IN THE SUPREME COURT OF APPEAL

APPEAL COURT CASE NO: 650/2010
WESTERN CAPE HIGH COURT CASE NO: 4217/2009
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*)
NATIONAL MINISTER OF WATER AFFAIRS AND ENVIRONMENT	Second Respondent (Third Respondent *a quo*)
MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE	Third Respondent (Fourth Respondent *a quo*)
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Fourth Respondent (Fifth Respondent *a quo*)

FIRST RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1. The issue in this appeal is whether a mining permit or mining right granted under the Mineral and Petroleum Resources Development Act 28 of 2002 (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, and environmental laws.

2. The third respondent (the Province) is responsible for implementation of the National Environmental Management Act 107 of 1998 (NEMA). The first respondent (the City) agrees with the approach of the Province to the interpretation of NEMA. In order to avoid unnecessary duplication, the City will focus its argument on municipal planning, and the Province will address provincial planning and environmental matters.

3. The second appellant (the DME)[1] granted the first appellant (Maccsand):

    3.1. a mining right in terms of sec 23 of the MPRDA in respect of Erven 1210 and 9889 Mitchell's Plain, and Erf 1848 Schaapkraal, and

    3.2. a mining permit in terms of sec 27 of the MPRDA in respect of Erf 13625 Mitchell's Plain.

[1] Since this litigation commenced, the Department of Minerals and Energy has been restructured, and the administration of the MPRDA is now the responsibility of the Minister of Mineral Resources. In these heads of argument we refer to the second appellant as "the DME" or "the Minister".

4. The City owns this land, which falls within its area of jurisdiction. Together the erven make up a corridor of dunes in Mitchell's Plain. The mining right and permit are for the mining of sand.

5. Three of the erven are zoned as public open space, and the fourth is zoned as rural, in terms of the Land Use Planning Ordinance 15 of 1985 (LUPO) and the scheme regulations thereunder.[2] These zoning categories do not permit mining activities as of right. No authority has been granted under LUPO for mining activities on the land.

6. All of these facts are common cause. Maccsand admits that no zoning under LUPO permits mining activities on the erven without authorisation, and that it does not have such authorisation.[3]

7. The City contends that mining is therefore not permitted on this land until either a consent use in respect of one of the erven, or permission for a departure from the land use restrictions imposed by the zoning scheme in respect of the other three erven, has been obtained in terms of LUPO.

8. The High Court held that mining is a land use and, on the authority of *Gauteng Development Tribunal*,[4] that the control and regulation of land use falls within the

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[2] Record vol 1 p 10 para 17; vol 4 pp281-282 paras 39-41.

[3] Record vol 2 pp 110-111 paras 58-61; pp 116-118 paras 75-81.

[4] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC). We shall refer to this judgment as *Gauteng Development Tribunal* (CC).

constitutional competence of "municipal planning" which is reserved to local government by Schedule 4B of the Constitution.[5] LUPO is the means whereby the City controls and regulates land use. Maccsand was accordingly interdicted from commencing or continuing any mining operations on the erven until and unless authorisation had been granted in terms of LUPO for the land in question to be used for mining.[6]

9. Maccsand and the DME contend that mining is not a land use which is subject to control and regulation in terms of LUPO.[7] They contend that mining is an exclusive national competence, and national government has exclusive powers in respect of all matters pertaining to mining.[8] That means, they say, that the MPRDA deals with the regulation of the land use where the mining takes place, because the entitlement to use the land in the manner required for the exercise of mining rights is inherently part and parcel of mining rights.

10. The DME and Maccsand thus contend that the granting of a mining right or permit under the MPRDA overrides all land use legislation.

11. The contention of the DME and Maccsand is, in effect, that the MPRDA is – notwithstanding the Constitution, and notwithstanding its own terms – "uber-legislation" which overrides or trumps all other relevant legislation.

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5 Record vol 13 p 1165 lines 1-9; p 1167 lines 1-7; p1172 lines 4-10.
6 Record vol 13 pp 1193-1194.
7 Maccsand's heads of argument p 21 para 44.
8 DME's heads of argument p 7 para 16.1.

12. Since this litigation commenced, this Court gave judgment in *Gauteng Development Tribunal*.[9] That judgment was upheld by the Constitutional Court.[10] It resolves this question decisively. It holds that the Constitution reserves land use planning for local government. Parliament may not legislate in a manner which permits the encroachment on that function by any other sphere of government.[11]

13. The City's case is that:

13.1. The MPRDA does not purport to override the legislation which governs land use. It deals with who has the right to exploit minerals, but not whether that form of land use is permitted on the land in question. Rights granted under the MPRDA are subject to other applicable laws.

13.2. When the DME[12] grants a mining right or permit, it does not make a land use planning decision, or confer land zoning or land use authority.

13.3. If the MPRDA did purport to override the laws which govern land use, or to determine land use, it would be inconsistent with the Constitution, which provides that municipal planning is a matter in respect of which local government has executive authority.

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9 *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA). We shall refer to this judgment as *Gauteng Development Tribunal* (SCA).

10 *Gauteng Development Tribunal and Others* (CC)

11 See paras [18] and [28] of the SCA judgment, and paras [55] to [57] of the CC judgment.

12 We refer in this context to "the DME" as a composite of the Minister or her delegate. The right and permit in this matter were granted by delegates of the Minister.

