IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Appeal Court Case No: 709/2010
No: 746/2010
Court *a quo* Case No: 4217/2009
No: 5932/2009

In the matter between:

MACCSAND (PTY) LTD — **First Appellant (First Respondent *a quo*)**

THE 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 — **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*)**

FILING SHEET

Documents filed: Practice Note
Second appellant's Heads of Argument and annexures

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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*)**

PRACTICE NOTE SUBMITTED ON BEHALF OF SECOND APPELLANT (in terms of the Practice Directions dated 17 August 2007)

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1. Nature of appeal:

1.1 This is an appeal against the whole of the judgment and order delivered by Davis J (with Baartman J concurring) on 20 August 2010 in the Western Cape High Court, Cape Town, in which an order, with costs, was granted interdicting the commencement and/or continuation of mining operations under a mining permit and a mining right granted in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 ("*the MPRDA*"), on four erven belonging to and within the jurisdiction of the City of Cape Town, unless and until:

1.1.1 a planning authorisation has been granted in terms of the Cape Land Use and Planning Ordinance 15 of 1985 ("*the LUPO*") that permits mining operations on those erven; and

1.1.2 an environmental authorisation has been granted in terms of the National Environmental Management Act 107 of 1998 ("*the NEMA*") that permits the carrying out of certain activities (namely, those activities listed as Item 12 and/or Item 20 in Government Notice R.386 of 21 April 2006, which was repealed before the date of judgement).

1.2 The order was based on the main findings that:

1.2.1 constitutional responsibility for the functional area of "*municipal planning*" (which includes the control and regulation of the use of land), entrusted by the Constitution of the Republic of South Africa, 1996 ("*the Constitution*") to a local government, cannot be taken away by national legislation because the Constitution does not give the national legislature such a right and the resultant overlap between the application of the MPRDA and the LUPO, to land on which mining operations take place, is congruent with the constitutional scheme of *concurrent* powers; and

1.2.2 in view of the provisions of section 24F(1), 24(8)(a), 24K and 24L of the NEMA, Parliament recognised that activities which require environmental authorisation under the NEMA may also be regulated by other legislation which required similar authorisation and thus the requirement for environmental authorisation under the NEMA, in respect of listed activities, was not removed because those activities may also be

regulated in terms of the MPRDA, an interpretation based on section 39(2) of the Constitution which is to be preferred because it provides tangible protection for the environment, in accordance with the environmental rights provided for in section 24 of the Constitution.

1.3 The appeal pertains to the interpretation of the MPRDA, in its proper constitutional setting, to determine the scope and field of its application, and the interrelationship thereof with the LUPO and the NEMA.

2. Issues on appeal succinctly stated:

The issues on appeal are:

2.1 whether the national legislature intended the MPRDA to regulate mining (as a functional area within the *exclusive* legislative competence of the national legislature) exhaustively and:

2.1.1 to the exclusion of any regulatory dispensation, for the control of land use by a local authority, under the LUPO; and/or

2.1.2 to the exclusion of any regulatory dispensation, for the control of certain activities with potential consequences for or impacts on the environment by a competent authority, under the NEMA; alternatively

2.2 whether, if it is concluded that the MPRDA and either the LUPO or the NEMA or both may apply to and regulate mining operations:

2.2.1 the conflict then existing between the MPRDA and the LUPO should be resolved in terms of section 146(2) of the Constitution, alternatively section 148 of the Constitution, further alternatively the common law, with the result that the MPRDA prevails over the LUPO in this regard;

2.2.2 the conflict then existing between the MPRDA (as legislation within the exclusive competence of the national legislature) and the NEMA (as legislation within the concurrent competence of the national legislature) should be resolved on the basis of the common law, with due regard to section 173 of the Constitution and section 4(2) of the MPRDA, with the result that the MPRDA prevails over the NEMA in this regard.

3. Estimated duration of argument:

We estimate the duration of the argument to be 3-4 days.

4. Portions or pages of record in language other than English:

In the core bundles there is a bilingual version of some regulations but the rest of the record is in English.

5. Parts of record necessary for determination of appeal:

5.1 In our view this appeal is concerned with the *legal issue* whether mining operations, authorised in terms of the MPRDA but without any planning authorisation under the LUPO and without environmental authorisation under the NEMA, are permissible in law and is not concerned with the *policy issue* of the

desirability of the mining in question, with the result that the bulk of the record and large portions of the core bundles are irrelevant and not necessary to peruse for this appeal.

5.2 In our view the following parts of the record (thirteen volumes bound in blue and the last one in yellow), in so far as they pertain to the legal issue referred to above, are necessary for a determination of this appeal:

- Volume 1 p. 3 (prayer 1 of the Notice of Motion), p. 6-17 and 20-23 (paragraphs 1-38 and 41-52 of the founding affidavit), p. 29-31 (the supplementary founding affidavit), p. 32-33 (the Notice of Amendment), p. 45-46 (the Notice of Second Amendment), p. 47-72 (the second respondent's answering affidavit);
- Volume 2 p. 73-167 (paragraph 1-187 of the first respondent's answering affidavit);
- Volume 4 p. 267-268 (prayer 1 of the Notice of Motion), p. 271-295 (the founding affidavit);
- Volume 5 p. 366-486 (the fourth respondent's affidavit);
- Volume 6 p. 551-554 (the Notice of Third Amendment);
- Volume 9 p. 736-805 (the second respondent's answering affidavit to the fourth respondent's affidavit);
- Volume 12 p. 1045-1109 (the fourth respondent's replying affidavit);
- Volume 13 p. 1149-1194 (the judgement and order).

5.3 In our view the following parts of the core bundles (five volumes bound in white) are necessary for a determination of this appeal:

- Core Bundle Volume 1 p. 58 (the mining permit), p. 95-108 (the mining right);

- Core Bundle Volume 5 p. 362-492 (assorted legislation and delegated legislation).

6. Summary of argument:

The main submissions of the second appellant are:

6.1 **firstly**, on a correct interpretation of the MPRDA, the legislature indeed intended the MPRDA (as national legislation administered by the national Minister of Mineral Resources) to regulate the subject-matter of mining (as a functional area within the *exclusive* legislative competence of the national legislature) exhaustively and:

6.1.1 to the exclusion of any regulatory dispensation for the control of land use by a local authority under the LUPO;

6.1.2 to the exclusion of any regulatory dispensation, for the control of certain activities with potential consequences for or impacts on the environment by a competent authority, under the NEMA;

6.2 **secondly** and on any other interpretation, the provisions of the MPRDA are and remain, in various respects, in actual or potential conflict with the provisions of the LUPO and/or the NEMA; and

6.3 **thirdly** and in the event of such actual or potential conflict remaining:

6.3.1 any such conflict between the MPRDA (as national legislation) and the

LUPO (as provincial legislation) should be resolved in terms of section 146(2) of the Constitution, alternatively section 148 of the Constitution, further alternatively the common law, with the result that the MPRDA prevails over the LUPO in this regard but does not invalidate the LUPO, which merely becomes inoperative in respect of the mining area to which, and for as long as, the mining authorisation and the MPRDA apply; and

6.3.2 any such conflict between the MPRDA and the NEMA (both national legislation) should be resolved on the basis of the common law, with due regard to section 173 of the Constitution and section 4(2) of the MPRDA, with the result that the MPRDA prevails over the NEMA in this regard.

7. Indication of authorities to which particular reference will be made during the course of the argument:

None.

8. Compliance with rule 8(8) and (9) of the Rules of the Supreme Court of Appeal:

All the parties endeavoured to reach agreement on a statement of agreed facts but was unable to do so. By agreement the original record (of some 2190 pages) was reduced to a record of some 1148 pages and core bundles (which include assorted legislation and delegated legislation) of some 492 pages.

Chambers
Pretoria
20 April 2011

MM OOSTHUIZEN SC
K WARNER
COUNSEL FOR SECOND APPELLANT

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MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**Fifth Respondent (Fifth Respondent *a quo*)**

HEADS OF ARGUMENT FOR SECOND APPELLANT

A. INTRODUCTION

1. This is an appeal, noted with leave of the court *a quo*, against the whole of the judgment and order delivered by Davis J (with Baartman J concurring) on 20 August 2010 in the Western Cape High Court, Cape Town and reported as *City of Cape Town v Maccsand (Pty) Ltd and Others* 2010 (6) SA 63 (WCC).

2. We refer to the parties as they were referred to before the court *a quo*.

3. The applicant, a local authority, applied for interdicts to prevent a mining company from commencing and/or continuing with sand mining operations on four (4) erven, belonging to the local authority and falling within its jurisdiction, unless and until the mining

company *inter alia* has been granted a planning authorisation under the Cape Land Use and Planning Ordinance 15 of 1985 ("*the LUPO*"), permitting those mining operations, and has been granted an environmental authorisation under the National Environmental Management Act 107 of 1998 ("*the NEMA*"), permitting the carrying out of certain listed activities related and directly incidental to those mining operations.

See: Record Volume 1 p. 3 (prayer 1 of Notice of Motion), p. 32 (para 1.3 of Notice of Amendment);
Record Volume 4 p. 267 (prayer 1.1 and 1.2 of Notice of Motion).

