THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number : 634/05

In the matter between :

ANGLO OPERATIONS LTD **APPELLANT**

and

SANDHURST ESTATES (PTY) LTD
RESPONDENT

CORAM : **HOWIE P, MTHIYANE, BRAND, MLAMBO JJA *et***

THERON AJA

HEARD : **13 NOVEMBER 2006**
DELIVERED : **29 NOVEMBER 2006**

Neutral citation: This judgment may be referred to as *Anglo Operations v Sandhurst* [2006] SCA 146 (RSA)

SUMMARY: Mineral rights – when holder is entitled to conduct open cast mining - related issue concerning diversion of stream to facilitate open cast mining activities

JUDGMENT

BRAND JA/

BRAND JA:

[1] This is a case about mineral rights. The respondent is the owner of a farm, described as the remainder of Brakfontein 117, about 850 hectares in extent, near Bethal in the Mpumalanga Province ('the property'). The appellant holds all rights to coal in respect of the property by virtue of a notarial cession of mineral rights which was duly registered during July 2001. The present proceedings started when the appellant brought an application in the Pretoria High Court. The relief sought was for an order, firstly, allowing the appellant to conduct open cast or strip mining – as opposed to underground mining – on approximately 60 hectares of the property and, secondly, permitting the diversion of an existing stream on the property in order to facilitate these open cast mining operations. The respondent raised various objections to both aspects of the relief sought. In a judgment which has since been reported *sub-nom Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T), most of these objections were upheld by the court *a quo* (De Villiers J). Consequently the appellant's application was dismissed with costs. The appeal against that order is with the leave of the court *a quo*.

[2] The appellant's mineral title arises from a notarial cession in its favour by African and European Investment Co Ltd ('AEIC') during 2001. AEIC in turn acquired these rights by virtue of two separate cessions, that were concluded on 18 March 1968, with the then owners of the property and the mineral rights involved. They were Mr Arthur Sulski, who owned both the property and a 5/6 share in the mineral rights and Mr Morris Sulski, who held the remaining 1/6 share in the mineral rights. Subsequent to these cessions to AEIC, the respondent took transfer of the property from Arthur Sulski. This was in 1972.

[3] The cession by AEIC to the appellant did not relate to the property only. It also provided for the transfer of the rights to coal in respect of a number of adjoining properties. It appears that these properties are situated in what is known as the Kriel South Coal Field where coal mining had taken place for many years, both by way of strip mining and underground mining activities. The appellant's case is that it had entered into an agreement with Sasol Mining (Pty) Ltd in terms of which it undertook to make coal available to the latter. In order to give effect to this agreement, the appellant explained, it decided to establish open cast mining operations on the south-western portion of the Kriel South Coal Field, consisting of the property and those adjacent to it, which together formed the subject matter of the AEIC cession.

[4] With regard to the two aspects of the relief sought by the appellant, I shall first deal with the dispute that arose from its desire to conduct open cast mining on part of the property. This dispute gave rise to issues of both law and fact. The issue of law turns on the content of the appellant's title as the holder of mineral rights. This title originally derived, as I have said, from two cessions by Arthur and Morris Sulski in favour of AEIC during 1968. These two cessions were quoted in full by the court *a quo* (at 355H-357C). As appears from the quotation, the terms of the cession by Arthur is substantially more detailed than the one by Morris. The reason for this, the court *a quo* inferred (at 357G), was that Arthur remained the owner of the surface rights while Morris no longer retained any interest in the property at all. Whatever the reason for the difference, both parties in argument before us followed the court *a quo*'s example by concentrating their focus on the more detailed provisions of Arthur's cession. Since I do not believe it makes much difference, I propose to do the same.

