IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No: **709/2010**
WCHC CASE Nos: 4217/2009 and 5932/2009

In the matter between:

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

and

CITY OF CAPE TOWN	**First Respondent** (Applicant *a quo*)
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	**Third Respondent** (Third Respondent *a quo*)
MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE	**Fourth Respondent** (Fourth Respondent *a quo*)
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**Fifth Respondent** (Fifth Respondent *a quo*)

FOURTH RESPONDENT'S HEADS OF ARGUMENT

Ref: Justin Truter, Werksmans
021 405 5100, jtruter@werksmans.com

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ABBREVIATIONS

Abbreviation	Definition
'DME'	The Department of Minerals and Energy (now Mineral Resources).
'EIAR, 2006'	Environmental Impact Assessment Regulations, 2006, made under ss 24(5) and s 44 of NEMA, promulgated in GN R385 of 21 April 2006, commenced on 3 July 2006 (GN R612 of 23 June 2006) and repealed on 2 August 2010 (the date of commencement of EIAR, 2010).
'EIAR, 2010'	Environmental Impact Assessment Regulations, 2010, made under ss 24(5), 24M and 44 of NEMA, promulgated in GN R543 of 18 June 2010, amended by GN R660 of 30 July 2010 and GN R1159 of 10 December 2010 and commenced on 2 August 2010 (GN R664 of 30 July 2010).
'EMP'	An environmental management programme or an environmental management plan contemplated in s 39 of the MPRDA.
'GN R386'	Government Notice R386, as amended (GN R613 of 23 June 2006 and GN R719 of 3 July 2009), made under ss 24 and 24D of NEMA on 21 April 2006, commenced on 3 July 2006 (GN R612 of 23 June 2006) and repealed on 2 August 2010 (the date of commencement of Listing Notice 1).
'Listing Notice 1'	Environmental Impact Assessment Regulations Listing Notice 1 of 2010, made under ss 24(2) and 24D of NEMA, promulgated in GN R544 of 18 June 2010, amended by GN R660 of 30 July 2010 and GN R1159 of 12 December 2010 and commenced on 2 August 2010 (GN R661 of 30 July 2010).
'Listing Notice 2'	Environmental Impact Assessment Regulations Listing Notice 2 of 2010, made under ss 24(2) and 24D of NEMA, promulgated in GN R545 of 18 June 2010, amended by GN R660 of 30 July 2010 and GN R1159 of 12 December 2010 and commenced on 2 August 2010 (GN R662 of 30 July 2010).
'Listing Notice 3'	Environmental Impact Assessment Regulations Listing Notice 3 of 2010 made under ss 24(2) and 24D of NEMA, promulgated in R546 of 18 June 2010, amended by GN R1159 of 12 December 2010 and commenced on 2 August 2010 (GN R663 of 30 July 2010).
'LUPO'	The Land Use Planning Ordinance 15 of 1985, Cape.
'Maccsand'	The first appellant.
'MPRDA'	The Mineral and Petroleum Resources Development Act 28 of 2002.
'NEMA'	The National Environmental Management Act 107 of 1998.
'PPA'	The Physical Planning Act 125 of 1991.

Abbreviation	Definition
'Rocklands dunes'	Erf 13625, Mitchell's Plain; the subject of the application under case number 4217/2009 in the Court below.
'the Chamber'	The Chamber of Mines of South Africa, the *amicus curiae*.
'the City'	The first respondent.
'the Constitution	The Constitution of the Republic of South Africa, 1996.
'the dunes'	The Rocklands and Westridge dunes collectively.
'the Environment Minister'	The second respondent.
'the Minerals Minister'	The second appellant.
'the Province'	The Western Cape Province.
'the Provincial Minister'	The fourth respondent.
'Westridge dunes'	Erf 1210, Mitchell's Plain, erf 9889, Mitchell's Plain and erf 1848, Schaapkraal; under case number 5932/2009 in the Court below.

AUTHORITIES

INTRODUCTION

1. Maccsand is a holder of a mining permit issued in terms of s 23 of the MPRDA and a mining right issued in terms of s 27 of the same Act in respect of certain properties in Mitchell's Plain, Cape Town. It does not have an authorisation to mine under the applicable zoning schemes or LUPO, nor does it have an environmental authorisation for mining in terms of NEMA.

2. The main issue raised for decision in this appeal is whether a mining permit or mining right granted in terms of the MPRDA exempts the holder from also having to obtain authorisations for its mining activity under the zoning schemes or LUPO and under NEMA. The Court below (Davis J, Baartman J concurring),[1] held that it did not and granted orders preventing Maccsand from commencing or continuing mining operations on the properties concerned until and unless it obtains those authorisations.

3. Maccsand and the Minerals Minister appeal to this Court with the leave of the Court below. The Chamber has been admitted by this Court as an *amicus curiae* and supports the appellants. The appeal is opposed by the City and the Province.

SALIENT FACTS

Erven and ownership

4. The Rocklands and Westridge dunes are located in the residential area of Mitchell's Plain, Cape Town. They are adjacent to private homes and, in the case of the Rocklands dunes, between two schools. The City owns the land on which they are situate.

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

Zoning, extents and zoning issues

5. The property on which the Rocklands dunes are situate (erf 13625, Mitchell's Plain) is zoned 'public open space' in terms of the applicable zoning scheme, which is the Zoning Scheme Regulations of the Municipality of the City of Cape Town Zoning Scheme ('the CCT zoning scheme').[2] The proposed mining area on the Rocklands dunes is 1.5 ha. The total extent of erf 13625 is 3.643 ha.

6. The Westridge dunes are situate on three erven. Two (erf 9889, Mitchell's Plain and erf 1848, Schaapkraal) are zoned 'public open space' in terms of the applicable zoning schemes, which are, respectively, the CCT zoning scheme and the Town-planning Scheme of the Divisional Council of the Cape ('the Divco zoning scheme').[3] The third (erf 1210, Mitchell's Plain) is zoned 'rural' in terms of the applicable zoning scheme, which is the Divco zoning scheme. The proposed mining area on the Westridge dunes is 16.3 ha. The total extent of erven 1210 and 9889, Mitchell's Plain and erf 1848, Schaapkraal is 17 ha.

7. Under both the CCT and Divco zoning schemes the properties zoned 'public open space' may not be used for mining, either as of right or with the consent of the local authority (the City). Consequently, if land use planning permission is legally required, appropriate departures must be granted under s 15 of LUPO or the zoning scheme itself must be amended under s 9(2) of LUPO.

8. Under the Divco zoning scheme, the property zoned 'rural' may not be used for mining as of right, but it may be so used as a conditional use with the consent of the City.[4] Consequently, if land use planning permission is legally required, the consent of the City must be obtained or appropriate departures must be granted under s 15 of LUPO or the zoning scheme itself must be amended under s 9(2) of LUPO.

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[2] Annexure RE15 core bundle vol. 5 pp. 414-430.
[3] Annexure RE16 core bundle vol. 5 pp. 431-458.
[4] Annexure RE16 core bundle vol. 5 pp. 457 section 12.(b).1.

9. Maccsand has neither sought nor been granted any authorisation in terms of LUPO to undertake mining operations on either the Rocklands or Westridge dunes.

The natural environment, the impact of mining and the environmental issues

10. The Rocklands and Westridge dunes are a habitat for the Cape Flats Dune Strandveld ecosystem, an indigenous vegetation type. The vegetation on these dunes is in good condition. The Cape Flats Dune Strandveld ecosystem is classified as 'Endangered' in both the 2004 National Spatial Biodiversity Assessment ('NSBA') and the 2009 Draft National List of Threatened Ecosystems.[5] The most recent data (November 2009) indicates that the Cape Flats Dune Strandveld is now 'Critically Endangered', the highest threat level. The Rocklands and Westridge dunes are currently used as conservation areas.[6]

11. The experts for the Province[7] and Maccsand[8] differ in their assessments of the conservation value of the dunes.

12. Maccsand proposes to mine the two sets of dunes for their sand, which is used in the building industry. To get the sand, the topsoil and natural vegetation covering the dunes will be removed using a bulldozer.

13. The expected duration of mining on the Rocklands dunes is two years. After its mining of the Rocklands dunes is completed, the Rocklands dunes will not be rehabilitated with natural vegetation. Instead Maccsand will convert the property into a playground, skate park, dirt track and graffiti wall with an associated parking area and block of toilets.[9]

14. According to Maccsand's EMP for the Westridge dunes, the expected life of the mine is 38 to 40 years. Maccsand however believes that mining may take place over a shorter

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[5] Annexure RE28 core bundle vo. 4 p. 354 para 63.
[6] Annexure SK5(c)/MGD26/MGD54 core bundle vol. 1 pp. 30-31.
[7] Ralston vol. 6 pp. 512-526 paras 7-23; Helme vol. 12 pp. 1115-1119 paras 11-22.
[8] Mabille vol. 11 pp. 919-931 paras 19-29; Low vol. 11 pp. 970-983 paras 5-39.
[9] Annexure RE1 core bundle vol. 2 p. 168 11th bullet (p 70 of the original document); Egypt vol. 11 p. 1013 para 4.5 Annexure LFE2 Core bundle vol. 1 p. 52; Ellis vol. 12 pp. 1091-1092 para 144.

duration. 14.67 ha of natural vegetation will be removed. Maccsand has proposed a rehabilitation programme in its EMP.[10] The respective experts for the Province[11] and Maccsand[12] differ in their assessment of the adequacy and likelihood of success of the proposed rehabilitation programme.

