CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 103/11
[2012] ZACC 7

In the matter between:

MACCSAND (PTY) LTD	Applicant
and	
CITY OF CAPE TOWN	First Respondent
MINISTER FOR WATER AFFAIRS AND ENVIRONMENT	Second Respondent
MEC FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE	Third Respondent
MINISTER FOR RURAL DEVELOPMENT AND LAND REFORM	Fourth Respondent
MINISTER FOR MINERAL RESOURCES	Fifth Respondent
and	
CHAMBER OF MINES OF SOUTH AFRICA	First Amicus Curiae
AGRI SOUTH AFRICA	Second Amicus Curiae

Heard on : 16 February 2012

Decided on : 12 April 2012

JUDGMENT

JAFTA J (Mogoeng CJ, Yacoob ADCJ, Cameron J, Froneman J, Khampepe J, Maya AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo AJ concurring):

Introduction

[1] At the heart of these applications is the interplay in the mining sector between the Mineral and Petroleum Resources Development Act[1] (MPRDA), on the one hand and on the other, the Land Use Planning Ordinance[2] (LUPO) and the National Environmental Management Act[3] (NEMA). Leave to appeal is sought against the judgment of the Supreme Court of Appeal which partly upheld the decision of the Western Cape High Court (High Court). Maccsand (Pty) Ltd (Maccsand) seeks leave to appeal against the part of the order that dismissed its appeal.

[2] The MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province (MEC) seeks leave to cross-appeal against the same part of the order but only in the event that this Court finds that LUPO does not apply to land, in respect of which a mining right and permit have been granted in terms of the MPRDA. The MEC also seeks leave to cross-appeal against a ruling in terms of which the Supreme Court of Appeal refused to grant a declaratory order.

[1] Act 28 of 2002.

[2] Ordinance 15 of 1985.

[3] Act 107 of 1998.

Statutory framework

[3] I consider it convenient at the outset to outline the framework within which the issues arise. The MPRDA is a fairly new enactment, which came into force on 1 May 2004. It seeks to achieve a number of objects, the majority of which are transformative. Among its key purposes is the commitment made by the state to eradicate all forms of discriminatory practices in the mineral and petroleum industries, by promoting access by all South Africans to mineral and petroleum resources.[4] The creation of equitable access is facilitated by declaring the mineral and petroleum resources to be the heritage of all the people and making the state a custodian of these

[4] Section 2 of the MPRDA provides:

"The objects of this Act are to—

(a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;

(b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;

(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

(e) promote economic growth and mineral and petroleum resources development in the Republic;

(f) promote employment and advance the social and economic welfare of all South Africans;

(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;

(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating."

resources for the benefit of all South Africans. This enables the state, through the Minister for Mineral Resources, to control and regulate access to these resources.[5]

[4] In order to ensure that access to resources by black people and women[6] is promoted, one of the requirements for granting a mining right is that the exercise of the right must be capable of expanding opportunities for black people and women to enter the industry concerned and benefit from the exploitation of the resources. In addition, the granting of the right must promote employment and advance the social and economic welfare of all South Africans.[7]

[5] As one of the laws passed to promote section 24 of the Constitution,[8] one of the MPRDA's purposes is to protect the environment by ensuring ecologically sustainable

[5] Under various sections of the MPRDA, the Minister for Mineral Resources is empowered to grant rights pertaining to mining.

[6] The MPRDA defines "historically disadvantaged person" in section 1 as:

> "(a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;
>
> (b) any association, a majority of whose members are persons contemplated in paragraph (a);
>
> (c) any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members' interest and are able to control a majority of the members' votes".

[7] See section 23(1)(h) of the MPRDA.

[8] Section 24 provides:

> "Everyone has the right—
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

development of mineral and petroleum resources while at the same time promoting economic and social development.

[6] Section 23(1) of the MPRDA empowers the Minister for Mineral Resources to grant mineral rights if certain listed conditions are met.[9] If all the conditions are satisfied, the Minister is bound to issue the mineral right. The Minister is free to impose whatever terms and conditions under which the right may be exercised.[10] Every right so granted comes into effect on the date on which the environmental management programme is approved.[11]

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[9] Section 23(1) provides:

> "Subject to subsection (4), the Minister must grant a mining right if—
>
> (a) the mineral can be mined optimally in accordance with the mining work programme;
>
> (b) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;
>
> (c) the financing plan is compatible with the intended mining operation and the duration thereof;
>
> (d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment;
>
> (e) the applicant has provided financially and otherwise for the prescribed social and labour plan;
>
> (f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996);
>
> (g) the applicant is not in contravention of any provision of this Act; and
>
> (h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan."

[10] Section 23(6) provides:

> "A mining right is subject to this Act, any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years."

[11] Section 23(5) provides:

> "A mining right granted in terms of subsection (1) comes into effect on the date on which the environmental management programme is approved in terms of section 39(4)."

