

MINERAL LAW AND THE DOCTRINE OF RIGHTS: A MICROSCOPE OF MAGNIFICATION?

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SUMMARY

The doctrine of rights has become part of private law jurisprudence. In this article the application of the doctrine in two decisions dealing with surface support in mineral law is examined. It is argued that the decision of Kriegler J in *Elektrisiteitsvoorsieningskommissie v Fourie*, namely, that the right to surface support is an entitlement, is more correct than *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* in which it was decided that the right to surface support is a competence. It is submitted that depending on the legal location of the entitlement in the relationship between owner and miner of land one may simply refer to either an owner's entitlement to surface support or a miner's entitlement to undertake opencast-cast mining.

1 INTRODUCTION

South African private law may be analysed in terms of the doctrine of rights. During the 1950's the Dooyeweerdian doctrine of (subjective) rights and Jean Dabin's classification of rights were introduced into South African legal theory largely through the writings¹ of WA Joubert.² Through his analysis and the subsequent work of a number of his students and their students this doctrine was accepted³ and adapted for South African law.⁴ A detailed exposition of the theory as such falls beyond the scope of this article and the reader is referred to other works in this regard.⁵ The theory does not

¹ Joubert *Persoonlikheidsreg* (1953) 119-21; and "Die Realiteit van die Subjektiewe Reg en die Betekenis van 'n Realistiese Begrip daarvan vir die Privaatreg" 1958 *THRHR* 12 and 98.

² See Van der Vyver "The Doctrine of Private-law Rights" in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 201; and Van der Walt "The Doctrine of Subjective Rights: A Critical Reappraisal from the Fringes of Property Law" 1990 *THRHR* 316.

³ *Universiteit van Pretoria v Tommie Meyer Films* 1977 4 SA 376 (T); and Neethling, Potgieter and Visser *Law of Delict* 5ed (2005) 45.

⁴ Van der Walt 1990 *THRHR* 316-317.

⁵ See in general Van der Vyver and Joubert *Persone en Familiereg* 2ed (1985) 1-32; Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 2ed (1982) chapters 10-12; Van der

necessarily provide the only or best explanation of the law of rights or the property law.⁶ The advantage of this theory is that it provides a reasonably well worked-out, consistent and clear framework for the explanation of the principles of private law on a fairly elementary level.⁷

The doctrine of rights *inter alia* fulfils an important role in property law in distinguishing not only between rights and objects but also between things (such as corporeal objects) and patrimonial rights serving as the object of rights (the so-called *res incorporalis*) and provides a better understanding of the notion of property.⁸ The doctrine distinguishes between personal rights and real rights for purposes of the distinction between property law and the law of obligations as well as the distinction between real rights and personal rights for purposes of registration of new categories of real rights in the deeds office.⁹ The determination of the appropriate remedy is also dependent on the classification of a right as real or personal.¹⁰ The distinction between the two inherent relationships of a right¹¹ has played an important role in showing the weaknesses of the different theories which seek to identify real rights and distinguish them from personal rights in the absence of a closed system of real rights (*numerus clausus*).¹² Generally the doctrine assists in understanding the nature of real rights.

The courts have on two occasions also made use of the doctrine of rights in the analysis of surface and subterranean support in mineral law. The doctrine was used in *Elektrisiteitsvoorsieningskommissie v Fourie*¹³ to decide whether it was possible for Eskom to expropriate an owner's right to lateral, surface and subterranean support. In the recent decision of *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*¹⁴ the right to lateral and surface support within the context of the ambit of mineral rights to coal was again at issue. In resolving the issues, De Villiers J emphasised the importance of the doctrine of rights as follows:¹⁵

"It seems that for a more accurate understanding of the so-called right to vertical or subjacent support it is necessary to use a microscope with much greater magnification. This is available in the construction by academic writers of the subjective right and in particular a real right".

Vyver *Huldigingsbundel vir WA Joubert* 201; Neethling, Potgieter and Visser 45-48; Van der Walt and Midgley *Principles of Delict* 3ed (2005) 76-77; and Cronje and Heaton *The South African Law of Persons* (1999) 1-5.

⁶ See for instance some of the criticism against the doctrine: Van der Walt 1990 *THRHR* 316; Lewis "Book Review Sakereg" 1991 *SALJ* 369; Kleyn and Boraine *Silberberg and Schoeman's Law of Property* 3ed (1992) 9-15; and Kleyn "Dogmatiese Probleme Rakende die Rol van Onstoflike Sake in die Sakereg?" 1993 *De Jure* 1.

⁷ Olivier, Pienaar and van der Walt *Law of Property Students Handbook* (1992) 3.

⁸ See in general Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 4ed (2002) chapter 2.

⁹ S 3(1)(r) of the Deeds Registries Act 47 of 1937; and see in general Badenhorst, Pienaar and Mostert 15 and 54-55.

