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TYDSKRIF VIR DIE SUID-AFRIKAANSE REG
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MINERAL RIGHTS ARE DEAD! LONG LIVE MINERAL RIGHTS!

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

1 Introduction

Whilst being mindful of the eventual extinction of the legal notion of mineral rights in South Africa upon expiry of the transitional measures in terms of schedule II of the Mineral and Petroleum Resources Development Act 28 of 2002 on 30 April 2009, the classification of mineral rights by the supreme court of appeal in the Anglo decision is to be welcomed, even though it is somewhat ironic at this stage. (As to the extinction of the notion of mineral rights, see Badenhorst “Mineral rights: ‘year zero cometh?’” 2001 Obiter 119; “Exodus of ‘mineral rights’ from South African mineral law” 2004 Journal of Energy and Natural Resources Law 218.) It will, however, be shown in this discussion that the decision of the supreme court of appeal will extend beyond the statutory transitional period and will also have an impact on rights to minerals or rights to petroleum as created in terms of the Mineral and Petroleum Resources Development Act (hereafter referred to as the act). For purposes of this discussion, one can simply continue to refer to mineral rights that developed from the common law as “mineral rights”, whilst referring to the new rights created in terms of the act as “rights to minerals and petroleum”. The present decision only deals with coal as “minerals”.

2 Facts

The summarised facts gleaned from the head note should suffice: The appellant, Anglo Operations Ltd, held all coal rights in respect of several farms, including that
of the respondent, Sandhurst Estates Ltd ("Sandhurst"), upon which coal mining had been conducted for many years. The dispute between the parties arose when Anglo decided to (a) conduct its mining operations on the farm by way of open cast mining, and (b) divert a stream on the farm to facilitate these operations. The grant of mineral rights in favour of Anglo did not refer, either expressly or tacitly, to open-cast mining (see 364C-D). Anglo applied to the Transvaal provincial division of the high court for orders allowing it to: (a) conduct open-cast mining (as opposed to underground mining) on a portion of the farm; and (b) permit the diversion of an existing stream on the farm in order to facilitate those open-cast mining operations (364D-E). The court a quo, following English law, held that unless open-cast mining was specifically authorised by the grant of mineral rights, the mineral rights holder was not free to do so, but was limited in law to underground mining. The court a quo found that Anglo was neither entitled to conduct open-cast mining nor to divert the stream (see 364-G). The decision of the court a quo was reversed on appeal (see 379F-G).

The facts of the decision are set out in more detail in the decision of the court a quo (Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2006 1 SA 350 (T)), our discussion thereof (Badenhorst and Mostert 2007 TSAR 409) and by the supreme court of appeal (366A-367H).

3 Arguments

Anglo contended, as broadly stated by the court, that unless it is expressly or tacitly excluded by the grant of mineral rights, the holder is entitled, by virtue of a term implied by law, to conduct open-cast mining when it is reasonably necessary for the removal of the minerals, provided that it is done in the manner least injurious to the interests of the surface owner (367B-F). Sandhurst, on the other hand, contended that unless the grant of mineral rights expressly or tacitly allows open-cast mining, it is excluded by virtue of a term implied by law (367G). Anglo's argument was accepted as correct by the supreme court of appeal.

4 Legal issues

The legal issues that arose on appeal were:

(a) whether the principle of lateral support as a rule of neighbour law should have been extended to govern the relationship between holders of mineral rights on a particular piece of land and the owners of the same land (370H-I);
(b) the content of the holder's right to coal (366I); and
(c) the determination of the default position at common law where open-cast mining is not expressly regulated by the granting of mineral rights (367E).

5 Decision

As a point of departure, the court accepted the following two principles of law:

(a) the owner of land is the owner of not only the surface, but of everything adherent thereto, and also of everything above and below the surface (371D); and
(b) a mineral right in the property of another is in the nature of a quasi-servitude over that property (371E-F).
In respect of legal issue (a) identified in § 4 above, the court held that the extension or incorporation of the principles of lateral support as a rule of neighbour law derived from English law to the relationship between the owner and the holder of mineral rights, cannot be sustained (see 371G-372B). Such extension of the principles of English law to vertical or subjacent support in Coronation Collieries v Malan (1911 TPD 577) on authority of London and South African Exploration Company v Rouloit ((1890-1891) 8 SC 74) and its incorporation by the court a quo in Anglo, in disregard of the abovementioned legal principles, was rejected by Brand JA as incorrect [371H-372I]. A second reason advanced by the court for not extending the principles of lateral support to the relationship between a mineral rights holder and the owner of land is that, like a servitude, a mineral right derogates from the rights of the servient owner in the sense of a curtailment or deprivation of the owner’s use of the land or even damage to land (see 372B-372F). As in the case of a servitude, the exercise of mineral rights will almost inevitably lead to a conflict between the entitlement of the owner to maintain the surface of the land and that of the holder of mineral rights to extract the minerals underneath (372H). Brand JA held that the correct approach is that the inherent conflict between the mineral right holder and the owner of the land should be determined in accordance with the principles developed by our law to resolve the inherent conflicts between the holders of servitudal rights and the owners of servitudal properties (372I-J).