[7] In order to exercise the right, the holder of a mining right needs a permit authorising it to enter the land in which the mineral is located and carry out mining to extract it from the land. A permit of this kind is issued by the Minister for Mineral Resources if three conditions are met.[12] First is that the mineral in question must be capable of being mined optimally within a period of two years. Second is that the area on which mining is to be carried out must not exceed 1.5 hectares. Third, the applicant must have submitted an environmental management plan.

The interplay between the MPRDA and NEMA

[8] Both Acts were passed to promote the right to an environment entrenched in section 24 of the Constitution.[13] The MPRDA obliges the Minister for Mineral Resources to consult with her colleague responsible for the administration of NEMA when she considers an environmental management plan or programme. In addition, this Minister must request written comments on the plan or programme concerned from the head of the department whose minister is consulted.[14] The Minister for

[12] Section 27 provides:

> "(1) A mining permit may only be issued if—
>
> (a) the mineral in question can be mined optimally within a period of two years; and
>
> (b) the mining area in question does not exceed 1,5 hectares in extent.
>
> . . .
>
> (6) The Minister must issue a mining permit if—
>
> (a) the requirements contemplated in subsection (1) are satisfied; and
>
> (b) the applicant has submitted the environmental management plan."

[13] Section 24 is set out above in n 8.

[14] Section 40 provides:

> "(1) When considering an environmental management plan or environmental management programme in terms of section 39, the Minister must consult with any State department which administers any law relating to matters affecting the environment.

Mineral Resources cannot approve an environmental management plan or programme without considering those comments and a recommendation by the Regional Mining and Development Committee.[15]

[9] NEMA was enacted as a general statute that co-ordinates environmental functions performed by organs of state.[16] It also provides for "co-operative, environmental governance by establishing principles for decision-making on matters affecting the environment".[17] As is evident from the long title, NEMA was passed to establish a framework regulating the decisions taken by organs of state in respect of activities which may affect the environment.[18] It lays down general principles which must be followed in making decisions of that nature.

[10] In order to give effect to general objectives of integrated environmental management, NEMA requires the Minister for Environmental Affairs (now Minister for Water Affairs and Environment), with the concurrence of the MEC to identify

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(2) The Minister must request the head of a department being consulted, in writing, to submit the comments of that department within 60 days from the date of the request."

[15] Section 39(4)(b) provides:

"The Minister may not approve the environmental management programme or the environmental management plan unless he or she has considered—

(i) any recommendation by the Regional Mining Development and Environmental Committee; and

(ii) the comments of any State department charged with the administration of any law which relates to matters affecting the environment."

[16] NEMA's Long Title states:

"To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith."

[17] Id.

[18] Above n 16 and Preamble of NEMA.

activities which may not commence without environmental authorisation from a competent authority.[19] These activities are listed in notices published in the Government Gazette.[20]

[11] When listing activities, the Minister for Water Affairs and Environment must identify the competent authority responsible for granting environmental authorisation in respect of each listed activity.[21] Section 24C(2) requires this Minister to be identified as the competent authority in relation to activities enumerated there. Most of these activities have implications for international environmental relations. Section

[19] Section 24(2) of NEMA provides:

> "The Minister, or an MEC with the concurrence of the Minister, may identify—
>
> (a) activities which may not commence without environmental authorisation from the competent authority;
>
> (b) geographical areas based on environmental attributes, and as specified in spatial development tools adopted in the prescribed manner by the environmental authority, in which specified activities may not commence without environmental authorisation from the competent authority;
>
> (c) geographical areas based on environmental attributes, and specified in spatial development tools adopted in the prescribed manner by the environmental authority, in which specified activities may be excluded from authorisation by the competent authority;
>
> (d) activities contemplated in paragraphs (a) and (b) that may commence without an environmental authorisation, but that must comply with prescribed norms or standards:
>
> Provided that where an activity falls under the jurisdiction of another Minister or MEC; a decision in respect of paragraphs (a) to (d) must be taken after consultation with such other Minister or MEC."

[20] Section 24D provides:

> "(1) The Minister or MEC concerned, as the case may be, must publish in the relevant Gazette a notice containing a list of—
>
> (a) activities or areas identified in terms of section 24(2); and
>
> (b) competent authorities identified in terms of section 24C.
>
> (2) The notice referred to in subsection (1) must specify the date on which the list is to come into effect."

[21] Section 24C(1) provides:

> "When listing or specifying activities in terms of section 24(2) the Minister, or an MEC with the concurrence of the Minister, must identify the competent authority responsible for granting environmental authorisations in respect of those activities."

24C prescribes that the Minister for Mineral Resources be identified as the competent authority where an activity constitutes mining or a related activity occurring within mining.[22] This means that it is only the Minister for Mineral Resources who is competent to grant authorisations in respect of these activities. She must also be consulted before any activity relating to mining is listed.

[12] Section 24O sets out the criteria to be taken into account when a competent authority considers an application for authorisation.[23] In peremptory terms the section

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[22] Section 24C(2A) provides:

> "The Minister of Minerals and Energy must be identified as the competent authority in terms of subsection (1) where the activity constitutes prospecting, mining, exploration, production or a related activity occurring within a prospecting, mining, exploration or production area."

