. This argument found favour with the court *a quo*. The High Court's reasoning led it to the conclusion that the applicant's contention resulted in a term being implied by the court to the effect that the owner is deprived of the use of the surface. What the court *a quo* objected to was that the implied term had the effect of the owner being deprived, without him

⁴⁶³ 2007 (2) SA 363 (SCA).

⁴⁶⁴ The Constitution of the Republic of South Africa 1996.

⁴⁶⁵ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T); see also *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

agreeing, of the last remaining aspect of his ownership that was of any practical value.⁴⁶⁶ However, on the facts the Supreme Court of Appeal refused to accept the court *a quo*'s reasoning. Brand JA argued that the owner cannot be said to be arbitrarily deprived of anything because he, the owner or, on the facts, his predecessor in title, had sold those rights. Brand JA said the following:

“[T]he purpose of the whole exercise is to determine the nature and ambit of what had been sold. It is true that if the ambit of the merx is extended, he will be deprived of whatever the extension entails. But by the same token it can be said that, to the extent that the merx is reduced, the buyer will be deprived of what he bought. That is why I hold the view that the notion of arbitrary deprivation does not enter the picture at all.”⁴⁶⁷

Brand JA also refused to accept the further argument of the High Court that s 39(2) of the Bill of Rights was applicable and that there was accordingly a duty for it to develop the common law in a manner that promoted the spirit, purport and object of the Bill of Rights.⁴⁶⁸ In his view, this could not be the case because, as in the case of servitudes, what had to be resolved was a conflict between the contradictory interests of two individuals who have agreed on the content of their respective rights. Both in the case of servitudes and in the case of mineral rights, there could be no reason why one of these conflicting interests would be preferred by any of the values underlying the Bill

⁴⁶⁶ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 398.

⁴⁶⁷ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 375.

⁴⁶⁸ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) 397.

of Rights, considering that the parties had agreed to the grant that caused the conflict in the first place. He consequently found that it was not conceivable that application of s 39(2) would yield an answer different from that which the common law provided.⁴⁶⁹

4.3 Constitutionality of Legislation in Regard to the Withdrawal of Subjacent Support

4.3.1 Introduction

As was indicated in the introduction to this chapter, the decision in *Anglo Operations v Sandhurst Estates*⁴⁷⁰ was only concerned with the pre-Mineral and Petroleum Resources Development Act position.⁴⁷¹ The Supreme Court of Appeal did not consider the effect of the new order of mineral exploitation in South Africa ushered in by the Mineral and Petroleum Resources Development Act. Under this new order, rights to the minerals on a landowner's property are not granted to the subsequent holder by the landowner himself but by the state in its capacity as the custodian of all the mineral and petroleum resources of the nation.⁴⁷² As was highlighted above, this places the conflict between a landowner and a mineral rights holder with regard to the right of subjacent support in a new context. It was seen that in

⁴⁶⁹ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) 375.

⁴⁷⁰ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

⁴⁷¹ Act 28 of 2002.

⁴⁷² S 3(1) of the Mineral and Petroleum Resources Development Act 28 of 2002. See further Van der Schyff E *The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (Unpublished LLD Thesis, NWU Potchefstroom 2006) 237; Van den Berg HM "Ownership of Minerals Under the New Legislative Framework for Mineral Resources" (2009) 3 *Stell LR* 139-158 139; Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa* (2008) 13-4, Dale *South African Mineral and Petroleum Law* (2006) 447.

the old order of private mineral rights a landowner had the opportunity to protect himself by stipulating that the holder of mineral rights was precluded from withdrawing subjacent support in the deed of grant.

However, as was made clear above, that even before the introduction of the new Act, there had always been legislative interference with the landowner's contractual powers in constituting a quasi-servitude. The old Minerals Act restricted this common law right by providing in s 68(5) that its provisions would not be affected by any term or condition in any agreement, regardless of whether the agreement was entered into before or after the commencement of the Act. Thus, the provisions of the Minerals Act could be invoked to override any contractual restriction or limitation that could otherwise have prevented or militated against the optimal utilization of any mineral resource.⁴⁷³ However, under the old Minerals Act, the quasi-servitudinal formulation of *Anglo Operations* would have found limited application. Section 68(5) of the old Act left very little room for repressive terms that would have had the effect of frustrating the objects of the Act. In spite of the heavy regulation, a landowner still had a semblance of control in that the decision to grant mineral rights remained with him. However, once he had constituted that personal quasi-servitude of mineral rights, the restrictive terms in his agreement with the mineral rights holder, which frustrated the objects of the Act, could be overridden by the provisions of the Act.

⁴⁷³ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 163.

As was seen in chapter 3 above, the Mineral and Petroleum Resources Development Act has had a much more dramatic effect on the quasi-servitude formulation of *Anglo Operations*. It is not conceivable that this quasi-servitudal construction can still find application under the new order of state issued and controlled mining rights. It has been replaced by a statutory process designed to allow a landowner to raise objections where his rights are threatened in terms of s 54 of the new Act. Unlike the quasi-servitudal formulation described in *Anglo Operations* where a landowner could completely exclude detrimental mining practices by contract, s 54 only provides a landowner with the opportunity to insist that a miner be barred from employing mining practices that are detrimental to his rights where it is not reasonably necessary for him to do so. In this regard, he has a right to have the conflict between himself and the mining right or permit holder resolved by a competent court.⁴⁷⁴

Nonetheless, in a situation where it is reasonably necessary for the mining right or permit holder to make use of a particularly prejudicial method of mining, such as open-cast mining, the landowner has little or no choice but to accept the agreed compensation with no further recourse. Therefore, since it is no longer the landowner who contracts away mineral rights to his land, but the state that issues licences in respect of those minerals, the question that arises is whether it can be said that the landowner has been expropriated or arbitrarily deprived of his property where a miner withdraws subjacent support and the landowner loses the use and enjoyment of his land.

⁴⁷⁴ S 54(6).

A similar question could have been posed with regard to s 68(5) of the old Minerals Act. In such a scenario there would have been a quasi-servitude agreement between the respective parties in place. If the mineral rights holder had invoked s 68(5) of the old Act to override the terms of the quasi-servitude, could it have been said that the landowner was expropriated or arbitrarily deprived of his property?

Before we delve into these taxing questions, the next sub-heading will briefly investigate the possibility of independently expropriating the right of support.

4.3.2 Can the Right of Support be Independently Expropriated?

In *Elektrisiteitvoorsieningskommissie v Fourie*⁴⁷⁵ it was held that the landowner's right to lateral and surface support was not a right *stricto sensu* and further, that it was not a right in, over or in respect of land as was intended in s 43 of the old Electricity Act,⁴⁷⁶ which could be expropriated. Fourie was the owner of land that contained considerable deposits of coal. In terms of a prospecting agreement, the mineral rights in respect of the coal deposits vested in a company called Alpha Coal Ltd. The right to actually mine the coal was ceded by Alpha Coal Ltd, by means of a prospecting lease agreement, to certain respondents who were referred to in the crucial agreements as the Joint Venture. By virtue of further agreements entered into by EVKOM and Alpha Coal Ltd, and again by Alpha Coal Ltd and the Joint Venture, all the coal mined on Fourie's property was to be supplied to

⁴⁷⁵ 1988 (2) SA 627 (T).