4. The first respondent, as the holder of a mining permit granted in respect of a portion of some 1.5 hectares of Erf 13625 Mitchell's Plain in terms of section 27 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("*the MPRDA*"), commenced with mining operations on that erf and, as the holder of a mining right granted in respect of a portion of some 16.3 hectares of Erf 9889 Mitchell's Plain, Erf 1210 Mitchell's Plain and Erf 1848 Schaapkraal in terms of section 23 of the MPRDA, intended to commence with mining operations on those erven.

See: Record Volume 1 p. 7 and 9 (para 6 and 13 of founding affidavit);
Record Volume 2 p. 109-110 and 168 (para 56 and 191 of first respondent's answering affidavit);
Record Volume 3 p. 169-171 (para 194 of first respondent's answering affidavit);
Record Volume 4 p. 272 and 280 (para 6 and 35 of founding affidavit), p. 310 and 327 (para 9 and 37 of first respondent's answering affidavit);
Core Bundle Volume 1 p. 58 (the mining permit) and p. 95-109 (the mining right).

5. Of these four erven:

5.1 Erf 13625 and Erf 9889 Mitchell's Plain is subject to the City of Cape Town Zoning Scheme Regulations made under the LUPO, with a zoning of "*public open space*";

5.2 Erf 1848 Schaapkraal is subject to the Divisional Council of the Cape Zoning Scheme Regulations made under the LUPO, with a zoning of "*public open space*"; and

5.3 Erf 1210 Mitchell's Plain is subject to the Divisional Council of the Cape Zoning Scheme Regulations made under the LUPO, with a zoning of "*rural*".

See: Record Volume 1 p. 7 and 17 (para 4 and 19 of founding affidavit);
Record Volume 4 p. 272, 273, 275-276 and 281-282 (para 4, 11.2, 18.3 and 39-40 of founding affidavit);
Record Volume 5 p. 399-400 (para 76 of fourth respondent's affidavit, containing a summary in table form);
Core Bundle Volume 5 p. 414-430 (City of Cape Town Zoning Scheme Regulations) and p. 431-458 (Divisional Council of the Cape Zoning Scheme Regulations).

6. The case for the applicant (and also for the fourth respondent after it was joined and made common cause with the applicant) was essentially that, regardless of the existence of a valid mining permit or a valid mining right (collectively referred to as "*mining authorisations*") in respect of the four (4) erven, granted in terms of the MPRDA:

6.1 the existing zoning of those erven (as "*public open space*" and "*rural*" respectively) under the LUPO did not allow for those erven to be used for the purposes of a mining operation and in fact prohibited such a use thereof on pain of a criminal sanction; and

See: Section 8, 9, 11, 39 and 46 of the LUPO.

6.2 the mining operation on those erven could not proceed because the mining company did not have an environmental authorisation in terms of the NEMA for the carrying out of certain listed activities related and directly incidental to the mining operation.

See: Section 24F(1)(a) and (2)(a) of the NEMA.

7. Government Notice R.386 of 21 April 2006, listing the activities for the purposes of the NEMA, was repealed before the date of judgement (20 August 2010), namely with effect from 2 August 2010, in terms of Government Notice R.544 of 18 June 2010 read with Government Notice R.660 of 30 July 2010.

8. The first respondent opposed the applications on various grounds, whilst the opposition of the second respondent was mainly restricted to the question whether the holder of a mining authorisation, granted in terms of the MPRDA, also required a form of planning authorisation, as contemplated in the LUPO, and/or an environmental authorisation, as contemplated in the NEMA, for the activities related or directly incidental to mining operations and listed under the NEMA, in order to exercise the mining authorisation.

9. The court *a quo* held in favour of the applicant and the fourth respondent effectively on the grounds thereof that:

9.1 constitutional responsibility for the functional area of "*municipal planning*" (which includes the control and regulation of the use of land), entrusted by the Constitution of the Republic of South Africa, 1996 ("*the Constitution*") to a local government, cannot be taken away by national legislation because the Constitution does not give the national legislature such a right and the resultant overlap between the application of the MPRDA and the LUPO, to land on which mining operations take place, is congruent with the constitutional scheme of *concurrent* powers; and

See: Record Volume 13 p. 1161 (line 3-5), p. 1164 (line 9-25), p. 1167 (line 8-9) and p. 1168-1173 of the judgement.

9.2 in view of especially the provisions of section 24F(1), 24(8)(a), 24K and 24L of the NEMA, Parliament recognised that activities which require environmental authorisation under the NEMA may also be regulated by other legislation which required similar authorisation and therefore the requirement for environmental authorisation under the NEMA in respect of listed activities was not removed because those activities may also be regulated in terms of the MPRDA, an interpretation based on section 39(2) of the Constitution which is to be preferred because it provides tangible protection for the environment, in accordance with the fundamental environmental rights in section 24 of the Constitution;

See: Record Volume 13 p. 1178-1184 of the judgement.

in the premise of which it granted various interdicts and an order for costs against the first and second respondents.

See: Record Volume 13 p. 1193-1194 (the court order).

10. We submit that the legal issue is whether the holder of a mining authorisation, granted in terms of the MPRDA, also requires a form of planning authorisation, as contemplated in the LUPO, permitting the use of land for mining purposes and/or an environmental authorisation, as contemplated in the NEMA, for the carrying out of activities related and directly incidental to mining operations and listed under the NEMA, to exercise his rights under that mining authorisation and to proceed with his mining operations.

11. We submit that, to deal with this issue, three main questions have to be answered.

12. The **first question** (one of interpretation) is whether the national legislature intended the MPRDA to regulate mining (as a functional area within the *exclusive* legislative competence of the national legislature) exhaustively and:

12.1 to the exclusion of any regulatory dispensation, for the control of land use by a local authority, under the LUPO; and/or

12.2 to the exclusion of any regulatory dispensation, for the control of certain activities with potential consequences for or impacts on the environment by a competent authority, under the NEMA.

13. The **second question** (one of legislative analysis and comparison) only arises if the conclusion is that, on a proper interpretation of the MPRDA, either the LUPO or the NEMA or both may also apply to and regulate land use or listed activities forming part of and related or directly incidental to mining operations, in which event the question is then whether there remains a conflict or potential conflict between the provisions of the MPRDA and the LUPO on the one hand and a conflict or potential conflict between the provisions of the MPRDA and the NEMA on the other hand.

14. The **third question** (one of conflict resolution) in turn also arises only if the conclusion is that there remains a conflict or potential conflict with the provisions of the MPRDA, in which event the question is then how it should be resolved.

15. Thus the dispute does not concern the competence to legislate on a particular subject but concerns the question how a perceived conflict between legislation is to be resolved: neither the issue of the "*constitutional status, powers or functions*" of organs of state in the national or provincial sphere nor the issue of the constitutionality of these legislative instruments is then immediately engaged.

See: Section 167(4)(a) of the Constitution;
***National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) para [25].**

16. It is the main submissions of the second respondent that:

16.1 **firstly**, on a correct interpretation of the MPRDA, the legislature intended the MPRDA to regulate the subject-matter of mining (as a functional area within the *exclusive* legislative competence of the national legislature) exhaustively and:

16.1.1 to the exclusion of any licensing dispensation for the control of land use by a local authority under the LUPO;

16.1.2 to the exclusion of any regulatory dispensation, for the control of listed activities by a competent authority, under the NEMA;

16.2 **secondly** and on any other interpretation, the provisions of the MPRDA are and remain, in various respects, in an actual or potential conflict with the provisions of the LUPO and/or the NEMA; and

16.3 **thirdly** and in the event of such actual or potential conflict remaining:

16.3.1 any such conflict between the MPRDA (as national legislation) and the LUPO (as provincial legislation) should be resolved in terms of section 146(2) of the Constitution, alternatively section 148 of the Constitution, further alternatively the common law, with the result that the MPRDA prevails over the LUPO in this regard but does not invalidate the LUPO, which becomes inoperative in respect of the mining area to which, and for as long as, the mining authorisation and the MPRDA apply; and

16.3.2 any such conflict between the MPRDA and the NEMA (both national

legislation) should be resolved on the basis of the common law, with due regard to section 173 of the Constitution and section 4(2) of the MPRDA, with the result that the MPRDA prevails over the NEMA in this regard.

17. As far as the case for the second respondent is concerned, the main relevant facts are those mentioned in **paragraph 3, 4, 5, 6 and 8 above** because the real issue is a legal one concerning the interpretation of the MPRDA and/or the interrelationship between the MPRDA and the LUPO as well as the NEMA.

B. MPRDA INTENDED TO REGULATE MINING EXHAUSTIVELY

18. At the outset it should be noted that the MPRDA itself prescribes or provides "*directive principles*" how the provisions thereof should be interpreted, which in our submission calls for a purposive interpretation of the MPRDA:

See: Section 4(1) read with 2 of the MPRDA.

I. APPLICATION OF LUPO TO MINING EXCLUDED

19. With regard to the correct interpretation of the MPRDA, as far as the LUPO is concerned, we make the following submissions:

19.1 **Firstly**, an interpretation of the MPRDA as legislation intended to regulate the subject-matter of mining exhaustively is consistent with the Constitution, in that it recognises the exclusive legislative competence of the national legislature in this functional area.

19.2 **Secondly**, the MPRDA already provides for the determination of mining-related

land-use rights in respect of land and for the control over those use rights as well as over the utilisation of the land subject to a mining-related land-use right so that the utilisation thereof can be harmonized with the surrounding land uses.