[23] Section 24O(1) provides:

> "If the Minister, the Minister of Minerals and Energy, an MEC or identified competent authority considers an application for an environmental authorisation, the Minister, Minister of Minerals and Energy, MEC or competent authority must—
>
> (a) comply with this Act;
>
> (b) take into account all relevant factors, which may include—
>
> (i) any pollution, environmental impacts or environmental degradation likely to be caused if the application is approved or refused;
>
> (ii) measures that may be taken—
>
> (aa) to protect the environment from harm as a result of the activity which is the subject of the application; and
>
> (bb) to prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation;
>
> (iii) the ability of the applicant to implement mitigation measures and to comply with any conditions subject to which the application may be granted;
>
> (iv) where appropriate, any feasible and reasonable alternatives to the activity which is the subject of the application and any feasible and reasonable modifications or changes to the activity that may minimise harm to the environment;
>
> (v) any information and maps compiled in terms of section 24(3), including any prescribed environmental management frame-works, to the extent that such information, maps and frame-works are relevant to the application;
>
> (vi) information contained in the application form, reports, comments, representations and other documents submitted in terms of this Act

requires the Minister for Water Affairs and Environment or the Minister for Mineral Resources, as the case may be, to comply with NEMA and take into account factors enumerated in the section when determining an application for an authorisation.

[13] In addition, these Ministers or other competent authorities are obliged to consult every state department that administers a law relating to the environment.[24] A state department consulted in terms of section 24O must submit written comments within 40 days of the request by the consulting Minister.[25] If a consulted state department objects to an application for mining, the Minister for Mineral Resources is obliged to refer the objection to the Regional Mining Development and Environmental Committee for consideration and recommendation.[26] This Committee must consider the objection and make a recommendation to the Minister for Mineral Resources for a final decision.[27]

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to the Minister, Minister of Minerals and Energy, MEC or competent authority in connection with the application;

(vii) any comments received from organs of state that have jurisdiction over any aspect of the activity which is the subject of the application; and

(viii) any guidelines, departmental policies and decision making instruments that have been developed or any other information in the possession of the competent authority that are relevant to the application; and

(c) take into account the comments of any organ of state charged with the administration of any law which relates to the activity in question."

[24] Section 24O(2) of NEMA.

[25] Section 24O(3) of NEMA.

[26] Section 24O(4) of NEMA provides:

> "If any State department contemplated in subsection (2) objects to the contents of an application for prospecting, mining, exploration, production or related activities in a prospecting, mining, exploration or production area, the Minister of Minerals and Energy must refer the objection to the Regional Mining Development and Environmental Committee for consideration and recommendation."

[27] Section 24O(5) of NEMA.

[14] The requirement for consulting every department that administers laws relating to environmental matters guarantees a co-ordinated and integrated environmental governance and management. It ensures that all role players are taken on board before a decision authorising an activity which affects the environment is made.

The interplay between LUPO and the MPRDA

[15] LUPO is a pre-Constitution legislation, which came into force in July 1986. It constitutes provincial legislation that was enacted by the Provincial Council of the former Cape of Good Hope.[28] The interim Constitution permitted it to continue in force subject to amendment or repeal by the competent authority.[29] Later the President assigned its administration to the provincial government of the Western Cape.[30]

[16] LUPO authorises municipalities to prepare structure plans which are submitted to the provincial government for approval.[31] The purpose of the structure plan is to lay down guidelines for future spatial development. It may also authorise rezoning of

[28] The Cape of Good Hope was one of the four provinces that constituted South Africa before 1994. Each province had the power to make laws.

[29] Section 229 of the interim Constitution provides:

> "Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority."

[30] GN 115 GG 15813, 17 June 1994.

[31] See section 4 of LUPO.

land by a municipality.[32] In Chapter 2 LUPO empowers the provincial government to make scheme regulations which determine the use to which land may be put in accordance with the zoning applicable to the land. The main object of scheme regulations is to control zoning.[33]

[17] If a landowner wants to use land for a purpose not permitted in terms of the zoning scheme or regulations, she or he must apply to the municipality for rezoning or for a use departure. If either is granted, the land must be used for the permitted purpose within a period of two years, failing which that rezoning lapses.[34] But a

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[32] Section 5 of LUPO.

[33] Section 9 of LUPO provides:

> "(1) Control over zoning shall be the object of scheme regulations, which may authorise the granting of departures and subdivisions by a council.
>
> (2) Scheme regulations may be amended or replaced by the Administrator by notice in the Provincial Gazette after the proposed amendment or replacement has, if deemed necessary by the director, been made known in such manner as the director may think fit."