¹⁰ See Sonnekus and Neels *Sakereg Vonnisbundel* 2ed (1994) 88.

¹¹ See par 5 below.

¹² See in general Badenhorst, Pienaar and Mostert 51-54 and 56.

¹³ 1988 2 SA 627 (T) (hereinafter "the Eskom decision").

¹⁴ 2006 1 SA 350 (T) (hereinafter "the Anglo decision").

¹⁵ 381C-D.

In this article the suggested approach of De Villiers J is welcomed, however, an examination is undertaken to see whether the greater magnification and understanding of surface and subterranean support to be provided by the holder of mineral rights through the doctrine of rights was indeed achieved.

2 TERMINOLOGY

In the *Eskom* decision reference is made to the “right to lateral and surface support and the right to subterranean support”.¹⁶ It is submitted at the outset that a distinction should be drawn between the right to lateral support and the right to surface support insofar as different right holders, relationships and areas of private law are concerned. Lateral support involves the relationship between neighbouring owners of land, whilst surface support involves the relationship between a holder of mineral (or mining) rights and the landowner in respect of the same land.¹⁷ It is arguable that the first relationship is governed by neighbour law¹⁸ and the second relationship by mineral law.¹⁹ The right to lateral support has developed and is acknowledged in the context of mineral law.²⁰

In both the *Eskom* and *Anglo* decisions the courts were aware of the distinction between lateral and surface support. In the *Anglo* decision it was submitted by counsel on behalf of the applicant that the duty of the mineral right holder *vis-à-vis* the owner of the land in regard to surface support differs in material respects from the duty of lateral support owed between neighbouring landowners, namely:²¹

- (a) the owner of the land and the holder of the mineral rights hold rights in the same land not in neighbouring lands;
- (b) in cases of conflict the entitlement of the mineral right holder to exploit the relevant minerals takes precedence over the entitlement of the surface owner to enjoy undisturbed possession; and
- (c) the process of mining for minerals under the surface of the land necessarily involves letting down the surface.²²

It was stated by counsel in the *Anglo* decision that in *London SA Exploration Co v Rouliot*²³ it was decided that the English law to lateral

¹⁶ See 630I: “Die reg van laterale en oppervlaktestut en die reg op stut deur die onderliggende grondlaag.”

¹⁷ Van der Walt “Onteiening van die Reg op Laterale en Onderstut – *Eskom v Fourie*” 1987 *THRHR* 462 473.

¹⁸ See further Van der Merwe *Sakereg* 2ed (1979) 197-201; Badenhorst, Pienaar and Mostert 116-117.

¹⁹ See further Franklin and Kaplan *The Mining and Mineral Laws of South Africa* (1982) 113-141; and Badenhorst (original text by Franklin) “Mining and Minerals” (1999-first reissue) Vol 18 *LAWSA* par 27-40.

²⁰ See Van der Walt 1987 *THRHR* 473.

²¹ 363A-B. See further Van der Walt 1987 *THRHR* 473.

²² It seems as if “letting down the surface” is to be seen as a disturbance of the surface of the land: 363B-C.

²³ (1891) 8 SC 74 92 94.

support was also part of Roman Dutch law.²⁴ It was further argued on behalf of the applicant that the statement in *Coronation Collieries v Malan*²⁵ that “the same principles apply to the right of vertical and to the right of lateral support” was incorrect.²⁶

After an analysis of the said decisions and *Regal v African Superslate (Pty) Ltd*,²⁷ De Villiers J decided in the *Anglo* decision that the *Rouliot* and *Coronation* decisions should be followed, because:

- (a) these judgments have been “in operation” for more than a hundred years. A court should not readily disturb the older judgments;²⁸
- (b) the reason for the adoption in these judgments of the principle of support was not the pedigree of the rule. The motivation of the judges in deciding the property law issue in *Rouliot* was to lay down a rule because they thought it was just and equitable and the rule enjoyed universal recognition;²⁹ and
- (c) the *Regal* decision does not require the *Rouliot* and *Coronation* decisions to be abandoned.³⁰

In the cases relied upon and those under discussion, the right to lateral and surface support are referred to in the same breath. I will follow this approach except where the court specifically refers to either surface or lateral support. Towards the end of my discussion I shall refer to surface support because it is the duty under discussion. Withdrawal of surface support by a miner may of course result in withdrawal of lateral support owed by the owner of land to his or her neighbour. Nonetheless they remain separate “rights” involving different parties and different legal relationships.

As the facts of the above mentioned decisions will illustrate, it is possible to have a holder of mineral rights and a holder of a mining right in respect of the land held in ownership by the owner. In this article references to a holder of mineral rights should also be construed as reference to holders of mining rights in respect of the land.