19.3 **Thirdly**, the LUPO is not "*relevant law*" as contemplated in certain provisions, or in the context, of the MPRDA or the mining authorisations.

19.4 **Fourthly**, in any apparent conflict between the LUPO and the MPRDA a court must seek an interpretation which avoids that conflict, whilst allowing for the fullest and effective exercise of the respective powers and functions possible.

(1) FIRST SUBMISSION: INTERPRETATION CONSISTENT WITH EXCLUSIVE LEGISLATIVE COMPETENCE

20. The legislative authority of the national sphere of government is vested in Parliament by section 44 of the Constitution, which includes the exclusive competence to pass legislation with regard to any so-called residual matter.

See: Section 44 of the Constitution;
Woolman *Constitutional Law of South Africa: Volume 1* (2008: Revision service 1 July 2009) 15-5 (and also footnote 5).

21. As far as the MPRDA is concerned, the Constitution in its allocation of exclusive legislative competence to a national level of government follows a structure that recognises the integrated nature of the Southern African mining sector, its importance to the economy and the internationally accepted sovereignty over the South African mineral resources vesting in *national* government.

See: Volume 9 p. 740-750 (para 3 and 4 of the second respondent's answering affidavit);
Section 233 of the Constitution;
Constitutional Principle XXI.1 of Schedule 4 to the Constitution of the Republic of South Africa 200 of 1993.

22. The functional area of mining is not included in Schedule 4 to the Constitution, which sets out the functional areas of *concurrent national and provincial legislative competence*; nor does mining appear as a functional area of *exclusive provincial legislative competence* in Schedule 5 to the Constitution.

23. It follows that municipal government is not granted *any executive authority* in respect of the functional area of mining in terms of section 156 of the Constitution, which is understandable because the regulation of mining, or any aspect thereof, realistically cannot be seen as a local government matter nor as part of the affairs of a municipality.

See: Section 156(1)(a) of the Constitution.

24. The functional area of mining therefore falls, by necessary implication, within the *exclusive competence* of the national legislature as part of its so-called residual legislative competence, a distinction it shares with other functional areas of national importance such as, for example, the functional area of national defence and the functional area of international relations.

See: Woolman *Constitutional Law of South Africa: Volume 1* (2008: Revision service 1 July 2009) 15-5 (and also footnote 5).

25. Consequently the executive power in respect of mining as well as the legislative competence in respect thereof fall to be dealt with *exclusively* by the national legislature and the national executive: the national legislature was competent to enact the MPRDA and from a constitutional perspective did so in the exercise of an *exclusive* legislative power vesting at the national level of government.

See: *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) 844I-J in footnote 163;
***Ex parte President of the Republic of South Africa: Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) 761F.**

26. This constitutionally-recognised exclusivity of national legislative power, and the concomitant executive power, will be best served by an interpretation that the MPRDA is national legislation intended to regulate the subject-matter of mining exhaustively.

See: *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) 268 in footnote 31.

27. On this constitutional platform of an exclusivity of legislative power in respect of mining, the MPRDA entrusts the Minister of Mineral Resources, acting on behalf of the State as the custodian of the nation's mineral and petroleum resources, with the power to grant, issue, refuse, control, administer and manage any mining authorisation granted in terms of the MPRDA - a wide and comprehensive power.

See: Ninth Preamble and section 3(2)(a) of the MPRDA.

(2) SECOND SUBMISSION: LAND-USE RIGHTS INTEGRAL COMPONENT OF MINING RIGHT AND DETERMINATION AS WELL AS CONTROL THEREOF ALREADY PROVIDED FOR IN MPRDA

28. We advance the propositions:

28.1 firstly, that the provisions of the MPRDA already provide for a complete *determination* of mining-related land-use rights as well as for a comprehensive system of *control* over those land-use rights and related matters; and

28.2 secondly, that an additional regulation of those land-use rights and the mining-related use of land under the LUPO is a duplication which is inconsistent with the objects of the MPRDA, is an instance of over-regulation inconsistent with the Constitution and is in breach of the rule of law.

29. We advance these propositions in the context of section 11 of the LUPO, which makes

provision for the use of land to be controlled on the basis of a zoning scheme, of which the general purpose 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.

30. In our submission it is important to appreciate in which manner a zoning scheme under the LUPO operates: *not* as a regulatory system which merely restricts the use of the land or restricts the exercise of *a priori* common-law rights of ownership of land *but* as a licensing system which create and bestow land-use rights on the basis of which the use of land is then controlled.

See: Section 2 *sv "use right"* and 14 of the LUPO;
Claassen "*Spatial planning, within Western Cape Province as a case study*" in Fuggle & Rabie *Environmental Management in South Africa* (2009) 923 and 925-927 (referring to a "*nationalisation*" of land-use rights).

31. The MPRDA regulates mineral resources as the *common* heritage of *all* the people of South Africa and *the State* is the custodian thereof for the benefit of *all* South Africans - a principle that underscores the national importance of mining for the South African economy and weighs against a fragmentation thereof along municipal boundaries.

See: Second Preamble and section 3(1) of the MPRDA;
Volume 9 p. 757 (para 6.1.2 of the second respondent's answering affidavit).

32. The custodianship of the State is a consequence of the right of the State to exercise sovereignty over all the mineral resources within the Republic of South Africa, from which sovereignty it follows that the State is entitled to control the mineral resources and to regulate the exploitation thereof both domestically and as far as international investments are concerned.

See: Section 2(a) of the MPRDA;
Dale *South African Mineral and Petroleum Law* (2005: Revision Service 6) para 82 (p. MPRDA-107 to p. MPRDA-114).

33. Section 3(2) of the MPRDA gives content to the custodianship of the nation's mineral resources by empowering the State, acting through the national Minister of Mineral Resources, to *inter alia* grant and control and administer mining rights whilst section 3(3) of the MPRDA commands the Minister to ensure the sustainable development of South Africa's mineral resources within a framework of national environment policy, norms and standards while promoting economic and social development.

See: Section 3(2) and (3) of the MPRDA.

34. Minerals occur in and upon land (although it may occur offshore within the sea or within water) and thus a mining authorisation has of necessity to be granted and exercised with respect to land - mining follows the mineral and not any boundaries.

34.1 The use of land for purposes of mining is *sui generis* in that the surface of land within a mining area may be relevant with respect to surface infrastructure and opencast mining.

34.2 The rights of the land owner to use the surface are curtailed only inasmuch as the surface is necessary for mining.

See: *Anglo Operations Limited v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (SCA) paras [20]-[22].

34.3 In the case of underground mining and after rehabilitation of the surface in opencast mining, the owner is entitled to continue his surface uses as before and inasmuch as the surface is still fit for that purpose.

34.4 In the case of underground mining, surface uses and the rights to use the surface may not be affected at all.

34.5 Control of the surface for purposes of mining and an abatement of the rights of the land owner, therefore, takes place only inasmuch as the reasonable exercise of the mining authorisation so demands.

35. The MPRDA is thus a *lex specialis* with regard to the overall control of mining and the specific control of the use of land for mining operations is an inherent component thereof: without control of the land used for mining purposes, control of mining and of mining authorisations is not possible.

36. The granting of a *mining right* in terms of section 23 of the MPRDA for the mining of a mineral in a defined mining area simultaneously determines the mining-related land-use rights for that mining right.

36.1 The holder of a mining right granted in terms of section 23 of the MPRDA is entitled to the rights referred to in section 5(3) of the MPRDA and such a mining authorisation accordingly confers a number of mining-related land-use rights.

See: Section 5(3) of the MPRDA.

36.2 This mining right, with all of the rights and benefits attached thereto, is legally in the nature of a limited real right in respect of the mineral and the land to which such right relates.

See: Section 5(1) of the MPRDA.

36.3 Inherent in mining activity and the mining right is the right to use the land, both with respect to the surface and below the surface, for mining activities and operations - without such a land-use right, mining would be impossible.

37. The granting of a *mining permit* in terms of section 27 of the MPRDA for the mining of a mineral in a defined mining area also simultaneously determines the mining-related land-use rights for that mining permit:

37.1 The holder of a mining permit granted in terms of section 27 of the MPRDA is entitled to the rights referred to in section 27(7) of the MPRDA and such a mining authorisation also confers a number of mining-related land-use rights.

See: Section 27(7) of the MPRDA.

37.2 These rights associated with a mining permit are not *limited real rights* in respect of the mineral and the land to which such a permit relates but are *statutory rights and competencies*; however, the fact that these rights are statutory does not derogate from the essential element of a mining-related land-use right bestowed upon the holder of a mining permit.

See: Section 5(1) of the MPRDA.

37.3 Inherent in mining activity and the mining permit is thus also the right to use the land, both with respect to the surface and below the surface, for mining activities and operations - without such a land-use right, mining would be impossible also in this instance.

38. A mining right and a mining permit in respect of land encompasses the right to use that land as aforesaid and, in this sense, the granting thereof in terms of section 23 or 27 of the MPRDA is also a *determination* of mining-related land-use rights.

39. Mining-related land-use rights are provided for by operation of law, once a mining authorisation is granted under the MPRDA, and are already "*determined*" once a mining

authorisation exists: the holder of a mining authorisation already has the right to enter the land in question and use it for mining purposes and activities related or directly incidental to mining, and there is no need for such rights to be given to him again.