The general rules regarding the content of a mineral right, as an answer to legal issue (b) identified in § 4 above, are derived from the abovementioned principles: the holder of mineral rights is entitled to go onto the property, search for minerals, remove them if he finds any (373B), and to do whatever is reasonably necessary to attain his ultimate goal as empowered by the grant of mineral rights (373C-D). Stated differently, a mineral right holder is entitled to do anything that is reasonably necessary to remove the minerals from the property (3771-J). The principles applicable to servitudes upon which the court relied are: (a) the owner of a servient property is bound to allow the holder of the servitude to do whatever is reasonably necessary for the proper exercise of his entitlements; and (b) the holder of the servitude is in turn bound to exercise an entitlement civiliter modo, that is, reasonably viewed, with as much possible consideration and with the least possible inconvenience to the servient property and its owner (373A-B). The court held that the general rules regarding the content of a mineral right that have become crystallised are in accordance with the famous dictum of Malan J in Hudson v Mann (1950 4 SA 485 (T) 488B-H; see 368B-G and 373E-F). The court expressly held that open-cast mining does not create an exception to the general rules regarding the content of a mineral right, but rather fits “seamlessly into this general pattern” (373F). The exception in the case of open-cast mining as recognised by the court a quo was thus expressly rejected. The court held earlier that the difference between underground mining and open-cast mining lies in the degree of disturbance of surface use of the owner of the land and not in whether or not it will occur (373F-G). In both instances, the degree of disturbance of the surface use of the owner of the land depends on the location and the extent of the reserves to be mined (see 372G-H).

Brand JA held that open-cast mining should be dealt with as follows in terms of the general rules regarding the content of a mineral right:

“Accordingly, because open-cast mining is usually more invasive of the surface owner’s rights than underground mining, it should only be allowed if it is reasonably necessary. Whether it qualifies as such in any particular case cannot be determined at a theoretical level. Reasonable necessity will always depend on the facts. And, in that event, the mineral rights holder, like the holder of a servi-
tude, is bound to exercise his right \textit{civliliter modo}, ie in a manner least injurious to the interest of the owner in the surface of the property" (373F-G).

Regarding legal issue (c) identified in § 4 above, the court held, whilst expressing itself in contract law parlance:

"[A]bsent any express or tacit term of the grant, the mineral rights holder is entitled, by virtue of a term implied by law, to conduct open-cast mining when it is reasonably necessary in order to remove the minerals, provided that it is done in a manner least injurious to the interests of the surface owner"(373G-H).

According to the court, an implied term must be understood as a provision of the grant imposed by law, namely, a reference to a \textit{naturalium} of a grant (367G-H). A tacit term, on the other hand, denotes unexpressed terms read into the contract that are based on the unarticulated but nevertheless inferred or imputed intention of the parties (367H). In mineral law parlance, the entitlement to conduct open-cast mining is included in a mineral right.

6 \textbf{Finding}

The factual issues, which were found to be secondary to the legal issues (368A-B), related to whether the open-cast method, as opposed to underground mining methods, that the applicant intended to employ:

(a) was reasonably necessary for the exploitation of the entitlement to remove the coal from the property (see 367I and 375G); and

(b) would occur with due respect to the entitlements of the surface owner and constitute no more than reasonable interference with the farming activities on the property (see 367J-368A, 375G).

Based upon the facts (see 375G-378C), the supreme court of appeal found that with reference to that part of Kriel South Coal Field, where the property is situated as a whole, open-cast mining could be described as reasonably necessary, as it was established that a large amount of coal would be left in the ground if extraction were limited to underground mining (377F). The court emphasised that the enquiry as to what is reasonably necessary must be directed not to the property in isolation, but the coal field as a whole, including adjoining properties (377I). The court found that the proposed open-cast mining would be reasonable (see 378C-E).