[5] In terms of clause 1 of Arthur's cession, AEIC and its successors were afforded 'all such rights as may be needed for proper mining and exploiting the coal in, on and under all of the said property'. In spite of this wide wording it is apparent, in my view, that neither clause 1, nor any of the other clauses of the cession expressly authorise open cast mining. The converse is equally apparent. Open cast mining is not expressly excluded by any term of the cession. Despite arguments to the contrary in the court *a quo* (which were considered at 391D-394D) both parties conceded in this court – rightly in my view – that neither of them can rely on any tacit term of the cessions which can be said to determine the question of open cast mining either way. The issue of law that therefore arises turns on the following question: what is the default position in common law where open cast mining is not expressly regulated by the grant of mineral rights? The position contended for by the appellant is, broadly stated, 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 to remove the minerals, provided that it is done in a manner least injurious to the interests of the surface owner. The respondent's contention, on the other hand, is that unless the grant expressly or tacitly allows open cast mining, it is excluded by virtue of a term implied by law. In referring to 'implied' and 'tacit' terms of the grant, I, of course, have the distinction in mind that is explained by Corbett AJA in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531-532. Accordingly, an implied term must be understood as a provision of the grant imposed by law, ie as a reference to a *naturalium* of the grant. The description 'tacit term' on the other hand, is used to denote unexpressed terms read into the contract that are based on the unarticulated but nevertheless inferred or imputed intention of the parties.

[6] The factual issues resulted from the appellant's allegations which were built on its contentions regarding the law. In the first place it alleged that the open cast mining method it intends to employ is reasonably necessary for the effective exploitation of its right to remove the coal from the property. Its second allegation was that it planned to conduct these operations with due respect for the respondent's rights as the surface owner and that the activities it intended to embark upon would constitute no more than reasonable interference with the

farming operations on the property. These allegations of fact were denied by the respondent in a number of material respects. It is apparent, however, that the factual disputes are secondary to the legal dispute in that they will only require determination if the legal issue is decided in favour of the appellant. I therefore propose to consider the question of law first before I turn to a more detailed account of the facts.

[7] The appellant's case is essentially based on the following exposition of the law by Malan J in *Hudson v Mann* 1950 (4) SA 485 (T) 488B-H:

'I have been referred to a number of decisions from which the rights of the holder of mineral rights appear reasonably well defined. Such a holder . . . is entitled to go upon the property, search for minerals and if he finds any to remove them. In the course of his operations he is entitled to exercise all such subsidiary or ancillary rights, without which he will not be able effectively to carry on his prospecting and/or mining operations.

When the owners are able reasonably to enjoy their respective rights without any clashing of interests no dispute is, as a rule, likely to arise. The difficulty arises, as has happened in the present case, when the respective claims enter into competition and there is no room for the exercise of the rights of both parties simultaneously.

The principles underlying the decisions appear to be that the grantee of mineral rights may resist interference with a reasonable exercise of those rights either by the grantor or by those who derive title through him. In case of irreconcilable conflict the use of the surface rights must be subordinated to mineral exploration. 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.'

(See also *West Witwatersrand Areas Ltd v Roos* 1936 AD 62 at 72; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 320C-E.)

[8] The respondent has no quarrel, in principle, with Malan J's exposition of the essential content of mineral rights. Its contention is, however, that it must be read subject to the surface owner's inherent right to what is described as subjacent or lateral support. The starting point of its argument in support of this contention, is the judgment of De Villiers CJ – with Smith and Buchanan JJ concurring – in *London and SA Exploration Co v Rouliot* (1891) 8 SC 75. The gravamen of the decision in this case was that a rule, similar in content to the English rule of lateral support, which provides landowners, as an intrinsic element of their ownership, with the right of adjacent support of their land, should be incorporated into our law. Though this rule never formed part of Roman Dutch Law, De Villiers CJ stated (at 92), our courts may '*in the absence of direct authority . . : be guided by well-established principles of the Roman law and of modern systems of law, provided*

they do not lead us to conclusions inconsistent with the Dutch law' (see also Smith J at 98-99).
Following upon this proposition, is the statement by De Villiers CJ (at p 94) which formed the keystone to the respondent's argument, namely that:

'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. If they had intended that the plaintiffs should be deprived of this natural right ought not the defendant to have stipulated to that effect? I am of 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.'