40. The MPRDA also provides for control over those mining-related land-use rights and over the utilisation of the land in a mining area as part of the overall administrative regime created by it, *inter alia* by means of the following:

40.1 The MPRDA prohibits, upon pain of a criminal sanction, any mining operations, or the commencement with any work incidental thereto, on any area without -

(a) an approved environmental management programme or plan, as the case may be;

(b) a mining right or mining permit, as the case may be; and

(c) notifying and consulting with the land owner or lawful occupier of the land in question.

See: Section 5(4) read with 98 and 99 of the MPRDA.

40.2 The MPRDA commands, again on pain of criminal sanction, the holder of such a mining authorisation to conduct his mining operations in accordance with a wide range of environmental obligations (which also pertain to the use of the land and the impacts thereof).

See: Section 37 and 38 read with 98 and 99 of the MPRDA.

40.3 The MPRDA authorises the imposition of conditions for the exercise of such a mining right, the breach of which may also result in a criminal sanction.

See: Section 23(6) read with 98 and 99 of the MPRDA.

40.4 The MPRDA provides for a power to suspend or cancel these mining authorisations where, *inter alia*, the holder thereof -

(a) is conducting mining operations in contravention of the MPRDA;

(b) breaches any material term or condition thereof; or

(c) is contravening the approved environmental management programme.

See: Section 47 of the MPRDA.

40.5 The MPRDA provides for wide powers of inspection, including the power to issue administrative orders in certain circumstances.

See: Section 91, 92 and 93 of the MPRDA.

41. Furthermore and in the process of granting a mining right or a mining permit under the MPRDA, other surface uses, zonings and the environment are taken into account.

41.1 The word "*environment*" is defined widely for the purposes of the MPRDA.

See: Section 1 sv "*environment*" of the MPRDA and section 1(1) sv "*environment*" of the NEMA.

41.2 The process for the grant of a mining right in terms of the MPRDA is an extensive one which allows for comments and objections by interested and affected parties, including authorities such as the applicant.

See: Section 10, 22(4) and 27(5) of the MPRDA;
Section 39 of the MPRDA, read with regulations 47 to 52 of the MPRDA Regulations;
Section 40 of the MPRDA.

41.3 The application procedure, including the procedure under section 39 of the MPRDA for a consideration and approval of an environmental management programme or plan, affords to all interested and affected parties and authorities

the opportunity for inputs, also with respect to the question of use of the surface of the land and the surrounding land.

41.4 All this information is put before the Minister of Mineral Resources, who makes a decision whether or not to grant a mining right in terms of section 23 of the MPRDA or a mining permit in terms of section 27 of the MPRDA, *and makes a separate decision* whether or not to grant approval for the environmental management programme (in the case of a mining right) or the environmental management plan (in terms of a mining permit) in terms of section 39(4) of the MPRDA - without such approval the mining authorisation cannot be exercised.

See: Section 5(4), 23(5), 27(6) and 39(4) of the MPRDA.

41.5 The power of the Minister of Mineral Resources is curtailed by a restriction on issuing a mining authorisation in respect of any land comprising a residential area; any public road, railway or cemetery; or any land being used for public or government purposes or reserved therefor.

See: Section 48(1)(a) to (c) of the MPRDA.

41.6 The Minister of Mineral Resources has the power to identify further areas by notice in the *Government Gazette* in respect of which the granting of a mining right or a mining permit may be restricted or prohibited.

See: Section 48(1)(d) and 49 of the MPRDA.

42. In the premise the Minister of Mineral Resources is duty-bound to consider the effect of the proposed mining on the existing and surrounding land use and planning, clearly so that the mining-related land-use right and mining operations can be harmonized with the surrounding land uses.

See: Regulation 8(1) of the Land Use Planning Regulations.

43. The provisions of the MPRDA with regard to the use of land for mining purposes are thus exhaustive of this subject-matter and do not allow for other authorities to control that land use.

See: Section 53 of the MPRDA.

44. The recognition of a power on the part of any other authority, and more specifically a local authority under the LUPO, to also *determine* land-use rights for mining purposes and to *control* that land use, over and above the determination and control already provided for by the MPRDA, is with respect an unnecessary duplication and could not have been intended by the legislature.

Sed contra: ***S v Anton*** **1967 (4) SA 622 (T) 623B-F;**
Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another **2009 (1) SA 337 (CC) para [80] (where a functional area of *concurrent* legislative competence in respect of agriculture was at stake).**

45. Such a duplication is in the first instance inconsistent with one of the objects of the MPRDA, namely to provide security of tenure: we submit that tenure cannot be secure where an activity is to be subjected to two separate licensing dispensations, each one depending upon a wide range of discretionary powers and control measures.

See: Eighth Preamble and section 2(g) of the MPRDA.

46. Such a duplication is in the second instance an over-regulation which is inconsistent with the Constitution, especially in view of (1) the fact that the Republic of South Africa is a *democratic* state founded on the value, and with an obligation, of advancing human *rights and freedoms*; (2) the constitutional imperative that public administration must be governed by the *democratic* values and principles enshrined in the Constitution; and(3) the constitutional imperative that in public administration the efficient, economic and

effective use of resources must be promoted.

See: Section 1, 7, 8, 195(1) and 195(1)(b) of the Constitution.

47. Such a duplication is in the third instance one which is in breach of the rule of law in that it introduces a potential for uncertainty or vagueness by reason of the potentially conflicting results between the two dispensations, for example with the one dispensation granting a right whilst the other dispensation takes it away or with rights being granted on certain terms and conditions under the one dispensation but other conflicting terms and conditions being imposed under the other dispensation - the rule of law requires certainty so that those who are bound by it, can ascertain what is required of them so that they may regulate their conduct accordingly.

See: *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para [108].

48. From a common-law perspective a court should construe statutory provisions in a manner reconciling conflicts between them, in some cases also by means of the maxim *generalia specialibus non derogant* - a general enactment (such as the LUPO) may be held not to interfere with a subject specially dealt with (under the MPRDA).

See: *Sasol Synthetic Fuels (Pty) Ltd v Lambert* 2002 (2) SA 21 (SCA) para [17]; Steyn *Uitleg van Wette* (1981) 188-191.

49. By reason of the aforegoing we submit that the national legislature did not intend, when enacting the MPRDA, that the LUPO would also apply to the mining-related use of land.

(3) THIRD SUBMISSION: LUPO NOT INCORPORATED BY MPRDA AS RELEVANT LAW

50. We accept, as a point of departure, that with the MPRDA the legislature intended that in any mining authorisation and the exercise thereof will be subject to all laws *relevant*

for the mining operations thereunder: the question is whether the MPRDA regards the LUPO as such a relevant law (1) where the LUPO is not expressly mentioned or referred to therein and (2) where, in this context, the otherwise superfluous use of the word "*relevant*" in the MPRDA emphasises the intention of the legislature that there must be some positive ground for any such other law to apply to mining operations and activities related or directly incidental thereto.

51. The reasoning of the court *a quo* in this regard is, with respect, flawed.

51.1 The court *a quo* in effect reasoned from a strictly literal perspective: the reference in section 25(2)(d) of the MPRDA to "*any other relevant law*" (and the absence of a phrase such as "*notwithstanding the provision of any other law*"), in the mining permit to the "*requirements of the provisions of any other law*" and in the mining right to "*any other law in force*" were taken on face value as including the LUPO as part of the battery of laws which are relevant for or applicable to these mining authorisations.

See: Record Volume 13 p. 1167 (line 8-21) and 1186-1188 (line 13-11) of the judgement.

51.2 There is no attempt to show why, nor a finding of any ground upon which, the LUPO would be a law that is relevant for the objects of the MPRDA in general and for the purposes of these mining authorisations in particular: no purposive interpretation was applied as is called for by section 4(1) of the MPRDA.

51.3 There is no definition in the MPRDA as to what the word "*relevant*" means but the ordinary and grammatical meaning thereof is as follows:

"*1. directly connected with or related to the matter in hand;*

pertinent.

2. legally sufficient."

See: ***The Pocket Oxford Dictionary*** **(1969) 696a sv "*** ***relevant*** **";**
Chambers 21st Century Dictionary **(1999) 1177b sv "*** ***relevant*** **";**
The New Shorter Oxford English Dictionary on Historical Principles: Volume 2 (N-Z) **(1993) 2536c sv "*** ***relevant*** **".**

51.4 The real interpretative issue is why the LUPO is relevant for or applicable to the new dispensation under the MPRDA and, in our submission, there is no positive reason or grounds for any relevance of the LUPO in this regard.

52. In view thereof that the MPRDA already provides for a determination of the land-use rights required for mining purposes as well as for a system of control over such mining-related land-use rights, there is no scope for the LUPO to be a "*relevant*" law or to be applicable to these mining authorisations.

52.1 An interpretation of the MPRDA whereby the use of land for mining operations is included within the land uses controlled in terms of the LUPO and whereby the use restrictions imposed in terms of the LUPO are applied with respect to the use of land for mining purposes, would result in the LUPO (and the local authorities) controlling the mining authorisation itself.

52.2 In terms of section 4(1) of the MPRDA, any reasonable interpretation that is consistent with the objects of the MPRDA must be preferred over any other interpretation that is inconsistent with those objects.

52.3 The preamble to and the objects of the MPRDA express the intention that the State would be the custodian of the nation's mineral resources, which means that the State, through the Minister of Mineral Resources, exercises national and

uniform control over mining rights as well as mining activities under the MPRDA and not the local authorities through the LUPO over land in respect of which a mining authorisation may have been granted.