⁴⁷⁶ Act 40 of 1958.

EVKOM, which in turn obtained the sole right to purchase the coal. In order to meet the demands of EVKOM, the Joint Venture had to abandon conventional mining methods and apply high-recovery mining techniques. This would have required the disturbance of the surface and subterranean layers of Fourie's land. However, the notarial prospecting contract in force expressly stipulated that mining operations would leave the surface of the land intact and also made provision for pillars and props to prevent the surface and bedrock from caving in. EVKOM consequently entered into negotiations with Fourie for the acquisition by itself of the right of support pertaining to the surface and bottom layers of the land. Fourie refused to contract away the right of support, and instead offered to sell his land to EVKOM. EVKOM thereupon set formalities in motion for the state to expropriate Fourie's right to surface and subterranean support in terms of s 43 of the Electricity Act.⁴⁷⁷

Kriegler J found in favour of Fourie. He held that what the EVKOM sought to expropriate was not a right within the meaning of s 43 of the Electricity Act; and even if it were a right, the applicant would not be eligible to acquire that right. The court said the right appeared to be merely a capacity arising from ownership or an entitlement of ownership. Even if it was accepted that the surface owner's claim to support was a right as was intended in s 43, it did not necessarily follow that it could be acquired by an outsider in respect of the land, whether by voluntary or forced purchase. The relevant right existed only

⁴⁷⁷ Act 40 of 1958. A compulsory purchase by virtue of the section could be sought by an authorised undertaker or any person entitled to cause electricity to be generated or to supply electricity in a particular area for the acquisition of such land or any such right in, over or in respect of land as such undertaker or person required for the exercise of such power.

as between the surface owner and the person entitled to the mineral rights and hence it is an incident of the relationship between them and the land in respect of which they have separate and potentially conflicting claims.

In analyzing this decision, Van der Vyver⁴⁷⁸ submits that Kriegler J in delivering this judgement touched upon important theoretical concepts and distinctions. The most important theoretical concept and distinction touched upon for our purposes concerns the difference and relationship between a right and the entitlements of the holder of a right. The crux of the *Fourie* judgement was that the right of support was not an entitlement of ownership and was therefore not capable of being expropriated separately. Stated differently, the right to support was not shorthand for the right to use and enjoy property but an inseparable aspect of the relationship between the two parties.

According to Van der Vyver, the claim of the person who has a right to what might be called the integrity or inviolateness of the object of his right, is fundamental to the exercise of the entitlements in a right. He submits that this is where the question of lateral, surface and subterranean support comes in. He agrees with Kriegler J's submission that the expectation of an owner that the object of his right should be kept intact is not an independent right but an integral part of ownership, not an entitlement and more specifically not the

⁴⁷⁸ Van der Vyver JD "Expropriation, Rights, Entitlements, and Surface Support of Land" (1988) 105 *SALJ* 1-16 3.

owner's entitlement to use and enjoy the object of his right but an aspect of the relationship between the two parties.⁴⁷⁹

However, the difficulty Van der Vyver had with the above construction in the *Fourie* decision was that the concept of entitlement was commonly equated to what a person could do with a legal object; and the inviolate disposition of the object was obviously fundamental to the exercise of all the entitlements included in the particular right.⁴⁸⁰ Whereas, he continues on the same page, a competence signifies what a person by virtue of being a legal subject in the juridical sense could do; an entitlement entails that which a legal subject, by virtue of having a right, could lawfully do with the object of his right. The right of support was neither of these.

Van der Vyver suggested that, because of the definition of an entitlement, it would perhaps be more accurate to classify the claim of an owner and other persons with a right to the integrity or inviolateness of the object of their right as part and parcel of the subject-third-parties relationship, rather than trying to construct it as an ingredient of the subject-object relationship, that is, as an entitlement. The implication of this approach, he submits, would be, *inter alia*, that the so-called right to lateral, surface and subterranean support cannot be transferred to another person, and consequently cannot be expropriated,

⁴⁷⁹ Van der Vyver JD "Expropriation, Rights, Entitlements, and Surface Support of Land" (1988) 105 *SALJ* 1-16 11. See further Milton JRL "The Lateral Support of Land: A Natural Right of Property" (1965) 82 *SALJ* 459-463 462; Anonymous "Natural Rights and Natural Servitudes" (1892) 9 *Cape LJ* 225-231 230.

⁴⁸⁰ Van der Vyver JD "Expropriation, Rights, Entitlements, and Surface Support of Land" (1988) 105 *SALJ* 1-16 11.

separate from ownership of the land as such. However, it would still be open to the owner to renounce it, in which event the corresponding obligation of third parties to refrain from impairing the object would lapse.⁴⁸¹

In light of the above, it is clear that the right of (lateral) support cannot be transferred to another person or be expropriated separately from the ownership of the land. This is because the right to support is an aspect of the relationship between the landowner and others who have to respect his right, and not shorthand for the right to use and enjoy property. A landowner can accordingly not be deprived of this right of support as it will be tantamount to him losing his ownership. However, it is open to the owner to renounce it, in which event the corresponding obligation of third parties to refrain from impairing the object would lapse.⁴⁸²

What is not clear is whether the same considerations hold true for the right to subjacent support. Van der Vyver refers to both the rights of “lateral” and “subterranean” support in the same breath, as was common in the period before the *Anglo Operations* decision.⁴⁸³ The facts in *Elektrisiteitvoorsieningskommissie v Fourie*⁴⁸⁴ dealt with subjacent and not lateral support. However, the court treated lateral support and subjacent

⁴⁸¹ Van der Vyver JD “Expropriation, Rights, Entitlements, and Surface Support of Land” (1988) 105 *SALJ* 1-16 11.

⁴⁸² Van der Vyver JD “Expropriation, Rights, Entitlements, and Surface Support of Land” (1988) 105 *SALJ* 1-16 11.

⁴⁸³ Van der Vyver JD “Expropriation, Rights, Entitlements, and Surface Support of Land” (1988) 105 *SALJ* 1-16 11.

⁴⁸⁴ 1988 (2) SA 627 (T).

support as if they were synonymous concepts with identical applicable principles. The court in *Fourie* failed to appreciate the distinction between lateral support and subjacent support. If it had been lateral support that was in question in *Fourie*, the court's *ratio* in reaching the decision it did would have been on point. Had the *Fourie* case been argued correctly, namely, from the point of view that the right to the minerals on the property of another is in the nature of a quasi-servitude, the outcome would have still been in favour of *Fourie*, although on different grounds. The result would have been consistent with the submission made in chapter 3, that is, in the absence of an express or tacit term to the contrary in the deed of grant of mineral rights, it is open to a mineral rights holder by virtue of a term implied by law to make use of the most invasive mining method, thereby withdrawing subjacent support where it is reasonably necessary. In that case it would have been possible to say, in line with the subsequent *Anglo Operations* decision, that the right of surface support is an inherent aspect of the relationship between the landowner and the holder of servitude or quasi-servitude rights to the land, with the implication that this right can be restricted or waived as between the two parties, but not transferred to another person or held independently of their relationship.