THE FACTUAL BACKGROUND

14. Erf 13625 is known as the Rocklands dune. It is vacant land which is 3.643 hectares in extent, located in the residential area of Mitchell's Plain. It abuts on private homes and is situated between two schools.[13]

15. Erven 1210, 9889 and 1848 are contiguous erven which make up the Westridge dune. It is also located in the residential area of Mitchell's Plain. It is 16.3 hectares in extent. The northern, southern and eastern sides of the Dune abut onto private homes. The area to the west of the Dune is vacant land. On that side, the Dune abuts onto a major road. There is an informal settlement on Erf 1210.[14]

16. The City owns or has the right to ownership of all of these erven.[15]

17. On 16 October 2007 Maccsand was granted a mining permit in respect of Erf 13625 under sec 27 of the MPRDA.[16]

18. On 29 August 2008 Maccsand was granted a mining right in respect of Erven 1210, 9889 and 1848 under sec 23 of the MPRDA.[17]

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13 Record vol 1 p 9 para 12.
14 Record vol 4 pp274-275 paras 14-17.
15 The ownership is described at Record vol 1 p 8 para 10, and at vol 4 pp 275-276 para 18.
16 The permit is in the Core Bundle at vol 1 p 58.
17 The mining right is in the Core Bundle at vol 1 p 95.

19. Erven 13625, 1848 and 9889 are zoned Public Open Space. Erf 1210 is zoned "rural".[18]

20. When Maccsand applied for the mining rights and permit, the City did not support the applications, and informed both Maccsand and the DME of its position. The City also informed Maccsand and the DME that authorisation in terms of LUPO was required before mining activities could be conducted on that land.[19]

21. The MPRDA requires consultation with the landowner at various stages of the process of an application for a mining right or permit. The City contends that Maccsand did not meet the consultation requirements of the MPRDA. The City was not notified by either Maccsand or the DME that the permit had been granted in respect of Erf 13625, until Maccsand delivered the mining permit to the City's law enforcement office in Mitchell's Plain less than two weeks before it commenced mining.[20] Maccsand had previously created the impression that it had abandoned plans to mine on Erf 13625.[21]

22. On 17 February 2009 Maccsand started mining activities on Erf 13625. It did not give the City any notification of such commencement as required by the DME.[22]

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[18] The zoning of the erven is fully described at Record vol 1 p 10 para 17; vol 4 pp281-282 paras 39-41. The affidavit on behalf of the Province contains further information regarding the zoning of the erven: see Record vol 5 pp 398-403 paras 72-84.

[19] Core bundle vol 3 pp 288-289.

[20] Record vol 7 pp 602-603 para 129.22 – 129.24

[21] Record vol 7 p 601 paras 129.17 – 129.19

[22] Such notification is required by section 5(4) of the MPRDA, and by the DME as indicated at Core Bundle vol 1 p 59 para 3.

23. On 3 March 2009 the City launched an urgent application to interdict Maccsand from continuing mining activities on Erf 13625 unless and until it had obtained the required authorisation in terms of LUPO.[23] On 6 March 2009 Koen AJ granted an interim interdict.[24]

24. The City then amended its notice of motion to include relief in terms of NEMA.[25]

25. Meanwhile, on 4 March 2009 the City's attorney had written to Maccsand, requesting an undertaking that it would not commence mining activities on Erven 1210, 9889 and 1848.[26] Maccsand failed to furnish the undertaking requested.

26. On 24 March 2009 the City launched an application to interdict Maccsand from conducting mining activities on Erven 1210, 9889 and 1848 unless and until the authorisations required by LUPO and NEMA had been obtained, and the refusal of the City to allow Maccsand to enter the land for the purposes of mining had been referred to the Regional Manager of the DME in terms of sec 54 of the MPRDA.[27]

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23 Notice of motion Record vol 1 p1.
24 The reasons for the order are at Record vol 1 pp 34-41.
25 Record vol 1 pp 29-33.
26 Core bundle vol 2 p 128.
27 Notice of motion Record vol 4 p 268 para 1.3.

THE CONSTITUTION DOES NOT PERMIT THE DME TO MAKE DECISIONS ABOUT MUNICIPAL LAND USE PLANNING

27. Section 40(1) of the Constitution provides that "*government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated*".

28. The Constitution has moved away from the previous hierarchical division of governmental power. A municipality enjoys original and constitutionally entrenched powers and functions.[28] The relationship between the three spheres of government is a "*partnership*".[29]

29. Section 151(4) of the Constitution provides that *"The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."*

30. Section 156 provides that a municipality has executive authority in respect of, and has the right to administer, the local government matters listed in Part B of Schedules 4 and 5. Those matters include, in Schedule 4B, "municipal planning".

31. In terms of sec 44, the national legislature has the power to legislate within a functional area listed in Schedule 4. However, that legislative power is

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[28] *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) para [60].

[29] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para [82].

circumscribed: the nature and extent of the power is described in sec 155(7). It is the power *"to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1)"*. It is not a power to confer on anyone else the exercise of that executive authority.

32. Thus, *"the executive authority over, and administration of, those areas is constitutionally reserved to municipalities: Legislation, whether national or provincial, that purports to confer those powers upon a body other than a municipality will be constitutionally invalid."*[30] The national and provincial spheres "*are not entitled to usurp the functions of the municipal sphere, except in exceptional circumstances, but then only temporarily and in compliance with strict procedures*".[31]

33. The reason why one of the matters listed in Part B of Schedule 4 is *"municipal planning"*, is that decisions as to the regulation and control of land use "*will necessarily be influenced by numerous local considerations*".[32]

34. This Constitutional framework for the role, functions and powers of local government is aimed at establishing local democratic control over matters which

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30 *Gauteng Development Tribunal* (SCA) para [28]. Also see, in this regard, *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) para [26]. While the order in this case was overruled by the Constitutional Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC), the Constitutional Court did not disagree with this characterisation of local government.