See: Second Preamble, section 2(a) and (b) as well as 3(2) of the MPRDA.

52.4 Section 23(6), 25(2)(d) and 27(7) of the MPRDA as well as any condition of these mining authorisations, if they are interpreted as section 4(1) of the MPRDA directs, namely with a due consideration of the objects of the MPRDA, thus excludes the LUPO as a *relevant* law.

53. Furthermore the LUPO puts the applicant in a position whereby it can veto the grant of a mining authorisation by refusing an application for rezoning (in terms of section 17 of the LUPO) or for a departure (in terms of section 15 of the LUPO) which otherwise would have allowed for the land in question to be used for mining purposes.

53.1 The applicant *must* refuse any application under Chapter II of the LUPO on the basis of a perceived "*lack of desirability*" of the contemplated use of the land concerned or on the basis of its effect on the existing rights concerned.

See: Section 36(1) of the LUPO.

53.2 An application for a rezoning (in terms of section 17 of the LUPO) and an application for a departure (in terms of section 15 of the LUPO), both applications under Chapter II of the LUPO, call for the exercise of a statutory discretion and furthermore may be refused by the applicant in those instances where it is not compelled to refuse them.

See: Section 15(1)(b), 16(1) and 17 of the LUPO.

53.3 If the LUPO thus also finds application to land in respect of which a mining authorisation has been granted in terms of the MPRDA, the applicant can in effect substitute its own discretion for that of the Minister of Mineral Resources, who in any event also had to take into account the effect of the mining activities on surrounding uses and social structures in approving the environmental management programme or plan in terms of section 39 of the MPRDA.

53.4 That a veto for each and every local authority was intended is inconceivable, given the scope and importance of the mining industry for the Republic of South Africa, the exclusive competence granted by the Constitution to the national legislature over mining and the legislative history of the MPRDA.

See: Record Volume 9 p. 740-748 (para 3 of second respondent's answering affidavit);
Paragraph 20-27 above (the first submission).

54. Another indication that the LUPO cannot be a "*relevant*" law, as contemplated in the MPRDA, is the fact that it opens the door for an unwilling land-owner to veto the exercise of the mining authorisation granted in terms of the MPRDA.

54.1 The MPRDA introduced a new dispensation in the South African law as far as mineral resources are concerned: it introduced a number of fundamental changes to the statutory regulation of the mineral resources of the Republic of South Africa, which includes

- doing away with the traditional [private law-orientated] concept of "*mineral rights*" and recognizing the State as the custodian of the mineral and petroleum resources of the Republic of South Africa;
- granting the holder of a prospecting or a mining right a limited real right in the land which is the subject-matter of the right [and similar statutory

rights in the case of a mining permit];

- giving a prevalence of State power of control over the mineral resources of the Republic of South Africa and effecting the concomitant ousting of the (mineral) rights of the land-owner and/or the common-law holder of mineral rights.

See: ***Meepo v Kotze*** **2008 (1) SA 104 (NC) 110F-J;**
Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd and Others **(641/09) [2010] ZASCA 109 (17 September 2010) para [24].**

54.2 In terms of the LUPO only an "*owner*" can bring an application for a rezoning (in terms of section 17 of the LUPO) or a departure (in terms of section 15 of the LUPO) which would allow for his land to be used for mining purposes.

54.3 An "*owner*" of land is defined in section 2 of the LUPO as the person in whose name that land is registered in a deeds registry, and may include the holder of a registered servitude right or lease, and any successor in title of such a person.

See: Section 2 (sv "*owner*") of the LUPO.

54.4 The holder of a mining authorisation in terms of the MPRDA is not included in this definition, which was enacted in 1985 when the current [public-law orientated] concepts of a mining authorisation and its holder did not exist.

54.5 To avoid the conclusion that the land-owner can in this way veto a mining authorisation, the fourth respondent has to argue that a mining authorisation is a *registered servitude right* as contemplated in the said definition.

See: Record Volume 5 p. 427-428 (para 138-139 of the fourth respondent's affidavit);
Record Volume 7 p. 584 (para 94 of the applicant's replying affidavit, not taking issue with this point).

54.6 Not even a common law mineral right was regarded as a servitude, even though it could be registered against the title deed of the property.

See: *Anglo Operations Limited v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (SCA) paras [16], [17].

54.7 A mining right is not registrable against the title deed of the property, but has to be notarially registered and executed in the Mining Titles Office - there is no notation which is endorsed against the title deed of the property in terms of the Deeds Registries Act 47 of 1937 at all.

See: Section 25(2)(a) of the MPRDA.

54.8 A mining permit is no longer registrable, either against the title deed of the property or in the Mining Titles Office.

See: Section 53 of the Mining Titles Registration Amendment Act 24 of 2003;
Dale *South African Mineral and Petroleum Law* (2005: Revision Service 6) para 48.1.7 (p. MPRDA-64).

54.9 A comparison between the content of a common law mineral right and that of a mining authorisation under the MPRDA leads to the conclusion that the content is virtually the same for purposes of assessing the nature thereof; however, although a mining right is a limited real right and a mining permit provides similar statutory rights in the land *and the minerals concerned*, they are not servitudes as they do not conform to the basic rules for the existence of a personal servitude, which is in principle untransferable and which does not allow for the "*abuse*" or destruction of the land or the removal of minerals in the land.

See: Section 11 of the MPRDA (but, in the case of a mining permit, compare section 27(8) thereof);
Badenhorst and others *The Law of Property* (2006) 321-322 and 338-342;

Franklin and Kaplan *The Mining and Mineral Laws of South Africa* (1982) 8-15;
***Van Vuren v Registrar of Deeds* 1907 TS 289 at 295 (stating that servitudes must originate from the *dominus* of the affected land and cannot be constituted by any person except the owner).**

54.10 In the premise the holder of a mining authorisation in terms of the MPRDA cannot be an "*owner*" of land as defined for the purposes of the LUPO.

55. Other provisions of the MPRDA reveal that the LUPO cannot be a law that is relevant, in that a zoning (or any kind of planning authorization) is either not mentioned in a particular context or is inconsistent with a particular provision of the MPRDA:

55.1 Before a person can commence mining, the MPRDA expressly requires that person to have (1) an approved environmental management programme or plan (2) a mining right or mining permit and (3) notified and consulted with the land-owner or lawful occupier of the land in question - no mention is made of an additional planning authorisation.

See: Section 5(4) of the MPRDA.

55.2 A mining right comes into effect on the date on which the environmental management programme is approved in terms of section 39(4) of the MPRDA - not when an additional planning authorisation is obtained - and the same principle can be inferred in respect of a mining permit.

See: Section 23(5), 27(6) read with 5(4), and 39(4) of the MPRDA.

55.3 The holder of a mining right *must* commence with mining operations within one year from the date on which the mining right becomes effective or within an authorised extension thereof - not when an additional planning authorisation is

obtained - and a failure to do so may be visited with cancellation of the mining right.

See: Section 25(2)(b) and 47(1) of the MPRDA.

55.4 The holder of a mining right *must* actively conduct mining in accordance with the mining work programme (the planned mining work programme to be followed to mine a mineral resource optimally, which contains the details of the applicable time-frames and scheduling of the various implementation phases of the proposed mining operation as well as a technically justified estimate of the period required for the mining of the mineral deposit concerned), failing which the mining right may be cancelled.

See: Section 25(2)(c) and 47(1) of the MPRDA;
Regulation 11(1)(f) of the MPRDA Regulations.

56. In addition there are also other legislative indications that the legislature did not intend mining to be qualified by, or subject to, planning authorisations.

See: Section 23 of the Local Government: Municipal Systems Act 32 of 2000 read with Chapter I of the Development Facilitation Act 67 of 1995 and the definition of the concept "*land development*" in section 1 thereof, resulting in a set of *general* principles for land development incorporated by reference into the function of municipal planning <u>but</u> excluding those general principles from application to the development of land in terms of mining legislation, resulting in serious difficulties where this differentiation is applied to a zoning scheme in terms of section 2(b) thereof;
Section 27 of the Physical Planning Act 125 of 1991;
Section 2(6) of the National Building Regulations and Building Standards Act 103 of 1977.

57. Lastly there is a fundamental difference between the MPRDA and the LUPO to consider, namely that the LUPO is premised upon the common-law concept of ownership of land whilst the MPRDA is not.

57.1 The essential nature of a zoning scheme has been described as an instrument to restrict the rights of all owners in an area, a regulated system which both limits the rights of ownership but also confers rights on owners to expect compliance by neighbours with the terms of the mutually applicable scheme so that powers and rights of owners of immovable property are restricted.

See: ***Walele v The City of Cape Town*** **2008 (6) SA 129 (CC) 182F-183D; Van Wyk** ***Planning Law: Principles and Procedures of Land-use Management*** **(1999) 21.**

57.2 The LUPO and its zoning schemes are premised upon the concept of the common-law ownership of land, the exercise of which has to be restricted and controlled so as to achieve an idealized arrangement of land uses: the LUPO is thus concerned with the use of land as an incident of common-law ownership or ultimately derived therefrom.

57.3 A mining authorisation granted in terms of the MPRDA is not derived from any ownership of the land itself, because in terms thereof the traditional concept of "*mineral rights*" - operating as a legal institution within the private law of property - has been abolished and replaced with a licensing system operating within the public law, making provision for a number of statutorily-defined authorisations.

