Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **4217/2009**
5932/2009

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
MACCSAND (PTY) LIMITED	First respondent
MINISTER OF MINERALS AND ENERGY	Second Respondent
NATIONAL MINISTER OF WATER AFFAIRS AND ENVIRONMENT	Third Respondent
MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE	Fourth Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Fifth Respondent

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JUDGMENT delivered on the 20th day of August 2010

DAVIS J

INTRODUCTION

Second Respondent granted first respondent, a black empowerment mining company, mining rights in terms of section 23 of the Mineral and

Petroleum Resources Development Act 28 of 2002 (MPRDA) in respect of Erven 1210 and 9889 Mitchell's Plain and Erf 1848 Schaapkraal together with a mining permit in terms of section 27 of MPRA in respect of Erf 13625 Mitchell's Plain. Applicant and fourth respondent contend that the Land Use Planning Ordinance 15 of 1985 (LUPO) requires, in addition to any right acquired under the MPRDA, that authorisation by applicant be procured before any exercise of these mining rights can take place.

Thus, the central dispute in this application is whether a mining permit or mining right granted under the MPRDA exempts the holder from having to obtain authorisation for its mining activities in terms of laws which regulate the use of that land, in particular the provisions of LUPO and the National Environment Management Act 107 of 1998 (NEMA).

The application, which was initially brought by the applicant, was for an order interdicting and restraining first respondent from conducting mining activities on the relevant erven, unless and until the necessary authorisations in terms of LUPO had been sought and obtained together with certain ancillary relief.

The initial application was brought in respect of Erf 13625, the so called Rocklands Dune. Applicant subsequently brought an application in

respect of the other three erven and these two applications were then consolidated. Fourth respondent was joined as a party on the insistence of second respondent. Having been so joined, fourth respondent then brought certain conditional counter-applications, one of which counter-applications necessitated the joining of a further party, the fifth respondent.

These counter applications are brought only on condition that this Court finds in the main application that, upon a proper interpretation of, firstly, section 27(2) of the Physical Planning Act, No. 125 of 1991 (*"the PPA"*), and secondly, the MPRDA, either the provisions of LUPO and the regulations of the zoning schemes promulgated thereunder do not apply in respect of any right of any person to prospect for or to mine any mineral, or a person undertaking mining operations is exempt from the requirement to comply with the provisions of LUPO and the regulations of the zoning schemes promulgated thereunder, for an order declaring-

6.6.1 that the PPA is inconsistent with the Constitution and invalid to that extent; and/or

6.6.2 that the MPRDA is inconsistent with the Constitution and invalid to that extent.

Fourth respondent, in a further alternative, and, in the event of the Court finding that the conditional relief sought falls within the exclusive

jurisdiction of the Constitutional Court, seeks to interdict Maccsand from commencing or continuing mining operations on the Rocklands and Westridge dunes until the matter is determined by the Constitutional Court.

Notwithstanding the submissions of fourth respondent, applicant insists that the dispute can and should be decided on the narrow basis as envisaged in the original applications, namely that (i) mining activity may not be carried out unless authorisation has been granted under land use and environmental legislation; and (ii) in this case, no such authorisation has been so granted.

THE FACTUAL BACKGROUND

A brief explanation of the facts is necessary to understand the full extent of the dispute. The Rocklands Dune (Erf 13625) is vacant land of 3.643 hectares in extent and is located in the residential area of Mitchell's Plain, adjacent to private homes and situated between two schools.

The Westridge Dune (Erven 1210, 9889 Mitchell's Plain and 1848 Skaapskraal) are continguous erven also located in the residential area of Mitchell's Plain. These erven constitute 16.3 hectares in extent. The

northern, southern and eastern sides of this dune abut onto private homes. The area to the west of the dunes is vacant land or, in this case, the dune abuts onto a major road. There is an informal settlement on Erf 1210.

On 16 October 2007 first respondent was granted a mining permit in respect of Erf 13625 in terms of Section 27 of MPRDA. On 29 August 2008, first respondent was granted a mining right in respect of Erven 1210, 9889 and 1848 in terms of Section 23 of MPRDA. The city owns or has the right to ownership of all of these erven. Erven 13625, 1848 and 9889 are all zoned public open space and Erf 1210 is zoned "*rural*".

