THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case nos: 709/2010

&746/10

In the matter between**:**

MACCSAND (PTY) LTD	**First Appellant**
MINISTER OF MINERAL RESOURCES	**Second Appellant**

and

CITY OF CAPE TOWN	**First Respondent**
NATIONAL MINISTER OF WATER AFFAIRS AND ENVIRONMENT	**Second Respondent**
MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE	**Fourth Respondent**
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**Fifth Respondent**
THE CHAMBER OF MINES OF SOUTH AFRICA	**Amicus curiae**

Neutral citation: *Maccsand v City of Cape Town* (709/10; 746/10) [2011] ZASCA 141 (23 September 2011)

Coram: HARMS AP, CLOETE, SHONGWE and WALLIS JJA and PLASKET AJA

Heard: 16 August 2011

Delivered: 23 September 2011

Summary: Mining, municipal planning and environmental management – whether holder of mining right or mining permit in terms of Minerals and Petroleum Resources Development Act 28 of 2002 also requires land use planning authorisation in terms of Land Use Planning Ordinance 15 of 1985 (C) – whether holder of mining right or mining permit also obliged to apply for environmental authorisation to conduct activities listed in terms of National Environmental Management Act 107 of 1998

ORDER

On appeal from: Western Cape High Court, Cape Town (Davis and Baartman JJ sitting as court of first instance):

(a) The appeal is upheld to the extent that paragraphs 2, 3, 4.2 and 5 of the order of the court below are set aside.

(b) Each party, including the *amicus curiae*, shall bear its own costs.

JUDGMENT

PLASKET AJA (HARMS AP, CLOETE, SHONGWE and WALLIS JJA concurring)

[1] This appeal from the Western Cape High Court, Cape Town concerns two issues. The first is whether the grant of a mining right or a mining permit issued by the Minister of Mineral Resources in terms of s 23 and s 27 of the Minerals and Petroleum Resources Development Act 28 of 2002 (the MPRDA) entitles the holder of the right or permit to undertake mining operations without obtaining authorisation in terms of the Land Use Planning Ordinance 15 of 1985 (C) (LUPO), which empowers municipalities to determine and enforce the use to which land in their areas of jurisdiction may be put. The second issue is whether such a holder is precluded from commencing or continuing with its mining operations without first obtaining environmental authorisations in terms of the National Environmental Management Act 107 of 1998 (NEMA) in respect of activities listed under s 24(2)(a) of NEMA. Davis J (with whom Baartman J concurred) found that both LUPO and NEMA applied to mining operations.[1] The appeal against both of these findings is with the leave of the court below.

The facts

[1] *City of Cape Town v Maccsand (Pty) Ltd & others* 2010 (6) SA 63 (WCC).

[2] The material facts are not in dispute. The first appellant (Maccsand) was authorised by a mining right issued to it by the second appellant, the Minister of Mineral Resources (the Minister) in terms of s 23(1) of the MPRDA and a mining permit issued to it in terms of s 27 of the MPRDA to mine sand on two pieces of land, the Westridge dune and the Rocklands dune, situated in Mitchell's Plain and owned by the first respondent, the City of Cape Town (the City). The Westridge dune consists of three erven,[2] one of which was zoned as rural and two as public open space in terms of LUPO. The Rocklands dune was zoned as public open space.

[3] The Westridge dune's mining area is 16.3 hectares in extent although its total area is 74.2 hectares. It is situated in a residential area. It is abutted on three sides by private homes and by vacant land on the fourth side. The mining right authorised mining for a period of nine years. The Rocklands dune is 3.643 hectares in extent but the proposed mining area is 1.5 hectares in extent. It too is situated in a residential area. It abuts private homes and lies between two schools. The mining right authorised mining for a period of two years, which could be renewed for a maximum of a further three years.

[4] While Maccsand asserted that it was entitled to mine without further authority, the City insisted that it could not do so without obtaining a consent use in respect of the Rocklands dune and a departure from the restrictions imposed by the zoning scheme in respect of the Westridge dune. Without having attempted to do so, Maccsand began to mine the Rocklands dune. The City launched an application for an interdict to stop this mining. An interim order was duly granted and the City then amended its notice of motion to include orders for relief in terms of NEMA as well.