Another factual issue was whether the diversion of the stream was reasonably necessary and amounted to a \textit{civliliter modo} exercise of entitlements. It was common cause that the stream would, unless diverted, sterilise a large part of the coal field and make the whole mining operation non-viable (378F). Having regard to the coal field as whole, the court found that the diversion of the stream was reasonably necessary (378F-G). The court found that compliance with the \textit{civliliter modo} requirement could only be determined properly after the commencement of Anglo's proposed stream diversion activities. According to the court, if Sandhurst at that stage believed that the activities exceeded reasonable interference with its interests, it would be able to seek protection against such conduct from the court (379D-F).
7 Findings by the court a quo revisited

Three findings of the court a quo also received the attention of the supreme court of appeal.

The first finding of the court a quo was that even if the Coronation Collieries case had been wrongly decided, the principles established therein had been in operation for nearly a hundred years and should thus not be lightly disturbed, provided that the usage based on error can be described as uniform and unbroken. This finding was not accepted by the supreme court of appeal (see 373I-374B). Brand JA held that Coronation Collieries did not give rise to any usage at all (see 374C).

The supreme court of appeal agreed with the second finding of the court a quo, namely that since the provisions of the Minerals Act 50 of 1991 are essentially regulatory in nature, they do not assist in determining the ambit of the entitlements acquired by the holder of mineral rights (see 374F-H). Brand JA concluded that the same can be said about the act (374H-I). According to the court, though the provisions of these statutes may become relevant in determining the civiltier modo exercise of open-cast mining, the mineral rights holder’s entitlement to adopt this method of mining must be established with reference to the express, tacit and implied terms of the grant (374F-I).

The court considered it unnecessary to deal with the court a quo’s third finding that an implied term to conduct open-cast mining would be in conflict with the guarantee against arbitrary deprivation of property afforded by section 25 of the Constitution of the Republic of South Africa of 1996 (see 374I-375A; as to a discussion and criticism of the court a quo’s finding on the constitutional principles, see Badenhorst and Mostert 2007 TSAR 419-421). The court nevertheless reviewed its opinion that the notion of arbitrary deprivation does not enter the picture at all (375D-E). The need found by the court a quo to apply section 39(2) of the constitution was also rejected by the supreme court of appeal. According to the court, resolution of conflicting interests in the case of servitudes and mineral rights does not require that one of these conflicting interests be preferred by any of the values underlying the bill of rights. Application of section 39(2) of the constitution would not yield a different answer from the common law (375E-F).

The doctrine of rights was recognised and applied by the court a quo, albeit not correctly (see Badenhorst “Mineral law and the doctrine of rights: a microscope of magnification?” 2006 Obiter 593). It is a pity that the supreme court of appeal did not make use of the opportunity to consider the doctrine of rights within the context of vertical support and property law in general. The correct usage of the concept “entitlement”, denoting the content of a right, by the court is welcomed.

8 Discussion

As seen before (§ 5(a) above), the court accepted as a fundamental principle of law that the owner of land is the owner of not only the surface, but of everything adherent thereto and also of everything above and below the surface. This principle is derived from the maxim cuius est solum eius est usque ad coelum et ad inferos (Franklin and Kaplan The Mining and Mineral Laws of South Africa (1982) 4). Whilst it was settled law prior to the commencement of the act, it is not clear whether this fundamental principle has been changed by section 3(1) of the said act, which determines that “[m]ineral 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. Views differ as to whether the *cuius est solum* rule has been abolished by section 3(1) of the act.

According to Dale *et al* (*South African Mineral and Petroleum Law (2005)*), the collective wealth of mineral and petroleum resources, as opposed to the minerals and petroleum as such, “belongs” to the nation. According to them, there is no provision in the act whereby minerals on individual properties are vested in anyone other than the owner of the land. No provision of the act is said to vest ownership of minerals in the state (MPRDA-10) or in the public (MPRDA-12). They maintain that ownership of mineral and petroleum resources does not vest in the “nation” or “people”, because neither the nation nor people have legal personality in public or private law that enable them to acquire or to hold ownership of or any rights to the resources (MPRDA-4). Dale *et al* argue that if the notions of “nation” and “people” are equated with the state, the notion of curatorship by the state does not fit, because a curator does not hold property for himself (MPRDA-115). It is concluded that ownership of unsevered minerals still vests in the owner of the land, but he may not exploit such minerals (MPRDA-122). The incidence of ownership to exploit minerals is said to have been destroyed by the act through “institutional expropriation” (MPRDA-122). The state as custodian is vested with public law powers that must be exercised for the benefit of all South Africans, the resources being the “common heritage” of all the people of South Africa (MPRDA-123). The problem with the first view is that its application to unlawful extraction of minerals or petroleum leads to a hiatus in the legislation.