Under those circumstances a landowner could be deprived of subjacent support, even if it meant he would have lost all use and enjoyment of property. This is because the right to the minerals on the property of another was in the nature of a quasi-servitude. The following section asks the question whether

such a deprivation is arbitrary and therefore in conflict with s 25(1) and (2) of the South African property clause.

4.4 Is The Landowner Expropriated or Arbitrarily Deprived of His Property by the Legislation?

4.4.1 Is the Landowner Expropriated?

Section 25 of the Constitution refers to two categories of limitations on property, namely, deprivations and expropriations. Van der Walt⁴⁸⁵ points out that since the Constitutional Court's decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services and Others (FNB)*,⁴⁸⁶ expropriations are regarded as a special subset of deprivations. Accordingly, some deprivations amount to expropriations, others do not, but expropriations are always deprivations.

It cannot be said that s 68(5) of the Minerals Act had the effect of expropriating a landowner under the old order of private mineral rights. This was because it was he, the landowner, who constituted the quasi-servitude of mineral rights of his own volition. Furthermore, under that old order the landowner still retained some contractual power with which he could protect himself against harmful activities of a mineral rights holder. At most, s 68(5) was just a regulatory provision. The effect of this provision on a landowner's rights will be discussed in greater detail in the following sub-heading that deals with deprivations.

⁴⁸⁵ Van der Walt AJ *Constitutional Property Law* (2005) 181.

⁴⁸⁶ 2002 (4) SA 768 (CC) 796.

In regard to the Mineral and Petroleum Resources Development Act, Dale argues that the acquisition by a holder of a permission, permit or right to entry⁴⁸⁷ constitutes an expropriation of the landowner's entitlement to use the land, for which the state is liable to pay compensation in terms of s 25(2) of the Constitution and item 12 of Schedule 2 to the Mineral and Petroleum Resources Development Act. The state, rather than the holder of a permit or right, is liable to pay compensation for such expropriation.⁴⁸⁸

Dale's contention in this regard,⁴⁸⁹ cannot be upheld in South African law. This is because as was seen in the preceding chapter, s 55 of the Mineral and Petroleum Resources Development Act specifically provides for expropriations in terms of the Act. Section 55 of the new Act stipulates that, if it is necessary for the achievement of the objects contained in s 2 of the Act, the Minister may, in accordance with s 25(2) and (3) of the Constitution, expropriate, any land or any right therein and pay compensation in respect thereof. This section is invoked by s 54(5), where the compulsory negotiations aimed at the agreement of the compensation to be paid to the landowner fail.

As was seen above s 54 of the new Act provides some measure of protection for a landowner who has suffered or is likely to suffer loss or damage as a result of the operations of a mining right or permit holder as the case may be.

⁴⁸⁷ S 5(3)(a); s 15(1); s 27(7)(a); s 75(5 (a) and s 78(2)(a).

⁴⁸⁸ Dale MO *South African Mineral and Petroleum Law* (2006) 447; Badenhorst PJ, Mostert H and Dendy M "Mineral and Petroleum" in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 150.

⁴⁸⁹ S 5(3)(a); s 15(1); s 27(7)(a); s 75(5 (a) and s 78(2)(a).

What Dale refers to is the deprivation of property brought about by state action that regulates or controls the use of property without taking it away for public use, and for which no compensation is payable, even though it may cause serious financial loss for the property owner.⁴⁹⁰ Therefore, in circumstances where the regulation becomes excessive and has dire consequences for the landowner, for example where he loses or is likely to lose all use and enjoyment of his property because a mining right holder makes use of the open-cast method of mining and thereby withdraws subjacent support for the surface, s 54(4) of the Act should come into operation. If open-cast mining is reasonably necessary under the circumstances, the landowner should then be expropriated in terms of s 55 of the Act, which has to adhere to the s 25(2) and (3) of the Constitution.⁴⁹¹ Failure to expropriate a landowner under those conditions will turn the deprivation into an arbitrary deprivation that will therefore be invalid in terms of s 25(1) of the Constitution.

⁴⁹⁰ Van der Walt AJ *Law of Property Casebook for Students* 6th ed (2006) 399. See also Van der Walt AJ *Constitutional Property Law* (2005) 154.

⁴⁹¹ Section 25 (2) of the Constitution provides that property may be expropriated only in terms of a law of general application, for a public purpose or in the public interest; and subject to compensation, the amount which and the time and manner of payment of which have either been agreed to by those affected or approved by a court. Section 25 (3) provides that the amount of compensation and the time of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all the relevant circumstances, including the current use of the property, the history of the acquisition and use of property, the market value of the property, the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property and the purpose of the expropriation.

To say that the state's assumption of custodianship and administration of mineral rights can be seen as a move towards expropriation cannot be correct in South African law. This is because custodianship and administration of rights concerning the use and exploitation of scarce resources might indicate exactly the opposite, namely regulatory exercise of the state's (non-expropriatory and hence uncompensated) police power.⁴⁹² In addition to this, it was seen in chapter 3 above, that the previous order of mining and mineral laws was not totally devoid of state interferences in the then quasi-servitodal relationship between a landowner and a mineral rights holder. State regulation was admittedly not as far reaching as the regulation brought about by the Mineral and Petroleum Resources Development Act, but it could not be said that a landowner under that order was entirely autonomous in his dealings with a mineral rights holder.

In light of the above, there are two questions that still remain. Firstly, whether a landowner under the old order of private mineral rights suffered an arbitrary deprivation of property where a mineral rights holder had invoked s 68(5) of the old Minerals Act. As was seen above this provision could be invoked to override a term in the grant of mineral rights that had the effect of preventing the optimal mining of a mineral resource.

Secondly, in light of the fact that the quasi-servitodal formulation of mineral rights enunciated in *Anglo Operations* is no longer applicable under the new order of state issued and administered mining rights and permits, can it be

⁴⁹² See Van der Walt AJ *Constitutional Property Law* (2005) 378-383, 383-392.

said that the landowner under this new system is arbitrarily deprived of his property where subjacent support is withdrawn in the course of the mining operations? Stated differently, because of the fact that it is now the state that grants minerals rights in respect of a landowner's property, can it be said that he is arbitrarily deprived of his property in the event that a mining right holder is permitted to carry out open-mining?

4.4.2 Is the Landowner Arbitrarily Deprived of His Property?

As was seen above s 68(5) of the Minerals Act could be seen as a severe regulatory provision. The effect of this provision would have been to deprive a landowner of his property regardless of the fact that there was a quasi-servitudinal agreement between himself and the mineral rights holder.

Under the new regime of mining and mineral laws introduced by the Mineral and Petroleum Resources Development Act, it is clear that a landowner is deprived of his property when a miner withdraws subjacent support in the course of his operations. This is because, unlike in the old system of private mineral rights, where his relationship with a mineral rights holder was regarded as being in the nature of a quasi-servitude (constituted by the respective parties), he no longer has the opportunity to preclude the possibility of open-cast mining that inevitably leads to the withdrawal of support for the surface. The landowner stands to lose all use and enjoyment of his land when subjacent support for the surface is withdrawn. It is clear that he is indeed deprived of his property.