57.4 The land use contemplated by the LUPO thus does not include the use of the land for mining and, to the extent the LUPO restricts or controls the use of land in the exercise of common-law ownership, the LUPO cannot be relevant for the regulation and control of mining or mining-related land use in the exercise of the statutorily-defined authorisations under the MPRDA.

58. In our submission a "*relevant law*", as contemplated by the MPRDA and/or the conditions

of the mining authorisations, is a law which regulates the exercise of the mining authorisation - not one which can prevent or veto or prohibit its exercise nor one which imposes a further precondition for its existence.

(4) FOURTH SUBMISSION: RESOLVING CONFLICT THROUGH INTERPRETATION

59. We submit that the appropriate tests for identifying a conflict between legislation are to be found in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466:

59.1 Where two enactments cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time, they are inconsistent.

See: *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 (4) SA 1098 (CC) para [24] (including footnote 12); *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 on 467 (in the headnote, reflecting that the majority did not regard this as a test of inconsistency of two laws).

59.2 Two enactments may also be inconsistent although obedience to each of them may be possible without disobeying the other, for instance where statutes do more than impose duties: they may confer rights, and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it.

See: *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 on 477-478 (per Knox CJ and Gavan Duffy J).

59.3 Where a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter *to any extent* upon the same field: the inconsistency

is demonstrated, not by comparison of detailed provisions, but by the mere existence of the two sets of provisions.

See: *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 on 489-490 (per Isaacs J).

59.4 If one enactment makes or acts upon as lawful that which the other makes unlawful, or if one enactment makes unlawful that which the other makes or acts upon as lawful, the two are to that extent inconsistent.

See: Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 466 on 490-491 (per Isaacs J, who also pointed out that what a legislature cannot do directly, in also cannot do indirectly).

60. We respectfully submit there is an obvious inconsistency between the MPRDA and its provisions with the LUPO and its zoning schemes, especially as far as the last-mentioned three tests set out in **paragraph 59 above** are concerned:

60.1 The MPRDA confers mining-related land-use rights which the LUPO effectively takes away.

60.2 The legislature evinces its intention to cover the whole field with the MPRDA, at least as far as the determination of mining-related land-use rights and the control thereof are concerned, whilst the LUPO assumes to enter, to that very extent, upon the same field.

60.3 The MPRDA makes lawful the mining-related land-uses inherent to and part of a mining authorisation, whilst the LUPO makes such a use of land unlawful.

60.4 In addition both the MPRDA and the LUPO make provision for further powers,

such as the power to make regulations and the powers to impose conditions, the exercise of which may also potentially be inconsistent and which, potentially, cannot be obeyed at one and the same time.

61. In the premise there is a conflict between the LUPO (as provincial legislation providing for a regime to license and control land use) and the MPRDA (as national legislation regulating and controlling land use as an integral component of a mining authorisation), which brings the provisions of section 150 of the Constitution as well as the rules of the common law, for avoiding such a conflict by means of interpretation, into play.

61.1 Section 150 of the Constitution requires of a court, when considering an apparent conflict between national and provincial legislation, to prefer any reasonable interpretation of the legislation that avoids a conflict over any alternative interpretation that results in a conflict.

See: Section 150 of the Constitution.

61.2 The common law requires that, in the case of an apparent conflict between legislation, one should seek an interpretation which reconcile the two because one cannot assume that the legislature contradicted himself.

See: Steyn *Uitleg van Wette* (1981) 188-191.

62. The reasonable interpretation, which in our submission avoids any conflict between the MPRDA and the LUPO, is that the legislature intended the MPRDA to regulate the subject-matter of mining, of which mining-related land-use forms an integral and indispensable part, exhaustively and to the exclusion of any licencing dispensation for the control of land use by a local authority under the LUPO.

II. APPLICATION OF NEMA TO MINING EXCLUDED

63. Regulation 75(3) of the Environmental Impact Assessment Regulations, 2010 came into operation on 2 August 2010.

See: Regulation 75(3) of the EIA Regulations, 2010

64. In the premise of this regulation, the issues pertaining to the NEMA are academic.

65. We submit that the "*provision*" referred to in this regulation is a reference to the similar "*provision*" contemplated in section 14(2) of the National Environmental Management Amendment Act 62 of 2008 ("*the NEMA Amendment*").

66. The said section 14(2) provides in effect that, despite the commencement of that amending statute on 1 May 2009, any provision relating to prospecting, mining, exploration and production and related activities only comes into operation on a date at least 18 months after the date of commencement of the Mineral and Petroleum Resources Development Amendment Act [49 of] 2008 ("*the MPRDA Amendment*"), which date has not yet been proclaimed in terms of section 94(1) thereof.

67. The environmental management programme (for the mining right) and the environmental management plan (for the mining permit) have been approved in terms of the MPRDA prior to those "*provisions*" coming into effect in and they are thus deemed to have been approved in terms of the NEMA.

See: Core Bundle Volume 2 p. 109 (letter of approval of environmental management programme dated 10 September 2008);
Core Bundle Volume 1 p. 59-61 (letter of approval of environmental management plan dated 16 October 2007).

68. We submit that the effect of this deeming provision is that the holder of a mining authorisation for which an environmental management programme or plan has been approved under the MPRDA is, in the interim, also deemed to have the requisite environmental authorisation under the NEMA for such mining operations and the activities related or directly incidental thereto - this makes the issues pertaining to the NEMA academic because the relief pursued by the applicant is in the nature of interdicts to prevent mining on the four (4) erven unless and until the mining company *inter alia* has been granted an environmental authorisation under the NEMA.

69. Should these issues not be academic, we make the following submissions on the correct interpretation of the MPRDA as far as the NEMA is concerned:

69.1 **Firstly**, an analysis of various provisions of the MPRDA reveals that the legislature intended to prescribe a comprehensive system to manage and mitigate the environmental impacts of mining.

69.2 **Secondly**, the legislature did not intend that, within the context of the MPRDA, the provisions of the NEMA would also be of general application to mining operations and the activities related or directly incidental thereto.

69.3 **Thirdly**, the transitional arrangement contained in the NEMA Amendment read with the MPRDA Amendment confirms that the two environmental-management systems, the one under the NEMA and the other under the MPRDA, were intended to be two separate, non-overlapping and self-contained systems.

(1) FIRST SUBMISSION: INTERPRETATION CONSISTENT WITH COMPREHENSIVE SYSTEM

70. We submit that from the provision of a comprehensive system in the MPRDA, to

manage and mitigate the environmental impacts of mining, it should be inferred that the legislature intended for an effective mining authorisation (one with an environmental management programme or plan already approved) to suffice without the need for a further environmental authorisation under the NEMA.

71. One of the objects of the MPRDA is to give effect to section 24 of the Constitution by ensuring that the nation's mineral resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.

See: Third Preamble and section 2(h) of the MPRDA.

72. One of the mechanisms for achieving the aforesaid object is to be found in the provision in the MPRDA for a duty to refuse certain applications on environmental grounds.

See: Section 17(1)(c) read with 17(2)(a) and 23(1)(d) read with 23(3) of the MPRDA.

73. Another such mechanism is section 5(4)(a) of the MPRDA, which prohibits any person from mining or commencing with any work incidental thereto on any area without an approved environmental management programme or plan, as the case may be.

See: Section 5(4)(a) and 39 of the MPRDA.

74. Furthermore section 37 of the MPRDA expressly incorporates the general environmental management principles as formulated in section 2 of the NEMA for the purposes of its application within a mining context and also expressly incorporates the generally accepted principles of sustainable development.

See: Section 37(1)(a), (b) and (2), read with 3(3) of the MPRDA.

75. The MPRDA provides, expressly, that the holder of a mining authorisation:

75.1 must at all times give effect to the general objectives of integrated environmental management laid down in Chapter 5 of the NEMA;

75.2 must consider, investigate, assess and communicate the impact of his prospecting or mining on the environment as contemplated in section 24(7) of the NEMA [now, after various amendments, section 24(4)];

See: Section 2 of the National Environmental Management Amendment Act 8 of 2004;
Section 2 of the NEMA Amendment;
Section 24(4) of the NEMA.

75.3 must manage all environmental impacts in accordance with his environmental management programme or plan;

75.4 must manage all environmental impacts as an integral part of the mining operation, unless the Minister of Mineral Resources directs otherwise;

75.5 must as far as it is reasonably practicable, rehabilitate the environment affected by the prospecting or mining operations to its natural or predetermined state or to a land use which conforms to the generally accepted principle of sustainable development; and

75.6 is responsible for any environmental damage, pollution or ecological degradation as a result of his reconnaissance prospecting or mining operations and which may occur inside and outside the boundaries of the area to which such right, permit or permission relates.

See: Section 38(1) of the MPRDA.