31 *Gauteng Development Tribunal* (CC) para [44]

32 *Gauteng Development Tribunal* (SCA) para [9].

affect the local community. It is fleshed out by the Local Government: Municipal Systems Act 32 of 2000. That Act confers on a municipal council the right to govern on its own initiative the local government affairs of the local community, and to exercise the municipality's executive and legislative authority without improper interference. Section 26 of the Act requires each municipality to develop a spatial development framework, which must include guidelines for a land use management system for the municipality. This forms part of the municipality's integrated development plan which, according to sec 35, is the strategic planning instrument which guides and informs all decisions with regard to planning and service provision in the municipality. Major developments have implications for the provision of municipal services such as electricity, water, sewerage, roads and public transport.

35. In *Gauteng Development Tribunal*, the legislation in question (the Development Facilitation Act 67 of 1995) purported to confer executive authority to make land zoning and land use decisions on provincial development tribunals. The question was whether this was an infringement of the municipality's exclusive executive authority over "municipal planning".

36. This Court and the Constitutional Court comprehensively investigated the meaning and import of that phrase. They found that the term "municipal

planning" has a particular, well-established meaning which includes the control and regulation of the use of land, such as the zoning of land.[33]

37. This recognition of the importance of local knowledge in decisions regarding land use planning is consistent with previous decisions of the Constitutional Court, which has held that town planning schemes must be informed by "*local conditions*",[34] and that the allocation of powers to the spheres of government resulted from "*a functional vision of what was appropriate to each sphere*".[35]

38. In *Gauteng Development Tribunal* this Court recognised that, in order to manage municipal planning successfully, a local authority requires extensive powers to control and regulate land use: "*To introduce into that ongoing process a third party with the power to intervene and impose its own decisions that might be inconsistent with the decisions and objectives of the municipality is a recipe for chaos...".*[36]

39. The Court also held that if legislation enables another sphere of government to "*override any and all control that a municipality is capable of exercising over the use of the land, and to do so notwithstanding opposition by the municipality, and notwithstanding that it will conflict with the objectives and plans of the*

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[33] *Gauteng Development Tribunal* (SCA) para [41]; *Gauteng Development Tribunal* (CC) para [57]

[34] *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para [61].

[35] *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) para [51].

[36] *Gauteng Development Tribunal* (SCA) paras [9] and [12]

municipality...",[37] it falls foul of the Constitution. The Court rejected an approach to the respective powers of the different spheres of government which reasons inferentially from the broad description of the powers of national government as a starting point, to delineate the powers of local government: such an approach "*is bound to denude the narrower expression [of the powers of local government] of any meaning and by so doing to invert the clear constitutional intention of devolving powers on local government".*[38]

Overlapping functions

40. It is common for a governmental decision to have implications for multiple functional areas. In such a situation, the Constitution does not provide that one authority may take over the decision-making function of another: it provides that each authority is to make its own decision, within its own functional area. When this happens, neither authority is intruding in the area of competence of another. Each authority is making its own decision, in its own area of functional competence.[39]

41. Where the matter impacts on land use in the area of a municipality, the activity is subject to the approval of that municipality, in the exercise of its constitutional function of executive authority over and administration of land use.

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37 At para [18]
38 At paras [36] to [37]
39 *Gauteng Development Tribunal* (CC) paras [53] to [55]

42. In *Wary Holdings*[40] the Constitutional Court dealt with the overlap between powers of national and local government with regard to the approval of the subdivision of agricultural land. It held that there is no reason why the two spheres of government cannot overlap even if the one may in effect "veto" the decision of the other. Each sphere operates from its own perspective, with its own constitutional and policy considerations, and each authority is required to give its approval, from its own perspective. The Minister of Agriculture would consider whether subdivision was desirable from the point of view of matters such as agriculture and food production. The local authority would consider whether subdivision was desirable from a local land use (zoning) point of view.

43. This echoes the Court's decision in *Fuel Retailers Association.*[41] In that case, the approval of both the municipality and the provincial government was required for the construction of a filling station. The municipality had to consider the matter from a land use point of view, as an application for rezoning had been made. Under the Ordinance, the municipality was obliged to consider the need for and desirability of the filling station. The provincial government had to consider an application for approval in terms of NEMA. For that purpose, it had to consider the social, economic and environmental impact of the proposed development. The provincial authorities did not themselves consider the need for and

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[40] At para [80]

[41] *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)

desirability of the filling station. They took the view that these were matters to be considered by the municipality in the context of the application for rezoning.[42]

44. The Constitutional Court held that this approach was fundamentally flawed: *"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."*[43]

45. DME and Maccsand contend that requiring the holder of a mining right or permit to comply with the provisions of other statutory instruments like LUPO and NEMA results in an encroachment on the powers of the Minister to regulate mining.

46. We submit that there is no basis for this contention. LUPO does not purport to regulate the allocation of mining rights. It regulates land use. There is no reason at all why two different spheres of government cannot exercise overlapping functions with regard to a particular matter, even if the result is that one may in practice sometimes in effect "veto" the decision of the other.