3 ELEKTRISITEITVOORSIENINGSKOMMISSIE V FOURIE

Briefly, the predecessor in title of the owner of land retained the right to surface support to land in respect of “mining operations” by reservation thereof in a prospecting contract with a prospecting company.³¹ The mineral

²⁴ 363.

²⁵ 1911 TPD 577 591 596.

²⁶ 363G.

²⁷ 1963 1 SA 102 (A).

²⁸ 372F.

²⁹ 372G-H/I.

³⁰ 372I.

³¹ 630J-631A: “Die gesegde prospekterder sal in die uitvoering van mynoperasies verband met die gesegde steenkool, op en onder die gesegde eiendom, die oppervlak van die gesegde eiendom ten volle beskerm, en nog die pilare en stutte in stand hou, om die gesegde oppervlakte te beskerm teen inval.” This seems to be an unusual reservation

right to coal was acquired in terms of the prospecting contract and ceded by the prospector to Matla Coal Ltd.³² In terms of a mineral lease agreement between Matla and a joint venture of mining companies (“JV companies”), the JV companies mined the land for coal against payment of royalties to Matla. In terms of an agreement of sale the JV companies supplied Eskom exclusively with coal. In order to supply Eskom, as purchaser,³³ with enough coal the JV companies intended to mine the land by open-cast mining methods and not by conventional underground mining methods.³⁴ Open-cast mining would have resulted in the withdrawal of the surface support of the land. Fourie, as owner of land, (and neither the mineral right holder or the holder of mining rights) was, therefore, entitled to the lateral, surface and subterranean support of the land.³⁵ Due to Fourie’s unwillingness to sell the right of support to Eskom, Eskom attempted to expropriate the right to support in terms of section 43 of the Electricity Act 40 of 1958.³⁶ In a nutshell, the purchaser of coal (as an outsider) intended to expropriate the right to surface support held by the owner of land to enable the miners of coal on the land, as sellers, to supply their purchaser with enough coal.

At issue was whether the owner of land’s right to lateral, surface and subterranean support to the land could be expropriated by or acquired by Eskom in terms of section 43 of the Electricity Act 40 of 1958.³⁷

Kriegler J held that the so-called right to lateral, surface and subterranean support was an entitlement arising from ownership or an incident of ownership.³⁸ Kriegler J was of the view that the argument presented on behalf of Fourie was a principally sound guiding light in the “maze”. It involved an inter-relationship between two legal subjects, namely the owner of the land and the holders of mineral rights, and a legal object, namely the land in its totality. From ownership of land arose certain entitlements in respect of land. At the same time the mineral right holder had entitlements in respect of the land as a result of his relationship to the land.³⁹ In addition there was a relationship between the two subjects in terms of which they have certain claims and reciprocal duties. The entitlements of an owner of land arose by operation of law from ownership and could be termed “natural”, “common” or “incident” to the ownership of the soil.⁴⁰ The court

because reservations of mineral rights took place under prescribed instances in the Deeds Registries Act 47 of 1937. See further Badenhorst and Mostert *Mineral and Petroleum Law of South Africa: Commentary and Statutes* (2004- first published) (Revision service 2) 3-2 to 3-3.

³² The terms of the cession of mineral rights (and the reservation of the right to surface support in the cession) do not appear from the reported decision.

³³ See 636D and G/H read with 642I-J.

³⁴ See 628C-630E.

³⁵ 630H/I-J

³⁶ See 631E-G; and s 43 is set out at 633A-I. See further 637D-E.

³⁷ 631H-J 633A.

³⁸ 642A.

³⁹ 641G-H.

⁴⁰ 641H-I.

expressed its doubt as to whether the right to lateral and surface support truly reflected a right.⁴¹

Kriegler J also held that the conclusion is inescapable in that the claim of the owner to support of the surface of the land is irrefutably attached to the interrelationship between the owner and the holder of the mineral right. Equally unassailable is the conclusion that the right to surface support can only be vested in either of the two legal subjects.⁴² The court reasoned that the idea that the owner's right to surface support may exist apart from the owner's relationship to a subject having an interest in the land is notionally untenable and capable of rejection.⁴³ According to the court this would postulate a "right" without any economic substance and which is unenforceable and inalienable.⁴⁴

The first four heads of arguments relied upon by counsel on behalf of Fourie formed the basis of the decision and were explicitly accepted by the court as correct⁴⁵ and may briefly be summarized as follows:

- (a) Eskom did not have any interest in the land or the mineral rights in respect thereof. With regards to the land, the use thereof and the exploitation of coal, Eskom was an outsider. Eskom was merely the holder of the sole right to the purchasing of coal from the farm after mining thereof and did not have a right to subside the surface of the land.⁴⁶
- (b) The right to lateral, surface and subterranean support which Eskom intended to expropriate was not an independent right or a right that could be separately expropriated.⁴⁷
- (c) The detached and abstract right to allow the withdrawal of the surface support was not capable of separate existence or acquisition by Eskom insofar as the right was irrefutably linked to the legal relationship between the owner and holder of mineral rights,⁴⁸ and
- (d) Because the right to surface and subterranean support was not needed by Eskom itself (but the miner), section 43 of the Electricity Act did not find application.⁴⁹

