

**CITY OF CAPE TOWN v MACCSAND (PTY) LTD AND OTHERS 2010 (6) SA 63 (WCC)**

<p><b>Importance</b></p>	<p>This is a very significant, recent case which essentially affirms that mining is not exclusively regulated by the national sphere of government, but that all three spheres may exercise their constitutionally-mandated concurrent powers in relation to this activity. It thus clarifies that the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) does not ‘trump’ either the Land Use Planning Ordinance 15 of 1985 (LUPO) or the National Environmental Management Act 108 of 1998 (NEMA). As regards the latter, the court rejected an argument that the MPRDA had ‘incorporated’ NEMA by virtue of the fact that the MPRDA contains environmental provisions and also cross-refers to provisions of NEMA. Finally, the court stated an extremely important principle of interpretation which arguably has broad application to the interpretation of <i>any</i> legislation affecting the environment, namely that the mandate to the court given by s 39(2) of the Constitution requires that the court must interpret legislation in a manner that gives as much tangible protection to the right to environment as the language of the statute can reasonably bear.</p>
<p><b>Parties</b></p>	<p><b>Applicant:</b> City of Cape Town  <b>First respondent:</b> Maccsand (Pty) Ltd (a black empowerment company)  <b>Second respondent:</b> Not specified.  <b>Third respondent:</b> Not specified.  <b>Fourth respondent:</b> Provincial Department responsible for Environment  <b>Fifth respondent:</b> Not specified.</p>
<p><b>Facts</b></p>	<p>The Department of Mineral Resources (DMR) had granted Maccsand (Pty) Ltd a mining permit for the mining of sand on the Rocklands Dune (erf 13625, comprising 3 643 ha) and mining rights in respect of the Westridge Dune (erven 1210 and 9889 Mitchell’s Plain and 1848 Schaapkraal, comprising 16 ha in extent) respectively. The Rocklands Dune was vacant land located in Mitchell’s Plain, between two schools and adjacent to private homes. The Westridge Dune abutted private homes with an informal settlement on erf 1210. The City of Cape Town owned all the erven. Erven 13625, 9889 and 1848 were all zoned public open space while erf 1210 was zoned rural.</p> <p>The City of Cape Town refused to support Maccsand’s application for mineral rights on these pieces of land and had informed the DMR of its position. It was also of the view that authorization in terms of the LUPO was required before mining activities could commence. The City was not notified by either Maccsand (Pty) Ltd or the DMR that a mining permit had been granted until the former delivered the permit to one of the City’s law enforcement offices less than two weeks before they started mining. They also failed to notify the City of commencement of mining as required by s 5(4) of the MPRDA.</p> <p>The City was of the view that this action was illegal as neither of the zones applicable in respect of the Rocklands and Westridge Dunes authorized the use of land for mining. Before mining could commence,</p>