However, the question that remains is whether the above two landowners were/are arbitrarily deprived of their property in the sense spelt out in *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services and Others*.⁴⁹³

In the *FNB* case it was concluded that a deprivation of property is arbitrary as meant in s 25 of the Constitution when the law referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. The court devised a test to establish “sufficient reason.”

According to the test, sufficient reason is to be established by evaluating the relationship between the means employed, namely the deprivation in question and the ends sought to be achieved, that is the purpose of the law in question.⁴⁹⁴ Further, a complexity of relationships has to be considered. In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected. In addition, regard must also be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.⁴⁹⁵ Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law

⁴⁹³ 2002 (4) SA 768 (CC).

⁴⁹⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services and Others* 2002 (4) SA 768 (CC) 810.

⁴⁹⁵ 2002 (4) SA 768 (CC) 810.

to constitute sufficient reason for the deprivation than in the case when property is something different and the property right something less extensive.⁴⁹⁶ Furthermore, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when deprivation embraces only some incidents of ownership and those incidents only partially.

Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36 (1) of the Constitution.⁴⁹⁷ Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with arbitrariness in relation to deprivation of property under s 25.⁴⁹⁸

Van der Walt submits that the essence of the *FNB* decision was that:

“a deprivation of property (a state action that regulates or controls the use of property without taking it away for public use, and for which no compensation is payable, even though it may cause serious financial loss for the property owner) would be arbitrary and therefore in conflict with s 25(1) of the Constitution if the general law in terms of which the

⁴⁹⁶ 2002 (4) SA 768 (CC) 810.

⁴⁹⁷ 2002 (4) SA 768 (CC) 810.

⁴⁹⁸ 2002 (4) SA 768 (CC) 811.

deprivation is effected or authorized does not provide sufficient reason for the deprivation or is procedurally unfair.”⁴⁹⁹

In a different work, the same author argues that sufficiency of the reasons for deprivation is tested with reference to a “thick” complexity of contextual factors and, depending on the context, the test can vary from mere rationality to something closer to a s 36-type proportionality test.⁵⁰⁰

In the context of the subjacent support question the thicker proportionality test will be the more appropriate. Because the deprivation concerns rights in land and the landowner stands to lose almost all use and enjoyment of his property, perhaps irrevocably, a strong reason for the deprivation will be required. The affected right is ownership, so there must be a strong *nexus* between either the affected owner or the affected property and the purpose of the deprivation.⁵⁰¹

The reasons for the deprivation that would have been brought about by s 68(5) of the Minerals Act would have been deducible from the long title of the Minerals Act. Therefore, the Act was enacted to regulate the prospecting for and the optimal exploitation, processing and utilization of minerals. According

⁴⁹⁹ Van der Walt AJ *Law of Property Casebook for Students* 6th ed (2006) 399; Van der Walt AJ *Constitutional Property Law* (2005) 154.

⁵⁰⁰ Van der Walt AJ *Constitutional Property Law* (2005) 154; *First National Bank of South Africa t/a Wesbank v Commissioner of the South African Revenue Services and Others* 2002 (4) SA 768 (CC) 810.

⁵⁰¹ *First National Bank of South Africa t/a Wesbank v Commissioner of the South African Revenue Services and Others* 2002 (4) SA 768 (CC) 815; Van der Walt AJ *Constitutional Property Law* (2005) 154.

to Kaplan and Dale, the legislature wanted to prevent the possible frustration *inter alia* of optimal utilization by contractual limitations or restrictions; as such limitations and restrictions were not uncommon in mineral right titles.⁵⁰² The two authors submit on the same page that s 68(5) was enacted specifically to guard against restrictive terms that would impede the objects of the Act. In my opinion because of the importance of mining to the South African economy, these reasons would have constituted sufficient reason for deprivations effected by the Minerals Act.

As an *addendum* to the above, under the old Minerals Act it might be useful to distinguish between cases where the quasi-servitude existing between the landowner and the mineral rights holder was agreed upon by the mineral right holder himself and those where it was agreed upon by his predecessors in title. In the former case where a mineral rights holder had agreed to terms of the grant himself, then seeks to rely on s 68(5) to override them would seem unfair and prejudicial to a landowner.

It must also be added in relation to the position under the Minerals Act, that in this old order of mining and mineral laws, the landowner still had a say in how the mineral rights holder exercised his rights. In terms of the grant of mineral rights between himself and the mineral rights holder, he could also negotiate for the compensation that would have been payable to him for the loss he would have endured. However, and more importantly, the landowner under that old system that recognised that mineral rights formed part of the property

⁵⁰² Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 163.

of the landowner was not obliged to grant the mineral rights to a third party. He could have simply sat on his minerals or held out for the best possible terms relating to compensation before he granted the mineral rights to a third party.

The position of the landowner under the new Mineral and Petroleum Resources Development Act is more precarious than that of his counterpart under the old regime of private mineral rights that were related to the land. With that said the reasons for the deprivation under the new Act can mostly be derived from the objects of the Mineral Resources Development Act.⁵⁰³ These objects include the substantial and meaningful expansion of opportunities for the historically disadvantaged, in order to facilitate greater participation in the mineral and petroleum industry by the relevant persons. This object is to enable these persons to benefit from the nation's mineral and petroleum resources.⁵⁰⁴ The second objective is to promote economic growth and mineral and petroleum resources development in South Africa.⁵⁰⁵ The third is the promotion of employment and advancement of the social and economic welfare of all South Africans.⁵⁰⁶ The fourth is the provision of security of tenure in respect of prospecting, exploration, mining, and production operations.⁵⁰⁷ The final object gives effect to s 24 of the Constitution, which grants an environmental right by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically

⁵⁰³ 28 of 2002. See s 2.

⁵⁰⁴ S 2(d).

⁵⁰⁵ S 2(e).

⁵⁰⁶ S 2(f).

⁵⁰⁷ S 2(g).

sustainable manner while promoting justifiable social and economic development.⁵⁰⁸

In the new state regulated system of mineral rights, a landowner who loses the use and enjoyment of his land because a miner has conducted open-cast mining which leads to the withdrawal of subjacent support, cannot be said to have been arbitrarily deprived of his property. The objects contained in s 2 of the Mineral and Petroleum Resources Development Act constitute sufficient reason (as contemplated in the *FNB* decision) for the heavy state regulation of the landowner's relationship with the mining right holder which results in the former losing the use and enjoyment of his property. More importantly, the Act makes provision for the protection of the landowner's interest.

Section 54(1) of the Act, affords the landowner an opportunity to be heard and, accordingly, to raise objections. Thus, if in the opinion of the regional manager the owner or the occupier has suffered or is likely to suffer loss or damage as a result of the proposed operations, the conflicting parties will be required to enter into negotiations aimed at agreeing to the payment of compensation for such loss or damage.⁵⁰⁹ Further, in terms of s 54(4) if the parties fail to reach an agreement, compensation must be determined by arbitration in terms of the Arbitration Act⁵¹⁰ or by any competent court. If, after considering all the issues raised by all the respective parties and recommendations by the Regional Mining Development and Environmental

⁵⁰⁸ S 2(h).