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42 At para [84]

43 At para [85]

47. This is illustrated by the *Kyalami* case.[44] There, the national government sought to provide emergency housing to flood victims, on its own land, in order to give effect to its constitutional obligations under the Bill of Rights. Notwithstanding this compelling situation, the Constitutional Court had no hesitation in finding that the implementation of this decision by national government would be subject to application by the national government for a number of authorisations (or "*consent*", as the Court termed it) from other organs of state, including in other spheres of government. The Court accepted that NEMA and the applicable town planning scheme (and the provincial ordinance) may require that such authorisations be obtained. Indeed, the Court held that "[*i]f consents are necessary and are not obtained, the decision cannot be implemented… because the conditions necessary for its implementation have not been fulfilled*"[45] and that "*absence of such consent may found an application for an interdict to restrain implementation of the decision*".[46]

48. This illustrates that even where the national government is under a constitutional obligation to take action, its actions must be authorised by the bodies which have the power to grant authority under different legislation, including the local government under the town planning scheme. In that case, if the settlement required consent under the town planning scheme, the local government had the

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[44] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) paras [56] to [63]

[45] At para [63].

[46] At para [59].

power to "veto" the decision taken by national government in terms of its obligations under the Constitution.[47]

"Mining is an exclusive national competence"

49. The DME and Maccsand place a good deal of reliance on the fact that national government has exclusive legislative power in respect of mining, because it is not a matter listed in Schedules 4 and 5. The proposition is correct, but the conclusions which are drawn from it, are not.

50. Some other areas of exclusive national legislative competence are water affairs, energy, and international airports.[48] If Maccsand and the DME are correct, the inescapable conclusion is that the national government may also enact legislation which empowers its officials to

50.1. build a major dam,

50.2. give permission to build and operate a nuclear power plant, or

50.3. give permission to build and operate an international airport

in the area of jurisdiction of a local council, without obtaining planning permission from the municipality to do so. We submit that the proposition has

[47] This same point is also made in Fuel Retailers at para [92]

[48] See Schedules 4A and 4B, which give provinces concurrent competence in respect of airports other than international airports, and municipalities competence in respect of municipal airports.

only to be stated, to be rejected. These matters require the local municipality to consider the services and other implications of such a development at a particular place. There is no special magic in mines, which places them above and outside the land use planning regime which applies to all other areas of our national life.

Conclusion

51. The DME and Maccsand contend that the MPRDA confers the power on the DME to make decisions about land use in the area of a municipality.

52. If the MPRDA were capable of the meaning that it overrides LUPO, it would to that extent be inconsistent with the Constitution, and invalid. That construction must therefore be avoided. It is "*axiomatic that, where possible, legislation ought to be construed in a manner that is consistent with the Constitution*".[49]

53. In *Wary Holdings*,[50] the Constitutional Court held that this principle applies not only to the Bill of Rights, but equally to the structural provisions of the Constitution (for example, the constitutional scheme in respect of the powers allocated to the different spheres of government).

54. In the next Chapter we submit that in any event, the MPRDA does not purport to override LUPO, and is not capable of the interpretation that it does so.

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49 *Affordable Medicines Trust v Minister of Health and Another* 2006 (3) SA 247 (CC) fn 31.

50 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) para [47].

THE MPRDA DOES NOT PURPORT TO PERMIT THE DME TO MAKE DECISIONS ABOUT MUNICIPAL LAND USE PLANNING

55. The appellants repeatedly assert that if LUPO applies to land which is to be used for mining, this amounts to an impermissible "veto" by the municipality over decisions by the DME. That is not correct, for two reasons. First, for the reasons set out in the previous chapter of these heads, it is not an impermissible "veto", but the constitutionally mandated exercise by the municipality of its powers. Secondly, the assertion rests on a misconception of the rights which the MPRDA confers.

What rights the MPRDA actually confers

56. Under the common law, the owner of land also owns the minerals under that land.[51] It has the right, at common law, to bring plant and machinery onto the land, to prospect and mine for the minerals, and to remove and dispose of the minerals. The common law does not however exempt the owner from complying, when it undertakes these activities, with municipal planning laws.

57. An analogy is the following: a land-owner has the common law right to erect a house, a block of flats, a shopping mall or a factory on its land. This right does not exempt it from complying with municipal planning

[51] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) para [16]

58. The MPRDA removes these common law mining rights from the owner of land, and authorises the state to confer them on an applicant.[52] It does not change the fact that the miner must comply, when undertaking those activities, with municipal planning laws. It does not purport to do so. There is no reason to infer that it impliedly does so. This follows from standard rules of statutory interpretation, and from what the MPRDA actually says.

59. Where Parliament intends a statute to override other laws, it says so, usually in the formulation "Notwithstanding any provision in any other law to the contrary", or words to that effect. Where Parliament does not say this, the presumption is that the law is to be interpreted in harmony with other laws. A later act must not be construed so as to repeal, amend or override the provisions of an earlier act, unless this is a necessary (and not merely possible) inference from the terms of the later statute.[53]

60. For the DME and Maccsand to succeed in their argument, it must thus be shown that either <u>expressly</u> or <u>by necessary inference</u>, Parliament intended that the MPRDA should override the provisions of LUPO and NEMA.

61. Not only does the MPRDA not so provide: in fact, it provides explicitly to the contrary.

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52 Section 5 of the MPRDA.