According to Badenhorst and Mostert (*Mineral and Petroleum Law of South Africa (2004)* 13-3), ownership of minerals and petroleum not yet severed from the land is vested in the state. (See also Van der Merwe in Du Bois (ed) *Wille’s Principles of South African Law (2007)* 619; and see Van der Walt *Constitutional Property Law (2005)* 391, where it is argued that such a change in the legal position of landowners would be justifiable in view of the transformative objectives of the South African constitution.) The *cuius est solum* rule in terms of the common law, which implies that a landowner is the owner of the minerals of the land, may have been abrogated by section 3(1) of the act. Support for such view may be found in the rule of interpretation in section 4(2) of the act, which states that, insofar as the common law is inconsistent with the act, the latter prevails (see, however, Dale *et al* MPRDA-10 and MPRDA-121, who argue that the provisions of the act do not warrant such departure from the common law). The term “custodianship” as used in the act is, however, a misnomer (Badenhorst and Mostert 13-3). The act seeks to achieve much more than mere custodianship of these resources. It aims at an actual vesting of mineral and petroleum resources in the state (Badenhorst and Mostert 13-4). Several possible explanations for the legislature’s choice of wording may be advanced. It seems as if the legislature might have borrowed from the law of the sea in its formulation of section 3(1) of the act. In this context it would mean that mineral and petroleum resources are vested in the “people of South Africa”, while the state is merely the custodian thereof for the benefit of the people. In terms of the law of property, therefore, mineral and petroleum resources would by these provisions become *res publicae* (Badenhorst and Mostert “Revisiting the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the constitutional property clause: an analysis in two parts” 2004 *Stell LR* 22 33 n 63). If it can be argued that a new *res* or thing (despite difficulty with the characteristic of independence) has been created, they could perhaps be classified as public things (see in general Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property (2006)* 26). However, one major difference exists between the law of the sea and the
law pertaining to mineral and petroleum resources. According to the law of the sea, the deep seabed, before it was declared to be the common heritage of humankind, had been regarded as either terra nullius or terra communis (Churchill and Lowe The Law of the Sea (1999) 464 468). The same cannot be said of land-containing minerals. In South Africa, land containing minerals has always belonged to private individuals (or the state, where applicable), but in a private capacity (Badenhorst and Mostert 13-4). It could probably also be argued that the language of section 3(1) of the act is merely an example of the socialist rhetoric informing a broad range of more recent legislative measures, without the section actually conveying any rights to the state. (Badenhorst and Mostert “Revisiting the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the constitutional property clause: an analysis in two parts” 2003 Stell LR 377 383). In the preamble to the act, it is acknowledged that South Africa’s mineral and petroleum resources belong to the nation and that the state is the custodian thereof. (As to an elaboration of their views, see Badenhorst and Mostert “Artikel 3(1) en (2) van die Mineral and Petroleum Resources Development Act 28 van 2002: ‘n herbeskouing” 2007 TSAR 469.)

It can also be argued that custodianship does not amount to ownership, so that the landowner still remains owner of unsevered mineral and petroleum resources, subject to the public trust doctrine (Glazewski Environmental Law in South Africa (2005) 464 468; Van der Schyff The Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002 (2006 thesis North West University) 149-152).

The acceptance of the cutus est solum rule by the supreme court of appeal, however, does not take place with reference to section 3(1) of the act or mineral rights in terms of the transitional measures. It is a pity that section 3(1) did not receive the attention of the supreme court of appeal. The impact of section 3(1) of the act remains, therefore, unanswered. (See further the discussion of s 3(1) in Badenhorst and Mostert 2007 TSAR 469.)