[5] The City's attorneys sought an undertaking from Maccsand that it would not mine the Westridge dune without the necessary authorisations required by LUPO and NEMA. When no undertaking was furnished, the City launched a second application to interdict the mining of this dune as well. The matters were later consolidated. During the course of the litigation the fourth respondent, the Minister of Local Government, Environmental Affairs and Development Planning, Western Cape Province was joined as a party. He made common cause with the City.

---

[2] The three erven are erf 9889, Mitchell's Plain, erf 1848, Schaapkraal and erf 1210, Mitchell's Plain. The Rocklands dune is erf 13625, Mitchell's Plain.

[6] In due course, the consolidated applications were argued and the court below issued an order in the following terms:

'It is declared that:

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 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.'

[7] The court below held in respect of the LUPO issue that the argument that the MPRDA excluded the application of LUPO was flawed because it undermined the division of powers envisaged by the Constitution and would have the effect of eradicating a municipality's planning function whenever a national competence impacted on land use. It was accordingly held that in the absence of a constitutionally permissible override, which was absent, LUPO applied. In respect of the NEMA issue, the court below held that even though a great deal of NEMA has been incorporated

into the MPRDA, this did not have the effect of ousting the obligation placed on Maccsand by s 24 of NEMA to obtain environmental authorisations where its mining activities involved listed activities.

[8] It was argued by Maccsand and the Minister that there is no need for a person to whom a mining right or mining permit has been issued to possess or obtain the necessary land use authorisation in terms of LUPO. The submission was made that the MPRDA, being legislation concerned with a competence vested in the national sphere of government, prevails over LUPO to the extent that the two conflict. They also contended that LUPO is not a 'relevant law' in terms of s 23(6) of the MPRDA and therefore that the holder of a mining right is not required to comply with it. It was also argued by them and the Chamber of Mines, which was admitted as *amicus curiae*, that the MPRDA incorporates aspects of NEMA in order to give effect to s 24 of the Constitution in the context of mining and that the aspects that it does not incorporate do not apply to mining.

[9] The City and the Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape Provincial Government argued that the MPRDA does not deal with land use planning and consequently there is no conflict between the MPRDA and LUPO. They contended that if the MPRDA were to be interpreted as being in conflict with LUPO, the MPRDA would be unconstitutional to that extent because municipal planning is an executive competence that is vested exclusively in the local sphere of government. Lastly, they argued that LUPO is indeed a relevant law for purposes of the MPRDA and that provisions of NEMA that were not directly incorporated into the MPRDA nonetheless apply to mining.

The LUPO issue

[10] The Constitution devolves governmental powers in various ways. Not only does it separate powers between the legislative, executive and judicial arms of government[3] but it also divides legislative and executive powers among three spheres of government. It does this in s 40(1) which provides:

'In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.'

[3] *South African Association of Personal Injury Lawyers v Heath & others* 2001 (1) SA 883 (CC) para 22.

[11] This division of power represents a significant change from the hierarchical structure of government that existed under the pre-1994 constitutions in which the national legislature was sovereign and all-powerful, and provincial and local government exercised only those powers that had been allocated to them by the sovereign legislature. Now the position is different.[4] As Ngcobo J held in *Doctors for Life International v Speaker of the National Assembly & others*[5] the 'basic structure of our government consists of a partnership' between the three spheres of government, oiled by the principles of co-operative government. These principles require, inter alia, that the various spheres of government 'exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere'.[6]

[12] Once governmental power is divided in this way, it becomes necessary to allocate powers to each sphere of government. The Constitution achieves this by s 44 (national legislative competence); s 85(2) (national executive competence); s 104(1) (provincial legislative competence); s 125(2) (provincial executive competence); and ss 156(1) and (2) (local executive and legislative competence). Schedule 4 of the Constitution lists functional areas of concurrent national and provincial legislative competence and Schedule 5 lists functional areas of exclusive provincial legislative competence.[7] In this way powers are distributed among, and in some cases reserved, to each sphere of government. A necessary corollary of this is that one sphere may not usurp the functions of another, although intervention by one sphere in the affairs of another is permitted in limited circumstances.[8] In addition deadlock-breaking measures are in place for instances when legislation originating from different spheres conflicts;[9] and the idea of cooperative government includes dispute resolution provisions so that inter-governmental disputes may be resolved without litigation.[10]

---

[4] *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) paras 26-40; *Johannesburg Municipality v Gauteng Development Tribunal & others* 2010 (2) SA 554 (SCA) para 24.

[5] *Doctors for Life International v Speaker of the National Assembly & others* 2006 (6) SA 416 (CC) para 82.