In passing it may be mentioned that the court in its analysis of the nature of the right to lateral, surface and subterranean support in (b) above, relied on the subtraction from the *dominium* test by stating that a subtraction from *dominium* does take place but a corresponding right is not acquired by Eskom, as is required by the subtraction from the *dominium* test.⁵⁰ The court also held that the right to lateral, surface and subterranean support was not

⁴¹ 641I-J.

⁴² 642F-G.

⁴³ 642G.

⁴⁴ 642G/H.

⁴⁵ 642I-J.

⁴⁶ See 636D-H.

⁴⁷ See 636I-639A/B.

⁴⁸ See 639b-C/D.

⁴⁹ See 639D-G.

⁵⁰ 638H.

a real right because it lacked the essential requirement of a real right of being enforceable against the whole world.⁵¹ The criticism against both the subtraction from the *dominium* test⁵² and the Personalist theory⁵³ with regard to distinguishing between real and personal rights is well known and need not be repeated.⁵⁴

There is an easier explanation for the right to surface support not being a real right. The court's finding that the right to surface support can only be vested in either the owner of the land or the mineral right holder means that the entitlement to supply or withdraw surface support is either encompassed by ownership or the mineral right. An entitlement in the air will not do. As an entitlement, the "right to surface support" forms the content of an existing real right and does not constitute a real right in itself.

Interestingly the court seemed to agree with the definition of expropriation presented by counsel on behalf of Fourie, namely that the expropriator acquires property and the expropriatee is divested of that property.⁵⁵ Reference is also made to the argument that the element of acquisition in an expropriation distinguishes expropriation from the exercise of the police power which merely restricts the owner's entitlement of disposal over his or her land.⁵⁶ In the new constitutional dispensation, the foregoing definition of expropriation and its distinction from the police power may, however, be qualified as being pre-constitutional expropriation jurisprudence if interpretation of the property clause takes place.⁵⁷

4 ANGLO OPERATIONS LTD V SANDHURST ESTATES (PTY) LTD

At issue in this decision was *inter alia* whether the holder of the right to coal, Anglo Operations Ltd,⁵⁸ was entitled to utilise a certain portion of Sandhurst Estates (Pty) Ltd's⁵⁹ property for open-cast mining purposes. Farming was

⁵¹ 638J-639A/B.

⁵² In *Cape Explosives Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA) 587D-E; [2001] All SA 321 (SCA) 328b-c the subtraction from dominium test was used by the Supreme Court of Appeal without questioning the soundness of the test. See further Badenhorst, Pienaar and Mostert 64-66.

⁵³ The notion of a real right being enforceable against the whole world seems to have become trite law: In *AXZS Industries v AF Dreyers (Pty) Ltd* 2004 4 SA 186 (W) 196F/G, Willis J stated: "A real right, such as ownership, is as every first year law student knows, enforceable against the whole world."

⁵⁴ As to criticism against the Personalist theory see: Van der Merwe 61-63, "Things" vol 27 *LAWSA* (first reissue) 2002 141; Sonnekus and Neels 89-93; Badenhorst, Pienaar and Mostert 52-54; Van der Vyver "Expropriation, Rights, Entitlements and Surface Support of Land" 1988 *SALJ* 1 12-16. As to criticism against the subtraction from the dominium test, see Van der Merwe 80-83; Sonnekus and Neels 102-104; Badenhorst, Pienaar and Mostert 59.

⁵⁵ 637A/B.

⁵⁶ 637D.

⁵⁷ See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 4 SA 768 (CC) [59]; 2002 7 BCLR 702 (CC) [59].

⁵⁸ Hereinafter "Anglo".

⁵⁹ Hereinafter "the Sandhurst Estates".

conducted on the property by Sandhurst Estates.⁶⁰ Anglo contended that it was entitled to mine by open-cast methods upon the land rather than underground methods because the former method would result in optimal exploitation of the coal reserve to be mined.⁶¹ The decision involved an examination of the common law, statutory rights and ancillary entitlements of the holder of mineral rights as conferred in the cession of the mineral rights to coal.⁶² The determination of the parameters of the rights aspects will not be discussed fully in this article but rather the court's construction of the right to lateral and surface support.

De Villiers J relied on the following conclusion reached by Van der Vyver in his discussion of the *Eskom* decision;⁶³

"Whereas a competence signifies what a person, by virtue of being a legal subject, in the juridical sense can do (is capable of doing) (without reference to a legal object), an entitlement is said to entail that which a legal subject, by virtue of having a right, may lawfully do with the object of his right.