[9] The next step in the progression of the respondent's argument is based on in the judgment of Bristowe J (with Smith J concurring) in *Coronation Collieries v Malan* 1911 TPD 577. Though the facts of the *Coronation Collieries* case were fairly complicated, the central question – for present purposes – was whether the underground miner owed the landowner a duty of vertical or subjacent support of the surface. Bristowe J began to answer the question by pointing out (at 590-591) that, according to the well-settled principles of English law '*the right to have the surface of land in its natural state supported by the 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.*'

[10] This statement regarding the position in English law, is clearly borne out by the cases to which Bristowe J referred (see eg the judgment of the House of Lords in *Butterknowle Colliery Co Ltd v Bishop Auckland Industrial Co-operative Co Ltd* [1906] AC 305 (per Lord Loreburn LC at 309 and per Lord Macnaghten at 313). The learned judge then immediately proceeded, however, to point out the material differences between our law and English law to which I shall presently return. But, he said, (at 591), '*this difference between the two systems of law does not affect the right of support, and the case of London and South African Exploration Co v Rouliot (8 S.C. 75) shows that, as regards the rights of support for land in its natural state, there is no difference between the English 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 were vertical.*'

[11] In evaluating Bristowe J's understanding of *Rouliot,* it is well to remember that, although that case 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. The claim was for damages arising from the defendant's alleged trespass on the plaintiff's property. What happened, in short, was that the defendant (Rouliot) leased a claim in the Du Toit's Pan Mine from the plaintiff company. The defendant conducted open cast mining on the claim for many years. During these years he left a sloping buttress of diamondiferous ground to support

the adjoining unleased property of the plaintiff, forming the margin of his mine. The defendant then decided to mine the sloping buttress as well. Before he did so, he removed a quantity of ground from the unleased adjoining property, because he considered that the working of the buttress would cause a fall of the reef into his claim. The removal of the ground constituted the alleged trespass.

[12] In the court of first instance, Solomon J 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. He 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. Consequently, he decided, the defendant had acted lawfully in removing ground on the adjoining unleased land before he exercised his right to remove the lateral support to that land. It is against this background that both De Villiers CJ and Smith J held on appeal that, although the principle of lateral support formed no part of Roman Dutch law, it is a just and equitable principle that should best be incorporated into our law. And, so De Villiers CJ held in the *dictum* upon which the respondent relies (see para [9] above), once it is accepted that the right to lateral support existed as an incident to the plaintiff's right of ownership, the parties must be deemed to have concluded their lease agreement with the view to the continued existence of that right.

[13] The court *a quo* (at 365H-I) referred to the severe criticism of the judgment of De Villiers CJ in *Rouliot* by Mr L Kadirgamar, an advocate from the then Ceylon, in the 1965 South African Law Journal (see (1965) 82 *SALJ* at 210, 357 and 395). It then proceeded to attribute a substantial part of its judgment (at 367A-373E) to the question whether or not the right of lateral support should be retained as part of our law. Ultimately the court concluded that it should.

[14] Unlike the court *a quo*, I do not believe that the question regarding the continued recognition of the principle of lateral support is one that we have to concern ourselves with in this case. It is clear that the principle was adopted in *Rouliot* as a rule of neighbour law. The real question in this case is whether that principle of neighbour law should have 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. Though the last mentioned case came on appeal to this court (see *Coronation Collieries Ltd v Malan* 1911 AD 586) the decision of Bristowe J was upheld on a different basis. In referring to *'Coronation Collieries*' I therefore have the Transvaal Provincial case in mind.

[15] In arguing that *Coronation Collieries* should not be followed, the appellant first pointed to the material conceptual difference in this regard between English law and our law. The position in English law, as pointed out by Bristowe J himself in *Coronation Collieries* (at 591), is that 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* (supra) at 313):

'The result seems to be that in all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support

for his property in its natural position . . .'