⁵⁰⁹ S 54(3).

⁵¹⁰ 42 of 1965.

Committee, the regional manager concludes that any further negotiations may be detrimental to some of the objects of the Act, he may recommend to the Minister that such land be expropriated in terms of s 55 of the Act.⁵¹¹ In terms s 54(6), if however the regional manager determines that failure to reach an agreement is the fault of the holder of the mining right or permit, the regional manager may in writing prohibit commencement or continuation of the mining operations until the dispute is resolved by a court of law. This is consistent with the common law principle that the right to carry out open-cast mining (thereby withdraw subjacent support) should be available to a mining right or permit holder only where it is “reasonably necessary” to do so. This provision was enacted specifically to protect landowners who were in danger of losing the use and enjoyment their land.

4.5 Conclusion

As was seen above, the quasi-servitodal formulation of the *Anglo Operations* decision has no application under the new scheme of state-issued and -controlled new-order mineral and mining rights and permits. The quasi-servitude formulation of mineral rights has been replaced by a comprehensive statutory scheme that vests custodianship of all the mineral and petroleum resources of South Africa in the state. Accordingly, it is no longer the landowner who grants the mineral rights that relate to his land to the subsequent mining right or permit holder, but the state. This means that the landowner no longer has a role to play in defining the extent of the mining

⁵¹¹ S 54(5); See further Badenhorst PJ, Mostert H and Dendy M “Mineral and Petroleum” in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515 para 150.

right holder's powers. Does this mean that a landowner is arbitrarily deprived of his property where a landowner loses the use and enjoyment of his land as a result of the use of an invasive mining method by the miner?

It cannot be said that the new Act arbitrarily deprives a landowner of his property because its provisions abolish the quasi-servitudinal formulation of *Anglo Operations*. It was seen above that this quasi-servitude construction was replaced by a comprehensive statutory framework that protects the interests of a landowner. What the landowner was deprived of was the right to negotiate with mineral rights holder on his own terms. However it was seen above that even before the inception of the new Act, severe inroads on the common law rights of a landowner in his dealings with a mineral rights holder, had already been made by provisions like s 68(5) of the old Minerals Act. The Act therefore provides sufficient reason for this deprivation in terms of its stated objects as contained in s 2.⁵¹²

⁵¹² Section 2(d)-(f). These objects include the substantial and meaningful expansion of opportunities for the historically disadvantaged, in order to facilitate greater participation in the mineral and petroleum industry by the relevant persons. This object is to enable these persons to benefit from the nation's mineral and petroleum resources. The second objective is to promote economic growth and mineral and petroleum resources development in South Africa. The third is the promotion of employment and advancement of the social and economic welfare of all South Africans. The fourth is the provision of security of tenure in respect of prospecting, exploration, mining, and production operations. The final object gives effect to s 24 of the Constitution, which grants an environmental right by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.

Chapter 5

Conclusion

5.1 Introduction

As is evident from the above, South African courts have preferred the theory that explains the right of lateral support as a natural right inherent in the ownership of property over the servitudinal theory. The right of lateral support was clearly received in *Rouliot*⁵¹³ as a natural right incidental to the ownership of the property and not as a servitude or as an easement. From the discussion of buildings and the right of lateral support in chapter 2, it was seen that the natural rights theory was endorsed by the decision in *Johannesburg Board of Executors v Victoria Building Company*.⁵¹⁴ In holding that the right of lateral support was not only available to land in its natural state but also to land that was encumbered by buildings, the court in *Victoria* upheld the natural rights theory. Subsequent to this case⁵¹⁵ a few other cases⁵¹⁶ confirmed the same view, until it was wrongly decided in *Douglas Colliery v Bothma*,⁵¹⁷ that the right of lateral support was in the nature of a servitude. However, as was emphasized above *Douglas Colliery v Bothma* was a mining law case, therefore different provisions existed/exist in South African law regarding rights to land essentially used for mining purposes. For

⁵¹³ *London and South African Exploration Company v Rouliot* (1890-1891) 8 SC 74 99.

⁵¹⁴ (1894) 1 Off Rep 43.

⁵¹⁵ *Johannesburg Board of Executors v Victoria Building Company* (1894) 1 Off Rep 43.

⁵¹⁶ *Phillips v South African Independent Order of Mechanics and Fidelity Benefit Lodge and Brice* 1916 CPD 61, *Municipal Council of Johannesburg v Robinson GMC* 1923 WLD 99.

⁵¹⁷ 1947 (3) SA 602 (T).

that reason, a clear distinction had to always be drawn between the rights of support as existing in private property law and as existing in mining law; and that in the field of private property law the view that the right of support is owed both to land and buildings was to be preferred.⁵¹⁸

5.2 The Distinction Between Lateral Support and Subjacent Support

The problematic distinction between the right of support as existing in private property law and in mining law again manifested itself, in the *Coronation Collieries v Malan*⁵¹⁹ decision where Bristowe J extended the rules of private property law of support to the field of mining law. There was an uncritical acceptance of the extension of the rules of lateral support to regulate the relationship of mineral right holders and land surface owners in both case law and academic writing. As was seen above the Supreme Court of Appeal in *Anglo Operations v Sandhurst Estates* brought some clarity by rejecting this controversial extension of lateral support principles to conflicts between landowners and mineral right holders in respect of the same land.⁵²⁰

It was seen in chapter 3 above, how the Supreme Court of Appeal in rejecting the extension brought about by *Coronation Collieries*⁵²¹ distinguished lateral

⁵¹⁸ In this regard see Milton JRL “The Law of Neighbours in South Africa” 1969 *Acta Juridica* 123-254 208. Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (1982) 123. This will also be discussed in greater detail in Chapter 3.

⁵¹⁹ 1911 557 TPD 591.

⁵²⁰ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

⁵²¹ 1911 557 TPD 591.

support from subjacent support. Lateral support clearly referred to a neighbour law situation that involved two properties adjacent to each other as described in chapter two. Whereas, subjacent support referred to the relationship between a landowner and a mineral rights holder in relation to a single piece land which derived vertical support from the underlying minerals that were the subject matter of a mineral right holder's rights. It was therefore seen in chapter 3 that the question of subjacent support only becomes important upon the severance of mineral rights from the title to the land. This is because the landowner's interest in maintaining the surface in its natural state is threatened where a mineral rights holder begins to extract the minerals that prop up the landowner's surface.

As was seen above, the Supreme Court of Appeal in *Anglo Operations v Sandhurst Estates*⁵²² finally settled the matter when they held that a right to minerals in the property of another was in the nature of a quasi-servitude over that property.⁵²³ Thus, as in the case of a servitude, the exercise of mineral rights will almost inevitably lead to a conflict between the right of the landowner to maintain the surface and the mineral rights holder to extract the minerals underneath.⁵²⁴ Therefore the correct approach in resolving this conflict did not lie in adopting the English law doctrine of subjacent support. This inherent conflict had to be resolved in accordance with the principles developed by our law to resolve conflicts between the holders of servitudal

⁵²² 2007 (2) SA 363 (SCA).