[6] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 289; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) para 43. See too, Constitution s 41(1)(g).

[7] See *Johannesburg Municipality v Gauteng Development Tribunal & others* (note 4) paras 25-26.

[8] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* (note 6) para 44; Constitution s 100 and s 139.

[9] Constitution s 146-150.

[10] Constitution s 41(2), (3) and (4).

[13] In this scheme, how are national legislative competences to be identified? In *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill*[11] Cameron AJ set out the approach thus:

'By contrast with Schedule 5, the Constitution contains no express itemisation of the exclusive competences of the national Legislature. These may be gleaned from individual provisions requiring or authorising "national legislation" regarding specific matters. They may also be derived by converse inference from the fact that specific concurrent and exclusive legislative competences are conferred upon the provinces, read together with the residual power of the national Parliament, in terms of s 44(1)(a)(ii), to pass legislation with regard to "any matter". This is subject only to the exclusive competences of Schedule 5 which are in turn subordinated to the "override" provision in s 44(2). An obvious instance of exclusive national legislative competence to which the Constitution makes no express allusion is foreign affairs.'

[14] Applying this approach, it is clear that the regulation of mining is an exclusive national legislative competence and that the administration of the MPRDA is vested in the national executive. Mining is not mentioned in either Schedule 4 or 5 and so, by 'converse inference' it is a legislative competence that falls within the scope of the term 'any matter' as contemplated by s 44(1)(a)(ii) of the Constitution;[12] and the MPRDA itself vests its administration in the Minister of Mineral Resources and her officials within the national executive sphere of government.

[15] The 'national character' of the MPRDA is evident from its objects, set out in s 2, which are of such a nature that the vesting of both legislative and executive competence in the national sphere of government is appropriate. Section 2 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;

---

[11] *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) para 46.

[12] Section 44(1)(a)(ii) provides:

'The national legislative authority as vested in Parliament –

(a) confers on the National Assembly the power –

(i) . . .

(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5 . . . .'

(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.'

[16] LUPO differs from the MPRDA in at least two respects. First, it is 'old order legislation' in that it is 'legislation enacted before the 1993 Constitution took effect'.[13] It continues in force subject to amendment or repeal and consistency with the Constitution.[14] While it may not have a wider effect than it had before the 1993 Constitution took effect, it 'continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution'.[15] Secondly, having been promulgated by the erstwhile Administrator of the Cape of Good Hope for that province prior to April 1994, and the administration thereof having since been assigned to the province of the Western Cape in June 1994, as well as to other provinces that made up the erstwhile Cape of Good Hope, LUPO is provincial legislation for purposes of the Constitution. Similar provincial legislation is in place in the rest of the country.[16]

[17] In terms of LUPO, powers are granted to municipalities to regulate land use in their areas of jurisdiction, subject to oversight by the provincial government. So, every municipality is empowered to prepare structure plans 'in respect of the land situated in its area of jurisdiction',[17] the purpose of which is to 'lay down guidelines for the future spatial development of the area to which it relates (including urban renewal, urban design or the preparation of development plans) in such a way as will effectively

[13] Constitution Schedule 6, item 1.
[14] Constitution Schedule 6, item 2(1).
[15] Constitution Schedule 6, item 2(2).
[16] Townships Ordinance 9 of 1969 (Orange Free State); Town Planning Ordinance 27 of 1949 (Natal); Town Planning and Townships Ordinance 15 of 1986 (Transvaal). See *Johannesburg Municipality v Gauteng Development Tribunal & others* (note 4) para 5.
[17] LUPO s 4(1).

promote the order of the area as well as the general welfare of the community concerned'.[18] A structure plan may 'authorise rezoning in accordance with such structure plan by a [municipal] council'.[19]

[18] Furthermore, while the Premier of the Western Cape is empowered to make scheme regulations[20] in order to effect control over zoning, such scheme regulations 'may authorise the granting of departures and sub-divisions by a council'.[21] The purpose of a zoning scheme in general terms is to 'determine use rights and to provide for control over use rights and over the utilisation of land in the area of jurisdiction of a local authority'.[22]

[19] Applications for amendments to land use restrictions applicable to a property or for the temporary use of a property for a use for which no provision has been made in the scheme regulations are directed to 'the town clerk or secretary' of a municipality and if a municipal council has been authorised to do so, it may grant or refuse such an application. (If it has not been so authorised, the Premier takes the decision.)[23] Similarly, a municipal council may, if authorised to do so by a structure plan, grant or refuse applications by the owner of land for its rezoning.[24]

[20] These powers must be seen in a broader context, namely the obligation placed on every municipality in terms of s 25(1) of the Local Government: Municipal Systems Act 32 of 2000 to adopt an integrated development plan which is required to reflect, inter alia, 'a spatial development framework which must include the provision of basic guidelines for a land use management system for the municipality'.[25] In terms of s 35(1)(a) the integrated development plan 'is the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality'.