My view of this circumscription of an entitlement is that it would perhaps be more accurate to classify the claim of an owner and of other persons having a right to the integrity or inviolateness of the object of their right as part of the subject-third party relationship – rather than trying to construct it as an ingredient of the subject-object relationship (that is, an entitlement). The implication of this approach would be, *inter alia*, that the so-called right to lateral, surface and subterranean support cannot be transferred to another person (and can therefore also not be expropriated); though the owner or other person having a right can renounce that claim, in which event the corresponding obligation of third parties to refrain from impairing the object would lapse".⁶⁴

With reference to the conclusion drawn by Van der Vyver, De Villiers J held:⁶⁵

"In my view the above analysis accurately reflects the nature of the so-called 'right to lateral support'. It is a capacity or competence. It cannot be transferred. It can only be 'renounced'".⁶⁶

According to De Villiers J the answer lies in the question whether the owner of land abandoned the "right to lateral support".⁶⁷

"What is required, therefore, is that in the grant of the mineral rights there should be an intention to abandon or waive the owner's competence to claim a prohibitory interdict or damages for breaches of the obligation to respect the owner's use and enjoyment of the property".⁶⁸

⁶⁰ See 355B-D.

⁶¹ See 362I.

⁶² See 358E-F.

⁶³ 1988 *SALJ* 11.

⁶⁴ 382B/C-D.

⁶⁵ 382D-E.

⁶⁶ Hereinafter "the first *dictum*" of De Villiers J.

⁶⁷ 382E-F.

⁶⁸ Hereinafter "the second *dictum*" of De Villiers J.

5 DISCUSSION

Generally the courts' reliance on the doctrine of rights may be welcomed. With great respect, Van der Vyver's conclusion was incorrectly interpreted in the *Anglo* decision and the doctrine of rights was applied incorrectly. As will be shown, the Eskom decision is not only correct but can satisfactorily be explained within the doctrine of rights.

At the outset, a clear distinction should be drawn between a competence, rights and entitlements. Van der Vyver maintains that insofar as private law is concerned, three distinct meanings of the word "right" must be clearly distinguished:⁶⁹

- (a) "right" in the sense of a *competence*; that is the capacity of a person to exercise the functions of a legal subject, which capacity is implicit in legal subjectivity and finds expression in a person's legal status as influenced, on the one hand, by subjective attributes of the person concerned (such as age, race,⁷⁰ sex and mental capacity) and, on the other hand, by other "external or incidental" circumstances that have a bearing on the possession of a person's rights and obligations (such as domicile and nationality, economic disabilities, adoption and legitimacy);
- (b) "right" in the sense of a claim of a legal subject as against other persons to a legal object, for which one should reserve the term *right* and which is commonly, and with a view of the nature of the object concerned, classified into the categories of real rights, immaterial property rights, personality rights and personal rights; and
- (c) "right" in the sense of *entitlement*, which constitutes the content of a right and denotes what a person, by virtue of having a right to a particular legal object, may lawfully do with the object of his right.

Secondly, a distinction should be drawn between different rights and their corresponding legal objects.⁷¹ Things, immaterial property, performances and aspects of personality are legal objects.⁷² As already indicated the rights to a thing, performance, immaterial property and aspects of personality are, respectively, called real rights, personal rights, immaterial property rights and personality rights.⁷³

Thirdly, a right is composed of two inherent relationships:⁷⁴

- (a) The *subject-object* relationship, that is, the relationship between the person having the right and the object of his right. In terms of this

⁶⁹ Van der Vyver (1988) 209, 1988 *SALJ* 1 6.

⁷⁰ The importance of race in the apartheid laws has been replaced with the importance of race for purposes of black economic empowerment.

⁷¹ See further, Van der Vyver (1988) 231-232.

⁷² To this may be added immaterial property as recognised by Neethling "Persoonlike Immaterieelgoedereregte: 'n Nuwe Kategorie Subjektiewe Regte? 1987 *THRHR* 316 320-324.

⁷³ See Van der Vyver (1988) 231-232. To this list may be added immaterial property rights as recognised by Neethling 1987 *THRHR* 320-324.

⁷⁴ Van der Vyver (1988) 211.

relationship the holder of the right has the entitlement to use and dispose of his legal object; and

- (b) The *subject-third parties* relationship, that is the relationship between the person having the right and all other legal subjects. The content of this relationship gives expression to the legitimate expectation of the holder of the right that the object of his right should be left intact and others should endure the exercise of his entitlements.