15. For the duration of the mining activities on both sets of dunes, the land being mined will not be usable as public open space.

Chronology of most relevant events

16. In letters dated 29 June 2006[13] and 17 July 2006[14] Maccsand's environmental consultant, Pro-Earth, notified the City that Maccsand had lodged an application with DME for the mining of sand on erven '1210, 1848, 9889 and 13625 Mitchell's Plain' (i.e. the Rocklands and Westridge dunes).

17. In a notice dated 8 November 2006[15] Maccsand advised the City that the Regional Manager of DME had accepted its application for a 'prospecting/mining right' in terms of s 27 of the MPRDA in respect of the Rocklands and Westridge dunes. Maccsand proposed a meeting and gave a list of the matters about which it intended to consult the City.

18. In a letter to Maccsand dated 3 January 2007[16] DME confirmed that its application for a mining permit in terms of s 27 of the MPRDA in respect of erf 13625 (the Rocklands dunes) had been accepted.

19. On 1 February 2007 Maccsand submitted an EMP for its mining of the Rocklands dunes[17] and DME forwarded it to the City and invited its comments within 60 days.[18]

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[10] Annexure RE2 core bundle vol. 3 pp. 208-210 (pp. 56-58 of the original document).
[11] Ralston vol. 6 pp. 529-543 paras 29-56; Helme vol. 12 pp. 1120-1129 paras 23-38.
[12] Mabille vol. 11 pp. 932-947 paras 32-58; Low vol. 11 pp. 984-988 paras 40-51.
[13] Annexure SK5(a) core bundle vol. 1 p. 27.
[14] Annexure SK5(b) core bundle vol. 1 p. 28.
[15] Annexure MGD29/KAW4 (second application) core bundle vol. 1 pp. 32-34.
[16] Annexure KAW2 (annexure to SK1) core bundle vol. 1 pp. 35-36.
[17] Annexure MDG13 core bundle vol. 1 pp. 39-42.

20. On 20 August 2007 DME sent the Province and the City an environmental 'scoping report' in respect of the proposed mining on the Westridge dunes, for comment.[19]

21. On 20 September 2007 the Province informed DME that the proposed mining comprises, among others, activities 12 and 20 listed in GN R386 and that an environmental authorisation in terms of NEMA was therefore required.[20] The Province also advised that the land in question would have to be rezoned or a temporary land use departure would have to be granted in terms of LUPO.[21]

22. On 16 October 2007 DME notified Maccsand of the approval of its EMP in respect of the Rocklands dunes, subject to certain conditions[22] and issued Maccsand with a mining permit in terms of section 27 of the MPRDA.[23]

23. In a letter dated 25 October 2007 the City advised DME that it does not support the proposed mining on the Rocklands and Westridge dunes and set out its reasons.[24]

24. On 29 August 2008 DME issued Maccsand with a mining right for the Westridge dunes in terms of section 23(1) of the MPRDA.[25]

25. In a letter dated 10 September 2008 Maccsand informed the City that DME had approved its EMP in respect of the Westridge dunes (but not Rocklands dunes).[26]

26. In a letter to Maccsand dated 30 October 2008 the City stated that the zoning of the Westridge dunes does not permit mining as of right. The City advised that it may approach the High Court for an interdict to prevent Maccsand from mining unless and until it obtains authorisation in terms of LUPO for mining.[27]

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[18] Annexure SK3 core bundle vol.1 p. 44.
[19] Annexure RE8 core bundle vol. 4 p. 295 line 15.
[20] Annexure RE8 core bundle vol. 4 pp. 293-295, especially 294 line 15.
[21] Annexure RE8 core bundle vol. 4 p. 295 line 30.
[22] Annexure SK6 core bundle vol. 1 pp. 59-61.
[23] Annexure KAW7 (first application) core bundle vol. 1 p. 58.
[24] Annexure MGD34 / MGD55 core bundle vol. 1 pp. 62-66.
[25] Annexure KAW7 (second application)/MGD57 core bundle vol. 1 pp. 95-108.
[26] Annexure KAW5 (first application) core bundle vol. 1 p. 109.
[27] Annexure MGD36 core bundle vol. 3 pp. 288-289.

27. On 17 February 2009 Maccsand commenced mining operations on the Rocklands dunes.

28. On 20 February 2009 the City reported to DME what it considered to be illegal mining activities on the Rocklands dunes.

29. In a letter dated 23 February 2009 DME advised the City that Maccsand had been issued with a mining permit in respect of the Rocklands dunes.[28]

30. On 3 March 2009 the City applied, in the Court below under case number 4217/09, for an interim interdict *pendente lite* and a final interdict prohibiting Maccsand from continuing with mining on the Rocklands dunes without authorisation under LUPO, and without first notifying and consulting with the City.[29] The respondents were Maccsand and the Minerals Minister.

31. In a letter dated 4 March 2009 the City referred to its interdict application in respect of the Rocklands dunes and requested Maccsand to undertake not to exercise its mining right in respect of the Westridge dunes until the issues in the first application had been resolved.[30] The undertaking was not given.

32. On 6 March 2006 the Court below (Koen AJ) postponed to 19 March 2010 the application under case number 4217/09 for an interim interdict and granted a temporary interim interdict to operate until the determination of that application.[31]

33. On 10 March 2009 the City gave notice of its intention to amend its notice of motion in case number 4217/09 by adding, as a pre-requisite for the mining, an authorisation under ss 24(2)(a) and (d) of NEMA for activity 20 listed in GN R386 ('activity 20').[32] The then respondents consented to the amendment.

34. On 16 March 2009 the Province issued Maccsand with a notice of its intention to issue a compliance notice in terms of s 31L of NEMA on the grounds, among others, that its

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[28] Annexure KAW6 (first application) core bundle vol. 2 p. 127.
[29] City's notice of motion vol. 1 pp. 1 to 3.
[30] Annexure KAW8 (second application) core bundle vol. 1 pp. 128-129.
[31] Reasons for order vol. 1 p. 34.
[32] City's notice of amendment vol. 1 pp. 32-33.

mining of the Rocklands dunes was an activity listed in items 12 and 20 of GN R386 and, absent an environmental authorisation in terms of NEMA, was unlawful.[33]

35. On 17 March 2009, by agreement, the Court below (Traverso AJP) postponed the application for final relief in case number 4217/09 for hearing on 3 June 2009 and replaced the interim order made on 6 March 2009 with an interdict *pendente lite*.[34]

36. On 24 March 2009 the City applied, under case number 5932/09, for a final interdict prohibiting Maccsand from commencing with mining on the Westridge dunes without an authorisation under LUPO and an authorisation under NEMA for activity 20, and without DME first dealing with the City's refusal to allow Maccsand to enter the land for the purpose of mining, under s 54 of the MPRDA.[35] The respondents were Maccsand and the Minerals Minister.

37. On 15 May 2009, by agreement,[36] the City's applications against Maccsand and the Minerals Minister, under case numbers 4217/09 (Rocklands dunes) and 5932/09 (Westridge dunes), were consolidated and postponed to 17 August 2009 for hearing.

38. On 28 May 2009 the Province was joined as the Fourth Respondent in the consolidated applications. The Environment Minister was also joined as the Third Respondent, but abided the decision of the Court.

39. On 21 July 2009 the Province delivered a notice of counter-application and conditional counter-application in the consolidated applications, as well as a notice of application for joinder.[37]

40. In its counter-application the Province sought, amongst other things, the following:

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[33] Annexure MGD21 core bundle vol. 4 pp. 297-302.
[34] Order 17 March 2009 vol. 1 pp. 42-44.
[35] City's notice of motion vol. 1 pp. 1-3.
[36] Order 15 May 2009 vol. 4 pp. 296-298.
[37] This was omitted from the appeal record but is annexed to the Province's conditional application for amendment filed with these heads.

40.1. declarators that Maccsand may not commence or continue mining on the Rocklands or Westridge dunes without authorisation under LUPO[38] and authorisation under NEMA for activity 20,[39] as well as an interdict prohibiting Maccsand from doing so until it has those authorisations;[40] and

40.2. a declarator that Maccsand may not commence or continue mining on the Westridge dunes without authorisation under NEMA for activity 12 listed in GN R386 ('activity 12'),[41] as well as an interdict prohibiting Maccsand from doing so until it has that authorisation.[42]

41. The only relief sought in the Province's conditional counter-application that remains relevant, is the following: If the Court were to find that the only reasonable interpretation of the MPRDA is that it exempts a holder of a mining right or mining permit from the requirements of LUPO (and the regulations and zoning scheme regulations promulgated under LUPO), the Province seeks a declarator that the MPRDA is unconstitutional and invalid to that extent.[43]

42. The Province's application for joinder was for the joinder of the national Minister of Rural Development and Land Reform ('the Land Minister') as the Fifth Respondent. On 29 July 2009 the joinder order was granted by the Court below (Moloi AJ). The Land Minister subsequently delivered papers and participate in the hearing in the Court below, but is not participating in this appeal.