[16] The fundamental principle of our law, on the other hand, is that the owner of land is the owner not only of the surface, but of everything legally adherent thereto and also of everything above and below the surface (see eg *Rouliot (supra)* at 91; *Rocher v Registrar of Deeds* 1911 TPD 311 at 315; *Union Government v Marais* 1920 AD 240 at 246). In terms of our law, it is thus not possible to divide the ownership in separate layers. In consequence, while in English law the holder of mineral rights actually becomes owner of a particular layer below the surface, this does not happen in our law. In accordance with what has now become a settled principle of our law, a right to minerals in the property of another is in the nature of a quasi-servitude over that property (see eg *Rocher v Registrar of Deeds (supra)* at 316; *Nolte v Johannesburg Consolidated Investment Company Ltd* 1943 AD 295 at 305-6; *South African Railways & Harbours v Transvaal Consolidated Land & Exploration Co Ltd* 1961 (2) SA 467 (A) at 490-491).

[17] Once this conceptual difference is appreciated, it is apparent that the extension of the rules governing the relationship between neighbours to the relationship between the mineral rights holder and the owner of the land, comes much more easily if one adopts the English approach. After all, the two owners of the different layers are vertical neighbours, so to speak. To say in these circumstances, as Bristowe J did in *Coronation Collieries,* that De Villiers CJ simply disregarded the conceptual differences in *Rouliot* and that he had decided that 'this difference between the two systems of law does not affect the right of support' is, with respect, not correct. Equally erroneous, in my view, is the statement that De Villiers CJ decided to incorporate the English doctrine of lateral and subjacent support, with all its ramifications, into our law. On the contrary, I agree with the statement by the court *a quo* (at 366B) that what had happened in *Rouliot* was that *'De Villiers CJ and Smith J simply introduced, as judge made law, a rule which they regarded as common to all civilised systems of law because, as they perceived it, a lacuna existed. The judges did not concern themselves with the exact pedigree of the rule . . .. The rule was introduced because it was regarded as just and equitable.*'

[18] I therefore agree with the appellant's argument 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 can not be sustained. *Rouliot* simply did not provide authority for the proposition on which the judgment by Bristowe J was built. A further reason why the judgment in *Rouliot* cannot unreservedly be extended to the relationship between the owner of property and the holder of what has been described as a quasi servitude, appears from the following *dictum* by Schreiner JA in *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A) 216H-217C:

'But . . . in the case of a servitude like the present one the position seems to me to be materially different from that in *Rouliot's* case. The exercise of the rights granted in that case did not necessarily involve any interference with the lessor's rights in the unleased part of its property. The lessee could mine, though not so deeply or so cheaply, without infringing the lessor's right of lateral support. But in the present case the damming of the river [which constituted the exercise of the

servitutal right under consideration] necessarily submerged part of the plaintiff's property . . . which would not otherwise have been submerged . . ..The normal effect of servitudes is that they derogate from the rights of the servient owner. The extent of the derogation will depend firstly on the terms of the servitude and secondly on the principle that the servitutal rights must be exercised *civiliter modo*. But there is no generally applicable principle that in the absence of contrary stipulation the rights of the servitude holder must yield to those of the servient owner . . .."

[19] The same can, in my view, be said about the exercise of mineral rights. Because minerals are by their nature usually found under the surface of the land, the right granted to the holder to extract and remove the minerals can generally only be exercised by excavating the land. Of necessity this involves damage to the surface of the land and a curtailment or even a deprivation of the rights of use normally enjoyed by the owner of the surface. The difference between underground mining and open cast mining lies in the degree of such disturbance and not in whether or not it will occur. 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 to preserve the surface, must depend (excepting for purposes of this point the terms of the grant) upon the location and the extent of the reserves to be mined.

[20] In consequence, as in the case of a servitude, the exercise of mineral rights will 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. How is this inherent conflict to be resolved in principle? According to the respondent's argument, based on *Rouliot* and *Coronation Collieries*, which found favour with the court *a quo,* the answer lies in the adoption of the English law doctrine of subjacent support. I do not agree with this approach. The correct approach, in my view, is the one proposed by the appellant, that this conflict should be determined in accordance with the principles developed by our law in resolving the inherent conflicts between the holders of servitutal rights and the owners of the servient properties.