With this in mind it becomes clear that the right to lateral and surface support cannot be a competence.⁷⁵ A legal competence pertains to what a person *can* do (without reference to a legal object) by reason of his being a legal subject with certain personal attributes and while being resigned to particular contingencies which, in the eyes of the law, have a bearing on his status.⁷⁶ The right to lateral, surface and subterranean support does not deal with what a legal subject can do by virtue of being a legal subject and indeed refers to land as its legal object. An entitlement denotes what a person *may* do with the object of his right.⁷⁷ The court's reference in the first dictum and second dictum of De Villiers J above, to "lateral support" instead of surface support, is incorrect.

The second dictum of De Villiers J seems to suggest that the entitlement to conduct open-cast mining can be acquired if the owner waives the remedies that are available on withdrawal or a threat of withdrawal of surface support. Waiver of the right to surface support can of course take place. It is submitted that it should rather, as will be seen below, be construed as a transfer of an entitlement to the holder of a mineral right. The waiver of an entitlement in the sense of escaping from the relationship between landowner and holder of a mineral right does not seem sound as an entitlement has to be encompassed by a right.

Due to the wide meaning of the notion "property",⁷⁸ the following formulation of a real right by the court in *Anglo* is unfortunate: "In a real right the object of the right is a thing such as property."⁷⁹ The reference by the court, albeit probably a typing error, to "the integrity or inviolateness of the *subject* of his right" (my emphasis) should rather be to the object of his right.

Despite the good intentions of De Villiers J in the *Anglo* decision, it is respectfully submitted that the doctrine of rights did not, as it ought to have, serve as a microscope with greater magnification.

Van der Vyver's dilemma with regard to the right to lateral, surface and subterranean support as an entitlement was the fact that the court held that this "right" could not exist in isolation from the owner of the land or holder of

⁷⁵ I concede that I labelled the right to navigate a river as a competence in Badenhorst "The Use of Public Rivers by the Public – *Transvaal Canoe Union v Butgereit* 1986 4 SA 207 (T)" 1987 *TSAR* 108. Even though the right of members of the public to navigate a river may differ from the right of an owner to lateral and surface support, a public law right to navigate may have been a better choice.

⁷⁶ Van der Vyver (1988) 209.

⁷⁷ Van der Vyver (1988) 211.

⁷⁸ See Badenhorst, Pienaar and Mostert 19-21.

⁷⁹ 381E/F.

a mineral right and could not separately be expropriated by an outsider. This dilemma forced Van der Vyver to postulate the right to lateral, surface and subterranean support not as part of the subject-object relationship but as part of the subject-third parties relationship of a right. According to Van der Vyver it is with the claim of a right holder to the integrity or inviolateness of the object of his right that the question of lateral, surface and subterranean support comes in.⁸⁰ In other words, the fact that Van der Vyver did not recognise the right to surface support as an entitlement in terms of the subject-object relationship did not mean he regarded it as a competence. In his construction, the right to lateral, surface and subterranean support still figured in the context of the content of a right.

Van der Walt⁸¹ illustrated that the idea that aspects of a right may not be alienated or may only be alienated to certain persons is not unknown in our law. According to him entitlements such as the entitlement of vindication and the entitlement of alienation or the kernel ("kern") of ownership cannot be alienated apart from ownership.⁸² The *Eskom* decision is also explained on the basis that an owner of land can transfer or lose some of his or her entitlements towards the land while remaining owner, but it is impossible to separate the protection afforded to an owner against interference from the ownership itself.⁸³

It should be noted that if the right to withdraw surface support is granted to the holder of mineral rights the remedies of the owner against the mineral right holder for collapsing the land will fall away. If an outsider, such as Eskom, could have acquired the right to withdraw the surface support of the land and this right is not transferred to the holder of the mineral right the owner would have retained its remedies against the miner. This scenario is, however, not possible in terms of the *Eskom* decision.

The so-called right to lateral, surface and subterranean support deals with what the owner of the land or the holder of a mineral right may do with the land. Krieglér J made it clear in the *Eskom* decision that this entitlement vested in either the owner of the land or the holder of a mineral right. The fact that lateral and surface support cannot be transferred to an outsider or expropriated by an outsider does not mean an entitlement is not present.

By analogy, a praedial servitude is imposed on the servient tenement to the benefit of the owner of the dominant tenement.⁸⁴ For purposes of a praedial servitude of right of way the entitlement to walk across or to drive vehicles over it is vested in the owner of the dominant tenement. If not granted, the entitlements to drive cattle across the land and graze on the servient land would remain vested in the owner of the servient tenement. The particular entitlement of right of way can only be exercised by the owner of the dominant tenement. The entitlement of use and enjoyment as encapsulated by the limited real right of a servitude cannot be exercised by a

⁸⁰ 1988 SALJ 11; *Anglo* decision 381G.

⁸¹ 1987 SALJ 473.

⁸² 473-474.

⁸³ Van der Walt *Law of Property Casebook for Students 2ed* (1995) 43.