43. On 5 August 2009 the City delivered a further notice of amendment seeking the same alternative and further alternative relief as the Province (i.e. the relief described in paragraphs 40 and 41 above).

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[38] para 1.
[39] para 2.
[40] para 4.
[41] para 3.
[42] para 5.
[43] paras 10 to 11.

44. Between 12 and 15 April 2010 the application and counter-applications were argued in the Court below before Baartman and Davis JJ.

45. On 20 August 2010 Davis J delivered the judgment of the Court below.

APPROPRIATE ZONINGS OR DEPARTURES

46. The Provincial Minister contends that if LUPO is applicable to Maccsand's mining activities, LUPO authorisations will be required because the land on which the Rocklands and Westridge dunes is situated is not zoned to permit mining as of right. It is zoned public open space (three erven) and rural (one erf). The LUPO authorisations can take the form of departures from the applicable zoning schemes granted by the City in terms of s 15(1)(a)(ii) of LUPO,[44] or the amendment of the applicable zoning schemes by the Provincial Minister in terms of s 9(2) of LUPO. If Maccsand seeks departures and the City refuses or imposes conditions Maccsand does not like, the City's decision may be taken on appeal to the Provincial Minister in terms of s 44(1)(a) of LUPO.

The Land Use Planning Ordinance 15 of 1985

47. Like the Town-Planning and Townships Ordinance 15 of 1986 (Transvaal) considered by this Court[45] and the CC[46] in the *Gauteng Development Tribunal* case, and the other two provincial ordinances that survived the transition to the present constitutional regime (the Town Planning Ordinance 27 of 1949 (Natal) and the Townships Ordinance 9 of 1969 (Orange Free State)), LUPO is a pre-new order law regulating land use planning matters. LUPO was enacted in 1985 by the Administrator of the former Cape Province under the Provincial Government Act 32 of 1961. It applied in the area of the former Province of

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[44] Although one of the three erven comprising the Westridge zones is zoned 'rural' in terms of the Divco scheme and consequently may be used for mining with the consent of the City under that scheme, this is not an option for the other two erven for which departures under LUPO itself must be obtained.

[45] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA) ('*Gauteng Development Tribunal SCA*').

[46] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) ('*Gauteng Development Tribunal CC*').

the Cape of Good Hope ('the former Cape Province'), including what is now the Western Cape Province. On 17 June 1994, shortly after the commencement in 1994 of the Constitution of the Republic of South Africa Act, 200 of 1993 ('the interim Constitution'), the President, acting under s 235(8) of the interim Constitution, assigned the administration of the whole of LUPO to a competent authority in the Western Cape Province.

48. We emphasize the following features of LUPO:

- one of its objects is to regulate land use planning within the Western Cape Province by means of zoning, which effectively determines the purpose for which land may be used and the restrictions applicable to such use as set out in zoning scheme regulations (s 11);
- all land within the Province is subject to zoning control (ss 7 and 8);
- zoning scheme regulations are made, amended or replaced by the Provincial Minister (the successor-in-law to the Administrator) (ss 7(2), 8 and 9(2));
- an 'owner of land' may apply for a departure from the applicable zoning provisions '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' (s 15(1)(a)(ii));
- an 'owner of land' may also apply for its rezoning in order to utilise the land for a proposed different purpose from the existing zoning (s 16(1));
- applications for departures and rezonings may be decided by the Provincial Minister or, if authorised thereto by scheme regulations (in the case of departures – s 15(1)(b)) or the provisions of a structure plan (in the case of rezonings – s 16(1)), municipalities;
- the factors to be considered in deciding applications for departures or rezoning are the desirability of the contemplated utilisation of land, the safety and welfare of the members of the community concerned, the preservation of the natural and developed environment concerned and the effect of the application on existing rights concerned (s 36);

- where a departure or rezoning is granted, the applicable authority is empowered to impose appropriate conditions to provide for all interests which are affected by the departure or rezoning (s 42). This is an important and necessary mechanism to ameliorate any potential negative consequences that might flow from the departure or rezoning or to address any local concerns in that regard;
- where an application for a departure or rezoning is refused or granted by a municipality, the applicant or any objector may appeal to the Provincial Minister against the refusal or granting or conditional granting of the application (s 44(1)(a)); and
- every municipality must enforce compliance with LUPO and the provisions of a zoning scheme (s 39(1)).

49. We submit that the subject-matter of LUPO and the zoning schemes promulgated under LUPO, the constitutionality of which has not been impugned by any party in these procedings, is:

- 'municipal planning', which is a local government matter listed in Schedule 4B of the Constitution; and
- 'provincial planning', which is an exclusive provincial functional area listed in Schedule 5A to the Constitution, not a concurrent national and provincial functional area listed in Schedule 4A.

50. Mining and prospecting entail the use of the surface of land, a fact acknowledged and regulated by the MPRDA itself. See, for example, the definitions of 'land', 'mine', 'mining area', 'owner', 'prospecting area' and 'topsoil' in s 1, ss 5(1) and (3) and ss 53-54. As Maccsand puts it, '[t]he entitlement to use the land in the manner required for the exercise of mining rights, is inherently part and parcel of the mining rights'.[47]

51. In the Western Cape Province, every user of land must have the right to do so under the applicable zoning scheme or pursuant to a departure from its provisions granted under

[47] Maccsand's heads p. 9 para 14. See also p. 10 para 16. We consequently to not understand Maccsand's contention later in its heads that mining is not a land use contemplated by LUPO (p. 21 para 44).

s 15 of LUPO. Section 11 of LUPO provides that 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. This and the other provisions of Chapter 2 of LUPO, which deals with zoning schemes, disclose no intention to exempt any land from the control in question.[48] Similarly, no provision in LUPO discloses any intention to exempt any person from such control. On the contrary, s 39(2)(a) of LUPO provides that no person shall contravene or fail to comply with the provisions incorporated in a zoning scheme.[49]

52. The main issues addressed in the remainder our argument on the planning aspect of this case are the following:

- the proper approach to the determination of the three spheres' powers in the Constitution;
- the meanings of 'municipal planning' and 'provincial planning';
- the inter-relationship between the three spheres' powers in the Constitution, in particular the powers of organs of state in the national sphere to intervene in terms of s 44(2) of the Constitution in Schedule 5A and 5B exclusive provincial functional areas;
- the concurrent regulation of mining by the national sphere under the MPRDA and the local and provincial spheres under LUPO.

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[48] *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others* 2010 (5) SA 367 (WCC) ('*Intercape Ferreira Mainliner*') para 104.

[49] There is no merit in the contention in Maccsand's heads p. 26 para 58 that at the time the MPRDA was enacted s 27 of the Physical Planning Act 125 of 1991 excluded the application of a zoning scheme to mining land. Section 27(2) and (3) do not deal generally with the field of application of LUPO or zoning schemes made in terms of LUPO, nor does it deal generally with their applicability to the holders of (old order) mining rights. It deals with the implications of the application to land of a regional structure plan or an urban structure plan made (or deemed to have been made) in terms of the PPA, which is applicable to that land.

The determination of the three spheres' powers

53. The *Liquor Bill* case[50] was the first to deal with the relationship between similar functional areas ascribed to different spheres of government. In that case the CC held that every functional area and local government matter in Schedules 4 and 5 must be interpreted as distinct, i.e. each has its own unique meaning and field of application.[51] The *Liquor Bill* case concerned a delineation of the powers of the national and provincial governments relating to the manufacturing, wholesaling and retailing of liquor. The CC concluded that the constitutional scheme ensured that where a matter required inter-provincial control, it fell within the national sphere of government. 'The corollary', the Court held, 'is that where provinces are accorded exclusive [i.e. Schedule 5] powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially.'[52] The identification of the content of the functional areas or matters should ascribe to each sphere of government those functions with which it can most appropriately deal. On this basis the CC held that the national government could enact licensing legislation for the producers and distributors of liquor; but that it could not enact licensing legislation for retail sales or the licensing of micro-manufacturers and producers of sorghum beer operating within one province only – those were exclusive provincial matters.

54. The arguments by both Maccsand and the Minerals Minister proceed as follows: under the Constitution, mining is an exclusive national competence, and consequently all mining-related matters, including land use and environmental regulation, are exclusive national competences.[53]

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[50] *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) (the '*Liquor Bill* case').
[51] *Liquor Bill* case paras 49-51 and 56.
[52] *Liquor Bill* case paras 52 and 74.
[53] Maccsand's heads p. 13 para 23, p. 16 para 30, p. 17 para 33 and p. 18 para 36; the Minerals Minister's heads pp. 8-9 para 19 (summary).