Applicant and first respondent have engaged through correspondence with regard to the possible exploitation of the mining rights and permits since June 2006. It appears that first respondent applied for these rights in September 2006. Applicant refused to support the application and informed both first and second respondent of its position. It further informed both parties that authorisation in terms of LUPO was required before mining activities could be conducted on the erven.

Applicant was not notified by either first or second respondent that a permit in respect of Erf 13625 had been granted until first respondent delivered the permit to applicant's law enforcement office in Mitchell's

Plain, less than two weeks before it commenced mining. On 17 February 2009 first respondent started mining activities on the erven but did not give applicant any notification for such commencement in terms of Section 5(4) of the MPRDA.

This action prompted applicant to launch an urgent application to interdict and restrain first respondent from continuing mining activities on Erf 13625 unless and until it obtained the requisite authorisations in terms of LUPO. On 4 March 2009 applicant's attorney wrote to first respondent requesting an undertaking that they would not commence mining activities on the remaining erven, an undertaking which first respondent then failed to furnish. This omission prompted a further application for an interdict which was brought by applicant on 24 March 2009, in this case seeking to prevent first respondent from conducting mining activities on the remaining erven until the necessary authorisations had been procured.

THE CORE DISPUTE

Applicant's case is that neither of the zones applicable in respect of the Rocklands or Westridge Dunes authorises the use of this land for mining. Applicant avers that two actions would have to be taken before lawful mining activity could take place; either the zoning scheme would have to

be amended to authorise mining on the relevant land or a departure would have to be granted from the existing zoning scheme to allow mining to take place on the land.

By contrast, both first and second respondent contend that, once second respondent or his or her delegate have granted a mining right or permit, the holder is granted a right to undertake mining at the location and that no other law or authority may "*veto*" the decision taken by the relevant Minister or delegate.

Mr. **Rose-Innes,** who appeared together with Ms. **Bawa** on behalf of first respondent, submitted that, in this case, there were three different legal regimes which operated at different spheres of government, all of which were relevant to mining, being NEMA, LUPO and the MPRDA. Mr. **Rose-Innes** submitted that, if there was a clash between these three regimes, then if second respondent, pursuant to the powers granted in terms of the MPRDA, approved the application for mining, this decision put an end to the case; that is this decision trumped all other considerations.

In amplification of this submission, Mr. **Rose-Innes** contended that the MPRDA had introduced a new mineral order when it came into effect on 1 May 2004, repealing the 1991 Minerals Act, and much of the common

law. The State is now the custodian of mineral resources and, thus, ownership of minerals vests in the State. The Act deals with the regulation of mineral resources as a whole and, of necessity, with the regulation of land use where the mining takes place.

Mr. **Rose-Innes** submitted further that, without the land use being regulated by the MPRDA, exploitation of the mineral resource could not effectively take place. He submitted further that the entitlement to use the land in the manner required for the exercise of mining rights, was inherently part of the exercise thereof and hence the grant of the mineral right without this entitlement could mean that mining rights might not be capable of being exercised at all. Certainly, in his view, they would not be exercised in a nationally, uniform manner.

Mr. **Rose-Innes** then referred to Chapter 4 of the MPRDA (Sections 9 – 56) which deals with mineral and environmental regulations. In his view, the provisions of this chapter were comprehensive and self-contained. In particular, he referred to section 48, entitled *"Restriction or prohibition on prospecting and mining on certain land"*. Subsection (1) provides

> *"Subject to section 20 of the National Parks Act, 1976 (Act No. 57 of 1976), and subsection (2), no reconnaissance permission, prospecting right, mining right or mining permit may be issued in respect of*
>
> *(a) land comprising a residential area;*

(b) any public road, railway or cemetery;

(c) any land being used for public or government purposes or reserved in terns of any other law; or

(d) areas identified by the Minister by notice in the Gazette in terms of section 49."

Section 48(2) provides that a mining right or permit may be issued in respect of land as contemplated in section 48(1), if the Minister is satisfied that-

"(a) having regard to the sustainable development of the mineral resources involved and the national interest it is desirable to issue it;

(b) the reconnaissance on prospecting or mining will take place within the framework of national environmental management policies, norms and standards; and

(c) the granting of such rights or permits will not detrimentally affect the interests of any holder of a prospecting right or mining permit."

Mr. **Rose-Innes** contended that section 48 thus contemplated the granting of mining rights and permits without the zoning of such land being affected in circumstances where the requirements of section 48(2) have been met.