The supreme court of appeal decided that it has now become a settled principle of our law that a mineral right in the property of another is in the nature of a quasi-servitude over that property (371E-F). Over the years, the courts and academics had differing views as to the nature or classification of mineral rights. (For a summary of the conflicting case law and differing academic views, see Franklin and Kaplan 8-15; Badenhorst “Klassifikasie en kenmerke van mineralrechte” 1994 TIRHR 34; Badenhorst and Mostert 3-4.) The debate was started in South Africa during 1903 by Innes CJ in Lazarus and Jackson v Wessels, Oliver, and the Coronation Freehold Estates, Town and Mines Ltd (1903 TS 499 510) when he expressed doubt as to the nature of mineral rights. A similar debate took place in the American state of Louisiana (see Badenhorst “Mineral rights under Louisiana law” 1993 De Jure 297 302). As was shown by De Boer (De Winning van Delfstoffen in het Romeinse Recht, De Middeleeuwse Juridische Literatuur en het Franse Recht tot 1810 (1978) 157 and 167-168) the debate had already been started by De Castro during the Middle Ages. According to the predominant view in South Africa, mineral rights were regarded as quasi-servitudes and were accepted as such by the supreme court of appeal in Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd (1996 4 SA 499 (A) 509I; see Badenhorst 1999 Stell LR 96 99-101). According to the other view, mineral rights were classified as real rights sui generis. Theoretically, the second view was previously preferred. The practical importance of the quasi-servitude construction in casu convinces one of the soundness of the first approach.

It is submitted that the classification of the nature of mineral rights is not a mere
academic exercise: the identification of the servitutal nature of mineral rights also determines entitlements by virtue of respective rights; the exercise thereof and the relationship between the holder of a mineral right and the owner of land. The last aspect, in particular, is a novel and important feature of the decision of the supreme court of appeal in the Anglo case. The main entitlements of entering the property subject to the mineral right, searching and removing minerals, are listed by the supreme court of appeal. An ancillary entitlement to do whatever is reasonably necessary in order to remove the minerals from the property is listed. Entitlements by virtue of a mineral right, however, have to be exercised civiliiter modo. The relationship between the owner of the property and the holder of a mineral right is a relationship between an owner and the holder of a limited real right that derogates from the entitlements of the owner. Conflicts between the owner of the land and the holder of a mineral right should be resolved in accordance with servitutal principles designed to resolve conflicts between owners and holders of servitudes (see § 5 above).

The supreme court of appeal held that a grant of mineral rights implicitly included the entitlement to conduct open-cast mining, unless expressly or tacitly excluded by a term of the grant. In mineral law parlance, the entitlement to conduct open-cast mining is included in a mineral right. Open-cast mining must, however, be reasonably necessary in order to remove the mineral and must be done in the manner least injurious to the owner of the land. The entitlement to conduct open-cast mining is thus subject to such inherent duties.

The classification of a mineral right as being a quasi-servitude remains important during the transitional period in terms of the act. Mineral rights constitute components of the "old order rights" recognised in terms of the act (see tables 1 to 3 of the transitional arrangements made in the act). "Old order rights" remaining in force during different transitional periods are subject to the terms and conditions under which they were issued or granted (see items 4(1), 5(1), 6(1), 7(1) and 8(1) of the transitional arrangements in schedule II of the act). It is submitted that the entitlements by virtue of respective old order rights, the exercise thereof and the relationship between the holder of an "old order right" and the owner of land will have to be determined with reference to the quasi-servitutal nature of the underlying mineral rights - subject, however, to the provisions of the act. This is exactly what the supreme court of appeal did in Anglo without even looking at provisions of the act.

It is interesting to note that the supreme court of appeal continued, despite the transformative provisions of the act, to treat mineral rights as belonging to the private law and not the public law domain. This raises the question, albeit tongue in cheek, as to the correctness of the "public law style" title of this case discussion.

The classification of mineral rights as quasi-servitudes may play a role even in respect of (new) rights to minerals and petroleum. Prospecting rights and mining rights to minerals and exploration and production rights to petroleum are recognised as limited real rights in section 5(1) of the act. In addition, section 2(4) of the Mining Titles Registration Act 16 of 1967 determines that registration of such rights constitutes a limited real right binding on third parties. The act does not state anything about the nature of reconnaissance permissions, retention permits and mining permits to minerals or reconnaissance permits and technical co-operation permits to petroleum. Section 5(1)(v) of the Mining Titles Registration Act merely makes provision for the recording of such permissions and permits rights. (As to the nature of rights in terms of the act, see Badenhorst "Nature of new order rights to minerals: a Rubikian exercise since passing the mayday Rubicon with a cubic circonium" 2005 Obiter S05). The entitlements by virtue of respective rights to minerals and
petroleum created by statute, the exercise thereof and the relationship between the holder of an "old order right" and the owner of land are governed by specific provisions in the act. However, especially in the resolution of conflicts between owners of land and holders of rights to minerals and petroleum, the courts may fall back on the notion of the quasi-servitutal nature of rights to exploit minerals and petroleum. The Anglo decision and other case law (see in this regard Franklin and Kaplan 113-141) that dealt with the conflict between owners of land and holders of mineral rights may be used in future to resolve conflicts between owners of land and holders of rights to minerals and petroleum. These rights, unlike mineral rights, prospecting rights and mining rights in terms of the common law, are not granted and will not be granted by the owner or former holder of mineral rights, but by the state. The granting of rights to minerals and petroleum in terms of the new order differs in this respect from the old order and creates a new dimension of conflicts between owners of land and holders of new order rights. New rights to minerals and petroleum granted by the state can perhaps not be construed as a derogation of ownership. Whether these new order rights may be construed as quasi-servitutal in nature will have to be determined by the courts in future.