53 *Kent NO v SA Railways & another* 1946 AD 398 at 405.

62. In relation to mining rights:

62.1. section 23 (6) of the MPRDA states that a "*mining right is subject to this Act, <u>any relevant law</u>, the terms and conditions stated in the right and the prescribed terms and conditions...*"; and

62.2. section 25(2)(d) of the MPRDA states that the holder of a mining right "*must... comply with the relevant provisions of this Act, <u>any other relevant law</u> and the terms and conditions of the mining right*". (emphasis added)

63. The section dealing with mining permits (sec 27) is silent on this question. That leads to the presumption that it must be read together with other statutes, and they must be interpreted in harmony with each other. The MPRDA neither expressly says that this section overrides existing land use planning laws, nor says so by necessary inference.

64. If there were any room for doubt in this regard, it is removed by the permit and the right which have been granted to Maccsand:

64.1. The mining permit issued to Maccsand in respect of Erf 13625 provides as follows:[54]

> *This permit <u>does not exempt the holder from the requirements of any provision of any other law</u> or from any restrictive provisions or conditions contained in the title deed of the land concerned...*

[54] The permit is in the Core Bundle at vol 1 p 58.

64.2. The mining right issued to Maccsand in respect of Erven 1210, 9889 and 1848 provides as follows in paragraph 16:[55]

> *The granting of this Right, does not exempt the Holder and its successors in title and/or assigns from complying with the relevant provisions of the Mine Health and Safety Act, (Act No. 29 of 1996), (Act No. 29 of 1996) and any other law in force in the Republic of South Africa.*

65. The mining permit is granted subject to any restrictive provisions or conditions contained in the title deed of the land concerned. Such conditions are servitudes. They can be created by various methods including by state grant, by registration against the title-deeds following on agreement between the relevant parties, and by statute.[56] Often, they are imposed as a condition of township establishment.[57] The mining permit provides that if the title deed prohibits mining on the land, the MPRDA does not override it, and the mining right does not permit mining at that place. In such a case, the exercise of the mining right is "vetoed" by the servitude.

66. If a restriction in a title deed can prohibit any mining at all, it is difficult to see on what basis it can sensibly be contended that a competent law may not provide that mining is permitted only with the permission of the local government. The appellants have to contend that while the rights of neighbours are protected by a title deed, the rights of the same people and of the broader public are not protected

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55 The mining right is in the Core Bundle at vol 1 p 95.

56 CG van der Merwe & MJ De Waal "Servitudes" in Joubert (ed) LAWSA Vol 24 (2nd ed) para 611.

57 See for example the (Cape) Townships Ordinance 33 of 1934.

by a law whose purpose is to provide such protection. It is difficult to imagine any logical basis for such a contention.

67. On any basis – the statutes or the grants themselves - the exercise of the rights conferred by the mining permit and mining right is subject to compliance with all other law which applies to the land. This includes LUPO and its zoning schemes.

68. The MPRDA authorises the granting of mining rights and mining permits. They in turn determine who is the person who is permitted to extract the minerals in question. They do not purport to authorise the holders to ignore other laws which must be complied with in order for them to carry out the process of extraction.

When the DME grants a mining right or permit, it does not make a land use planning decision

69. The DME does not in fact or in law make a land use planning decision when it grants a mining permit or right. This is demonstrated by the criteria which are to be applied when an application for a mining permit or right is considered.

70. The underlying motif of the MPRDA is to encourage the extraction of minerals. This is most clearly seen in the "use it or lose it" theme which underlies the system of rights and permits.

71. Holders of existing rights, which are referred to in Schedule II (Transitional arrangements) as "old order" rights, have a preferential claim to a right under the MPRDA. Item 7 of Schedule II, which deals with "old order mining rights", is typical of the structure. Old order mining rights continue in force for a period generally not exceeding 5 years. The holder must apply for "conversion" of that right into a right under the MPRDA, within the period of validity of the old order right. That application must include an affidavit verifying that the holder is conducting mining operations on the land in question, and setting out the periods for which such mining operations have been conducted. The application must also contain a statement setting out the period for which the mining right is required, substantiated by a mining work programme.

72. If the holder complies with the requirements set out in Item 7(3), the DME "must" convert the old order mining right into a mining right under the MPRDA.

73. The scheme of this is, therefore, that the holder of an old order mining right has the right to convert that right into a new order right, but only if it is already using it, and intends to continue using it. If that is not the case, the right falls away, and it is allocated to another person who will make use of it.

74. The reason for this is the "use it or lose it" principle, which reflects Parliament's desire to encourage the extraction of minerals.

75. That principle explains the nature of the decision which the DME makes when it grants a mining right or other right or permit under the MPRDA. We address the grant of a mining right under sec 23 as an exemplar of the process and criteria. The other rights and permits have a similar structure.

76. The core elements of sec 23 are the following:

76.1. The matters which the DME must consider, in deciding an application, are identified. They are set out in sec 23(1)(a)-(h)

76.2. Where the requirements set out in sec 23(1)(a)-(h) are established, the DME *"must"* grant a mining right. The DME has no discretion whatsoever in this regard.

77. If one examines the requirements which trigger the DME's obligation to grant the right, there are two striking features:

77.1. The need for or desirability of mining of the resource is not a matter which the DME is entitled, let alone obliged, to consider. (Two of the jurisdictional facts are that the granting of the right will substantially and meaningfully expand opportunities for historically disadvantaged persons – sec 2(d) – and that the granting of the right will promote employment and advance the social and economic welfare of all South Africans – sec 2(f). Neither of these goes to the underlying desirability of the proposed

mining.) The reason for this is the premise of the MPRDA to which we have referred, namely that the extraction of mineral resources is to be encouraged.