[34] Section 16 of LUPO provides:

> "(1) Either the Administrator or, if authorised thereto by the provisions of a structure plan, a council may grant or refuse an application by an owner of land for the rezoning thereof.
>
> (2)(a) A rezoning in respect of which the application has been granted by virtue of the provision of subsection (1) shall lapse—
>
> (i) if the land concerned is not, within a period of two years after the date on which the application for rezoning was granted, utilised as permitted in terms of the zoning granted by the said rezoning;
>
> (ii) where it has been so granted for the purposes of section 22, if a relevant application for subdivision in accordance with the rezoning concerned is not made in terms of section 24 within a period of two years after the date on which the application for rezoning was granted, or
>
> (iii) where such application for subdivision was indeed so made, but the subdivision concerned or part thereof is not confirmed, unless either the Administrator or, if authorised thereto by the provisions of the structure plan concerned, the council extends the said period of two years, which extension may be granted at any stage.
>
> (b) Subject to the applicable provisions of section 7, 14(2), 14(4)(a) or 14(4)(b), land in respect of which a zoning has lapsed in terms of subsection (2) of this section shall be deemed to be zoned in accordance with the utilisation thereof as determined by the council concerned.

rezoning may also be initiated by the municipality in whose jurisdiction the land falls or the provincial government.[35] LUPO obliges municipalities to enforce compliance with its provisions.[36] More importantly it prohibits the use of land for purposes other than the one permitted in terms of the zoning scheme.[37]

[18] Therefore in terms of LUPO, mining may only be undertaken on land if the zoning scheme permits it (or a departure is granted). If not, rezoning of the land must be obtained before the commencement of mining operations. The zoning that permits that land to be used for mining does not, however, license mining nor does it determine mining rights. The role played by LUPO is limited to the control and regulation of the use of land.

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(3) Where an application for rezoning is granted under subsection (1) or a rezoning has lapsed in terms of subsection (2), the local authority concerned shall as soon as practicable amend the zoning map concerned and, where applicable, a register in its possession accordingly."

[35] Section 18 of LUPO.

[36] Section 39(1) of LUPO.

[37] Section 39(2) of LUPO provides:

"No person shall—

(a) contravene or fail to comply with—

(i) the provision incorporated in a zoning scheme in terms of this Ordinance, or

(ii) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934,

except in accordance with the intention of a plan for a building as approved and to the extent that such plan has been implemented, or

(b) utilise any land for a purpose or in a manner other than that intended by a plan for a building as approved and to the extent that such plan has been implemented."

[19] It is against this legislative background that the issues arising in this matter fall to be decided. But before considering them, it is necessary to set out briefly the facts and the history of litigation.

Facts

[20] In October 2007 the Minister for Mineral Resources, acting in terms of section 27 of the MPRDA, granted a mining permit to Maccsand. This permit authorised Maccsand to mine sand on the Rocklands dunes which are 3.643 hectares in extent, but the mining was restricted to an area of 1.5 hectares in extent. These dunes are located in a residential area between two schools and close to private homes. The City of Cape Town (City) is the owner. The permit authorised Maccsand to carry out sand mining for a period of two years, which could be renewed for a period of not more than three years. But in terms of LUPO the Rocklands dunes were zoned as public open space. This meant that unless the land was appropriately rezoned, it could not be used for mining.

[21] In August 2008 the Minister for Mineral Resources issued a mining right to Maccsand which entitled it to mine and remove sand from the Westridge dune which is 74.2 hectares in extent. The proposed mining area was however limited to 16.3 hectares. This dune too is situated in a residential area. Private homes abut the dune on three sides and vacant land abuts it on the fourth side. The Westridge dune consists of three erven owned by the City. Two erven were zoned as public open spaces whereas one was zoned rural. This zoning did not allow the land to be used for

mining. Both the Rocklands and the Westridge dunes are located in Mitchell's Plain, a residential area within the municipal area of the City.

[22] In February 2009 Maccsand commenced mining operations on the Rocklands dunes. The City, which is obliged to ensure compliance with LUPO, instituted proceedings for an interdict restraining Maccsand from mining sand on the dunes until the dunes were rezoned to allow mining.

In the High Court

[23] The City later amended the relief it sought in the High Court, by adding that Maccsand also be interdicted from mining on the dunes until authorisations were granted to it under NEMA. Although no relief was sought against them, the Minister for Mineral Resources, the Minister for Water Affairs and Environment, the MEC and the Minister for Rural Development and Land Reform were cited with Maccsand as respondents.

[24] Before the High Court, both the Minister for Mineral Resources and Maccsand contended that to construe LUPO as applying to land used for mining would be inconsistent with the scheme of the Constitution. They argued that the Constitution divides and confers powers to each sphere of government and where it does not permit a concurrent exercise of powers, one sphere cannot interfere with the exercise of power by another sphere. They submitted that mining falls under the exclusive

competence of the national government and therefore LUPO does not apply to land used for mining because it regulates a municipal functional area.