⁵²³ 2007 (2) SA 363 (SCA) 373.

⁵²⁴ 2007 (2) SA 363 (SCA) 372.

rights and owners of servient properties.⁵²⁵ Therefore, the owner of the servient property was bound to allow the holder of the servitudinal rights to do whatever is reasonably necessary for the proper exercise of those rights. The holder of the servitude is in turn bound to exercise his rights *civiliter modo*, that is, with as much as possible consideration and with the least possible inconvenience to the servient property and its owner. In applying these principles to mineral rights, the holder was entitled to go onto the property, search for minerals and, if he found any, to remove them and carry them away. This had to include the right on the part of the holder of mineral rights to do whatever was reasonably necessary to attain his ultimate goal.⁵²⁶ And in terms of South African common law, in the absence of any express or tacit term to the contrary in the grant, the mineral rights holder was entitled by virtue of a term implied by law to conduct open cast mining. Therefore in the absence of such a term, if it was reasonably necessary for the mineral rights holder to let down the surface in carrying out his mining operations, he could do so, so long as he did so in a manner that was least injurious to the surface owner.

5.3 The Significance of Legislation for the decision in *Anglo Operations*

As was stated above, an in-depth enquiry into the implications of the decision in *Anglo Operations* was necessary because the court did not refer to the

⁵²⁵ 2007 (2) SA 363 (SCA) 373.

⁵²⁶ 2007 (2) SA 363 (SCA) 373.

effect of the Mineral and Petroleum Resources Development Act⁵²⁷ in reaching their decision. The second half of the thesis illustrated how the new Act removed mineral rights from the private domain, and how, in doing so the relationship between the landowner and the mineral rights holder was further complicated. It was suggested that the quasi-servitudinal formulation of the relationship between the landowner and the mineral rights holder described by *Anglo Operations* was abolished by a comprehensive statutory framework that defined the respective parties' rights. A landowner under the new dispensation no longer has the opportunity to preclude, by contract, the possibility of open-cast mining being conducted by a mineral rights holder, whereas under the common law system of private mineral rights he could protect his use rights by reserving certain surface use rights in the grant of mineral rights. The change is brought about by the systemic changes introduced by s 3(1) of the new Act. In terms of this provision, the mineral and petroleum resources of South Africa are the common heritage of all the people of South Africa, and the state is the custodian thereof. This means that the landowner no longer has the power to contract his mineral rights to the subsequent holder, it is now the state that does so.

It was argued that this interference with a landowner's common law rights by the Mineral and Petroleum Resources Development Act was not a novelty. Section 68(5) of the Minerals Act⁵²⁸ provided that its provisions would not be affected by any term or condition in any agreement, whether such agreement was entered into before or after the commencement of the Act. This provision

⁵²⁷ Act 28 of 2002.

⁵²⁸ Act 50 of 1991.

was enacted to prevent the possible frustration *inter alia* of optimal utilization by contractual limitations and restrictions. Therefore the provisions of the Minerals Act could be invoked to override any contractual restriction or limitation that might have otherwise prevented or militated against optimal utilization of any mineral resource.⁵²⁹ Therefore, I argued that the common law rights of the landowner (to negotiate terms with the mineral rights holder) had already begun to be eroded before the inception of the Mineral and Petroleum Resources Development Act. However unlike the new Act, the Minerals Act would not have wholly done away with the quasi-servitude formulation of *Anglo Operations*. This was because the principle that the owner of the land was also the owner of the mineral rights was still functional at the time. Accordingly, it was still the landowner who granted mineral rights to the subsequent holders of mineral rights. In doing so, the Minerals Act gave him some autonomy in his dealings with a mineral rights holder. Therefore to some degree the relationship between a landowner and a mineral rights holder would have still been governed by the quasi-servitude construction described in *Anglo Operations*.

5.4 Conclusion

As was seen above, the quasi-servitudinal formulation of the *Anglo Operations* decision was abolished by the new Act and therefore has no application under the new order of state issued and controlled mining rights and permits. The quasi-servitude formulation of mineral rights has been replaced by a comprehensive statutory scheme that vests custodianship of all the mineral

⁵²⁹ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 163.

and petroleum resources of South Africa in the state. Accordingly, it is no longer the landowner who grants the mineral rights that relate to his land to the subsequent mining right or permit holder, but the state. This means that the landowner no longer has a role to play in defining the extent of the mining right holder's powers. The question was asked in chapter 4 whether the landowner is expropriated or arbitrarily deprived of his property where he loses the use and enjoyment of his land as a result of the use of an invasive mining method by the miner.

In referring to the Mineral and Petroleum Resources Development Act, Dale argues that the acquisition by a holder of a permission, permit or right to entry⁵³⁰ constitutes an expropriation of the landowner's entitlement to use the land, for which the state is liable to pay compensation in terms of s 25(2) of the Constitution and item 12 of Schedule 2 to the Mineral and Petroleum.

However, it was argued above that Dale's contention is misplaced because to suggest that the state's assumption of custodianship and administration of mineral rights could be treated as a move towards expropriation could not be accurate in South African law. This was because custodianship and administration of rights concerning the use and exploitation of scarce resources could indicate exactly the opposite, namely regulatory exercise of the state's (non-expropriatory and hence uncompensated) police power.⁵³¹

⁵³⁰ S 5(3)(a); s 15(1); s 27(7)(a); s 75(5 (a) and s 78(2)(a).

⁵³¹ See Van der Walt AJ *Constitutional Property Law* (2005) 378-383, 383-392.

Furthermore in regard to the previous point, as was seen in chapter 3 above, the previous order of mining and mineral laws was not totally devoid of state interference. State regulation was admittedly not as far reaching as the regulation brought about by the Mineral and Petroleum Resources Development Act, but it could not be said that a landowner under that order was entirely autonomous in his dealings with a mineral rights holder.

In addition to this, Dale's argument falls down in light of the fact that the new Act specifically provides for expropriations in terms of s 55. Therefore, where a deprivation is excessive and too prejudicial to a landowner (as it seems Dale is suggesting), the landowner would have to be expropriated in terms of s 55 of the Act. Failing which, the deprivation will be deemed arbitrary and therefore invalid.

In respect of the Minerals Act it was determined that, it could not be said that that s 68(5) of the Act had the effect of expropriating a landowner under the old order of private mineral rights. This was because under that old order the landowner still retained some contractual power with which he could protect himself against harmful activities of a mineral rights holder. At most, s 68(5) was a regulatory provision that begged the question whether its application would have arbitrarily deprived a landowner of his property.

With regard to the question whether the new Act arbitrarily deprives a landowner of his property because its provisions abolish the quasi-servitudinal formulation of *Anglo Operations*, it was seen above that this was indeed a

deprivation but not an arbitrary deprivation as contemplated by the *FNB*⁵³² decision. The Act has replaced the quasi-servitude formulation of mineral rights with a comprehensive statutory scheme that protects the interests of the landowners.⁵³³ The new position of landowners under this new scheme is not as attractive as it was under the old order of private mineral rights, but this in itself does not constitute an arbitrary deprivation. The Act provides sufficient reason for the deprivation in terms of its objects as contained in s 2.