77.2. None of the jurisdictional facts which the DME has to consider, deals with land zoning or the regulation of land use. The closest that sec 23(1) comes to this is in sub-paragraph (d), namely that *"the mining will not result in unacceptable pollution, ecological degradation or damage to the environment"*. This is plainly not a reference to land zoning or municipal planning. As the Constitutional Court pointed out in *Fuel Retailers*, environmental and land use decisions raise different considerations. Schedule 4 to the Constitution distinguishes between "environment" and "municipal planning".

78. It follows that not only is the DME not required to consider land zoning when it decides whether to grant a mining right - <u>if it did consider land zoning, and refused to grant a right on that basis, that would be an unlawful exercise of its power</u>. If an application for a mining right satisfied all of the jurisdictional facts set out in sec 23(1)(a)-(h), and the DME refused the application on the grounds that mining in that particular area was not desirable because of the land zoning, the DME's decision would be the subject of a very simple application for review. The application would be unanswerable.

79. That is clearly how the DME has interpreted its powers. It admits that it does not know what the zoning of the Rocklands and Westridge dunes is.[58] This is not inappropriate, because zoning and a change of land use are not matters which fall within the jurisdiction of the DME. They are matters which the Constitution reserves to local government, because land use decision-making requires local knowledge, it requires consideration of local questions such as the availability of services, and it is to be undertaken by democratically elected local government in the interests of the local community. The Minister and her delegate, based in Pretoria, can hardly be expected to know and understand the consequences of a particular land use on a particular erf in a particular part of Cape Town. Even if the DME broadly had regard to zoning questions in issuing mining rights and permits, there would still remain a constitutionally mandated role for local government to *"micro-manage"* land use decisions within its area of jurisdiction,[59] because of its specific knowledge of local circumstances, and its accountability to the local people who are affected and who elected it.

80. The DME plainly did not apply its mind to the zoning of the land: it could not have done so, because it did not know what the zoning was. More importantly, it was correct in taking this approach, because it was not entitled to have regard to the zoning of the land: if it had done so, this would have been an improper exercise of its powers.

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58 Record vol 4 p 351 para 39.1

59 *Gauteng Development Tribunal (SCA)* para [41]

81. We submit that this disposes of the contention that when the DME grants a mining right, it implicitly also makes a land use and zoning decision. It does not do so; in terms of the MPRDA it may not do so; and if the MPRDA authorised it to do so, that would be inconsistent with the Constitution.

82. There is therefore no conflict between the MPRDA and LUPO. It is therefore not necessary to enter upon the debate as to what the consequences are where there is a conflict between national (MPRDA) and provincial (LUPO) legislation regulating the exercise of municipal powers.

Section 48 of the MPRDA

83. For the sake of completeness, we submit that sec 48 of the MPRDA does not cure this situation. Section 48 provides that mining rights and similar rights and permits may not be issued in respect of certain areas, which include land comprising a residential area, unless the Minister is satisfied as to matters set out in sec 48(2).

84. There are several reasons why the granting of approval under sec 48(2) is not a land zoning and land use decision which overrides the powers of the municipality.

85. First, sec 48(1)(a) refers in broad terms to *"a residential area"*. Land constituting a residential area may have a variety of different zonings. For example, the

Municipality of Cape Town Zoning Scheme Regulations provide for the residential use of various zones, including General Business and General Commercial, and even the General Industrial zone, with consent of the Council.[60] The fact that an area is used for residential purposes thus tells one nothing about the zoning of the land. The sec 48(2) permission addresses the broad-brush function of the land, but does not address the particular zoning.

86. Second, the sec 48(2) decision concerns the general area in which the mining is to take place, but not the zoning of the particular erf which is to be used. Zoning, by contrast, addresses the permitted use of a specific erf. Whether a particular erf may be used for a particular purpose depends not only on the general broad-brush nature of the area, or even the zoning of the area, but also the location of that particular erf and its use in relation to the use of other erven in the vicinity. Zoning and land use management is a matter of *"micro-management"*. The Constitution gives national and provincial government the authority to legislate in the functional area of urban development, while *"reserving to municipalities the authority to micro-manage the use of land for any such development".*[61] The decision of the Minister under sec 48(2) is not (and could not be) such a decision.

87. Third, and strikingly, zoning is not a matter which the Minister is entitled to consider in exercising her sec 48(2) power. The matters which she is to consider are set out in sec 48(2)(a) to (c). None of them has anything whatsoever to do

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60 Core bundle vol 5 p428.

61 *Gauteng Development Tribunal* (SCA) para [41]

with zoning, land use management, or the interests of other people who own or occupy land in the vicinity.

88. Fourth, sec 48(2) applies to land comprising a residential area; any public road, railway or cemetery; or any land being used for public or governmental purposes or reserved in terms of any other law. If the DME grants a mining right in respect of land which is zoned industrial, where that particular industrial zoning does not permit mining, there is no basis on which it can be contended that the DME has made a land zoning decision. As we have pointed out, sec 23 does not entitle or even permit the DME to have regard to land use questions. The mining right in an industrial area therefore does not constitute a zoning and land use decision. If that is so, it is difficult to see the basis on which it could be contended that a mining right granted in a residential area constitutes a land use or zoning decision. It would be extraordinary if the same decision – namely the decision to grant a mining right – were to constitute a zoning or land use decision in some cases, but not in others, depending purely on whether the land is in a residential area.