[25] Relying on decisions of this Court,[38] the High Court rejected the argument and held that LUPO applies to land used for mining.[39] Regarding the claim for an interdict based on NEMA, the High Court rejected the argument advanced by the Minister for Mineral Resources to the effect that NEMA did not apply to mining activities because the MPRDA adequately protects the environment. Invoking section 39(2) of the Constitution, the High Court held that the MPRDA and NEMA must be construed in a manner that both laws apply to mining activities.[40]

[26] Consequently the High Court issued interdicts in these terms:

> "(1) the respondent may not commence or continue with mining operations on erf 13625, Mitchell's Plain; erf 9889, Mitchell's Plain; erf 1848, Schaapkraal; and/or erf 1210, Mitchell's Plain ('the properties') until and unless authorisation has been granted in terms of the Land Use Planning Ordinance 15 of 1985, Cape ('LUPO') for the land in question to be used for mining;
>
> (2) the first respondent may not commence or continue with mining operation on the properties until and unless an environmental authorisation has been granted in terms of the National Environmental Management Act 107 of 1998 ('NEMA') for the

[38] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC); and *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* [2007] ZACC 13; 2007 (6) SA 4 (CC); 2007 (10) BCLR 1059 (CC).

[39] *City of Cape Town v Maccsand (Pty) Ltd and Others* 2010 (6) SA 63 (WCC) at 72-3.

[40] Ibid at page 79.

carrying out of the activity identified in item 20 of Government Notice R386 of 21 April 2006 on the land in question;

(3) the first respondent may not commence or continue with mining operations on erf 9889, Mitchell's Plain; erf 1848, Schaapkraal; and erf 1210, Mitchell's Plain until and unless an environmental authorisation has been granted in terms of NEMA for the carrying out of the activity identified in item 12 of Government Notice R386 of 21 April 2006 on the land in question.

(4) The first respondent is interdicted from commencing or continuing with mining operations on the properties until and unless:

4.1 authorisation has been granted in terms of LUPO for the land in question to be used for mining.

4.2 an environmental authorisation has been granted in terms of NEMA for the carrying out of the activity identified in item 20 of Government Notice R386 of 21 April 2006 on the land in question.

(5) The first respondent is interdicted from commencing or continuing with mining operations on erf 9889, Mitchell's Plain; erf 1848, Schaapkraal; and erf 1210, Mitchell's Plain until and unless an environmental authorisation has been granted in terms of NEMA for the carrying out of the activity identified in item 12 of Government Notice R386 of 21 April 2006 on the land in question.

(6) The costs of this application are to be paid by first and second respondents, jointly and severally with one another, including the costs of two counsel."

In the Supreme Court of Appeal

[27] Unhappy with the order issued by the High Court, Maccsand and the Minister for Mineral Resources appealed to the Supreme Court of Appeal. They argued that a land use authorisation in terms of LUPO was unnecessary where a mining right or permit had been issued in terms of the MPRDA. They submitted that in the event of a conflict between these laws, the MPRDA prevailed because it regulated a functional

area vested in the national sphere of government. They argued further that LUPO is not a "relevant law" in terms of section 23(6) of the MPRDA and as a result a holder of a mining right need not comply with it. The Chamber of Mines of South Africa (Chamber), admitted as an amicus curiae, supported the argument advanced by the appellants that NEMA did not apply to mining because the MPRDA gave sufficient effect to section 24 of the Constitution.[41]

[28] Having considered the devolution of power between the three spheres of government and the objects of LUPO and the MPRDA, the Supreme Court of Appeal held that these pieces of legislation operate alongside each other. Therefore, the Court held further that a holder of a mining right or permit cannot proceed to mine unless LUPO permits mining on the land concerned. However, the Supreme Court of Appeal set aside the interdicts based on NEMA on the ground that Government Notice R386, on which they were based, was repealed before the High Court delivered its judgment. This meant, the Court held, that items 12 and 20 which required authorisation before the relevant activities could commence were no longer in force and could not be contravened in the future. The Court concluded that the interdicts on this aspect were invalidly issued.

[29] The MEC had also sought a declarator to the effect that, notwithstanding the rights and permits issued in terms of the MPRDA, no person may commence or continue with a mining activity listed in terms of section 24 of NEMA without an

[41] *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* 2011 (6) SA 633 (SCA) at para 8.

environmental authorisation. The Supreme Court of Appeal refused to make the order on the ground that the matter was of a hypothetical nature because none of the parties to the dispute had the interest envisaged in section 19(1)(a)(ii) of the Supreme Court Act.[42]

In this Court

[30] As mentioned earlier, Maccsand seeks leave to challenge the order of the Supreme Court of Appeal to the extent that it dismissed the appeal. It has cited as first to fifth respondents: the City, the Minister for Water Affairs and Environment, the MEC, the Minister for Rural Development and Land Reform and the Minister for Mineral Resources. But the Minister for Rural Development and Land Reform did not participate in these proceedings.

[31] The Chamber, a voluntary association comprising mining finance companies and companies involved in the mining of minerals, was admitted as an amicus curiae. The objects of the Chamber are to "advance, promote and protect the mining and other interests of its members".[43] It also acts on their behalf in cases where decisions are likely to affect the common interests of its members.

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[42] Section 19(1)(a)(ii) of the Supreme Court Act 59 of 1959 provides:

> "A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power—
>
> . . .
>
> (ii) to review the proceedings of all such courts."

[43] Paragraph 2(a) of the Chamber's constitution.