[21] In accordance with the principles applicable to servitudes, 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. In applying these principles to the mineral rights it can be accepted on good authority that the holder is entitled to go onto the property, search for minerals and if he finds any to remove them (see eg *Hudson v Mann (supra)* at 488; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) 509G-H). 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', 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. In *West Witwatersrand Areas Ltd v Roos (supra)* at 72 Curlewis ACJ refers with approval to the following examples given in illustration of this maxim:

'So, if a man leases his land and all mines therein, when there are no open mines the lessee may dig for the minerals; by the grant of the fish in a man's pond is granted power to come upon the banks and fish for them; and where minerals are granted the presumption is that they are to be enjoyed and that a power to get them is also granted as a necessary incident.'

[22] In my view, the general rules regarding the content of mineral rights that has thus become crystallised, is in accordance with the statement by Malan J in *Hudson v Mann (supra)* at 488B-H (see para [7] above). In contrast with the view held by the court *a quo,* I do not believe that open cast mining creates an exception to these general rules. On the contrary, I believe it fits seamlessly into this general pattern. 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 servitude, is bound to exercise his right *civiliter modo*, ie in a manner least injurious to the interest of the owner in the surface of the property. Otherwise stated in contract law parlance – absent 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 is done in a manner least injurious to the interests of the surface owner.

[23] Finally, three findings by the court *a quo* remain for comment. First among these is the finding that even if it were to be held – as in my view it should – that *Coronation Collieries* was wrongly decided, that decision had been 'in operation' for nearly a hundred years and should thus not be lightly disturbed (at 372F-H). This finding appears to rely on the maxim which has been described by Innes J in *Webster v Ellison* 1911 AD 73 at 92 as 'that dangerous maxim *communis error facit ius'*, which can only find application, Innes J said, if the usage based on error can be described as 'uniform and unbroken'. The mere fact that decisions based on a wrong interpretation of the law were given many years ago would not be sufficient reason for refusing to correct the error because, so Innes J said (at 93):

'If it were otherwise, the result would be an unfortunate one. For when does a decision become so

venerable that its original error is to be regarded as modifying the law?

(See also *Du Plessis NO v Strauss* 1988 (2) SA 105 (A) 141F-142H; *Business Aviation Corporation v Rand Airport Holdings* [2006] SCA 72 (RSA) at paras 38-41.)

[24] I do not think it can be said that *Coronation Collieries* gave rise to any usage at all. The only authority, apart from *Coronation Collieries* itself, relied upon by the respondent in this regard, was the judgment of Kriegler J in *Elektrisiteitsvoorsieningskommissie v Fourie* 1988 (2) SA 627 (T) (at 634A-H, 641C-J and 642F-G) where it was accepted, without comment, that, by virtue of *Coronation Collieries*, the English right of subjacent support must be regarded as part of our common law (see also the discussion of this case in the judgment of the court *a quo* at 380G-382E). It must, however, be borne in mind that in *Fourie* the existence of such right in common law was not in dispute at all. The reason probably was that the mineral rights holder had in any event expressly undertaken, in terms of the grant, to provide adequate subjacent support to the surface (see 630J-631A). In the circumstances it is clear, in my view, that the doctrine of *communis error facit ius* does not apply.

[25] The second finding by the court *a quo* which requires comment relates to the relevance of the Minerals Act 50 of 1991 to the outcome of the present legal dispute. Broadly stated, the view expressed by the court *a quo* in this regard (at 388A-389E) was that, since the provisions of the Act are essentially regulatory in nature, they do not assist in determining the ambit of the rights acquired by the holder of mineral rights. Or, as De Villiers J put it (at 388I-389A) *'It is thus clear that the provisions of the Minerals Act 50 of 1991 are designed to regulate mining, not to add to or subtract from common-law mineral rights. Those rights are treated by the Minerals Act as something previously established, only the exercise of which is regulated.*' I agree with this conclusion. Moreover, the same can, in my view, be said of the successor to that Act, ie the Mineral and Petroleum Resources Development Act 28 of 2002, which came into operation on 1 May 2004. Though these legislative provisions may become relevant in determining the *civiliter modo* exercise of open cast mining, the mineral rights holder's entitlement to adopt this method of mining at all must be established with reference to the express, tacit and implied terms of the grant.