76. Furthermore the MPRDA requires that:

76.1 every person who has applied for a mining right must conduct an environmental impact assessment and submit an environmental management programme, whilst any person who applies for a mining permit must submit an environmental management plan as prescribed;

76.2 an applicant who prepares an environmental management programme or plan must:

- establish baseline information concerning the affected environment to determine protection, remedial measures and environmental management objectives;
- investigate, assess and evaluate the impact of his proposed prospecting or mining operations on the environment;
- *in the case of an application for a mining right but not one for a mining permit*, also investigate, assess and evaluate the impact of his proposed prospecting or mining operations on the socio-economic conditions of any person who might be directly affected by the mining operation;
- investigate, assess and evaluate the impact of his proposed prospecting or mining operations on any national estate referred to in section 3(2) of the National Heritage Resources Act 25 of 1999 (with certain exceptions);
- *in the case of an application for a mining right but not one for a mining permit*, develop an environmental awareness plan describing the manner in which the applicant intends to inform his employees of any environmental risks which may result from their work and the manner in which the risks must be dealt with in order to avoid pollution or the

degradation of the environment;

- describe the manner in which he intends to modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation;
- describe the manner in which he intends to contain or remedy the cause of pollution or degradation and migration of pollutants; and
- describe the manner in which he intends to comply with any prescribed waste standard or management standards or practices;

76.3 the Minister of Mineral Resources must within a specified period approve the environmental management programme or plan if:

- it complies with the requirements set out in **paragraph 76.2 above**;
- the applicant has made the prescribed financial provision for the rehabilitation or management of negative environmental impacts in terms of section 41(1) of the MPRDA; and
- the applicant has the capacity, or has provided for the capacity, to rehabilitate and manage negative impacts on the environment;

76.4 the Minister of Mineral Resources, however, may not approve the environmental management programme or plan as contemplated in **paragraph 76.3 above** unless:

- any recommendation by the Regional Mining Development and Environmental Committee; and
- the comments of any State department charged with the administration of any law which relates to matters affecting the environment;

have been considered.

See: Section 39(1) to (4) and 93(1)(b) of the MPRDA;
Section 38(1)(b) of the MPRDA read with section 24(4) of the NEMA;
Record Volume 13 p. 1185 (line 12-16) of the judgement (where the court *a quo* takes the view that the MPRDA does not require an environmental impact assessment before a mining right may be granted).

77. The Minister of Mineral Resources is furthermore empowered:

77.1 to call for additional information from an applicant for the approval of an environmental management programme or plan;

77.2 to direct that the environmental management programme or plan in question be adjusted in such way as the Minister of Mineral Resources may require; and

77.3 even after approval of an environmental management programme or plan but after consultation with the holder of the mining authorisation concerned, to approve an amended environmental management programme or plan.

See: Section 39(5) and (6) of the MPRDA

78. Various other provisions of the MPRDA also touches upon the management of the environment affected or potentially affected by mining activities.

78.1 Section 40 thereof allows for consultation with other State Departments.

78.2 Section 41 thereof deals with the financial provision which has to be made for the remediation and rehabilitation of environmental damage.

78.3 Section 43 thereof pertains to the principle that a miner carries his environmental liabilities "*from the cradle to the grave*" unless he receives a closure certificate

that relieves him of that liability.

78.4 Section 45, section 46 and section 47 thereof contain various ministerial powers which allow for the full and proper protection of the environment before, during and after mining operations.

79. Lastly section 107 of the MPRDA empowers the Minister of Mineral Resources to make regulations for, *inter alia*:

- the conservation of the environment at or in the vicinity of any mine or works;
- the management of the impact of any mining operations on the environment at or in the vicinity of any mine or works;
- the rehabilitation of disturbances of the surface of land where such disturbances are connected to prospecting or mining operations;
- the prevention, control and combatting of pollution of the air, land, sea or other water, including ground water, where such pollution is connected to prospecting or mining operations;
- pecuniary provision by the holder of any right, permit or permission for the carrying out of an environmental management programme;
- the establishment of accounts in connection with the carrying out of an environmental management programme and the control of such accounts by the Department of Mineral Resources;
- the assumption by the State of responsibility or co-responsibility for obligations originating from such regulations; and
- the monitoring and auditing of environmental management programmes.

80. It is clear, therefore, that the MPRDA prescribes a comprehensive system to manage and mitigate the environmental impacts of mining.

81. We submit that the MPRDA has a self-contained system of environmental regulation, which has been designed with reference to the basic principles of the original NEMA-dispensation, but which was adapted to the specific circumstances of the mining world: the MPRDA does not only give direct effect to the original NEMA in the mining context but it also provides for cooperation with other government departments administering laws affecting the environment in accordance with the principles of cooperative governance enshrined in chapter 3 of the Constitution.

82. The intention of the legislature in the MPRDA was not to duplicate what has already been dealt with in the NEMA but to select those components of the general management system which find application in a separate and independent environmental-management system for mining.

See: Paragraph 45-47 above, which argument also applies to the NEMA

83. These various provisions of the MPRDA and the comprehensive system to manage and mitigate the environmental impacts of mining in terms thereof demonstrate how the legislature has elected to give effect to the original NEMA in the mining context.

83.1 Firstly, we have an <u>express</u> application of the environmental management principles contained in section 2 of the NEMA to all mining operations.

83.2 Secondly, we have the <u>subjecting</u> of the exercise of a mining authorisation to an environmental management programme or plan, which itself must give effect to the objectives of integrated environmental management laid down in chapter 5 of the original NEMA, and by making the approval of such programme or plan subject to the environmental management principles contained in section 2 of the NEMA and the minimum requirements contained in section 24(7) of the NEMA

(before its amendment, now contained in section 24(4) thereof).

84. In respect of the regulation of the environment specifically affected by mining operations, the MPRDA and the MPRDA-Regulations thus are special statutory measures to deal comprehensively and exclusively with the management of the environment in respect of prospecting and mining operations - a highly specialised field.

85. Parliament has thus entrusted the management of the environment, as contemplated in section 24 of the Constitution, to the Minster of Mineral Resources through the MPRDA as far as the effects of mining activities on the environment are concerned, by making a choice: instead of rendering those subject to its provisions also directly subject to the provisions of the provisions of the NEMA, it chose to subject them indirectly to the principles of the original NEMA as incorporated into the MPRDA.

(2) SECOND SUBMISSION: NEMA NOT DIRECTLY RELEVANT OR APPLICABLE

86. We submit that:

86.1 by having elected to expressly incorporate those principles of the NEMA which the legislature deemed relevant for mining operations, it impliedly intended that the remaining provisions of the NEMA would not be of general application to mining operations;

86.2 by having already provided for a comprehensive system to manage and mitigate the environmental impacts of mining in the MPRDA, the legislature did not intend to duplicate that system; and

See: Paragraph 45-47 above, which argument also applies to the NEMA

86.3 there is no ground or reason why the NEMA, to the extent that it is not expressly incorporated into the MPRDA, should be regarded as relevant for mining operations under the MPRDA.

87. In the premise a further environmental authorisation in terms of the NEMA is not required under the present legislation over and above an approval for an environmental management programme or plan in terms of the MPRDA.

(3) THIRD SUBMISSION: TRANSITIONAL LAWS SHOW NO OVERLAP INTENDED

88. We submit that the intention of the legislature, that the two environmental-management systems (one provided for in the MPRDA in respect of impacts from mining activities specifically and the other provided for in the NEMA in respect of impacts from human activities generally) were two separate, non-overlapping and self-contained systems, appear also from the passing of two amending statutes by the national legislature, namely the NEMA Amendment (parts of which already came into operation on 1 May 2009) and the MPRDA Amendment (which has not yet been put into operation).

89. The objective of the proposed amending statutes is *inter alia* to align the principal statutes (namely, the MPRDA and the NEMA respectively) in order to provide for one environmental management system.

See: Long Title of the NEMA Amendment and of the MPRDA Amendment.

90. What is sought through the amendments is, broadly speaking, the removal from the MPRDA of all the current provisions in it that have to do with environmental authorisation and management in respect of mining and mining-related activities and the inclusion in the NEMA of such provisions as appropriate.

91. If both systems were to apply to mining operations, there is a real prospect that the holder of a mining authorisation may face competing and contradictory but mandatory directions from the designated authority under the MPRDA and the competent authority in terms of NEMA in respect of the same activity.

91.1 Since there are no mechanisms in either the MPRDA or the NEMA to resolve such conflicts, the only way out of the conundrum would be to interpret the MPRDA as conferring exclusive jurisdiction upon the Minister of Mineral Resources to regulate mining operations, including the environmental consequences thereof.

91.2 Such an interpretation is consistent with the constitutional principle of the rule of law, which amongst other includes the essential that the law should be such that people will be able to be guided by it.

See: Paragraph 47 above.

91.3 Such an interpretation is one that prevents the absurd result of permitting conflicting legal requirements.

92. In the premise the legislature thus acknowledged that there are at present two environmental-management regimes - one for mining and mining-related activities, administered in terms of the MPRDA, and one for other activities, administered in terms of the NEMA - which the amending statutes aim to align in order to provide for one integrated environmental-management system.

93. Despite the commencement of the NEMA Amendment, none the provisions thereof, *relating* to prospecting, mining, exploration and production and related activities, by

virtue of section 14(2) thereof, came into operation: thus section 24, 24F(1), 24K(1) and (3)(b), 24L and 24F(1) of the NEMA - al relied upon by the court *a quo* - are not yet operational as far as prospecting, mining, exploration, production and related or incidental activities are concerned.

94. Accordingly we submit with respect that at present a separate environmental authorisation in terms of the NEMA, for mining activities or activities incidental or ancillary thereto, is not required in law.