[32] Agri South Africa (Agri SA) was also admitted as an amicus curiae. It is an association representing nine provincial unions and twenty eight commodity organisations. Its members are commercial agricultural producers. The Chamber and Agri SA were permitted not only to submit written argument but also to make oral submissions at the hearing in this Court. Agri SA argued in favour of applying NEMA to mining activities whereas the Chamber advanced argument to the contrary.

[33] In addition to the conditional cross-appeal, the MEC sought leave to cross-appeal against the ruling of the Supreme Court of Appeal not to grant the general declarator sought by the MEC. In the alternative, the MEC sought direct access to this Court to apply for the declarator which the Supreme Court of Appeal had refused to grant.

Issues

[34] Apart from the question whether leave to appeal and to cross-appeal should be granted, we have to determine whether the MEC must be granted direct access to seek the relief he failed to obtain in the Supreme Court of Appeal. Regarding the merits, two issues arise. The first issue is whether a holder of a mining right or permit granted in terms of the MPRDA may exercise those rights only if the zoning scheme made in terms of LUPO permits mining on the land in respect of which the mining right or permit was issued. The second issue is whether, in the present circumstances,

the general declarator sought by the MEC in the Supreme Court of Appeal should be granted.

[35] In view of the fact that the application for leave to appeal is limited to the issue pertaining to the applicability of LUPO to land used for mining, I find it convenient to separate the issues. I will consider the application for leave to appeal first and this will be followed by the merits should I hold that leave ought to be granted. The outcome on the merits of this issue will have a bearing on the conditional application to cross-appeal. But I need to dispose of condonation applications first.

Condonation

[36] The MEC sought condonation for the late filing of the application for leave to cross-appeal and direct access. The City also sought condonation for the late filing of its written argument. Both applications are not opposed. These parties were late by one day and the explanations furnished in both instances are satisfactory. No other party was prejudiced by the delay because documents were served on them timeously. In these circumstances condonation should be granted.

Leave to appeal – LUPO issue

[37] As the matter clearly raises constitutional issues, the only question that needs consideration on this aspect of the case is whether it is in the interests of justice to grant leave. That the case raises issues of great constitutional importance cannot be gainsaid. As stated earlier, the interface between the MPRDA and LUPO is at the

heart of the present dispute. On the face of it, there may be a tension between these two laws with regard to circumstances where the land in respect of which a mining right or permit has been granted under the MPRDA is not zoned to be used for mining in terms of LUPO. The administration of these laws falls under different spheres of government, which are under a constitutional obligation to exercise their powers in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.[44]

[38] The issues arising in this matter are not confined to the Western Cape Province. As national legislation, the MPRDA applies throughout the country. LUPO, on the other hand, applies in three provinces: the Western Cape; parts of the Eastern Cape; and parts of the North-West Province.[45] There are similar provincial laws in other provinces as well.[46] Therefore the final determination of this dispute will have an effect beyond the present parties.

[39] Mining plays an important role in the national economy. Potential investors and those who have already invested in mining require clarification on the statutory requirements that they must meet, if they are to exercise mining rights granted in terms of the MPRDA. A decision by this Court would give clarity and establish certainty. I am satisfied that it is in the interests of justice to grant leave to appeal.

[44] See section 41(1)(g) of the Constitution.

[45] Section 81(1) of the Northern Cape Planning and Development Act 7 of 1998 repealed LUPO.

[46] The Orange Free State's Townships Ordinance 9 of 1969, applicable in the Free State Province and the Transvaal Province's Town-Planning and Townships Ordinance 15 of 1986, which applies in Gauteng, Limpopo and Mpumalanga.

The merits – LUPO issue

[40] It is apparent from the present facts that long before the MPRDA was passed, LUPO applied to land falling within the municipal area of the City. The Rocklands dunes and part of the Westridge dunes were zoned for use as public open spaces before Maccsand was granted the mining right and permit. The question that arises is whether upon the grant of those rights to Maccsand, the application of LUPO to the land concerned ceased. Maccsand and the Minister for Mineral Resources, supported by the Chamber, contended that because LUPO does not regulate mining, it does not apply to land in respect of which mining rights have been granted.

[41] Proceeding from the premise that mining falls under the exclusive competence of the national sphere of government, these parties argued that to hold that LUPO applies would amount to permitting an unjustified intrusion of the local sphere into the exclusive terrain of the national sphere of government. This, they argued, is contrary to the constitutional imperative that spheres of government must exercise their powers in a way that does not encroach on functional areas of other spheres.

[42] It is true that mining is an exclusive competence of the national sphere of government. It is also true that the MPRDA is concerned with mining and that LUPO does not regulate mining nor does it purport to do so. LUPO governs the control and regulation of the use of all land in the Western Cape Province. This function

constitutes municipal planning, a functional area which the Constitution allocates to the local sphere of government.[47]

[43] These laws, as the Supreme Court of Appeal observed, serve different purposes within the competence of the sphere charged with the responsibility to administer each law. While the MPRDA governs mining, LUPO regulates the use of land. An overlap between the two functions occurs due to the fact that mining is carried out on land. This overlap does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments.