[21] From the above it can be seen that municipalities play a central role in land use planning in their areas of jurisdiction. It is, no doubt, appropriate for them to do so given their knowledge of local conditions and their intimate link with the local

[18] LUPO s 5(1).
[19] LUPO s 5(2).
[20] LUPO s 9(2).
[21] LUPO s 9(1).
[22] LUPO s 11. See too *Walele v City of Cape Town & others* 2008 (6) SA 129 (CC) paras 129-131.
[23] LUPO s 15(1).
[24] LUPO s 16(1).
[25] Local Government: Municipal Systems Act s 26(e).

electorate whose interests they represent. The importance of this planning function was commented on by Rogers AJ in *Intercape Ferreira Mainliner (Pty) Ltd & others v Minister of Home Affairs & others*[26] when he said that land use contrary to LUPO would frustrate the very purpose of town planning and, even if the disregard of LUPO was relatively minor, 'the character of the area and the welfare of the members of the community in that area would be jeopardised and the planning objectives of the local authority . . . frustrated'.

[22] I turn now to consider the constitutional position of municipalities and the powers and functions that are vested in them by the Constitution. A municipality under the present constitutional dispensation 'is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation' but an organ of state that 'enjoys "original" and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits'.[27]

[23] Section 151 of the Constitution concerns itself with the status of municipalities. It provides:

'(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.

(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.'

[24] Section 152(1) lists a number of objects of local government. They include the provision of democratic and accountable government at local level,[28] the promotion of social and economic development[29] and the promotion of a safe and healthy environment.[30] Section 155(6) places an obligation on a province to take steps 'by legislative or other means' to 'provide for the monitoring and support of local government in the province' and to 'promote the development of local government capacity to enable municipalities to perform their functions and manage their own

---

[26] *Intercape Ferreira Mainliner (Pty) Ltd & others v Minister of Home Affairs & others* 2010 (5) SA 367 (WCC) para 105.
[27] *City of Cape Town & another v Robertson & another* 2005 (2) SA 323 (CC) para 60.
[28] Constitution s 152(1)(a).
[29] Constitution s 152(1)(c).
[30] Constitution s 152(1)(d).

affairs'. Section 155(7) provides that both the national government (subject to s 44) and provincial governments 'have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)'.

[25] Section 156(1), in turn, provides:

'A municipality has executive authority in respect of, and has the right to administer –

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) any other matter assigned to it by national or provincial legislation.'

Section 152(2) empowers municipalities to legislate in order to administer effectively those matters which they may administer. One of the matters that is listed in Part B of Schedule 4 as a matter over which municipalities have executive authority and powers of administration is municipal planning.

[26] The effect of s 152, when read with Part B of Schedule 4, on the competences of the various spheres of government was summarised thus by Nugent JA in *Gauteng Development Tribunal*:[31]

'It will be apparent, then, that, while national and provincial government may legislate in respect of the functional areas in Schedule 4, including those in Part B of that schedule, the executive authority over, and administration of, those functional areas is constitutionally reserved to municipalities. Legislation, whether national or provincial, that purports to confer those powers upon a body other than a municipality will be constitutionally invalid. None of that is controversial.'

[27] What remains to be determined in respect of this aspect of the case is the meaning of the term 'municipal planning' in Part B of Schedule 4. Once again, the answer is provided by Nugent JA in *Gauteng Development Board*:[32]

'It is clear that the word "planning", when used in the context of municipal affairs, is commonly understood to refer to the control and regulation of land use, and I have no doubt that it was used in the Constitution with that common usage in mind. The prefix "municipal" does no more than to confine it to municipal affairs.'

[28] This interpretation is consistent with what Yacoob J, albeit in a minority judgment, held planning legislation to be in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*

[31] Note 4 para 28.
[32] Note 4 para 41.