By contrast, Mr. **Budlender,** who appeared together with Ms. **Van Huyssteen** for the applicant, submitted that land could not be used for mining activities without the authorisation by applicant, acting pursuant

to the provisions of LUPO. He referred to the long title of LUPO which states that its purpose 'is to regulate land use planning and to provide for matters incidental thereto'. In particular, section 11 of LUPO provides

> *"11 General purpose of zoning scheme*
>
> *The general purpose of a zoning scheme shall be 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."*

Pursuant to the applicable provisions of LUPO, erven 13625 and 9899 are zoned public open space. In terms of applicants' zoning scheme, regulations promulgated under LUPO, Erf 1848 is zoned public open space and Erf 1210 is zoned rural in terms of the Divisional Council Cape's zoning scheme regulations under LUPO.

These zoning categories do not permit mining. Thus, Mr. **Budlender** submitted that the only way in which mining activities could take place, contrary to the zoning scheme, was by way of recourse to section 15 of LUPO, which reads:

> *"15 Applications for departure*
>
> *(1)(a) An owner of land may apply in writing to the town clerk or secretary concerned, as the case may be-*

(i) for an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned, or

(ii) to utilise land on a temporary basis for a purpose for which no provision has been made in the said regulations in respect of a particular zone."

Much was made by both first and second respondent that, were the applicant's approach to be correct, the effect of LUPO and the relevant zoning schemes would be to confer on the owner of a property, such as the applicant, a *veto* power on the exercise of a mining right. This power would follow because only the owner could apply, in terms of section 15 for a departure from the zoning scheme which prohibited mining activity.

To this argument, Mr. **Budlender** submitted that the Provincial Minister, in this case fourth respondent, could amend the scheme conditions so that mining was permissible on the land in question. Fourth respondent could act in terms of the powers granted to the Provincial Minister pursuant to section 9(2) of LUPO. If the Minster so refused, it was possible that his decision could be taken on review. Further, Mr. **Budlender** submitted that the Premier may rezone the land to make mining permissible, acting pursuant to section 18 of LUPO on his or her own initiative. It would then be open to an aggrieved party, such as first respondent, or the holder of the mining right, to approach the Premier and request that he or she

exercise this power. Again, the possibility of a review could be contemplated, if the Premier so refused.

Mr. **Budlender** further submitted that the applicant could re-zone the land to make mining permissible in terms of section 18 of LUPO, of which a refusal to do so, could again trigger a review application. Furthermore, section 55(1) of the MPRDA was of application, if the extraction of the minerals concerned was of such importance that other policy considerations should be over-ridden. Second respondent could thus expropriate the land, a power which was available, if it was necessary for the achievement of the objects contained in sections 2(d), (e), (f), (g), (h) of the MPRDA.

Viewed within the context of these submissions, the critical decision for resolving this dispute turned on a determination of a clash, as Mr. **Rose-Innes** described it, between the legislative regimes set out respectively in the MPRDA and LUPO.

In further framing this dispute, Mr. **Budlender** correctly noted that the very nature and purpose of LUPO was that it represented the key mechanism for municipal planning, in this case, for the Province of the Western Cape. If LUPO was over-ridden, it would make it extremely

difficult for authorities such as applicant to fulfil their constitutional function with regard to municipal principal planning.

It is thus to the question of the respective constitutional responsibilities of an authority, such as applicant, and second respondent, to which I must turn for a resolution of this problem.

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY ET AL: THE CONSTITUTIONAL COURT DISPOSES OF PART OF THE PROBLEM

In order to determine the respective competence of national, provincial and local government, a considerable debate took place between counsel concerning the meaning of 'municipal planning' as listed in Part B of Schedule 4 of the ***South African Constitution Act*** 108 of 1996 ("the Constitution").

In particular, section 156 (1)(a) of the Constitution provides that a municipality has executive authority in respect of these matters. First and second respondents contended that legislation like LUPO had to give way to the MPRA if the objectives of the latter were to be properly fulfilled.

Hence the debate turned on two questions: the meaning of the phrase 'municipal planning' and the fit between the former and the national power dealing with mining. Subsequent to oral argument in the present dispute, the Constitutional Court delivered a judgment in ***The City of Johannesburg Metropolitan Municipality*** *and* ***The Gauteng Development Tribunal and Others*** ([2010] ZACC 11, judgment delivered on the 18th June 2010) which gave clear meaning to the term municipal planning.

