ANGLO OPERATIONS LTD V SANDHURST ESTATES (PTY) LTD (2006) 1 ALL SA 230 (T)

Importance	This is an extremely complex decision that mainly deals with the relationship between the mineral rights holder and the surface owner as regards the concept of 'lateral support'. The concept of lateral support is a very broad one that includes adjacent (implicating land uses that affect neighbouring properties) and subjacent support (implicating land uses that affect the surface). In this case, Anglo Operations' claim that it had an 'ancillary right' to conduct open-cast mining operations on the respondent's property was conceived as impacting on this concept of lateral support. The case is significant for affirming that the doctrine of lateral support is recognized in South African law and that the surface owner's renunciation to such support (in both its adjacent and subjacent aspects) is not 'implied by the law' into the granting of a mineral right – *it has to be expressly or tacitly agreed upon by the mineral rights holder and surface owner*. Recognition of this capacity on the part of surface owners is potentially hugely significant because it means that – at common law – a landholder cannot be deprived of their use of the surface simply by operation of the law, *some form of agreement has to be in place*. The court also went on to hold that any law that *did* imply such a term into the granting of mineral rights would constitute a violation of s 25(1) of the Constitution and that it would not be saved by the limitation clause. What immediately comes to mind therefore, is the rule, based on s 4(c) and other provisions of the Mineral and Petroleum Resources Act 28 of 2002 (MPRDA), that potential mineral rights holders need only *consult* with landowners, and need not obtain their *consent* to mine. However, the 'framing law' for this case was the Minerals Act 50 of 1991, which still recognized common law bases for obtaining mineral rights. It is not clear how the rules and principles affirmed in this case would apply in the context of the MPRDA because unlike the Minerals Act, which affirmed the common law, the MPRDA holds in section 4(2) that '[i]n so far as the common law is inconsistent with this Act, the Act prevails'. The key questions would therefore be whether the legislature intended that the duty to consult in terms of the MPRDA override the common law position that express or implied agreement to renounce lateral support be obtained, and, if so, whether this violates s 25(1) of the Constitution.
Parties	Applicant: Anglo Operations Respondent: Sandhurst Estates (registered property owner)
Facts	In terms of an agreement with Sasol (which related to the provision of coal for Sasol's synfuel plants), Anglo Operations (henceforth 'Anglo') intended establishing open-cast strip mining operations on the south-western portion of the Kriel South Coal Field (the latter forming part of the Witbank/Highveld Coal Field which has been subjected to mining activities for more than 100 years). The mine itself would be called the Kriel South strip mine. The property of Sandhurst Estates, on which farming operations (cattle grazing and cultivation) were conducted, lay on a portion of the Kriel South Coal Field. There were no farm workers or dwelling houses located on the property.

	Anglo had obtained all rights to coal in, on and under the property in contention in terms of a notarial cession (a formal transfer of rights) from the African and European Investment Company Ltd (AEIC) in 2001. AEIC had in turn obtained the rights by way of two notarial cessions from Morris and Alfred Sulski respectively in 1968. The terms of the earlier cessions were incorporated into the cession between AEIC and the applicant. Relevant to the dispute was that in terms of the earlier cession with Arthur Sulski (who was the surface owner at the time), the company (i.e. the relevant mining company) had 'all rights *as may be needed* for proper mining of and exploiting coal in, on and under all of the said property'. The cession with Morris Sulski similarly indicated that the company was ceded 'all such ancillary rights or other rights' related to the entitlement to the coal. To establish the Kriel South strip mine, Anglo needed to construct a stream diversion on Sandhurst Estates' property and utilize approximately 60 000 hectares of the northern portion of the property for open-cast mining. Anglo relied on (a) the common law, (b) the terms of the cession; and (c) s 5(1) of the Minerals Act 50 of 1991 to argue that it had rights to do so. In terms of the common law, Anglo argued that it was entitled to exercise all 'ancillary rights' required for the efficient carrying out of mining operations; that in the event of conflict use of surface rights had to be subordinated to mineral exploitation subject only to the requirement that the operations be conducted *civiliter modo* with regards to the surface owner; and that 'optimal utilization' of the coal reserves required open-cast mining. In this regard they also argued that the common law principle of 'lateral support' (a rule of law introduced in the case of *London SA Exploration Company v Rouliot* (1891) 8 SC 74) did not form part of South African law or was at least not applicable to the duties of support owed by a mineral rights vis-à-vis the surface owner. Anglo argued that the terms of the cession did not contractually limit these rights, but in fact supported them. Anglo also argued that s 5(1) of the Minerals Act 50 of 1991 supported them because it conferred a right to do 'all such ancillary things as (were) reasonably necessary' to give full and proper effect to its primary right to mine. They also argued that 'optimal utilization' and 'reasonableness' should be interpreted objectively according to the circumstances pertaining at the time of the exercise of the mining right, not according to the subjective intention of the parties at the time the cessions were concluded. Anglo's argument that the coal could only be mined optimally using open-cast method was based on, amongst others, arguments that the coal could not be won safely using underground methods due to the shallow depth at which the minerals were located, and that 95% of the coal could be won using open-cast mining as opposed to only 55% by underground methods. Sandhurst Estates disputed that Anglo had a right to conduct the relevant activities on the property in contention.
Relief Sought	A declaratory order that Anglo was entitled to mine coal on a portion of Sandhurst Estates' property using open-cast methods, and to construct a stream diversion on the property.
Legal Issues &	***Issue 1.*** What is the general principle in common law regarding the