[44] If it is accepted, as it should be, that LUPO regulates municipal land planning and that, as a matter of fact, it applies to the land which is the subject matter of these proceedings, then it cannot be assumed that the mere granting of a mining right cancels out LUPO's application. There is nothing in the MPRDA suggesting that LUPO will cease to apply to land upon the granting of a mining right or permit. By contrast section 23(6) of the MPRDA proclaims that a mining right granted in terms of that Act is subject to it and other relevant laws.[48]

[45] Maccsand and the Minister for Mineral Resources argued that LUPO is not a "relevant law" envisaged in section 23(6) because it does not apply to mining. The words "any relevant law", they submitted, mean and are confined to a law applicable

[47] Part B of Schedule 4. See *Johannesburg Metropolitan Municipality* above n 38 at para 57.

[48] The permit issued in this case states that it is subject to any other relevant law.

to mining like the Mine Health and Safety Act.[49] The MPRDA does not define this phrase and consequently it must be accorded its ordinary wide meaning. There is no justification for limiting it to laws regulating mining only.

[46] Maccsand also contended that the Supreme Court of Appeal, by finding that mining is subject to compliance with LUPO, permitted a local authority to usurp the functions of national government in a manner which is not contemplated in the Constitution. This argument is based on a misinterpretation of the judgment of the Supreme Court of Appeal. That Court did not find that LUPO regulates mining. Instead, it held that the MPRDA and LUPO have different objects and that each did not purport to serve the purpose of the other. The MPRDA's concern, the Court found, was mining and not municipal planning, hence it held that the two laws operate alongside each other.[50] Because LUPO regulates the use of land and not mining, there is no merit in the assertion that it enables local authorities to usurp the functions of national government. All that LUPO requires is that land must be used for the purpose for which it has been zoned.

[47] Another criticism levelled against the finding of the Supreme Court of Appeal by Maccsand and the Minister for Mineral Resources was that, by endorsing a duplication of functions, the Court enabled the local sphere to veto decisions of the national sphere on a matter that falls within the exclusive competence of the national sphere. At face value this argument is attractive but it lacks substance. The

[49] Act 29 of 1996.

[50] Above n 41 at para 33.

Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere.[51] But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.[52]

[48] The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed.[53] If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power, which does not extend to the power of the other functionary. This is so in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through cooperation between the two organs of state, failing which, the refusal may be challenged on review.

[51] *Johannesburg Metropolitan Municipality* above n 38 at para 53.

[52] Section 41 of the Constitution.

[53] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 59 and *Wary Holdings (Pty) Ltd* above n 38 at para 80.

[49] But Maccsand argued that because LUPO permits the owner of the land to apply for rezoning, mining right and permit granted to it will never be exercised due to the fact that it is not the landowner and therefore cannot apply for rezoning. It is true that LUPO authorises a landowner to apply for rezoning of land.[54] However, land may also be rezoned at the instance of the provincial government or the municipality in whose jurisdiction it is located.[55] In the light of the City's opposition to the mining in question, it is still open to Maccsand to request the Provincial Government to intervene and have the rezoning effected.

[50] The final argument advanced by Maccsand and the Minister for Mineral Resources was that if it is found that both the MPRDA and LUPO apply to land used for mining, then the application of the two laws gives rise to a conflict. It was submitted that this conflict must be resolved by invoking section 146 of the Constitution,[56] alternatively section 148 of the Constitution.[57] Section 146 finds no

[54] See section 16 and 17 of LUPO.

[55] Section 18 of LUPO provides:

> "(1) A rezoning may, on the initiative of the Administrator or a council, be granted under section 16(1) by either the Administrator after consultation with the council concerned or, if authorised thereto by the provisions of a structure plan, that council in respect of land situated in its area of jurisdiction, irrespective of whether or not a local authority is the owner of the land.
>
> (2) The provisions of section 16 and 17 shall, in so far as they can be applied, apply *mutatis mutandis* in relation to such a rezoning; provided that where the local authority concerned is not the owner of the land concerned, the owner, if his address is known or can be ascertained, shall be notified of the proposed rezoning and be afforded an opportunity of commenting; provided further that the provisions of section 16(2) shall not apply to land which is rezoned in terms of subsection (1) of this section with a view to the acquisition thereof by the council concerned."

[56] Section 146, in relevant part, provides:

> "(1) This section applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4.

application to the present dispute for the reason, among others, that the MPRDA is not legislation falling within a functional area listed in Schedule 4 of the Constitution.

[51] But more importantly the two sections do not apply because there is no conflict between LUPO and the MPRDA. Each is concerned with different subject matter. And, as stated earlier, the exercise of a mining right granted in terms of the MPRDA is subject to LUPO. This is what the MPRDA proclaims.[58] It follows that the appeal must fail for all these reasons.

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(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:

(a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

(b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing—

(i) norms and standards;

(ii) frameworks; or

(iii) national policies.