89. For all of these reasons, the sec 48(2) decision is not and does not purport to be a land zoning decision which somehow overrides the constitutional functions of the municipality.

90. We therefore submit that even if the MPRDA could validly give the Minerals Minister the power to make a land use and zoning decision, it does not do so.

MINING REQUIRES AUTHORISATION UNDER LUPO

91. In the City's area of jurisdiction, the legislative framework and authorisation for the "*detailed control and regulation of land use"*[62] is provided by LUPO. The long title of LUPO states that its purpose is to "*regulate land use planning and to provide for matters incidental thereto*".[63]

92. Section 11 of LUPO provides that the general purpose of a zoning scheme is to determine use rights and to provide for control over use rights and over the utilisation of land in the area of jurisdiction of a local authority.

93. Erven 13625 and 9899 are governed by the City of Cape Town zoning scheme regulations under LUPO, and are zoned public open space. Erven 1848 and 1210 are governed by the Divisional Council of the Cape zoning scheme regulations under LUPO, and are respectively zoned public open space and rural.[64]

94. These zoning categories do not permit mining as of right. On erven 13625, 9899 and 1848, mining could only be permitted by means of a departure[65] authorised in terms of sec 15 of LUPO. On erf 1210, mining is permitted as a consent use (ie with the consent of the City).

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62 *Gauteng Development Tribunal* (SCA) para [9]

63 A copy of LUPO commences at Core bundle vol 5 p 465.

64 See the comprehensive discussion of the zoning scheme regulations applicable to the erven in the Province's affidavit at Record vol 5 pp 398-403 paras 72-84.

65 That is, an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned.

95. Section 39 of LUPO prohibits contravention of a zoning scheme. It places an obligation on the City to enforce the provisions of LUPO and any applicable zoning scheme. Section 46 of LUPO provides for offences and penalties. The contravention of sec 39(2) is an offence.

96. The proposed use of the land for mining purposes therefore constitutes an offence under LUPO, and the City has the right and indeed the duty to prevent such a contravention.

97. Remarkably, Maccsand disputes that mining is a land use.[66] That flies in the face of the language of LUPO and the meaning of words. It also flies in the face of:

97.1. The Physical Planning Act 125 of 1991, which recognises mining as a land use and grants it exemption from one of the restrictions which it places on land uses in sec 27(2);

97.2. The Transvaal Planning and Townships Ordinance 15 of 1986, on which Maccsand relied in the High Court, which recognises mining as a land use;

97.3. The Divisional Council of the Cape Town Planning Regulations Scheme Regulations which recognise mining as a land use;[67] and

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66 Maccsand's heads of argument p 21 para 44.

67 Core Bundle vol 5 p457 item 12(b)(1.)

97.4. The Scheme Regulations promulgated under sec 8 of LUPO, which create a zone called "Industrial Zone III" in which the primary use is mining.[68]

98. We submit that there can be no real dispute that mining is a land use, and that in this case it is a land use which is inconsistent with the zoning of the erven in question.[69]

99. From this, it follows unavoidably that the mining is an unlawful activity.

100. The DME and Maccsand contend that if the City's approach is correct, the effect of LUPO and the zoning schemes is to confer on the owner of a property (such as the City) a veto on the exercise of a mining right. This is so, they say, because only the owner may apply for a departure from the zoning scheme.[70] They contend that this veto is impermissible, because the owner of a mining right has the right to extract the minerals from the land, including in the face of objections by the owner of the land.

101. We have already submitted that this is not an impermissible veto, for two reasons: first, it is simply the constitutionally mandated exercise by the municipality of its powers, in a matter in respect of which more than one sphere of government has an interest under the Constitution; second, the assertion rests on a misconception of the rights which the MPRDA confers.

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68 Record vol 13 p 1171 lines 1-10.

69 Maccsand are not able to suggest any permitted land use which includes mining.

70 Section 15 of LUPO

102. For the sake of completeness, however, we point out that this "veto" is of a limited nature.[71]

103. First, the responsible Minister in the Province (the MEC) may amend the scheme regulations so that mining is permissible on the land in question under sec 9(2) of LUPO. If the MEC refuses to do this, that decision may be taken on review.

104. Second, the Premier may rezone the land to make mining permissible, acting under sec 18 of LUPO. It is open to an aggrieved party (whether the DME or the holder of a mining right) to approach the Premier and ask her to exercise that power. If she refuses to do so, that decision can be taken on review.

105. Third, the City (acting in its capacity as local authority) may rezone the land to make mining permissible, under sec 18 of LUPO. If the City refuses to do so on request, that decision can be taken on review.

106. Fourth, if the extraction of the minerals concerned is a matter of such importance that other considerations should be overridden, the Minister can expropriate the land in terms of sec 55(1) of the MPRDA. The Minister has this power if it is necessary for the achievement of the objects of sec 2(d), (e), (f), (g) and (h) of the Act. Once the Minister has expropriated the land, she may apply, in her capacity as owner, for a departure from the zoning scheme regulations. If that is refused

[71] In this section of these heads we assume that all of LUPO is consistent with the constitutional distribution of legislative and executive powers. There is reason to doubt that assumption. However, that is a matter which is beyond the scope of this matter. For the moment at least, LUPO remains in operation.

by the City, she may appeal the refusal to the Province, and if that is unsuccessful, she may take that further refusal on review. Alternatively, the Minister may transfer the land to the ownership of the holder of the mining right, who may then take these steps.