	<p>therefore, either the zoning scheme would have to be amended to authorize mining on the land or a departure from the zoning scheme would have to be granted to permit mining on the land.</p> <p>The respondents maintained that once a mining authorization had been granted, the right or permit authorized mining to take place on the land concerned and no other law or authority could ‘veto’ the decision of the Minister of Mineral Resources or her delegate.</p> <p>The City maintained that if LUPO could be overridden by the MPRDA, it would make fulfilment of the constitutional obligations of municipalities in regard to municipal planning extremely difficult. Countering this, the respondents argued that exploitation of minerals could not take place effectively if land use were not solely regulated by the MPRDA.</p> <p>Interdict proceedings were launched by the City of Cape Town to stop Maccsand (Pty) Ltd from continuing with mining activities until it had obtained the necessary authorizations.</p>
<b>Relief Sought</b>	<p>A final interdict restraining the first respondent from mining in the disputed areas until they had obtained the requisite authorizations in terms of LUPO and other laws.</p>
<b>Legal Issues &amp; Judgment</b>	<p><b>Issue 1:</b> What were the respective competences of national, provincial and local government in respect of ‘municipal planning’? Davis J held that the debate turned on two issues: The meaning of the phrase ‘municipal planning’ and the fit between municipal planning and the national power dealing with mining.</p> <p><b>Judgment:</b> On the first question, the court found the meaning ascribed to the term ‘municipal planning’ by the Constitutional Court in the case of <i>City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others</i> 2010 (6) SA 182 (CC) utterly persuasive. Davis J held that two ‘significant’ implications flowed from this judgment: The first is that municipal planning includes the control and regulation of the use of land which falls within the jurisdiction of the municipality (and is thus not confined to the sense of being ‘forward planning’); the second is that the national and provincial spheres of government cannot by legislation arrogate to themselves the power to exercise executive municipal powers (thus to control and regulate the use of land) or to administer municipal affairs. Their mandate was limited to <i>regulating</i> the exercise of these powers (at 71D – E).</p> <p>As regards the question whether the MPRDA ‘trumped’ legislation such as LUPO, the court held that the Constitution does not recognize ‘exclusive national competences’, of which mining would be one. Looking at the construction of the Schedules to the Constitution which set out the respective powers of the national, provincial and local spheres it was clear that the functional competence of the national government was defined by way of an examination of the functional competences of the provincial and local spheres of government and not the other way around (at 71J – 72B). LUPO was thus clearly applicable to the matter and could not be trumped by the MPRDA (at 72G). This interpretation was supported by the wording of s 25(2)(d) of the MPRDA which indicated that the holder of a mining right must ‘comply with the relevant provisions of this Act, any other relevant</p>

	<p>law under terms and the conditions of the mining right' (at 72D – F). This does not preclude the possibility of an ‘overlap’ between the powers of national and local government – an approach that was supported by the Constitutional Court’s decision in <i>Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another</i> 2009 (1) SA 337 (CC) (2008 (11) BCLR 1123) at para 80 and <i>Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others</i> 2007 (6) SA 4 (CC) (2007 (10) BCLR 1059) at para 85. Each sphere of government considers an activity from its own unique perspective. If LUPO were to have no application it would challenge the very idea of concurrent powers envisaged in Chapter 4 of the Constitution (at 73B).</p>
	<p><b>Issue 2:</b> Was mining a ‘land use’?  <b>Judgment:</b> The court found that mining was indeed a land use on the basis that the scheme regulations promulgated in terms of s 8 of LUPO recognized this. This was not inconsistent with the constitutional scheme of concurrent powers (at 73I – J and 74G).</p>
	<p><b>Issue 3:</b> Was an environmental authorization required for mining on the Rocklands and Westridge Dunes respectively? Had not the environmental provisions in the MPRDA ‘incorporated’ NEMA?  <b>Judgment:</b> The court found that obtaining an environmental authorization under NEMA was required on the basis of the text in s 24F(1), 24(8)(a) and s 24L. Taken together, these provisions made it clear that activities which require an environmental authorization under NEMA may also be regulated by other legislation requiring similar authorizations (at 77G).</p> <p>The argument that the MPRDA had ‘incorporated’ NEMA rested upon the content of ss 2(h), 5(4)(a), 23(1)(d) and 37 – 39, particularly s 37(1) which provides that the principles in s 2 of NEMA apply to all mining and serve as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA. It was argued that Parliament had, through the MPRDA, entrusted the management of environmental issues to the Minister of Mineral Resources (at 78A – 79A). In deciding this issue the court once again referred to the text of ss 24(8), 24F(1) and 24L(4) of NEMA which it held made it clear that an environmental authorization under NEMA is required even where processes and authorizations exist under other laws (at 79B – D). This interpretation was also supported by the wording of the permits granted to the first respondent (at 80ff). The mandate to the court given by s 39(2) of the Constitution requires that the court must interpret legislation in a manner that gives as much tangible protection to the right to environment as the language of the statute can reasonably bear (at 79F – G).</p>
<p><b>Outcome</b></p>	<p>The court interdicted the respondents from commencing or continuing with mining operations on the properties in contention until and unless authorization for the land use and activities was obtained under both LUPO and NEMA.</p>
<p><b>Obiter</b></p>	<p>None</p>