55. However, as this Court said in the *Gauteng Development Tribunal* case,[54] that line of reasoning approaches the matter the wrong way round. Consistently with the constitutional scheme of devolution, one must start with interpreting the powers vested in municipalities, then those vested in provincial government and lastly those vested in national government. The CC followed a similar approach in its judgment in the *Gauteng Development Tribunal* case.[55]

56. The correctness of this approach is underscored by the fact the Constitution does not define or even refer to most of the exclusive powers of national government: most of them, including mining, are residual powers.[56] That is to say, the residual powers of national government are determined by, amongst other things:

56.1. excluding from Parliament's power to pass legislation with regard to any matter, conferred by section 44(1)(a)(ii) of the Constitution, the 'exclusive' provincial functional areas listed in Schedule 5, in which national legislation is permissible only if it is necessary to intervene for the purposes listed in section 44(2); and

56.2. acknowledging the restrictions, imposed by section 155(7) of the Constitution, on Parliament's power to pass legislation in respect of the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5.

57. It is necessary, therefore, to determine, first, the ambit of 'municipal planning', then the meaning of 'provincial planning' and, having done so, the nature and extent of the national government's exclusive powers in relation to mining. It follows that if either 'municipal planning' or 'provincial planning' entails the power to control land use and changes of land use, then the national government's exclusive powers in relation to mining do not entail municipalities' or provinces' planning powers.

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[54] *Gauteng Development Tribunal SCA* paras 35-37.
[55] *Gauteng Development Tribunal CC*, especially paras 54-63.
[56] *Liquor Bill* case para 46.

The meaning of 'municipal planning'

58. In the main judgment of this Court in the *Gauteng Development Tribunal* case this Court held that the word 'planning' entailed the 'control and regulation of land use'. This Court added that the prefix 'municipal' in 'municipal planning' confined it to municipal affairs. Consequently, 'municipal planning' reserved to municipalities the authority to micro-manage the use of land,[57] i.e. to control and regulate land use in detail.[58] 'municipal planning' thus includes all the functions assigned to municipalities under the four provincial ordinances that survived the transition to the present constitutional regime,[59] one of which as stated is LUPO in the Western Cape.

59. This Court's definition of 'municipal planning' in the *Gauteng Development Tribunal* case is consistent with the approach of the majority of the CC in the earlier *Wary Holdings* case,[60] and it was followed by the CC in its unanimous judgment in the appeal from this Court in the *Gauteng Development Tribunal* case.

60. It is implicit in the reasoning of the majority of the CC in *Wary Holdings* that the administration by municipalities of the provincial ordinances according them powers of planning, zoning and rezoning of land and approval of applications for subdivision, is compatible with their enhanced status under the Constitution.[61]

61. In its judgment in the appeal from this Court in the *Gauteng Development Tribunal* case, the CC said it agreed with this Court that 'municipal planning' bears the 'particular, well-established meaning' it has assumed in the context of municipal affairs, a meaning which includes 'the control and regulation of the use of land', and 'the zoning of land and the establishment of townships'.[62]

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[57] *Gauteng Development Tribunal SCA* para 41.
[58] *Gauteng Development Tribunal SCA* para 9.
[59] *Gauteng Development Tribunal SCA* para 41, read with paras 4-9, 30-31 and 40.
[60] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) ('*Wary Holdings*').
[61] *Wary Holdings* paras 79 to 80.
[62] *Gauteng Development Tribunal CC* para 57.

62. The control and regulation of the use of land through zoning and township establishment customarily involves the allocation of the same or similar use rights to all properties in a particular area so that there are areas set aside for residential use, other areas for commercial use, and yet others for industrial use, and so forth. The purpose of the control and regulation would be frustrated if significant users of land were free to disregard zoning restrictions. 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 and (as we contend below) the Province would be frustrated.[63]

The meaning of 'provincial planning'

63. In the *Gauteng Development Tribunal* case neither this Court nor the CC defined or gave a detailed description of the content of 'provincial planning'.[64] However, in its judgment in the *Gauteng Development Tribunal* case, the CC prefaced its endorsement of this Court's statement of the meaning of 'municipal planning' with a reference to the *Liquor Bill* case[65] as well as with a general discussion of the 'regional planning and development' and 'provincial planning' constitutional functional areas,[66] saying that although they share the word 'planning' they are distinct from 'municipal planning' and '[t]he distinctiveness lies in the level at which a particular power is exercised'.[67]

64. The approach of the CC in the *Liquor Bill* case to demarcating similarly-worded functional areas in Schedules 4A, 4B, 5A and 5B (described in paragraph 53 above) suggests that the local government matters listed in Schedules 4B and 5B are matters which the framers of the Constitution decided may appropriately be governed by municipalities, i.e. services which may appropriately be provided intra-municipally;

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[63] Cf. *Intercape Ferreira Mainliner* para 104; *Odendaal v Eastern Metropolitan Local Council* 1999 CLR 77 (W) 84-85, quoted by O'Regan ADCJ (diss.) in *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 131.
[64] Compare *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) paras 50-51, 56-57 and 61, in which the CC held township establishment fell within the provinces' 'regional planning and development' and 'urban and rural development' provincial functional areas in Schedule 6 to the interim Constitution.
[65] *Gauteng Development Tribunal CC* para 53.
[66] *Gauteng Development Tribunal CC* para 54.
[67] *Gauteng Development Tribunal CC* para 55.

governmental tasks which may appropriately be undertaken intra-municipally; and matters which may appropriately be regulated intra-municipally. In other words, the local government matters in Schedules 4B and 5B grant municipalities power to deal with those aspects which principally affect themselves and their inhabitants, but not those that principally have inter-, extra- or non-municipal effects. (We say 'principally' not only because generally speaking the three spheres government in South Africa are interdependent and interrelated, but also because of the similarities of some of the functional areas in Schedules 4B and 5B.) Most land use regulation or control decisions have an impact on only the properties to which they relate and certain properties in their immediate vicinity. As their effect is purely 'intra-municipal', decisions such as these fall within the 'municipal planning' function and must be taken by the municipality concerned in light of local conditions.

65. By contrast, some land use regulation or control decisions will have a significant inter-municipal or extra-municipal effect either because they have significant effects beyond the boundaries of a particular municipality, or because they impact significantly on one or more of the provincial functional areas relevant to land use control and regulation other than 'provincial planning'. The latter are the concurrent national and provincial functional areas in Schedule 4A of 'agriculture', the 'environment', 'housing', 'industrial promotion', 'nature conservation', 'pollution control', 'public transport', 'regional planning and development', 'soil conservation', 'tourism', 'trade' and 'urban and rural development', and the exclusive provincial functional area of 'provincial roads and traffic' in Schedule 5A. Examples are developments which, though located within one municipal area, will significantly affect inter-municipal transportation ('public transport') and commuting ('provincial roads and traffic'); major new housing projects ('housing'); major new tourist attractions ('tourism'); and developments which will significantly extend the urban edge at the expense of agricultural areas on the fringe of a town or city ('agriculture').

66. Consequently, we submit, 'provincial planning' includes land use regulation or control decisions which will have principally an inter-municipal or extra-municipal effect in the respects outlined above.

67. We further submit that it follows from the part of the CC judgment in the *Wary Holdings* case discussed in paragraph 60 above and from the judgments of this Court and the CC in the *Gauteng Development Tribunal* case, that 'provincial planning' includes the functions assigned to the provinces under the four provincial ordinances that survived the transition to the present constitutional regime, including LUPO. In its judgment in the *Gauteng Development Tribunal* case, the CC remarked (without expressing any criticism) that the Johannesburg Municipality was 'an authorised local authority under the [Transvaal] Town-Planning and Townships Ordinance [15 of 1986]';[68] and further that '[t]he Ordinance authorises the relevant provincial authority (referred to in the Ordinance as the 'Administrator') to administer the Ordinance and, in terms of s 2, to declare municipalities to be 'authorised local authorities' with the mandate to exercise powers contained in Chs II, III and IV'.[69] These *dicta* are consistent with the main judgment of this Court in the *Gauteng Development Tribunal* case, where the discussion of the Transvaal Ordinance opens with the following: 'Under the ordinance the authority to regulate the use of land is assigned in general to authorised municipalities (the appellant is such a municipality) with certain powers of oversight vested in the provincial authorities.'[70]

68. As stated in paragraph 48 above, the functions assigned to the Province under LUPO include the powers to amend zoning schemes (s 9(2) of LUPO) and the power to determine applications for departures and rezonings. However, for the reasons given in paragraph 64 above, the Provincial Minister may determine such applications as a first-and-final-instance decision-maker only in cases where the proposed changes in land use

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[68] *Gauteng Development Tribunal CC* para 9 (our emphasis).
[69] *Gauteng Development Tribunal CC* para 30 (our emphasis).
[70] *Gauteng Development Tribunal SCA* para 6 (our emphasis).

will have principally an inter-municipal or extra-municipal effect. (We deal below with appeals to the Provincial Minister against municipal land use control decisions.)

The national sphere's legislative authority in relation to Schedules 4 and 5 generally

69. The national government's legislative authority in relation to local government matters listed in Schedules 4B and 5B and its legislative authority in relation to the concurrent functional areas in Schedule 4 as a whole and the exclusive provincial functional areas in Schedule 5 as a whole, and its relevance to the present case, are as follows:

69.1. In relation to concurrent functional areas in Schedule 4B, the national government has the same authority as the provinces. If conflicts arising between national and provincial legislation falling in those functional areas, they must be resolved using s 146 of the Constitution. The present case is not primarily concerned with any functional areas in Schedule 4A and consequently s 146 is inapplicable (see s 146(1)).