107. The "veto" is therefore not of an absolute nature.

THERE HAS NOT BEEN COMPLIANCE WITH THE CONSULTATION REQUIREMENTS OF THE MPRDA

108. Section 5(4)(c) of the MPRDA provides that no mining activities may commence without notifying and consulting with the land owner or lawful occupier of the land in question.

109. In *Meepo*,[72] the court held that mining activities may have a major disruptive effect on a landowner and other occupiers of his property, and that the consultative process envisaged in sec 5(4)(c) of the MPRDA "*is intended to afford a landowner the opportunity of 'softening the blow' inevitably suffered as a consequence of the granting of a prospecting or other right*" under the MPRDA. This is the only means afforded in the MPRDA to a landowner to protect its rights as such, other than the mechanisms for the resolution of disputes referred to in sec

[72] *Meepo v Kotze and Others* 2008 (1) SA 104 (NC) at 114D – E

sec 54 of the MPRDA: *"This interpretation accords with the rational balancing of conflicting interests and/or rights..."*

110. That approach was approved by this Court in *Joubert and Others v Maranda Mining Co (Pty) Ltd.*[73]

111. The City contends that Maccsand failed to comply with the consultation requirements of the MPRDA and the mining right and permit.[74]

112. Section 54 of the MPRDA stipulates the steps which are to be taken in the event of dispute, and provides for the payment of compensation under certain circumstances. None of these steps has been taken in this instance.

113. In the High Court the City therefore asked for an order directing Maccsand and the DME to pursue the steps provided for in sec 54, as the City has made it clear to the parties that it will suffer damage as a result of the mining activities on its land.

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[73] 2010 (1) SA 198 (SCA) para [12].

[74] See para 129 of the City's replying affidavit for a full account of the "consultation" between Maccsand and the City, Record p1450.

IT IS APPROPRIATE THAT INTERDICTORY RELIEF BE GRANTED

114. The City has a clear right to enforce the zoning provisions of LUPO in the interests of the local community and to prevent contraventions of those provisions.[75] It similarly has a clear interest in enforcing the environmental legislation in respect of land which it owns, and land within its area of jurisdiction.[76]

115. The injury reasonably apprehended by the City is Maccsand's unlawful breach of the provisions of LUPO and NEMA, on land owned by the City and within the City's area of jurisdiction.

116. Maccsand has mined the land at Erf 13625. It intends to mine all four erven pursuant to the mining permit and mining right, without regard to the provisions of LUPO and NEMA. The City's attempt to obtain an undertaking from Maccsand with regard to mining on Erven 1210, 9889 and 1848 was unsuccessful. This patently gives rise to a reasonable apprehension.

117. Such unlawful conduct undermines the City's ability to regulate the matters within in its jurisdiction in the public interest, and to carry out its constitutional and statutory duties. It constitutes an injury to the right of the City to enforce the provisions of LUPO in the public interest. In addition, this unlawful activity will

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[75] See, for example, *Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums & Pails* 1997 (3) SA 867 (N) at 872D

[76] See section 152(1)(d) and 152(2) of the Constitution.

be undertaken on land which belongs to the City. That is by itself an adequate basis for interdictory relief at the instance of the City.

118. In *Drums and Pails*[77] the court made it clear that unlawful conduct, in contravention of a legislative provision, is regarded as an injury of the rights of the body charged with enforcing that provision, for the purposes of final interdictory relief.

119. There is no effective alternative remedy available to the City. The City is not limited to the statutory remedies in LUPO, which in any event are not likely to be effective.[78] It would be practically impossible to quantify the damage caused by the unlawful conduct of Maccsand in order to bring a claim against it. Damages would in any event at best address the damage suffered by the City *qua* owner of the land. It would not address the injury (which would be a continuing injury) caused to the City *qua* local authority by the breach of the land use and environmental legislation.

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77 At 876F-G.

78 *Johannesburg City Council v Knoetze and Sons* 1969 (2) SA 148 (W) at 154B-E. That judgment has frequently been cited with approval and followed.

CONCLUSION

120. The City asks that the appeal be dismissed with costs, including the costs of two counsel.

GEOFF BUDLENDER SC

ELSA VAN HUYSSTEEN

First Respondent's counsel

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June 2011

LIST OF AUTHORITIES

1. **Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC).
2. **Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA).
3. *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC).
4. *Doctors for Life* International *v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).
5. *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA).
6. **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC).
7. *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC).
8. **Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC).
9. **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).
10. **Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC).
11. *Affordable Medicines Trust v Minister of Health and Another* 2006 (3) SA 247 (CC).

12. *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

13. *Kent NO v SA Railways & another* 1946 AD 398.

14. *Meepo v Kotze and Others* 2008 (1) SA 104 (NC) .

15. *Joubert and Others v Maranda Mining Co (Pty) Ltd* 2010 (1) SA 198 (SCA).

16. *Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums & Pails* 1997 (3) SA 867 (N).

17. *Johannesburg City Council v Knoetze and Sons* 1969 (2) SA 148 (W).

18. CG van der Merwe & MJ De Waal "Servitudes" in WA Joubert (ed) LAWSA Vol 24 (2^{nd} ed).