& another[33] namely 'legislation concerning zoning and subdivision of land'. Nugent JA's interpretation of municipal planning was, furthermore, held to be correct by Jafta J in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others*[34] when he said:

'Returning to the meaning of "municipal planning", the term is not defined in the Constitution. But "planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use "planning" in the municipal context, they were aware of its common meaning.'

[29] It was argued by Maccsand and the Minister that the MPRDA vests in the national executive sphere of government, as a necessary component of the power to regulate mining in the national interest, the power to determine mining-related land use rights, and that consequently there is no room for the land use planning regime of LUPO in respect of mining. If this argument is correct it raises the spectre of the MPRDA being in conflict with the Constitution's division of powers. The anterior question, however, is whether as a matter of interpretation the MPRDA does indeed purport to determine questions of land use dealt with under LUPO.

[30] The Minister represents the State as custodian of the nation's mineral and petroleum resources and, in this capacity, is empowered to 'grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right'.[35] She is, in this capacity, obliged to 'ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development'.[36]

[31] A person may, in terms of s 22 of the MPRDA, apply to the Minister for a mining right. If the application complies with the prescribed requirements, it is placed before the Minister for her decision. In terms of s 23(1) she 'must' grant a mining right if eight

---

[33] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another* 2009 (1) SA 337 (CC) para 131.
[34] Note 6 para 57.
[35] MPRDA s 3(2)(a).
[36] MPRDA s 3(3).

factors are present and, in terms of s 23(3), she must refuse to grant it if 'the application does not meet all the requirements referred to in subsection (1)'. Those requirements are:

'(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 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.'

[32] Section 27 deals with applications for mining permits. Such a permit may only be issued if two requirements are met. They are that 'the mineral in question can be mined optimally within a period of two years' and that 'the mining area in question does not exceed 1.5 hectares in extent'.[37] Section 27(6) provides that the Minister must issue the mining permit if these requirements are met and an environmental management plan has been submitted by the applicant.

[33] It is clear, in my view, from a reading of s 23 and s 27 that not one of the considerations that the Minister is required to take into account is concerned with municipal planning. She does not have to, and probably may not, take into account a municipality's integrated development plan or its scheme regulations.[38] She will not consider and probably will not even have the information available to her as to the current use of land, much less the municipality's views on how the issue of a mining right or mining permit may impact on the inhabitants and on its future plans. As a result, it cannot be said that the MPRDA provides a surrogate municipal planning function that displaces LUPO and it does not purport to do so. Its concern is mining,

[37] MPRDA s 27(1).

[38] If the Minister take these matters into account and refuses to grant a mining right or mining permit on that account her decision might well be susceptible to review on the basis of her having regard to irrelevant considerations. See the Promotion of Administrative Justice Act 3 of 2000 s 6(2)(e)(iii).

not municipal planning. That being so, LUPO continues to operate alongside the MPRDA. Once a mining right or mining permit has been issued, the successful applicant will not be able to mine unless LUPO allows for that use of the land in question.

[34] It was argued by Maccsand and the Minister that this results in a duplication of administrative functions that cannot have been intended. The short answer is that I have found that the MPRDA and LUPO are directed at different ends and therefore there is no duplication. In any event, for as long as the Constitution reserves the administration of municipal planning functions as an exclusive competence of local government, a successful applicant for a mining right or a mining permit will also have to comply with LUPO in the provinces in which it operates. The authority to mine granted by the Minister after taking into account mining-related considerations is 'logically anterior to the procurement of consents that may be necessary for its execution', to borrow a phrase from *Minister of Public Works & others v Kyalami Ridge Environmental Association & another (Mukhwevho Intervening)*.[39] In any event, as the cases (including the *Kyalami Ridge* case) demonstrate, dual authorisations by different administrators, serving different purposes, are not unknown, and not objectionable in principle – even if this results in one of the administrators having what amounts to a veto.[40] In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another*,[41] Kroon AJ made the point that there is no reason why 'two spheres of control cannot co-exist' and that where, as in that case and this case, one operates from 'a municipal perspective and the other from a national perspective' they each apply their own 'constitutional and policy considerations'.[42]

[35] In the result, the LUPO issue must be decided against Maccsand and the Minister and in favour of the City and the Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape. That means that the appeal must fail in respect of paragraphs 1 and 4.1 of the order issued by the court below.

The NEMA issue

---

[39] *Minister of Public Works & others v Kyalami Ridge Environmental Association & another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) para 59.
[40] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another* (note 33) para 80.
[41] Note 33.
[42] Para 80. See too *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & others* 2007 (6) SA 4 (CC) para 82.