(c) The national legislation is necessary for—

(i) the maintenance of national security;

(ii) the maintenance of economic unity;

(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;

(iv) the promotion of economic activities across provincial boundaries;

(v) the promotion of equal opportunity or equal access to government services; or

(vi) the protection of the environment."

[57] Section 148 provides:

"If a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation or provincial constitution."

[58] Section 23(6) of the MPRDA.

Conditional leave to cross-appeal

[52] The conditional cross-appeal, in terms of which the MEC sought to impugn the constitutional validity of the MPRDA, does not arise because the condition on which it was based has not materialised. It depended on a finding that the MPRDA displaced LUPO with regard to land used for mining.

Leave to cross-appeal

[53] The MEC's application for leave to cross-appeal must fail because it is not in the interests of justice to grant leave. The cross-appeal has no prospects of success. The declaratory order sought is based on an assumption that mining is listed in an operational notice as an activity which may not commence without an environmental authorisation. This assumption is wrong. Since the repeal of Government Notice R386, on which the interdicts granted by the High Court were based, the Minister for Water Affairs and Environment has not as yet put into force the listing of activities relating to mining. Section 24C(2A) of NEMA requires that the Minister for Mineral Resources be made a competent authority responsible for granting authorisations in respect of mining activities. At present there is no listing in operation which authorises this Minister to grant authorisation.

Direct access

[54] Direct access is sought in the alternative to leave to cross-appeal. In the present circumstances the request for direct access is improper. Since direct access implies that the issues sought to be raised have not been adjudicated by another court, it is

impermissible to seek direct access in respect of matters which were decided by another court. Therefore, an issue which is the subject matter of an application for leave to appeal cannot, at the same time, be the subject matter of an application for direct access. This issue may feature in a direct appeal and not direct access. If the MEC were entitled to seek direct access, the request would still fail for lack of prospects of success. Accordingly direct access must be refused.

Costs

[55] On costs in this Court, counsel for Maccsand argued that should the appeal fail, the general rule applicable to costs in constitutional litigation must be followed. That rule provides that an unsuccessful private party in proceedings against the state should not be ordered to pay costs.[59] But if the state is unsuccessful, it is generally ordered to pay costs. The dismissal of the appeal means that Maccsand, a private party, and the Minister for Mineral Resources, a state party, have been unsuccessful. The City has successfully opposed the appeal and therefore it is entitled to its costs. On the application of the general rule Maccsand must be exempted from paying the City's costs. It did not raise a frivolous appeal nor did it behave in a manner deserving of censure by this Court.[60]

[56] However, Maccsand also sought to have the costs order issued by the High Court set aside. The Supreme Court of Appeal left this order unaltered. The High

[59] *Biowatch Trust v Registrar Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 21.

[60] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

Court ordered Maccsand and the Minister for Mineral Resources to pay the City's costs jointly and severally. Although the High Court's judgment does not expressly set out reasons for the costs order granted, it is apparent that the order is based on the fact that both parties unsuccessfully opposed the City's claim. This, on the face of it, does not constitute an improper exercise of a discretion, on account of either the facts or legal principles.

[57] Sitting on appeal, we are not entitled to interfere with the exercise of that discretion even if we could have exercised it differently, had we been sitting as a court of first instance.[61] A court of appeal is entitled to interfere with the exercise of this discretion only if it is shown that the discretion has not been judicially exercised or has been exercised on the basis of a wrong appreciation of the facts or wrong principles of law.[62]

[58] Maccsand has not established any of the grounds upon which this Court is entitled to interfere. Indeed the fact that it made common cause with the Minister for Mineral Resources in opposing the City's claim, coupled with the fact that they were both unsuccessful, support the view that the decision of the High Court was judicially made. In similar circumstances this Court, in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*,[63] ordered a private party to pay

[61] *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC) at paras 19-22.

[62] *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) at para 131.

[63] [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 88.

costs jointly and severally with a state party on the basis that it made common cause with the state party in relation to issues which were raised unsuccessfully.

Order

[59] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.
4. Leave to cross-appeal is refused.
5. Direct access is refused.
6. The Minister for Mineral Resources must pay the costs of the City of Cape Town in this Court, including costs occasioned by the employment of two counsel.
7. The other parties must pay their own costs in this Court.

For the Applicant:	Advocate L Rose-Innes SC and Advocate N Bawa, instructed by Cliffe Dekker Hofmeyr Inc.
For the First Respondent:	Advocate G Budlender SC and Advocate E Van Huyssteen, instructed by Cullinan and Associates.
For the Second Respondent:	Advocate L Nkosi-Thomas SC and Advocate N Rajab-Budlender, instructed by the State Attorney.
For the Third Respondent:	Advocate AM Breitenbach SC and Advocate R Paschke, instructed by Werksmans Inc.
For the Fifth Respondent:	Advocate MM Oosthuizen and Advocate K Warmer, instructed by the State Attorney.
For the First Amicus Curiae	Advocate SJ Grobler SC and Advocate P Lazarus, instructed by Norton Rose South Africa.
For the Second Amicus Curiae:	Advocate A Katz SC and Advocate H Kruger, instructed by MacRobert Inc.