[26] Thirdly, I need to deal with the court *a quo*'s finding that the legally implied term contended for by the appellant would be in conflict with the guarantee against arbitrary deprivation of property afforded by s 25 of our Constitution (at 397G-399B). The court's reasoning in support of this finding appears to be encapsulated by the following statement, at 398B-D:

'The argument for the applicant results in a term being implied by the court *ex lege* to the effect that the owner is deprived of the use of the surface. . . .
If the argument were upheld it would result in an implied term which has the effect that the owner is deprived, without his agreeing thereto, of the last remaining aspect of his ownership which is of any practical value to him.'

[27] I do not agree with this line of reasoning. In my view the owner cannot be said to be arbitrarily deprived of anything. He – or, in this case, his predecessor –

had sold certain rights. The 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 had 'bought'. That is why I hold the view that the notion of arbitrary deprivation does not enter the picture at all. In the light of its views on the effect of s 25, the court *a quo* also found room for the application of s 39(2) of the Constitution, which requires all courts, when developing the common law, to promote the spirit, purport and object of the Bill of Rights (at 397H-398B). Again, I do not agree. As in the case of servitudes we are trying to resolve a conflict between the contradictory interests of two individuals. Both in the case of servitudes and in the case of mineral rights, I can see no reason why one of these conflicting interests would be preferred by any of the values underlying the Bill of Rights. Consequently I do not believe that the application of s 39(2) yields an answer different from that which I have found the common law to provide.

[28] I revert to the facts. In this regard two questions arise. Firstly, whether the applicant has shown that open cast mining, as opposed to underground mining methods, is reasonably necessary. Secondly, whether the way in which the appellant proposes to conduct these activities has been shown to be the least invasive of the respondent's interest in the surface of the property. Consideration of these questions has been complicated by the manner in which the appellant chose to lay the factual foundation for its case, coupled with the respondent's penchant for technical objections. In the result, a substantial portion of the court *a quo's* judgment was dedicated to a discussion on squabbles of a procedural kind (at 383D-387H; 383H-391A). I do not propose to repeat this discussion in any detail. The only reason why I refer to it at all is that it ultimately led to a dismissal of a substantive application by the appellant to supplement its founding affidavit, which in turn gave rise to a separate ground of appeal. Apart from these procedural issues, a statement of the facts in broad outline would, in my view, suffice.

[29] The opening statement on behalf of the appellant in its founding affidavit was that underground mining on the property is not economically viable and that open cast mining is thus reasonably necessary. In motivating this contention, the deponent to the affidavit did not deal with the property in isolation, but in the context of that part of the Kriel South Coal Field where the property is situated as a whole, because, so he said, utilisation of the coal reserves on the property must be considered in the context of the whole mining project planned by the appellant on that part of the field. As to why the project as a whole requires open cast mining, he essentially gave the following reasons:

(a) The shallow depth of the coal in the area will render underground extraction both uneconomical and unsafe.

(b) The extraction ratio attainable through open cast mining will be significantly higher than through underground mining methods.

(c) Significantly higher strip ratios – ie the amount of overburden to be removed (expressed in cubic metres) to uncover one ton of coal – will be attainable through open cast mining.

(d) A geotechnical analysis by consultant geologists had confirmed the

suitability of the area for open cast mining methods.
(e) The type of coal obtained through open cast mining is better suited for Sasol's requirements, which is important, because the economic viability of the mining project as a whole is dependent on the appellant's ability to satisfy Sasol's requirements.

[30] With reference to these reasons, the deponent to the respondent's answering affidavit stated that he had no knowledge of 'the contents of these paragraphs and consequently deny it'. He then proceeded to object to the admissibility of this evidence – of which he had no knowledge – on the basis that it was of an expert nature and not supported by expert witnesses who had properly qualified themselves to do so. In its replying affidavit, the appellant sought to meet this objection by filing confirmatory affidavits by properly qualified experts. These were met by the respondent in a rejoining affidavit. However, in its rejoinder the respondent again produced no rebutting evidence of a substantive nature, but contented itself with further technical objections, now aimed primarily at the appellant's alleged attempt to make out a case for the first time in reply.