The main issue in this case was the constitutionality of Chapters V and VI of the Development Facilitation Act 67 of 1995 which authorised provincial development tribunals to determine applications for the rezoning of land and the establishment of townships. A dispute arose between the City of Johannesburg Metropolitan Municipality and the Gauteng Development Tribunal which had been created by the Development Facilitation Act, the dispute concerning which sphere of government was entitled, in terms of the Constitution, to exercise the powers relating to the establishment of townships and the rezoning of land within the municipal area of the City.

In order to determine the dispute, the Constitutional Court was obliged to examine the constitutional scheme relating to the levels and powers of the

three tiers of government. As **Jafta J** said, in terms of section 40 of the Constitution, which defines the model of government so contemplated:

> *"the government consists of three spheres: the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and "not assume any power or function except those conferred on [it] in terms of the Constitution."* (para 43).

Of equal importance is a further observation by **Jafta J**:

> *"the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed."* (para 44).

The starting point for the determination of ***The City of Johannesburg*** case was section 156(1) of the Constitution which affords municipality's original constitutional powers. It reads thus:

> *"(1) 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."*

Part B of Schedule 4 includes the following functional area, "Municipal Planning".

In determining the meaning of "municipal planning", a term not defined in the Constitution, **Jafta J**, on behalf of a unanimous Constitutional Court, found as follows:

> *"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. Therefore, I agree with the Supreme Court of Appeal that in relation to municipal matters the Constitution employs "planning" in its commonly understood sense. As a result I find that the contested powers form part of "municipal planning"."* (para 57).

Two significant implications flow from this judgment for the purposes of the present dispute: Firstly, municipal planning includes the control and the regulation of the use of land which falls within the jurisdiction of a municipality and secondly, the national and provincial spheres of government cannot by legislation give themselves *the power to exercise executive municipal powers nor the right to administer municipal affairs. A mandate of these two spheres of government should ordinarily be limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by local authorities.*

MINING: A TRUMP?

But even if municipal planning includes the regulation of all land under the jurisdiction of a municipality, the first and second respondents contend that mining is a national competence and hence trumps the relevant power of local government. Much was thus made by the first and second respondents that mining was *"an exclusive national competence"*. This argument was employed for the justification that a national competence such as mining could over-ride municipal planning, even if the latter phrase was given the extensive meaning accorded to it by the Constitutional Court.

However, as Mr. **Budlender** correctly observed, the Constitution does not refer expressly to exclusive national competences. Schedule 4 of the Constitution provides for functional areas of concurrent national and provincial legislative competence. Schedule 5 provides for functional areas of exclusive provincial legislative competence. In Part B of both Schedules a list of *"local government matters"* is contained. Both of these schedules need to be read together with sections 155 and 156 of the Constitution. For completion, mention shall be made that certain of the provincial powers can be gleaned from Schedules 4 and 5 read together with sections 104 and 146 of the Constitution.

When these sections are examined together, it is clear that the Constitution does not detail exclusive national competence but carves out areas for provinces and municipalities, leaving the balance, being areas which are not so specified, to national government. In other words, the functional competence of the national government is defined by way of an examination of the functional competences of the local and provincial governments and not the other way round. In terms of section 44(1)(a)(2) of the Constitution, national government can pass legislation with regard to any matter, including the matters within the functional area listed in Schedule 4 which would include municipal planning.

As **Jafta J** pointed out at para 54 in the ***City of Johannesburg Metropolitan Municipality*** case, *supra,* the national sphere can regulate the exercise of executive municipal powers and the administration of municipal spheres by municipalities but cannot abrogate to itself the power to exercise executive municipal powers nor assume the right to administer municipal affairs by way of legislation outside of the scope of the Constitution.

The Constitution does not give national legislation the right to take away the planning function of municipalities. In this connection, much was made of section 25 of the MPRDA which provides, in terms of sub-section (2), that the holder of a mining right must (d) comply with the relevant provisions of this Act, any other relevant law under terms and the conditions of the mining right. Thus, had Parliament wanted to ensure that the MPRDA overrode legislation such as LUPO, the question arises as to why it would have phrased the MPRDA in the fashion set out in section 25(2)(d). To over-ride the provisions of LUPO, Parliament would have been required to directly insert a provision, such as 'notwithstanding the provision of any other law'. This was not the case in the present dispute. By contrast, the relevant legislation includes, within the potential supervisory scope, the provisions of *"any other law"*.