These objects include the substantial and meaningful expansion of opportunities for the historically disadvantaged, in order to facilitate greater participation in the mineral and petroleum industry by the relevant persons. This object is to enable these persons to benefit from the nation's mineral and petroleum resources.⁵³⁴ The second objective is to promote economic growth and mineral and petroleum resources development in South Africa.⁵³⁵ The third is the promotion of employment and advancement of the social and economic welfare of all South Africans.⁵³⁶ The fourth is the provision of security of tenure in respect of prospecting, exploration, mining, and production operations.⁵³⁷ The final object gives effect to s 24 of the Constitution, which grants an environmental right by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically

⁵³² *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services and Others (FNB)* 2002 (4) SA 768 (CC) 796.

⁵³³ S 54.

⁵³⁴ S 2(d).

⁵³⁵ S 2(e).

⁵³⁶ S 2(f).

⁵³⁷ S 2(g).

sustainable manner while promoting justifiable social and economic development.⁵³⁸

Furthermore, the landowner's rights are also protected by s 54(1) of the new Act which affords him procedural fairness. This provision requires the parties to enter into negotiations, in the course of which a landowner is given the opportunity to raise objections. Section 54(6) ensures that a landowner's rights are not lightly infringed. In terms of this provision, where the negotiations between the parties fail to reach a successful conclusion, their conflict is referred to a court of law for adjudication. In terms of this provision, a landowner is protected from unwarranted use of invasive mining methods that endanger the use and enjoyment his property. Where a landowner feels that the proposed mining practice is not reasonably necessary under the circumstances, the landowner may have his objections thereto referred to a court of law for adjudication.

With regard to the Minerals Act, the question whether a deprivation resulting from the invocation of s 68(5) by a mineral rights holder to override a contractual term between himself and a landowner would have been justifiable in terms of s 25(1) of the Constitution, was asked and left open. It was suggested that in deciding this question, it might be helpful to distinguish between a quasi-servitodal agreement that was entered into by the mineral rights holder himself, and one that was entered into by his predecessors in title. However, Kaplan and Dale submit that the legislature in crafting s 68(5),

⁵³⁸ S 2(h).

had in mind the intention to do away with contractual terms and agreements that impeded the stated objects of the Minerals Act, the optimal utilization and exploitation of mineral resources.⁵³⁹ The importance of mining to the South African economy would have been seen as sufficient reason for depriving a landowner of his rights.

⁵³⁹ Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (1992) 163.

Bibliography

- Anonymous** “Natural Rights and Natural Servitudes” (1892) 9 *Cape LJ* 225-231
- Badenhorst PJ** “The Revesting of the State-held Entitlements to Minerals in South Africa: Privatisation or Deregulation” 1991 *TSAR* 113-131
- Badenhorst PJ and Mostert H** *Mineral and Petroleum Law of South Africa: Commentary and Statutes* (2007) Juta & Co Cape Town
- Badenhorst PJ, Mostert H and Dendy M** “Mineral and Petroleum” in Joubert WA and Faris JA (eds) *LAWSA* 18 (2007) 1-515
- Badenhorst PJ, Pienaar JM, and Mostert H** *Silberberg and Schoeman’s The Law of Property* (5th ed 2006) Durban: LexisNexis Butterworths
- Badenhorst PJ and Roodt JA** “Artikel 5(1) van die Mineraalwet 50 van 1991: ‘n Herfomulering van die Gemenerereg?” (1995) 58 *THRHR* 1-15
- Church J and Church J** “Nuisance” in Joubert WA, Faris JA and Harms LTC (eds) *LAWSA* 19 (2007) 116-143
- Dale MO** *South African Mineral and Petroleum Law* (2005) Durban: LexisNexis Butterworths
- Emden ACR** *The Law Relating to Building* (1980)
- Erasmus HJ, Gauntlett JJ and Visser PJ** “Damages” in Joubert WA, Faris JA and Harms LTC (eds) *LAWSA* 7 (2007) 3-93
- Franklin BLS and Kaplan M** *The Mining and Mineral Laws of South Africa* (1982) Durban: Butterworths
- Erasmus HJ, Gauntlett JJ and Visser PJ** “Damages” in Joubert WA, Faris JA and Harms LTC (eds) *LAWSA* 7 (2007) 1-123

- Gray K and Gray SF** *Elements of Land Law* (5th ed 2009) Oxford University Press
- Gregorowski J** “Miners Obligations” (1887) 4 *Cape LJ* 155-167
- Hall CG and Kellaway EA** *Servitudes* 2nd (1957) Juta Cape Town
- Kadirgamar L** “Lateral Support for Land and Buildings an Aspect of Strict Liability” (1965) 82 *SALJ* 210-231
- Kaplan M and Dale MO** *A Guide to the Minerals Act 1991* (1992) Butterworths Durban
- Kaser M** *Roman Private Law* 3rd ed (1980) University of South Africa Muckleneuk Pretoria
- Maasdorp AFS** *Institutes of South African Law: The Law of Things* 8th ed (1960) Juta & Co Johannesburg
- Mackay, Lord** *Halsbury’s The Laws of England - Mines, Minerals and Quarries; Misrepresentation and Fraud* 4th ed Vol 31 (2003) Lexis Nexis UK
- Milton JRL** “The Law of Neighbours in South Africa” (1969) *Acta Juridica* 123-254
- Milton JRL** “The Lateral Support of Land: A Natural Right of Property” (1965) 82 *SALJ* 459-463
- Rose C** “Mahon Reconstructed: Why the Takings Issue is Still a Muddle” (1984) 57 *Southern Carolina LR* 561-599
- Van den Berg HM** “Ownership of Minerals Under the New Legislative Framework for Mineral Resources” (2009) 3 *Stell LR* 139-158
- Van der Merwe CG** *Sakereg* 2nd ed (1989) Butterworths Durban

- Van der Merwe D** *Oorlas in die Suid-Afrikaanse Reg* (1982) LLD Dissertation
University of Pretoria
- Van der Merwe H** “Vonnisbespreking: *Regal v African Superslate (Pty) Ltd*
SA 102 (A)” (1963) 2 *THRHR* 125-139
- Van der Schyff E** *the Constitutionality of the Mineral and Petroleum*
Resources Development Act 28 of 2002 (2006) LLD Dissertation North-
West University
- Van der Vyver JD** “Expropriation, Rights, Entitlements, and Surface Support
of Land” (1988) 105 *SALJ* 1-16
- Van der Walt AJ** “Onteieing van die Reg op Laterale en Onderstut” (1987) 50
THRHR 462-474
- Van der Walt AJ** *Constitutional Property Law* (2005) Juta and Co Cape Town
- Van der Walt AJ and GJ Pienaar** *Introduction to the Law of Property* (5th ed
2006) Juta & Co Lansdowne
- Van der Walt AJ** *Casebook for Students Law of Property* (6th ed 2006) Juta
and Co Lansdowne
- Viljoen HP and Bosman PH** *A Guide to Mining Rights in South Africa* (1979)
Lex Patria Johannesburg