69.2. In relation to exclusive provincial functional areas in Schedule 5A, the provinces are the main repositories of authority. The national government may intervene only when it is necessary for the purposes specified in s 44(2), in which case the national legislation prevails of the provincial legislation (s 147(2)). The 'provincial planning' functional area is relevant in the present case, but as explained below neither Maccsand nor the national government respondents has invoked s 44(2) to justify any intervention in that functional area and no grounds for such intervention are apparent from the record.

69.3. In relation to the local government matters in Schedule 4B, the national government is limited by s 155(7) to passing legislation to see to the effective performance by municipalities of their functions in respect of matters listed there, by regulating the exercise by municipalities of their executive authority. The upshot of this is that the powers given to the national government (and to

the provincial governments), in respect of local government matters, are effectively confined to the supervision, monitoring and support of local government within the areas of municipal functional responsibility.[71] The 'municipal planning' functional area is relevant in the present case. We discuss below the Province's supervision, under LUPO, of municipalities' exercises of their power to control and regulate the use of land.

69.4. In relation to the local government matters in Schedule 5B, the national government is limited both by s 155(7) and by s 44(2). In other words, unless it is necessary for the national government to intervene for one of the purposes specified in s 44(2), the national government has no power to legislate in relation to those local government matters; and if it does have the power to legislate, it is limited to the powers of supervision, monitoring and support contemplated by s 155(7). The present case is not concerned with a Schedule 5B functional area.

The national sphere's legislative authority in relation to 'provincial planning'

70. For the reasons given earlier the Provincial Minister may determine applications for departures and rezoning if the proposed changes in land use will have principally an inter-municipal or extra-municipal effect. Mining operations, particularly large-scale mining operations, may well have profound implications for the provincial authorities' system of land use planning and control (and their system of environmental control, discussed below).

71. Consequently, if, as the Minerals Minister and Maccsand contend, the MPRDA, properly construed, has the effect of exempting every holder of a mining right or mining permit from the requirements of LUPO and the regulations and zoning scheme regulations

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[71] *Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 367; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) para 171.

promulgated under LUPO, apart from the resulting intrusion in the 'municipal planning' local government matter discussed in the City's heads, the resulting intrusion in the exclusive 'provincial planning' functional area will be inconsistent with the Constitution and invalid unless it can be justified in terms of s 44(2).[72] However, as indicated above, neither the Minerals Minister[73] nor Maccsand[74] claims the MPRDA is legislation contemplated in s 44(2) of the Constitution.

72. This Court is required to prefer any reasonable interpretation of the MPRDA which would preserve its constitutional validity over an interpretation which would result in it being unconstitutional.[75] We submit that the reasonable interpretation is that the MPRDA acknowledges that, for mining activities to be lawful, both a mining authorisation under the MPRDA and a land use authorisation under the LUPO and its zoning scheme regulations, are required. There is nothing in the MPRDA which shows that the holders of mining rights or mining permits are exempt from the requirements of LUPO and the regulations and zoning scheme regulations promulgated under LUPO. On the contrary, ss 23(6) and 25(2)(d) and of the MPRDA make it plain that a mining right is subject to 'any relevant law', a phase which, we submit, includes LUPO and zoning scheme regulations made under LUPO because mining entails the use of land and LUPO and zoning schemes regulate the use of land. Both the mining right in respect of the Westridge dunes[76] and the mining permit in respect of the Rocklands dunes[77] contain conditions which require Maccsand comply with the requirements of any other law in force in South Africa.

73. If, contrary to our interpretative submissions, the MPRDA has the effect of exempting every holder of a mining right or mining permit from the requirements of LUPO and the regulations and zoning scheme regulations promulgated under LUPO, the resulting

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[72] *Liquor Bill* case paras 79-81 and 87.
[73] Nogxina's affidavit vol. 9 pp. 781-782 para 26.
[74] Darries's fourth affidavit vol. 10 p. 864 para 87.2.
[75] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) ('*Hyundai Motor Distributors*') para 22; *Wary Holdings* paras 44 and 46-47.
[76] Annexure MGD57 core bundle vol. 1 p. 103 para 16.
[77] Annexure KAW7 core bundle vol. 1 p. 58.

intervention in the exclusive 'provincial planning' functional area will be inconsistent with s 44(2) of the Constitution and invalid. The Provincial Minister's conditional counter-application concerning the constitutionality of the MPRDA is directed towards this scenario.

The provincial sphere's authority in relation to 'municipal planning'

74. The Transvaal Ordinance discussed in the *Gauteng Development Tribunal* judgments contains provincial powers of oversight, including the power to determine appeals against decisions by authorised municipalities in applications by owners of land who wish to have the provisions of a town-planning scheme relating to their land changed (s 59(1)(a)(ii), read with s 56(1)). This power is similar to the power of the 'Administrator' under LUPO to consider and determine appeals against municipal decisions to grant or refuse applications for departures from zoning schemes (ss 44(1)(a) and (2) of LUPO). The provinces' powers to consider and determine appeals concerning 'municipal planning' matters stems from the provincial governments' powers, set out in ss 155(6) and (7) of the Constitution, to take legislative and other measures that:

- provide for the monitoring and support of local government in the province;
- promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs; and
- see to the effective performance by municipalities of their functions in respect of 'municipal planning' matters, by regulating the exercise by municipalities of their executive authority.

75. In its judgment in in the *Gauteng Development Tribunal* case, the CC affirmed the power of government in the national and provincial spheres to regulate the exercise of executive municipal powers and the administration of municipal affairs by municipalities.[78]

[78] *Gauteng Development Tribunal CC* paras 47 and 59.

76. It follows that any unconstitutional intrusion by the national sphere into 'municipal planning', will result in a concomitant unconstitutional intrusion into the overseeing role which the provinces are entitled and required to fulfil in relation to municipal land use control and regulation.

Conclusion: concurrency

77. As is the case with the power of the national Minister of Rural Development and Land Reform to regulate the subdivision of agricultural land under the Subdivision of Agricultural Land Act 70 of 1970 ('SALA') upheld by the CC in *Wary Holdings,* or the power of the Environment Minister or a provincial MEC to regulate environmental matters under the NEMA referred to by the CC in *Fuel Retailers,*[79] there is no constitutional reason why the three spheres of control over mining cannot co-exist even if they overlap and even if the one can, in effect, veto the decisions of the others. The three spheres of control operate from national, provincial and municipal perspectives, each having its own constitutional and policy considerations.[80]

78. There is thus no question of the provincial and municipal spheres usurping or 'overruling' the 'exclusive' national competence in relation to mining as contended by the Minerals Minister and Maccsand, or of LUPO and the MPRDA allowing for the imposition of 'contradictory directions',[81] or of the MPRDA having impliedly repealed LUPO as contended by the appellants.[82] Although a mining right or mining permit granted in terms of the MPRDA would be unusable if authorisation under LUPO were to be refused or granted subject to conditions which are incompatible with conditions imposed under the MPRDA, those are consequences of miners requiring, in addition to a mining right or

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[79] *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) ('*Fuel Retailers*').
[80] *Wary Holdings* para 80; *Fuel Retailers* para 85.
[81] Maccsand's heads para 88; Minerals Minister's heads p. 20 para 47. Cf. the Chamber's heads (albeit in relation to environmental authorisations) pp. 3-4 paras 5-6 and p. 21 paras 62-63.
[82] Maccsand's heads p. 20 para 43; Minerals Minister's heads p. 55 para 120.

mining permit from the Minerals Minister, a land use authorisation from a municipality or the Province.[83]

79. Contrary to what Maccsand submits, if (as we contend) the provincial and local spheres have the power to refuse, on planning grounds, permission for the use of land for mining purposes, that would not be a 'recipe for regulatory chaos'.[84] It would be quite wrong to assume, as Maccsand apparently does, that if the provincial or local spheres of government have powers of control over land use for mining, they will exercise them unreasonably or capriciously or to further ulterior purposes or the like. The Promotion of Administrative Justice Act 3 of 2000 applies to all exercises of administrative power, including land use planning decisions under laws like the LUPO. Consequently, to be right, Maccsand must show (and cannot show) that:

- a reasonable decision by the City to refuse an application for a consent use under the zoning scheme to permit mining on, for example, the Oudekraal land because that would be undesirable for the cultural and environmental reasons canvassed in the Oudekraal litigation,[85] or
- a reasonable decision by the City or the Province to refuse an application for a departure from the zoning scheme to permit sand mining on Rocklands dune, which is all of 1.5 ha in extent,

will be a recipe for chaos or weaken the effective regulation of mining in South Africa.

80. What these examples illustrate is that the use of land for mining purposes, like the environmental impacts of the use of land for mining purposes, are not matters of solely national concern.

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[83] Cf. *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) paras 56 and 63; *Fuel Retailers* para 92.
[84] Maccsand's heads para 34.
[85] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2002 (6) SA 573 (C); *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA).

AUTHORISATIONS UNDER NEMA

81. The Court below declared[86] that Maccsand may not commence or continue with mining operations on the Rocklands and Westridge dunes until and unless an environmental authorisation has been granted in terms of NEMA for the carrying out of the activity identified in item 20 of GN R386, and it also interdicted[87] Maccsand from doing so. A similar declarator[88] and a similar interdict[89] were granted in respect of the Westridge dunes in relation to the activity identified in item 12 of GN R386.