[36] In the court below it was declared that Maccsand was not entitled to commence or continue its mining operations until and unless an environmental authorisation had been granted in terms of NEMA for the carrying out of the activities listed as item 20 (in respect of all four erven) and item 12 (in respect of the Westridge dune) in Government Notice R386 promulgated in *Government Gazette* 28753 of 21 April 2006. Interdicts to this effect were also granted.

[37] It is unnecessary to examine the legislative scheme of NEMA because on 2 August 2010 Government Notice R386 was repealed in its entirety.[43] That meant that items 20 and 12 of the listings were no longer in operation and could not be contravened in the future. This rendered the prayers for the interdicts redundant and the declarators academic. While the matter had been argued over a number of days in April 2010, the judgment of the court below was handed down on 20 August 2010, with the court obviously not having been informed of the repeal. That being so, the interdicts in respect of items 20 and 12 of Government Notice R386 could not validly have been issued and the declarators were made in the erroneous belief that the listing notices were current. There was thus no reason for the declarators to have been made in the absence of a live, concrete dispute, and they served no purpose. The appeal must therefore succeed to the extent that prayers 2, 3, 4.2 and 5 of the court below's order must be set aside.

[38] The repeal of Government Notice R386 appears to be part of a wider, continuing process of amendment of NEMA and its subordinate legislation that is aimed, it would seem, at rationalising environmental regulation generally and in relation to the specific undertaking of mining. Argument was addressed to us on the effect of the amendments that have been effected, including amendments that have yet to be brought into force. We were asked to give guidance by way of declaratory relief on the relationship between the MPRDA and NEMA.

[39] I decline to accede to the request. The proper approach to this issue was set out by Corbett CJ in *Shoba v Officer Commanding, Temporary Police Camp,*

[43] Environmental Impact Assessment Regulations Listing Notice 1 of 2010, Government Notice R544 promulgated in *Government Gazette* 33306 of 18 June 2010 reg 4.

Wagendrift Dam & another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg & another[44] when he said:

'Generally speaking, the Courts will not, in terms of s 19(1)(a)(iii) [of the Supreme Court Act 59 of 1959], deal with or pronounce upon abstract or academic points of law. An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case. . . . But because it is not the function of the Court to act as an advisor, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding.'

It is not clear to me that any of the parties have the type of interest required by s 19(1)(a)(iii) in the dispute on which we are requested to give advice. If I am incorrect, however, I am nonetheless of the view that the hypothetical nature of the dispute entitles us to refuse to engage with it.

Costs

[40] In the court below, the City achieved substantial success even though it was not entitled to the relief concerning NEMA. As a result, its costs ought to be borne by Maccsand and the Minister of Mineral Resources. In this court, Maccsand and the Minister of Mineral Resources succeeded in part in that, while they lost the LUPO issue, they won the NEMA issue. I would not classify this as substantial success because the City and the Province were equally successful. I am of the view that because of the success each of the parties has achieved on appeal, they should bear their own costs. The Chamber of Mines, as *amicus curiae*, and the Minister of Local Government, Environmental Affairs and Development Planning, Western Cape Government should also bear their own costs.

The order

[41] The following order is made:

(a) The appeal is upheld to the extent that paragraphs 2, 3, 4.2 and 5 of the order of the court below are set aside.

---

[44] *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam & another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg & another* 1995 (4) SA 1 (A) at 14F-G.

(b) Each party, including the *amicus curiae*, shall bear its own costs.

C. Plasket
Acting Judge of Appeal

APPEARANCES

First appellant:	L Rose-Innes SC (with him N Bawa)
	Instructed by:
	Cliffe Dekker Hofmeyr Inc, Cape Town
	Claude Reid Inc, Bloemfontein
Second appellant:	MM Oosthuizen SC (with him K Warner)
	Instructed by:
	State Attorney, Cape Town
	State Attorney, Bloemfontein
First respondent:	G Budlender SC (with him E Van Huysteen)
	Instructed by:
	Cullinan and Associates, Cape Town
	Barbara Cordiers Attorneys, Bloemfontein
Fourth respondent:	AM Breitenbach SC (with him R Paschke)
	Instructed by:
	Werksmans, Paarl
	Naudes, Bloemfontein
Amicus Curiae:	SJ Grobler SC (with him P Lazarus)
	Instructed by:
	Deneys Reitz, Johannesburg
	Webbers, Bloemfontein