As agreements, prospecting rights or mining rights and exploration rights or production rights can be compared to prospecting leases or mineral leases (and claim licences) that were available in terms of the Mining Rights Act 20 of 1967 and the Precious Stones Act 73 of 1964 and legislation prior thereto; such agreements are partly contractual and partly administrative in nature, but remain creatures of statute (see Dale et al MPRDA-134). Reconnaissance permissions, retention permits and mining permits to minerals, and reconnaissance permits and technical cooperation permits to petroleum, as agreements, are totally new kinds of agreements, and are also creatures of statute. Leases and sub-leases flowing from prospecting rights and exploration rights (see ss 11(1) of the act) can be compared to prospecting contracts and nomination agreements (Dale et al MPRDA-178). Leases and sub-leases flowing from mining rights or production rights (see ss 11(1) of the act) can be compared to common law mineral leases and tributing agreements (Dale et al MPRDA-178-179).

The supreme court of appeal's refusal to extend the principle of lateral support of neighbour law to the relationship between the owner of land and the holder of a mineral right is sound. Prima facie it seems odd or inconsistent that, legally, vertical support of land should be treated differently from lateral support of land. The mere fact that it was in the past necessary to borrow from English law in relation to lateral support in neighbour law does not make it necessary to incorporate English law in relation to vertical support. Unlike English law, the catus est solum rule applies or applied to our law. The conflict between neighbouring owners regarding lateral support involves a conflict between the exercise of ownership by the respective owners. The conflict between an owner of land and a holder of a mineral right involves a conflict between the owner of land and a holder of a limited real right (ie a quasi-servitutal right). In the first instance, the same or equal rights are involved, namely ownership, whereas in the second relationship, a mother right and a derogated real right are involved. According to the court, the principles developed in our law to resolve conflicts between owners and holders of servitutal rights are more appropriate in resolving the conflicts between owners of land and holders of mineral rights than neighbour law principles based on English law.

It is now clear that open-cast mining should be treated in accordance with the general principles applicable to the conflict between the owner of the land and the holder of a mineral right. This theoretically sound approach does have implications
for protection of the environment against more invasive forms of mining being permitted. The requirements for open-cast mining are, however, a safeguard against abuse of open-cast mining.

9 Conclusion

It was held by the supreme court of appeal in the Anglo decision that open-cast mining should not in law be treated differently to any other form of mining. Subject to compliance with certain requirements, open-cast mining is thus permissible. In the absence of an express or tacit term of a mineral right grant, the holder of a mineral right is, by virtue of a term implied by law, entitled to conduct open-cast mining. Open-cast mining is, however, possible only when it is: (a) reasonably necessary in order to mine and remove minerals; and (b) done in the manner least injurious to the interests of the owner of the land. Even though open-cast mining is more destructive and damaging to the environment, the requirements for this form of mining would provide a necessary safeguard against possible abuse by mining companies.

The classification of mineral rights as quasi-servitudes by the supreme court of appeal not only ends a century-old South African debate about the nature of mineral rights, but also clearly sets out the entitlements flowing from a mineral right, the exercise thereof and the resolution of conflicts between the owner of land and the holder of mineral rights. The court relied on the notion of a quasi-servitude, which can be traced back to centuries of common law principles of servitudes, rather than blindly following English property law. The supreme court of appeal continued, despite the transformative provisions of the act, to treat mineral rights as belonging to the private law rather than the public law domain. The solid foundation of a quasi-servitude laid by the decision may not only be helpful during the cumbersome transition to a new mineral order, but may be used as a building block for the new order rights.

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