82. Maccsand and the Minerals Minister argue that a holder of a mining authorisation in terms of the MPRDA is not required to obtain an environmental authorisation in terms of NEMA because Maccsand was granted its mining permit and mining right following the preparation and approval of an EMP in compliance with what they contend are the 'comprehensive' environmental management provisions of the MPRDA.[90]

83. In addition:

83.1. Maccsand and the Minerals Minister point out in their heads[91] that after the hearing in the Court below in April 2010 but 18 days before it handed down judgment on 20 August 2010, on 2 August 2010 GN R386 was repealed by the first of three new listing notices under NEMA (i.e. Listing Notice 1)[92] and replaced by Listing Notices 1, 2 and 3. Maccsand consequently argues that because of this, the Court below should not have issued the NEMA interdicts it did.

83.2. Maccsand and the Minerals Minister argue that the issues relating to NEMA are academic because regulation 75(3) of the new EIAR, 2010, which also

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[86] Order vol. 13 p. 1193 para 2.
[87] Order vol. 13 p. 1194 para 4.2.
[88] Order vol. 13 p. 1194 para 3.
[89] Order vol. 13 p. 1194 para 5.
[90] Maccsand's heads p. 8 para 10; the Minerals Minister's heads p. 7 para 16.1 and p. 34 para 69 (summaries).
[91] Maccsand's heads p. 5 para 3 and p. 27 para 63; the Minerals Minister's heads p. 4 para 7.
[92] GN R386 was repealed by item 4 of the Schedule to Listing Notice 1, with effect from 2 August 2010.

commenced on 2 August 2010, has the effect that a holder of an EMP approved under the MPRDA is deemed to have the requisite environmental authorisation under NEMA.[93]

83.3. The Chamber argues[94] that the Environment Minister had no power to list activities under NEMA which oblige miners to obtain environmental authorisations under NEMA.

84. In this part of the argument we deal with the following issues:

- the series of relevant amendments to NEMA since the MPRDA commenced on 1 May 2004;
- the listing of activities under s 24(2)(a) of NEMA;
- the basic requirement that an authorisation under NEMA be obtained for listed activities;
- the implications for that requirement of the obtaining of an authorisation under another law, like the MPRDA, for an activity listed in terms of s 24(2) of NEMA;
- whether the mining on the Rocklands and Westridge dunes entailed or would have entailed activity 12 or activity 20 of GNR 386;
- the significance of the fact that the dates of commencement of the mining activities described in items 8 and 9 of GN R386 were never published;
- the implications of the repeal and replacement of GN R386 on 2 August 2010;
- whether the mining on the Rocklands and Westridge dunes entails activity 13 in Listing Notice 3;
- the significance of the fact that the mining activities described in items 19 and 20 of Listing Notice 1 and in items 20 to 23 of Listing Notice 2 have not commenced yet;
- the meaning and effect of regulation 75(3) of EIAR, 2010; and

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[93] Maccsand's heads p. 28 paras 65-66; the Minerals Minister's heads pp. 33-34 paras 63-68.
[94] The Chamber's heads p. 3 para 5, p. 4 para 7.

- the contention that the Environment Minister exceeded her powers in listing activities which require a miner to obtain an environmental authorisation.

The series of relevant amendments to NEMA since 1 May 2004

85. Since the MPRDA commenced on 1 May 2004 NEMA has been amended three times, in respects relevant to the present matter, namely by:

85.1. the National Environmental Management Amendment Act 8 of 2004, which commenced on 7 January 2005;

85.2. the National Environmental Management Amendment Act 62 of 2008, which commenced on 1 May 2009, save for the provisions relating to prospecting, mining, exploration and production and related activities.[95] Section 14(2) of Act 62 of 2008 provides that those provisions will come into operation on a date 18 months after the date of commencement of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008, the date of commencement of which is still to be proclaimed.[96] The main relevant effect of those provisions is to transfer from the Environment Minister to the Minerals Minister, the power to grant mining-related environmental authorisations under NEMA;[97] and

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[95] The provisions of Act 68 of 2008 which have not yet commenced include the following: section 1, to the extent that it inserts or amends the definitions in NEMA of 'applicant', 'exploration area' , 'holder', 'holder of an old order right', 'mine', 'Mineral and Petroleum Resources Development Act, 2002', 'mining area', 'Minister', 'Minister of Minerals and Energy', 'owner of works', 'production area', 'prospecting area', 'Regional Mining Development and Environment Committee', 'residue deposit', and 'residue stockpile'; section 2, which substitutes section 24(1) of NEMA; section 3, which inserts section 24C(2A) of NEMA; section 5, which substitutes section 24F(1)(a) of NEMA; section 6, which it substitutes section 24G(1) of NEMA; section 8, which inserts section 24M(2) and (4) and sections 24N, 24O, 24P and 24R of NEMA.

[96] In addition, s 13 of Act 62 of 2008 provides that after a further period of 18 months (i.e. 36 months after the date of commencement of Act 49 of 2008) the series of further amendments to NEMA in the Schedule to Act 62 of 2008 will come into operation. The main relevant effect of the further amendments is to return the administration of the mining-related provisions of NEMA to the Environment Minister.

[97] In addition, s 13 of Act 62 of 2008 provides that after a further period of 18 months (i.e. 36 months after the date of commencement of Act 49 of 2008) the series of further amendments to NEMA in the Schedule to Act 62 of 2008 will come into operation. The main relevant effect of the further amendments is to return the administration of the mining-related provisions of NEMA to the Environment Minister.

85.3. the National Environment Laws Amendment Act 44 of 2008, which commenced on 11 September 2009.

86. The current provisions of NEMA most relevant to the determination of this matter are sections 24(1), (2), (4), (7) and (8), 24K and 24L, quoted by the Court below,[98] as well as sections 24(1A), 24C(1), 24D, 24F and 24M.

The listing of activities under section 24(2)(a) of NEMA

87. Ever since the amendment of s 24 of NEMA on 7 January 2005 by Act 8 of 2004, s 24(2)(a) of NEMA has conferred on the Environment Minister the power to list activities which may not commence without an environmental authorisation from the competent authority, without first obtaining the concurrence of any other Minister under whose 'jurisdiction' the activity may fall. Since 7 January 2005 the proviso to s 24(2) has stated that the Environment Minister exercises the listing power 'after consultation with' not 'in consultation with' any such other Minister. It follows that the Environment Minister is empowered to list mining activities or other activities which are or may be incidental or ancillary to mining, without the concurrence of the Minerals Minister and even in the face of opposition from the Minerals Minister.

The legal consequence of an activity being listed under section 24(2)(a) of NEMA

88. Section 24F(1) provides that, 'notwithstanding any other Act', no person may commence an activity listed in terms of section 24(2)(a) unless the competent authority has granted an 'environmental authorisation' for the activity. The term 'environmental authorisation' is defined in section 1 of NEMA as meaning an environmental authorisation under NEMA itself or a similar authorisation under one of five listed 'specific environmental management Acts', which does not include the MPRDA.

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[98] 2010 (8) SA 63 (WCC) 75A-76H.

The implications of obtaining of an authorisation under another law like the MPRDA

89. Section 24(8)(a) of NEMA, which was inserted by section 2 of Act 62 of 2008 (i.e. after the enactment of the MPRDA) and commenced on 1 May 2009, says expressly that an authorisation obtained under any other law (such as the MPRDA) for an activity listed in terms of NEMA, does not absolve the person concerned from obtaining an environmental authorisation under NEMA, unless an authorisation has been granted in the manner contemplated in section 24L of NEMA. (As explained shortly, this exception is to be found in section 24L(4) of NEMA.)

90. It follows that, unless section 24L applies, the obtaining of an authorisation under another law, like the MPRDA, for an activity listed in terms of section 24(2) of NEMA, does not release the person intending to commence the activity from the requirement of obtaining an environmental authorisation under NEMA.

91. Sections 24K and 24L of NEMA, which were inserted by section 8 of Act 62 of 2008 and also commenced on 1 May 2009, go on to deal in some detail with the 'alignment of environmental authorisations' in cases where a listed activity contemplated in section 24 of NEMA is also regulated in terms of another law.

92. Section 24K(1) allows the Environment Minister or a MEC responsible for administering environmental affairs to consult with any organ of state responsible for administering 'legislation relating to any aspect of an activity that <u>also requires environmental authorisation under [NEMA]</u>' in order to coordinate the respective requirements of such legislation and to avoid duplication. Under section 24K(3)(b) the competent authority may, when considering an application for environmental authorisation under NEMA that '<u>also requires authorisation in terms of other legislation</u> take account of … any process authorised under that legislation as adequate for meeting the requirements of Chapter 5 of [NEMA].'

93. Section 24L(1) provides that if the carrying out of a listed activity contemplated in section 24 of NEMA 'is <u>also regulated in terms of another law</u>,' the respective authorities may

exercise their powers jointly by, amongst other things, issuing an integrated environmental authorisation. Furthermore, a competent authority empowered to issue an environmental authorisation under NEMA may regard an authorisation in terms of any other legislation that meets the requirements of NEMA to be an environmental authorisation in terms of NEMA (section 24L(4)).