CONCLUSION

The absence of a national legislative over-ride read, together with the decision in ***City of Johannesburg Metropolitan Municipality***, *supra,* leads to a conclusion that LUPO has clear application to the present dispute. This finding does not of course preclude the possibility of an overlap between the powers of national and local government. To the contrary, as the Constitutional Court held in ***Wary Holdings (Pty) Ltd*** *vs* ***Stalwo (Pty) Ltd and Another*** 2009(1) SA 337 (CC) at para 80:

> *"There is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the subdivision of 'agricultural land', the one may in effect veto the decision of the other. It should be borne in mind that the one sphere of control operates from a municipal perspective and the other from a national perspective, each having its own constitutional and policy considerations."*

This approach also finds an echo in ***Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*** 2007 (6) SA 4 (CC), in particular where the Court held at para 85:

> *"The local authority considers need and desirability from the perspective of town-planning, and an environmental authority considers whether a town-planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town-planning perspective and yet fail from an environmental perspective."*

For it to be held that LUPO has no application to the use of land in a case such as the present dispute, the very idea of concurrent powers as envisaged in Schedule 4 of the Constitution would be called into question. The following example is illustrative of this concern. An examination of Schedules 4 and 5 reveals that correctional services, including the construction of prisons, is considered as an exclusive national competence; that is, it clearly not a provincial nor a local competence. Could it then be suggested that the construction of a prison by the Department of Correctional Services could take place in circumstances where the municipality, in whose jurisdiction the prison is proposed to be constructed, would have no say at all about the location of the proposed prison? Such a conclusion would not simply limit but eradicate the municipality's powers of municipal planning, allowing prisons to be located in, for example, an area zoned residential, no matter the views of the duly elected local government.

MINING AS A LAND USE

The approach that I have adopted leads thus to the further question as to whether mining is a land use, which in turn would fall within the scope of applicant's constitutional powers.

Mr. **Rose-Innes** submitted that mining is not a *"land use"*. In his view, nowhere do the provisions of LUPO authorise mining nor does LUPO characterise mining in matters incidental thereto as a *"land use"*. Both Mr. **Rose-Innes** and Mr. **Oosthuizen,** who appeared together with Mr. **Warner** on behalf of second respondent, submitted that, were it otherwise and LUPO was interpreted so that the use of land for mining was included within the range of land uses controlled by LUPO, so that use restrictions were applied in respect of the use of land for mining, this would effectively result in LUPO controlling mining activity. A mining right inherently consists of the use of the land for mining. Hence, it would be constitutionally impermissible for the national competence relating to the regulation of mining to be subjected to the provisions of LUPO, which in turn could result in the prohibition of nationally authorised mining in the designated area. Whatever the rights granted under the MPRDA, an authority like applicant could then invoke powers under LUPO to prevent the exploitation of these rights.

The scheme regulations which had been promulgated in terms of section 8 of LUPO recognise mining as a land use and have created a special zone for it. In more specific terms, Schedule 3 to LUPO deals with planning control. It then provides "*The following provision shall apply in the relevant zones*". There then appears as para 3.15, 'Industrial Zone III Primary use mining'. Mining is then defined in the Regulations as "*an enterprise which practises the extraction of raw materials, whether by means of surface or underground methods and includes the removal of stone, sand, clay, kaolin, ores, minerals or precious stones*". LUPO recognises mining as a land use and thus, on the strength of ***The City of Johannesburg*** case, such land use falls within municipal planning and applicants' as well as fourth respondents' concurrent powers.

Mr. **Breitenbach,** who appeared together with Mr. **Paschke** on behalf of fourth respondent, submitted that the implication of ***Wary Holdings***, which judgment needs to be read together with ***Gauteng Development Tribunal***, *supra* (the decision of the CC) suggested that 'provincial planning' as listed in schedule 5A, as an exclusive provincial legislative competence, includes all the functions assigned to the provinces under the four provincial Ordinances that survived the transition to the present constitutional regime, including LUPO. These would include the powers to amend zoning schemes (section 9(2) of LUPO) and the powers to