[31] Again the appellant tried to remedy the situation, this time through a substantive application to supplement its founding affidavit by incorporating the alleged new matter, consisting mainly of confirmatory affidavits by experts, already introduced in reply. Though the application was launched one month before the hearing of the matter in the court *a quo*, the respondent again elected not to deal with this 'new matter' on its merits, but chose to oppose the substantive application instead. In the event its opposition was upheld by the court *a quo*. The court's reasons for this decision appear from the following laconic statement (at 390H-I):

'Mr du Plessis [for the respondent] submitted that the court should decide the matter on the founding affidavit and dismiss the new application, which he submits is totally irregular. In my view, the court should indeed dismiss the new application with costs. I agree that the new application is totally irregular. The respondent would be seriously prejudiced if the new application were to be upheld.'

[32] I am not entirely sure what is meant by the description of the application as 'totally irregular'. If it is intended to convey that the application amounted to a deviation from the uniform rules of court, the answer is, in my view, that, as has often been said, the rules are there for the court and not the court for the rules. The court *a quo* obviously had a discretion to allow the affidavit. In exercising this discretion, the overriding factor that ought to have been considered was the question of prejudice. The perceived prejudice that the respondent would suffer if the application were to be upheld, is not explained. Apart from being deprived of the opportunity to raise technical objections, I can see no prejudice that the respondent would have suffered at all. At the time of the substantive application,

the respondent had already responded – in its rejoining affidavit – to the matter sought to be included in the founding affidavit. The procedure which the appellant proposed would have cured the technical defects of which respondent complained. The respondent could not both complain that certain matter was objectionable and at the same time resist steps to remove the basis for its complaint. The appellant's only alternative would have been to withdraw its application, pay the wasted costs and bring it again supplemented by the new matter. This would merely result in pointless waste of time and costs. For these reasons the applicant's substantive application to supplement its founding affidavit should, in my view, have succeeded.

[33] Having regard to all the affidavits in their final form, the applicant has, in my view, established that a great deal of coal would be left in the ground if extraction were to be limited to underground mining in that part of the Kriel South Coal Field where the property is situated. It is therefore apparent that with reference to that part of the coal field, viewed as a whole, open cast mining can be described as reasonably necessary. The respondent's answer was, however, that the same cannot be said with regard to the property as a discrete entity. According to the respondent's argument, the position regarding adjoining properties is of no consequence. Otherwise, so the respondent argued, it would be possible for a mineral rights holder to enhance his rights with reference to a particular property by acquiring the mineral rights of its neighbours. The answer to this argument is, in my view, that it depends on the facts. As I have said before, questions relating to reasonable necessity cannot be answered at a theoretical level. On the facts established by the appellant in this matter, I am satisfied that mining for minerals on the property can only be made economically viable by means of a project which combines it with its adjoining properties. The enquiry as to what is reasonably necessary must therefore, in my view, be directed to the project as a whole. This, I believe, results from the principle derived from the law of servitudes, that the mineral rights holder is entitled to do anything which is reasonably necessary to remove the minerals from the property.

[34] Another reason why, on the facts of this case, it would not be right to regard the property in isolation is that it was clearly within the contemplation of the parties to the original cession that, for purposes of mining activities, the property would be combined with its neighbours to form part of a larger field. Thus it was agreed in clause 6 of the cession (which is quoted in the court *a quo*'s judgment at 356D-E) that the mineral rights holder '*shall have the right to mine and exploit adjoining or other areas from the said property and shall have all rights of user and way for their purpose*'.

And in clause 4 of the cession (quoted at 356A-B) reference is made to installations which the mineral rights holder '*might require to enable it to properly exercise its rights or to exploit the field successfully*'.