94. We submit that these provisions make it clear that Parliament recognises that activities that require environmental authorisation under NEMA, may also be regulated by other legislation requiring similar authorisations. Parliament also recognises that the requirements for an authorisation in terms of legislation other than NEMA may in fact meet the requirements for an environmental authorisation stipulated in NEMA. Parliament says it would be desirable for the organs of state responsible for issuing those authorisations to avoid duplication and to integrate their decision-making. However, the requirement for environmental authorisation in terms of NEMA in respect of listed activities is not removed merely because the activity 'is <u>also</u> regulated in terms of another law' or '<u>also</u> requires authorisation in terms of other legislation'. This is so even where the other legislation meets all the requirements stipulated in section 24(4) of NEMA (section 24L(4)). For a listed activity to be lawfully undertaken, the competent authority must either grant an environmental authorisation in terms of NEMA, or take a decision to regard the other authorisation to be an authorisation in terms of NEMA.

Activity 20 in GN R386

95. The Court below found, correctly we submit, that Maccsand's mining activities on the Rocklands dunes and its proposed mining activities on the Westridge dunes fell within activity 20 listed in GN R386.[99] Activity 20 is defined as 'the transformation of an area zoned for use as public open space or for a conservation purpose to another use.' The Rocklands dunes[100] and two of the three erven comprising the Westridge dunes[101] are

[99] 2010 (8) SA 63 (WCC) 80B-D.
[100] Erf 13625, Mitchell's Plain.
[101] Erf 9889, Mitchell's Plain and erf 1848, Schaapkraal.

zoned public open space. For the duration of the mining (expected to be 38 to 40 years in the case of the Westridge dunes)[102] the mining areas will be occupied by mining enterprises and will consequently not be public open spaces, i.e. spaces to which the public have access or which are kept open for the public benefit.[103] After the mining, the Rocklands dunes will not be used for a conservation purpose;[104] Maccsand's stated intention is to construct, among other things, a parking area and playground there instead of restoring the indigenous Cape Flats Dune Strandveld.[105]

Activity 12 in GN R386

96. The Court below also found that the proposed mining of the Westridge dunes fell within activity 12 listed in GN R386.[106] Item 12 includes 'the … removal of indigenous vegetation of three hectares or more.' It is common cause that the dunes are covered with indigenous vegetation that will be removed during the mining. According to Maccsand, the mine area on the Westridge dunes is 16.3 ha.[107] The Province estimated the percentage cover of indigenous vegetation in the proposed mining area as at least 90%.[108] On that basis, the mine on the Westridge dunes would result in the removal of 14.67 ha of indigenous vegetation.[109]

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[102] This is the expected life of the mine on the Westridge dunes according to its EMP: Ellis's first affidavit vol. 5 p. 426 para 136.3.
[103] Ellis's first affidavit vol. 5 p. 443 para 173; Darries's fourth affidavit vol. 10 p. 872 para 103; Nogxina's affidavit vol. 9 p. 792 para 47.
[104] The current use of the dunes for a conservation purpose is implicitly acknowledged by Maccsand's expert: Low's affidavit vol. 11 p. 976 para 19, p. 978 para 23, p. 980 para 30. As to the fact that the dunes are currently used for a conservation purpose and are valuable for conservation, see Ralston's affidavit vol. 6 p. 541-542 para 53; Ellis's first affidavit vol. 5 p. 442-443 para 171.
[105] Darries's fourth affidavit vol. 10 pp. 900-901 para 160, read with annexure LFE2 CB vol. 1 p. 50; RE1 CB vol. 2 p. 168 11th bullet; Ellis's second affidavit vol. 12 p. 1091-1092 para 144, p. 1097 para 156.
[106] Judgment vol. 13 pp. 1185 second para.
[107] Darries's fourth affidavit vol. 10 p. 830 para 37.1.
[108] Ellis's founding affidavit vol. 5 p. 378 para 26. Maccsand claims that this overestimated, but fails to allege any alternative. In effect, this is a bald denial.
[109] Ellis's second affidavit vol. 12 p. 1066 para 66.

Activities 8 and 9 in GN R386

97. Items 8 and 9 of GN R386 were never put into operation. They listed as activities for which an environmental authorisation under NEMA was required, the granting or renewal of permissions, rights or permits for reconnaissance, prospecting, mining or retention operations under the MPRDA, and the conducting of such activities. Does the description of mining activities under activities 8 and 9 mean that mining activities are not subject to any other item in GN R386? We submit that many activities may and, in practice, frequently do, fall under more than one listed activity. The provisions of NEMA require that an environmental authorisation must be obtained in respect of each listed activity. Not all mining operations as provided for in the MPRDA entail the transformation or removal of indigenous vegetation of 3 hectares of more (cf. item 12), or the transformation of an area zoned for use as public open space or for a conservation purpose to another use (cf. item 20).

The implications of the repeal and replacement of GN R386 on 2 August 2010

98. We submit the order of the Court below is not affected by the repeal of GN R386 on 2 August 2008 (the possible implications of which were first appreciated by Maccsand and raised in its heads in this Court), for the following two reasons:

    98.1. In the absence of a clear contrary intention appearing from amending or repealing legislation, pending litigation must be decided in accordance with the law in force at the time of the institution of the proceedings.[110] Neither the EIAR, 2010 nor Listing Notice 1 (item 4 of the Schedule to which repealed GN R386), states or implies that it affects pending litigation. In this matter the litigation commenced well before GN R386 was repealed, and Maccsand had already commenced mining on the Rocklands dunes before the first application

[110] Section 12(2)(c) and (e) of the Interpretation Act 33 of 1957; *Woerman and Schutte NNO v Masondo and Others* 2002 (1) SA 811 (SCA) para 18 and the cases cited in note 13. See also *Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd* 1995 (3) SA 51 (C) at 64B-I.

(case number 4217/2009 in the Court below) was brought and only stopped when an interim interdict was granted.[111] The second application (case number 5932/2009 in the Court below) followed Maccsand's refusal to give an undertaking that it would not commence mining the Westridge dunes.[112]

98.2. The last affidavit was almost five months before the repeal of GN R386.[113] The effect of the resulting *litis contestatio* was to 'freeze' the parties' rights and obligations as at that moment.[114]

99. We accordingly submit that the Court below was bound to decide the application as though GN R386 had not been repealed and replaced.

100. In any event, at least for consideration of costs, we submit that it is necessary to decide whether Maccsand's proposed mining of the dunes would have fallen within the ambit of activities 20 and/or 12 listed in GN R386. All the costs in the Court below, save for those of the application for leave to appeal, were incurred before 2 August 2010.

Activity 13 in Listing Notice 3

101. If contrary to what we have argued above, this Court holds this appeal should be decided on the law as it existed at the time of the judgment by the Court below rather than at the time when the proceedings were instituted or the issue was joined, the issue which arises is whether this Court may determine if the mining Maccsand proposes resuming (Rocklands) and starting (Westridge) would involve any of the activities currently listed in terms of s 24(2) of NEMA.

102. We submit this question should be answered in the affirmative. The conditional application filed with these heads, the Province accordingly seeks leave to amend the

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[111] Per Koen AJ on 6 March 2009. The reasons for this order are at vol. 1 p. 34.
[112] Wiseman vol. 4 paras 35-36.
[113] The last affidavits, the replying affidavits of the Province, were filed on 5 March 2010: vol. 12 p. 1045.
[114] *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 608A-E.

declaratory and interdictory relief sought in its notice of counter application so as to refer to what it contends is the relevant activity in the new listing notices, namely activity 13 in Listing Notice 3 ('activity 13'). We ask this Court to allow the amendment for several reasons:

102.1. Maccsand itself raised and discussed the question whether its mining falls within activity 13 in its heads in this appeal.[115] As discussed below, the facts have already been relatively fully canvassed in the affidavits. The determination of this question will consequently not entail any unfairness to Maccsand.

102.2. The amendment is a means to enable this appeal to be decided on the real issue in dispute on the NEMA point, namely whether the holder of a mining authorisation issued in terms of the MPRDA must also obtain an environmental authorisation in terms of NEMA to carry out any listed activities that are entailed by or incidental to the mining. As Maccsand itself acknowledges, the present matter is a test case.[116]

103. We submit that Maccsand's proposed mining operations on the Westridge dunes involves activity 13 and it is unlikely that, on reconsideration, Maccsand will dispute that the same applies to its mining operations on the Rocklands dunes.

103.1. The relevant part of activity 13 is '[t]he clearance of an area of 1 hectare or more of vegetation where 75% or more of the vegetative cover constitutes indigenous vegetation'. It is common cause that the mining of both sets of dunes will involve the clearance of all the vegetation from an area of 1 hectare or more – according to Maccsand the mining areas will be 1.5 ha of the Rocklands dunes[117] and 16.3 ha of the Westridge dunes.[118] It is also common cause that the vegetation to be removed, namely Cape Flats Dune Strandveld, is

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[115] Maccsand's heads pp. 30-32 paras 73-78.
[116] Maccsand's heads p. 6 para 4.
[117] Maccsand's heads para 7 and the references in n 12 to the record.
[118] Maccsand's heads para 8 and the references in n 17 to the record.

indigenous vegetation.[119] As mentioned, the percentage cover of indigenous vegetation in the proposed mining area on the Westridge dunes is estimated at 90%.[120] Although we have not been able to find a similar estimate in the papers in respect of the Rocklands dunes, we doubt that Maccsand will contend that less than 1 ha of the area to be mined has less than 75% indigenous vegetative cover.