⁸⁴ Badenhorst, Pienaar and Mostert 310.

third owner of land adjacent to the dominant tenement.⁸⁵ In that sense a right of way over a servient tenement can not be acquired by a third owner of land which is not a dominant tenement. Even the state cannot expropriate a praedial servitude and acquire it, if the state is not becoming the owner of a dominant tenement. Acquisition or expropriation of a personal servitude in the above circumstances is of course possible. The argument is, however, based upon the content of a praedial servitude.

Therefore, it is submitted that the approach of Kriegler J in the *Eskom* case is more correct by regarding the right to lateral, surface and subterranean support as an entitlement even though it can only be vested in the owner of the land or the holder of mineral rights. As argued before, the right to surface support is either encapsulated by ownership or a mineral right. The "right" to lateral support can, however, not be a real right *per se*.

It has been argued over the years that a mineral right has as its content the following entitlements:⁸⁶

- (a) *use*, which entails the entitlement to use the land for the purpose of exploitation of minerals to which the mineral rights relate. The entitlement includes the following: (i) the entitlement to enter upon the land for purposes of prospecting for and mining of minerals; (ii) the entitlement to prospect for minerals; and (iii) the entitlement to mine the minerals;
- (b) *disposition*, which entails the entitlement to decide what may and may not be done on the land for purposes of the exploitation of minerals;
- (c) *alienation*, which entails the entitlement to cede the mineral rights in respect of the land to another person or to grant a prospecting right or mining right in respect thereof;
- (d) *encumbrance*, which entails the entitlement to grant a limited real right (such as a usufruct or mortgage bond) with regard to the mineral right;
- (e) *resistance*, which entails the entitlement to resist any unlawful interference with the exercise of the mineral right; and
- (f) *reversionary or minimum entitlement*,⁸⁷ that is, the entitlement to regain any of the above entitlements⁸⁸ if they have been transferred for a fixed period and the period has lapsed or terminated, or the entitlement to

⁸⁵ The maxim *servitus servitutis esse non potest* (meaning that no further servitudes can be imposed on an existing servitude) applies: Van der Merwe and De Waal *The Law of Things and Servitudes* (1993) par 217.

⁸⁶ Badenhorst "Minerale Regte en Eiendomsreg – Skeiding en Samesmelting – *Du Preez v Beyers*; *Beyers v Du Preez*" 1989 *De Jure* 379 390; Badenhorst and Van Heerden "Betekenis van die Woord Minerale – *Roets en 'n ander v Secundior Sand Bpk*" 1989 *TSAR* 452 459; Badenhorst "The Revesting of State-held Entitlements to Exploit Minerals in South Africa: Privatisation or Deregulation?" 1991 *TSAR* 113 115; Badenhorst and Roodt "Artikel 5(1) van die Mineralewet 50 van 1991: 'n Herformulering van die Gemeenereg?" 1995 *THRHR* 1 10; and Badenhorst and Mostert 3-11 to 3-12.

⁸⁷ See in general Badenhorst *Die Juridiese Bevoegdheid om Minerale te Ontgin in die Suid-Afrikaanse Reg* (1992 – LLD thesis UP) 164-182.

⁸⁸ Upon registration of cession the reversionary entitlement is also transferred together with the other entitlements.

exercise an entitlement which has been restricted, after removal of the restriction.⁸⁹

The above list of entitlements does not purport to provide a complete list of all the entitlements of a mineral right.⁹⁰ Ancillary entitlements have also been added to the list. Within this context the following principles regarding the content of a mineral right are applicable:

- (a) a reservation or grant of a mineral right by implication includes all ancillary entitlements incident to the grant, being those that are directly necessary to the enjoyment of the right granted;⁹¹
- (b) what is necessarily ancillary depends on the facts of each case;⁹²
- (c) the mineral right holder is not entitled to remove from the land more than is granted to him;⁹³ and
- (d) the right to mine one mineral does not authorise the taking of another mineral with which it was found in association.⁹⁴

It was held in the *Anglo* decision that the holder of the mineral right would be entitled by exercising his primary right to conduct underground mining but not open-cast mining, unless something to the contrary appears from the cession of mineral rights.⁹⁵ The court reasoned that parting with surface support by the owner of land, as grantor, is neither a *naturalia* of a grant of a mineral right or an ancillary right implied by law.⁹⁶ According to the court an owner of land could not be deprived of support of the land without expressly or tacitly agreeing thereto.⁹⁷

The entitlement to mine may, depending on the parameters within which the mineral rights were granted, include the entitlement to conduct underground mining but not open-cast mining, unless expressly or tacitly granted. The so-called right to surface support can be explained as follows: If the entitlement to surface support is vested in the owner of land, the holder of a mineral right, for instance, lacks the entitlement to undertake open-cast mining. The converse of the entitlement to surface support is the duty of the holder of a mineral right to provide such support. If the entitlement to surface support is not vested in the landowner, the holder of the mineral right is entitled to undertake open-cast mining. On these lines De Villiers J held in the *Anglo* decision:

⁸⁹ The existence of this entitlement explains why a mineral right, just like ownership, had the characteristic of elasticity.