[35] The conclusion that, in the circumstances, the appellant is entitled to conduct open cast mining on the property, raises the question as to the *civiliter modo* exercise of this right. It appears that the appellant's interference with the surface will divest the respondent of approximately 50 hectares of irrigable land. According to the respondent, irrigation on the property takes place by way of the

centre pivot system. By means of this system, four circles of about 38 hectares each are irrigated on a rotational basis once every four years. The proposed open cast mining will affect about one and a half of these circles. I do not believe that this in itself renders the appellant's proposed conduct unreasonable. Consequently it should, in my view, be allowed.

[36] I now turn to the diversion of the stream for which permission is sought. It relates to an unnamed stream on the property that currently flows through the proposed open mining area. It is common cause that the stream will, unless diverted, sterilise a large part of the coal field and may make the whole mining operation unviable. If that occurs, there can be no mining on the property.

[37] Having regard to the field as a whole, the diversion of the stream is therefore reasonably necessary. According to the approach adopted by the court *a quo* (at 399C-400J) it is, however, not permissible to have regard to the field as a whole. For purposes of this enquiry, so the court found, the property must be seen as a separate entity. Since it is common cause that the stream will not interfere with mining activities on the property itself, the court held, permission for its diversion should be denied. I do not agree with this approach. In the particular circumstances of this case, I believe the property should be regarded as part of the field because it can only be economically mined in combination with its neighbours. Moreover, it appears to have been within the contemplation of the parties to the original cession that it would be so combined (see paras [33] and [34] above). I therefore conclude that the diversion of the stream is for the appellant's exploitation of its mineral rights with reference to the property and that it should therefore be allowed.

[38] This raises the question whether the manner in which the appellant proposed to effect this diversion would pass the *civiliter modo* test. The appellant admitted that, without mitigatory measures, the proposed stream diversion will:

(a) cut off water to the existing dam and thereby affect the irrigation on the farm;
(b) result in a loss of cattle watering-holes in the bed of the stream;
(c) create an obstruction in the path along which cattle are herded once a week in order to be dipped.

The appellant therefore undertook to implement the following mitigatory measures if the diversion of the stream is allowed:

(a) 'It will install the infrastructure necessary to ensure that the supply of water to the existing farm dam is maintained at current levels.'

(b) 'It will install the infrastructure necessary to ensure that the watering requirements for cattle are maintained at present levels.'

(c) 'The current design of the stream includes a causeway . . . [which] will be suitable for access by cattle and will thus not affect the present dipping arrangements of the cattle on the property.'

[39] It goes without saying that any permission granted for the diversion of the stream will be subject to the appellant's compliance with these undertakings. The

respondent's reaction in its rejoining affidavit was, however, that the undertakings were too vague and, in any event, inadequate. I think the answer to these objections is that compliance with the *civiliter modo* requirement can only be determined properly after the commencement of the appellant's activities. If the respondent at that stage believes that these activities are more than reasonably injurious to its interests, its position will be no different from that of any other owner of servient property. It will be able to seek protection against such conduct from the court.

[40] For these reasons the following order is made:

'1. The appeal is allowed with costs, including the costs occasioned by the employment of two counsel.

2. The order of the court *a quo* is set aside and for it is substituted the following:

(a) 'The applicant's application to supplement its founding affidavit is granted.

(b) It is declared that the applicant is entitled to undertake the following activities on Remaining Extent of the farm Brakfontein 117, Registration Division I.S., Mpumalanga Province ('the property'), by virtue of applicant's right to coal as held under Notarial Cession of Mineral Rights K3770/2001RM together with its mining authorisation 13/2003 granted in terms of section 9(1) read with section 9(3)(e) of the Minerals Act 50 of 1991, as read with the definition of "old order right" in item 1 of Schedule II to the Mineral and Petroleum Resources Development Act 28 of 2002.:

(i) to construct a stream diversion on the property at the point marked on the map annexed to respondent's answering affidavit as annexure 'H4';

(ii) to utilise 60.2925 hectares on the northern portion of the property, as indicated on annexure 'H4', for open cast coal mining purposes.

(c) The respondent is directed to pay the costs of the application, including the costs occasioned by the costs of two counsel.'

.....

F D J BRAND
JUDGE OF APPEAL

Concur:

Howie P
Mthiyane JA
Mlambo JA
Theron AJA