103.2. The geographical areas in which activity 13 applies include 'urban areas' in the Western Cape in 'areas zoned for use as public open space'. It is common cause that the Rocklands and Westridge dunes are in an urban area in the Western Cape and that the Rocklands dunes and two of the three erven comprising the Westridge dunes are zoned 'public open space'.[121]

Activities 19 and 20 of Listing Notice 1 and activities 20 to 23 of Listing Notice 2

104. What is the significance of the fact that the mining activities described in items 19 and 20 of Listing Notice 1 and items 20 to 23 of Listing Notice 2 have not commenced yet? We repeat the argument in paragraph 97 above *mutatis mutandis*.

Regulation 75(3) of EIAR, 2010

105. The appellants argue that the issues relating to NEMA are academic because regulation 75(3) of EIAR, 2010 has the effect that a holder of an EMP approved under the MPRDA is deemed to have the requisite environmental authorisation under NEMA. In our submission, this is plainly not what the regulation says, and as we argue below it could not permissibly have such a meaning.

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[119] Ellis vol. 5 pp. 373-376 paras 16, 22-23; Darries vol. 10 pp. 821-827 paras 27, 31-32; Low para vol. 11 p. 987 para 48.
[120] Para 96, note 108 above.
[121] The dunes are in the residential area of Mitchells Plain, Cape Town: Maccsand's heads paras 7-8 and the references there to the record.

106. Regulation 75(3) states:

> 'Any environmental management programme or environmental management plan approved in terms of the Mineral and Petroleum Resources Development Act or regulations promulgated in terms thereof or any old order right approved in terms of the Minerals Act, 1991, prior to any provision relating to prospecting, mining, reconnaissance, exploration and production coming into effect in terms of the Act shall be deemed to be approved in terms of the Act.'[122]

107. The relevant effect of regulation 75(3) is that it deems an EMP approved in terms of the MPRDA to be an environmental management plan or an environmental management programme approved in terms of NEMA. Regulation 75(3) does not say that an EMP approved in terms of the MPRDA is deemed to be an environmental authorisation in terms of NEMA. A consideration of NEMA, the EIAR, 2006 and the EIAR, 2010 show that an 'environmental authorisation',[123] an 'environmental management programme'[124] and an 'environmental management plan'[125] and are entirely distinct.

107.1. As mentioned, s 24F(1) of NEMA provides that, notwithstanding any other Act, no person may commence a listed or specified activity without an 'environmental authorisation'.

107.2. Section 24N of NEMA deals with environmental management programmes. It provides that an environmental management programme contains 'proposed management, mitigation, protection or remedial measures that will be undertaken to address the environmental impacts' of a proposed activity which is the subject of an application for an environmental authorisation in terms of NEMA.[126]

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[122] In the EIAR, 2010, 'the Act' is defined to mean NEMA, and according to regulation 1(1) 'any word or expression to which a meaning has been assigned in the Act has that meaning.'

[123] Defined in s 1 of NEMA to mean, when used in Chapter 5, 'the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act'.

[124] Defined in s 1 of NEMA as 'a programme required in terms of section 24'.

[125] Defined in s 1 of NEMA as 'a management plan referred to in section 11'. Section 11 contemplates plans that must be drawn up regularly by various departments of state. However, of more relevance in this context is the document that a person applying for an environmental authorisation had to submit as part of an EIA report (regulation 32(1)(o) of the EIAR, 2006).

[126] Section 24N(2)(a) of NEMA. Regulation 33 of the EIAR, 2010 prescribes the contents.

107.3. Depending on the nature of the proposed activity, a person applying for an environmental authorisation may be required to submit an environmental management programme.[127] An environmental management programme is required in respect of a wide range of listed activities that are unrelated to mining, such as the construction of certain dams, railway lines and the route determination of specified roads. A decision maker must take into account any proposed environmental management programme when considering whether or not to grant an environmental authorisation under NEMA.[128]

107.4. An environmental management programme would have to be approved before the listed activity may commence. However, even if an environmental management programme is accepted, the competent authority may still refuse the application for environmental authorisation.[129]

107.5. Accordingly, the actual approval of an environmental management programme by a competent authority acting in terms of NEMA does not mean that an 'environmental authorisation' has been granted. It follows that the deemed approval of an environmental management programme by operation of regulation 75(3) cannot have that effect.

108. The present case demonstrates the purpose of regulation 75(3). Maccsand already has EMPs approved in terms of the MPRDA. When Maccsand applies for an environmental authorisations in terms of NEMA, as it is required to do, its EMPs will be regarded as accepted. In other words regulation 37(1)(e) of the EIAR, 2010 (concerning the approval of an environmental management programme) will not apply to it.

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[127] An environmental management programme may be required before any application for an environmental authorisation is considered (s 24N(1) of NEMA). It is always required in mining-related applications and before consideration of an application for environmental authorisation which must be preceded by a full-blown EIA (s 24N(2) of NEMA, read with item 3(2) of Listing Notice 2 and regulation 20(2) of the EIAR, 2010).
[128] Section 24(1A)(d) of NEMA.
[129] Regulation 35(1)(b), read with regulation 34(3) of the EIAR, 2010.

109. If anything, regulation 75(3) reinforces the Province's interpretation of the NEMA regulatory regime.

109.1. Regulation 75(3) applies 'prior to any provision relating to prospecting, mining, reconnaissance, exploration and production coming into effect', i.e. at present and for a period ending a date eighteen months after the commencement of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008.

109.2. After that date, the governing provision will be s 12(4) of the National Environmental Management Amendment Act 62 of 2008, which provides:

> 'An environmental management plan or programme approved in terms of the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) immediately before the date on which this Act came into operation[130] must be regarded as having been approved in terms of the principal Act[131] as amended by this Act.'

109.3. Both before and after that date, an environmental authorisation under NEMA is required for mining. All that regulation 75(3) and s 12(4) of Act 62 of 2008 achieve, is to absolve miners with EMPs approved under the MPRDA from having their EMPs also approved under NEMA.

110. If regulation 75(3) were to mean that an EMP approved under the MPRDA is deemed to be an environmental authorisation under NEMA, then it would be *ultra vires* s 24L(3)[132] and s 24M.[133] As stated, this Court is required to prefer any reasonable interpretation of regulation 75(3) which would preserve its validity over an interpretation which would result in it being invalid.[134]

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[130] As section 12(2) of Act 62 of 2008 is a 'provision relating to prospecting' etc, its commencement is governed by s 14(2) of Act 62 of 2008.
[131] That is, NEMA.
[132] Section 24L(3) confers on the competent authority a discretion, to be exercised on a case by case basis, to 'regard an authorisation in terms of any other legislation that meets all the requirements stipulated in s 24(4)(a) and, where applicable, s 24(4)(b)' to be an environmental authorisation in terms of NEMA.
[133] Section 24M provides for the granting of exemptions from provisions of NEMA (excluding s 24(4)(a), which is mandatory), also on a case-by-case basis.
[134] See paragraph 72 above.

Did the Environment Minister exceed her powers?

111. The Chamber contends that the Environment Minister has acted outside her powers in listing activities which require a miner to obtain an environmental authorisation. This is incorrect. Chapter 4 of NEMA empowers the Environment Minister to list under s 24(2) of the NEMA activities which may have a significant effect on the environment and consequently should not be undertaken without an environmental authorisation granted by the competent authority after their potential environmental impact has been properly assessed. See ss 23(2), 24(1) and 24(2). Mining undoubtedly has potentially significant effects on the environment. This is acknowledged by the MPRDA itself. See, for example, ss 2(h), 5(4)(a), 23(1)(d) and 37 to 39 of the MPRDA.

COSTS

112. We submit costs should follow the result. Maccsand however argues that if it wins it should be entitled to its costs, but if it loses it should not be ordered to pay the City's or the Province's costs in this Court and further that the order of the Court below to that effect should be set aside. Maccsand says it is caught in the middle of an institutional dispute between the three spheres of government, the case raises important constitutional issues and the general principle in such cases is that private parties who litigate to ventilate such issues should not be discouraged from doing so by running the risk of having to pay the costs of their adversaries. However, the principle to which Maccsand refers is subject to an exception, namely that an unsuccessful private litigant apparently pursuing private commercial interests (like Maccsand undoubtedly is) will be ordered to pay its adversaries' costs.[135]

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[135] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) para 51.

CONCLUSION

113. In all the circumstances, the Province asks:

113.1. in the event that this Court finds that the appeal should be decided on the basis that GN R386 has been repealed, for an order granting the amendment to the Province's counter-application sought in the notice filed with these heads; and

113.2. that the appeal be dismissed with costs including those of two counsel.

ANDREW BREITENBACH SC

RON PASCHKE

Chambers
Cape Town
20 June 2011