⁹⁰ Franklin and Kaplan 15; and Badenhorst and Roodt 1995 *THRHR* 11.

⁹¹ *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd supra* 520D-E; and *Anglo* decision 375B-C.

⁹² 540F.

⁹³ 521E.

⁹⁴ 522F.

⁹⁵ The *Anglo* decision 375C-380G.

⁹⁶ 375G; and see further 377B-380E.

⁹⁷ 373c-D 375G 380F/G.

“The [mineral right holder] has no entitlement to let down the surface and the [owner of the land], on the other hand, is entitled, as owner of the surface, not to have the surface let down”.⁹⁸

It is submitted that one should rather refer to the owner’s entitlement of surface support in the first instance. In the second instance, one should merely refer to the entitlement to undertake open-cast mining or the entitlement to mine (in broad terms). As mentioned before, the fact that the entitlement to surface support can only be vested in the owner of the land or holder of a mineral right to the land does not mean it does not constitute an entitlement.

In passing, one needs to note that the decision in *Anglo* was delivered on 23 September 2004, at a time when the Minerals Act 50 of 1991 had already been repealed by the Minerals and Petroleum Resources Development Act 28 of 2003 (MPRD Act).⁹⁹ The introduction of the MPRD Act on 1 May 2004 does not, however, impact on what was decided by the court. In terms of item 7(1) of Schedule II of the transitional arrangements in terms of the MPRD Act¹⁰⁰ an “old order mining right” remains in force until 30 April 2009, subject to the terms and conditions under which it was granted. In other words, the terms regarding the ambit of the “old order mining right” remain unchanged, unless they are contrary to a provision of the Constitution of the RSA.¹⁰¹ To the extent that the terms of the grant of an “old order mining right” forms the borderline between being entitled to surface support or not, these rights will continue to exist on the same terms during the period of transition. The content of new order mining rights to minerals, converted from old order mining rights, will depend on the content of the “old order mining right”. Hence in this context, the *Eskom* and *Anglo* decisions remain important for the future.

De novo grants of mining rights to minerals by the Minister of Mineral and Energy Affairs in terms of the MPRD Act will depend on the terms of the grant. In this regard, both the *Eskom* and *Anglo* decisions will by analogy be important in interpretation of these new rights and their parameters.¹⁰² What will change is that the owner of land will play no role in the granting of new mining rights even though the relationship between the owner of the land and the miner might become riddled by conflict. The legal issues that would arise where the state expressly or implicitly grants the right to mine by open-cast mining to a mining company in respect of a farm are a cause for concern and would require future analysis section 54 of the MPRD Act which, *inter alia*, makes provision for reaching an agreement about payment or determination of compensation if the regional manager is of the opinion

⁹⁸ 397F.

⁹⁹ 361E: The court permitted an amendment of the applicant’s notice of motion to make allowance for the provision of the MPRD Act.

¹⁰⁰ As to the transitional arrangements in terms of Schedule II of the Act, see in general Badenhorst and Mostert 25-1ff; Dale *South African Mineral and Petroleum Law* (2005-first published) Service issue 3 SchII-Iff.

¹⁰¹ Item 7(4).

¹⁰² See also Dale MPRDA-138.

that the owner of land may suffer damage as a result of, for instance, mining operations.

6 CONCLUSION

The “right to surface support” is not a competence in terms of the doctrine of rights. In this regard the *Anglo* decision is incorrect. Instead it is an entitlement, as was correctly decided in the *Eskom* decision. Ownership of land contains such an entitlement. If the entitlement was transferred to the holder of mineral rights it forms part of the content of a mineral right (or a new order mining right). The entitlement to surface support of the land can, however, only be alienated to or acquired by the holder of a mineral right. As such it is not capable of alienation, transfer or expropriation by a party external to the relationship between the owner of land and the holder of mineral rights.

The entitlement to surface support forms part of the legal relationship between the owner of land and the holder of a mineral right. The entitlement to enjoy surface support can remain vested in the owner of the land, whilst the miner is only entitled to underground mining by virtue of a mineral right. The right to conduct open-cast mining may be vested in the holder of mineral rights, whilst the owner of the land is not entitled to surface support. As in the past, it will be the task of the courts; as in the *Eskom* and *Anglo* decisions, to draw this division by looking for the presence or absence of the entitlement to surface support. Policy considerations such as the importance of mining *vis-à-vis* surface use and especially the doctrine of rights, if applied correctly, could assist in, metaphorically speaking, drawing the line underneath or on the land. Just like any doctrine, if the doctrine of rights is used as a microscope of magnification, it may also magnify an error instead of sound theory.