Judgment	scope of the rights enjoyed by the mineral rights holder vis-à-vis the surface owner? ***Judgment:*** In common law the general principle is that the grantor of mineral rights must have intended to also grant all things necessary for the exercise of those rights. However the scope of the common law on the question of the respective rights of the parties could be modified by agreement between them. In this case the terms of the agreement were constituted by the terms of the cession. The provisions of statutory law also needed to be considered (at 362D – I).
	Issue 2: Does South African law recognize a 'doctrine of lateral support'? Was the renunciation of 'lateral support' (including adjacent and subjacent support) something that the mineral rights holder and surface owner had to agree upon, or was a waiver to lateral support implied by law in the granting of the mineral right? ***Judgment:*** The doctrine of lateral support is recognized in South African law (at 366B). The 'right to lateral support' (which included adjacent and subjacent support) relates to the relationship between a surface owner and his property in the sense that it captures his interest in ensuring the integrity and inviolateness of such property as the object of the right of ownership. It is simply a capacity or competence to renounce or abandon the expectation that others would not violate the integrity of the property. It is a competence that cannot be transferred or expropriated (at 381C – 382E). Most importantly, the renunciation of this competence is not implied by the law in the granting of a mineral right; i.e. it is not a *naturalia* of a grant of mineral rights. It has to be explicitly agreed upon, either expressly or tacitly, by the parties. The mineral rights holder therefore has no ancillary right at common law, to proceed in a manner that violates either the adjacent or subjacent support of the land (at 375E – G). It is necessary that there be an express or tacit intention on the part of the surface owner in the contractual grant relating to mineral rights, to abandon or waive his competence to claim a prohibitory interdict or damages for breaches of the obligation to respect the integrity and inviolateness, and thus the use and enjoyment of his property (at 382F).
	Issue 3: What factors were relevant to determining whether the surface owner had expressly or tacitly agreed to the renunciation of lateral support? ***Judgment:*** In determining whether there has been a 'tacit' agreement to let down lateral support in a contractual grant between a mineral rights holder and the surface owner, the subjective intention of the parties at the time the contract is included is of paramount importance. The tacit intention of the surface owner cannot be conflated with what is necessary given the exigencies of the situation (e.g. that a surface owner can be assumed to have tacitly agreed to open-cast mining if it is found to be the safest and most efficient method of mining) (at 376I – 377A, 377E – F and 380G).
	Issue 4: On the facts of the case, had the surface owner tacitly consented to the renunciation of lateral support? ***Judgment:*** On the facts of the case Anglo had failed to establish a 'right' to conduct open-cast mining. There was no basis for this right in

	common law and the terms of the cession had not granted this right expressly or by implication (at 382H – 383B).
	Issue 5: Did the reference to 'optimal' utilization in the Minerals Act, 1991 afford Anglo an entitlement to use open-cast mining methods? ***Judgment:*** 'Optimal utilization' is not a common-law concept but a construct used in the Minerals Act 50 of 1991 (at 388A). The provisions of the Minerals Act affirm mineral rights obtained in terms of the common law while regulating their exercise (at 388I – 389A). The reference to 'optimal utilization' has no bearing on the negotiation between the mineral rights holder and surface holder; i.e. it does not imply a term into a contractual grant that the mineral right be exercised 'optimally'. The case law indicated that in common law the mineral holder is entitled only to 'ordinary and reasonable enjoyment' and not 'optimal enjoyment (at 389B – E).
	Issue 6: Would implying a term into the grant of all mineral rights that the owner of the surface is deprived of the use of the surface where this is necessary to exercise the mineral rights optimally pass constitutional scrutiny? ***Judgment:*** The effect of implying such a term into the grant of mineral rights would be that the owner is deprived, without his agreeing thereto of the 'last remaining aspect of his ownership which is of any practical value' (at 398D). This would constitute 'deprivation' in terms of s 25(1) of the Constitution (at 398E) and would contravene s 25(1) (at 398G). A rule that implied a preferential right to mine over the rights of surface holders would not meet the test for limitation set out in s 36 because it would not comply with the criterion that there be less restrictive means to achieve the purpose (at 398H).
	Issue 7: Did Anglo have a 'common-law right' to divert the stream on Sandhurst Estates' property? ***Judgment:*** Anglo had not proved on the facts that it was necessary to divert the stream in order to conduct mining operations *on Sandhurst Estates' property*. Rather, this diversion was necessary to conduct mining operations on adjacent properties (at 400F). It is a 'logical implication' that ancillary rights always follow the primary right. Thus if the primary right is restricted to a certain property, the ancillary rights are necessarily also so restricted, making it necessary for Anglo to show that it was necessary to divert the stream for purposes of mining on Sandhurst Estates' property.
Outcome	Anglo's application was dismissed with costs, with the judge also remarking that it was 'totally irregular' (at 391A).