Case Law

South Africa

Adrich Investment Holdings CC v Triple Thirteen Investments Shareblock (Pty) Ltd and Another 1994 (2) SA 81 (C)

Agri South Africa (Association incorporated under Section 21) v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy unreported case no 55896/2007; 10235/2008 (10 February 2009)

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

Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 (SCA)

Bezuidenhout v Worcester Gold Mining Company (1894) 1 OR 249

Burnett and Taylor v De Beers Consolidated Mines, Limited (1895–1898) 8 HCG 5

Cecilia Clifton v Alpha Anthracite (Pty) Ltd and Duiker Exploration Ltd unreported case 19 October 1979 (NPD)

Central South African Railways v Geldenhuis Main Reef GM Co Ltd 1907 TH 270

Coronation Collieries v Malan 1911 TPD 577

Cosmos (Pty) Ltd v Phillipson 1968 (3) SA 121 (R)

D & D Deliveries (Pty) Ltd v Pinetown Borough 1991 (3) SA 250 (D)

Demont v Akals' Investment (Pty) Ltd and Another 1955 (2) SA 312 (N)

Douglas Colliery Ltd v Bothma and Another 1947 (3) SA 602 (T)

East London Municipality v South African Railways and Harbours 1951 (4) SA
466 (E)

Elektrisiteitvoorsieningskommissie v Fourie en Andere 1988 (2) SA 627 (T)

Ex Parte Pierce and Others 1950 (3) SA 628 (O)

*First National Bank of SA Ltd t/a Wesbank v Commissioner for the South
African Revenue Services and Others* 2002 (4) SA 768 (CC)

Foentjies v Beukes 1977 (4) SA 964 (C)

Free State Gold Areas Ltd v Merriespruit (OFS) GM Co Ltd & Another 1961
(2) SA 505 (W)

Gijzen v Verrinder 1965 (1) SA 806 (D)

Gordon v Durban City Council 1955 (1) SA 634 (N)

Grieves and Anderson v Sherwood 1901 (22) NLR 225

*Griqualand West Diamond Mining Co Ltd v London and SA Exploration Co
Ltd* (1883) 1 BAC 239

Hall v Compagnie Francaise Des Mines De Diamant Du Cap (1882) 2 HCG
464

Hudson v Mann 1950 (4) SA 485 (T)

Johannesburg Board of Executors v Victoria Building Company (1894) 1 Off
Rep 43

John Newmark and Co (Pty) Ltd v Durban City Council 1959 (1) SA 169 (N)

Kakamas Bestuursraad v Louw 1960 (2) SA 202 (A)

Lazarus and Jackson v Wessels and Others 1903 TS 499

Levin v Vogelstruis Estates & Gold Mining Co Ltd 1921 WLD 66

London and SA Exploration Company v Rouliot (1890–1891) 8 SC 74

Louw v Kakamas Bestuursraad 1958 (4) SA 768 (GW)

Macfarland v De Beers Mining Board (1883) 2 HCG 398

Municipal Council of Johannesburg v Robinson Gold Mining Co Ltd 1923
WLD 99

Murtha v Von Beek (1882) 1 BAC 121

Nolte v Johannesburg Consolidated Investment Co Ltd 1943 AD 295

Oslo Land Co Ltd v The Union Government 1938 AD 584

*Philips v SA Independent Order of Mechanic sand Fidelity Benefit Lodge and
Brice* 1916 CPD 61

Regal v African Superslate (Pty) Ltd 1963 (1) SA 102 (A)

Rocher v Registrar of Deeds 1911 TPD 311

Setlogelo v Setlogelo 1914 AD 221

Simmer and Jack Proprietary Mines Ltd v Union Government (Minister of Railways and Harbours) 1915 AD 368

South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd 1961 (2) SA 467 (A)

Stocks & Stocks (Cape) (Pty) Ltd v Gordon and Others NNO 1993 (1) SA 156 (T)

Transvaal Consolidated Land & Exploration Co v South African Railways and Harbours 1960 (3) SA 659 (W)

Transvaal Property & Investments Co Ltd and Reinhold & Co v SA Townships Mining & Finance Corp Ltd and the Administrator 1938 TPD 512

Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd 1996 (4) SA 499 (A)

Turffontein Estates Ltd v Mining Commissioner Johannesburg 1917 AD 419

Union Government (Minister of Railways and Harbours) v Marais and Others 1920 AD

United Building Society and Another v Lennon Ltd 1934 AD 149

Van Vuuren v Registrar of Deeds 1907 TS 289

Webb v Beaver Investments (Pty) Ltd and Another 1954 (1) SA 13 (T)

West Witwatersrand Areas Ltd v Roos 1936 AD 32

Witbank Colliery v Malan and Coronation Colliery Co Ltd 1910 TPD 667

Witbank Colliery v Lazarus 1929 TPD 529

Yelland and Others v Group Areas Development Board 1960 (2) SA 151 (T)

Zuurbekom Ltd v Union Government 1947 (1) SA 514 (A)

United Kingdom

Backhouse v Bonomi (1861) 9 HL 503

Bonomi v Backhouse (1859) EB & E 646

Brown v Rubins 4 H & N 186

Butterknowle Colliery Co Ltd v Bishop Auckland Industrial Co-operative Co Ltd [1906] 305 (AC)

Dalton v Angus (1881) 6 AC 740

Darley Colliery v Mitchell (1886) 11 HL 127

Davies v Powell Duffryn Steam Coal Co Ltd (No 2) (1921) 91 LJ Ch 40, CA

Davis v Treharne 6 AC 460 *Harris v Ryding* (1839) 5 M & W 60

Hext v Gill 7 Ch App 713-714

Humphries v Brogden [1884] 12 QBD 739

Love v Bell 9 AC 286

New Sharlston Colliery Co v Earl of Westmoreland 1904 2 Ch 443

Peyton v London Corporation (129) 9 B & C 725

Wakefield v Duke of Buccleuch (1867) LR 4 HL 377

Warwickshire Coal Company Ltd v Coventry Corpn [1934] Ch 488

Wilde v Minsterley (1639) 2 Roll Abr 564

Wyatt v Harrison 3 B & A 875

United States of America

Pennsylvania Coal Co v Mahon 1922 260(US) 393

Other

Xpress Print Pte Ltd v Monocrafts Pte Ltd and L & B Engineering (S) Pte Ltd

[2000] 3 SLR 545

Legislation

South Africa

Arbitration Act 42 of 1965

Constitution of the Republic of South Africa 1996

Electricity Act 45 of 1958

Mineral and Petroleum Development Act 28 of 2002

Minerals Act 50 of 1991

Mining Rights Act 20 of 1967

National Water Act 36 of 1998

Precious Stones Act 73 of 1964

Sectional Titles Act 95 of 1986

Websites

http://en.wikipedia.org/wiki/Open-pit_mining 06/06/09.