C. REMAINING CONFLICT WITH MPRDA

95. If it is concluded that, on a proper interpretation of the MPRDA, either the LUPO or the NEMA or both may also apply to and regulate land use or listed activities forming part of and related or directly incidental to mining operations, the next question is whether there remains a conflict or potential conflict between the MPRDA and the LUPO and/or a conflict or potential conflict between the MPRDA and the NEMA.

96. We submit that, on a comparison between the three legislative instruments, there is indeed such a conflict or potential conflict on the tests we have already dealt with.

See: Paragraph 59 above.

97. As far as the LUPO is concerned, we make the following submissions:

97.1 The MPRDA expressly confers (or "*determines*") a number of mining-related land-use rights on the holder of a mining authorisation, such as for example:

- the right to enter the land to which such right relates together with his or her employees;

- the right to bring onto that land any plant, machinery or equipment;
- the right to build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of mining;
- the right to mine for his own account on or under that land for the mineral for which such right has been granted;
- the right to remove and dispose of any such mineral found during the course of mining; and
- the right to carry out any other activity incidental to mining and which activity does not contravene the provisions of the MPRDA.

See: Section 1 sv "*mine*" and "*mining operation*", 5(3) and 27(7) of the MPRDA.

97.2 In view of the present zoning of the four (4) erven in question (which does not recognise a right to use that land for mining) and the fact that the holder of a mining authorisation does not have the standing to apply for any planning authorisation which will give him such a right under the LUPO, the LUPO effectively vetoes those mining-related land-use rights and takes them away: the use of that land, in accordance with and for the purpose of the rights granted under the MPRDA, constitutes a criminal offence under the LUPO.

See: Section 39(2) of the LUPO.

97.3 We repeat **paragraph 60.2 above**.

97.4 The MPRDA makes or acts upon as lawful the mining-related land-use rights conferred upon the holder of a mining authorisation: that use of the land and the activities to be conducted thereon are the premise upon which, for example, an

environmental management programme or plan is approved - but very same conduct is made unlawful by the LUPO.

See: Section 39(3)(b) of the MPRDA, which requires that the holder investigate, assess and evaluate the impact of his proposed mining operations;
Section 39(2) of the LUPO.

97.5 In addition both the MPRDA and the LUPO make provision for further powers, such as the power to make regulations and the powers to impose conditions, the exercise of which may also potentially be inconsistent and which cannot be obeyed at one and the same time.

98. As far as the NEMA is concerned, we make the following submissions:

98.1 This is a classical example of one statute (the MPRDA) evincing an intention to cover the whole field of the environmental management of mining and mining-related activities, whilst another statute (the NEMA) also assumes to enter upon the same field: to the extent that the NEMA purports to do so, the inconsistency is demonstrated by the mere existence of the two sets of provisions.

98.2 Also in this instance both the MPRDA and the NEMA make provision for further powers, such as the power to make regulations and the powers to impose conditions, the exercise of which may also potentially be inconsistent and which, potentially, cannot be obeyed at one and the same time.

See: Section 38(1)(b)(c)(i) and 98(a)(iii) read with 99(1)(c) of the MPRDA;
Section 24F(2)(c) and (4) of the NEMA.

98.3 We submit that section 5(4) of the MPRDA entitles the holder of a mining authorisation to mine and proceed with his mining operations once the *three*

conditions thereof are met but the NEMA takes that right away by making it dependent on a *fourth* condition before those operations can commence: the separate environmental authorisation under the NEMA for certain listed activities.

See: Section 5(4) of the MPRDA;
Item 20 of Listing Notice 1 of 2010 (Government Notice R.544 of 18 June 2010, as amended);
Item 20 of Listing Notice 2 of 2010 (Government Notice R.545 of 18 June 2010, as amended);
Section 24(F)(1) of the NEMA.

99. Consequently, if the proposed interpretation (namely, that the national legislature intended the MPRDA to regulate mining exhaustively and to the exclusion of any dispensation under the LUPO and/or the NEMA) is not adopted, the further question, on the level of conflict resolution, then arises as to how that conflict or potential conflict should be resolved if not by means of interpretation.

D. RULES FOR RESOLVING CONFLICT BETWEEN LEGISLATION

100. Because the Constitution as well as the common law provide for rules calculated to resolve any remaining conflict between legislation, there is no necessity to turn to the constitutionality of the legislation in question (which issue, in any event, should be a last port of call if no other solution can be found).

See: Woolman *Constitutional Law of South Africa: Volume 1* (2008: Revision service 1 July 2009) 3-21 (on the general principle of constitutional avoidance);
S v Mhlungu 1995 (3) SA 867 (CC) para [59].

I. MPRDA PREVAILS IN CASE OF CONFLICT WITH LUPO

101. This conflict is to be resolved, firstly, by means of the provisions of section 146(2) of the Constitution, alternatively, by means of the provisions of section 148 thereof, and further

alternatively, by means of the doctrine of implied repeal under the common law.

102. We submit **in the first place** that such a conflict falls to be resolved in terms of section 146(2) of the Constitution, with the result that the MPRDA prevails over LUPO in this regard but does not invalidate the LUPO, which becomes inoperative in respect of the mining area for as long as the MPRDA applies.

103. Section 146 of the Constitution establishes a framework for resolving conflicts between national and provincial legislation by providing that national legislation prevails over provincial legislation if certain conditions, set out in section 146(2) or (3) thereof, apply and, conversely, by providing that provincial legislation prevails over national legislation if section 146 (2) or (3) thereof does not apply, provided that such a prevailing law has been approved by the National Council of Provinces.

104. The first issue to consider is whether this is a conflict between national legislation (the MPRDA) and provincial legislation (the LUPO) falling within a functional area listed in Schedule 4 of the Constitution.

See: Section 146(1) of the Constitution.

105. In this regard there is a possible ambiguity to consider, namely whether:

105.1 the *conflict* must fall within a functional area listed in Schedule 4 of the Constitution;

105.2 only the *provincial legislation* must fall within a functional area listed in Schedule 4 of the Constitution; or

105.3 *both the national legislation and the provincial legislation* must fall within a functional area listed in Schedule 4 of the Constitution.

106. On either of the interpretations referred to in **paragraph 105.1 and 105.2 above**, this prerequisite for the overall application of section 146 of the Constitution is met, in that:

106.1 the pith and substance of the *conflict* between the MPRDA and the LUPO essentially concerns the determination of, and control over, land use rights inherently part of a mining right granted in terms of the MPRDA, which at least falls within the following functional areas listed in Schedule 4 of the Constitution: regional planning and development; urban and rural development; and/or municipal planning;

See: ***Ex parte President of the Republic of South Africa: Constitutionality of the Liquor Bill*** **2000 1 SA 732 (CC) para [62]-[63];**
Ex parte Speaker of the Kwazulu-Natal Provincial Legislature: In re Kwazulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex parte Speaker of the Kwazulu-Natal Provincial Legislature: In re payment of Salaries, Allowances and other Privileges to the Ingoyama Bill of 1995 **1966 4 SA 653 (CC) para [19].**

106.2 the LUPO is *provincial legislation* dealing with, and falling within, the same functional areas.

107. Assuming that section 146 of the Constitution is applicable, the second issue is whether the MPRDA conforms with the requirements set out in section 146(2) and (6) thereof:

107.1 The MPRDA is national legislation that applies uniformly with regard to the country as a whole.

See: Section 146(2) of the Constitution.

107.2 The MPRDA deals with a matter than cannot be regulated effectively by legislation enacted by the respective provinces individually.

See: Section 146(2)(a) of the Constitution;
Record Volume 9 p. 755-757 (para 6.1.1 of the second respondent's answering affidavit).

107.3 To be dealt with effectively, the control and regulation of exploitation of South African mineral resources require uniformity across the nation and the MPRDA provides that uniformity by establishing norms and standards, frameworks and national policies.

See: Section 146(2)(b) of the Constitution;
Record Volume 9 p. 757 (para 6.1.2 of the second respondent's answering affidavit).

107.4 Furthermore, the MPRDA is necessary for the maintenance of economic unity and the promotion of economic activities across provincial boundaries, and it is also necessary for the protection of the environment.

See: Section 146(2)(c)(ii) and (vi) of the Constitution;
Record Volume 9 p. 757-759 (para 6.1.3, 6.1.4 and 6.2 of the second respondent's answering affidavit).

107.5 The National Council of Provinces has approved the MPRDA on 26 June 2002.

See: Section 146(6) of the Constitution;
Record Volume 9 p. 759 (para 6.3 of the second respondent's answering affidavit).

108. In the premise the requirements set out in section 146(2) and (6) of the Constitution are met and under this deadlock-breaking mechanism the MPRDA prevails over the LUPO and its zoning schemes as far as the use of land for mining, within the area subject to the mining authorisation granted in terms of the MPRDA, is concerned but without the LUPO and its zoning schemes being invalidated because they become temporarily

inoperative to the extent of the conflict and for as long as it remains.

See: Section 149 of the Constitution.

109. We submit **in the alternative** that such a conflict falls to be resolved in terms of section 148 of the Constitution, with the same result.

110. On the interpretation referred to in **paragraph 105.3 above**, which appears to be the one favoured by the Constitutional Court although, it will not suffice that the MPRDA is national legislation derived from an exclusive legislative competence of the national legislature, because on this interpretation this provision is specifically designed to resolve disputes arising from the exercise of a concurrent legislative competence entrusted to the national and the provincial sphere of government.

See: *Ex parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape* 1997 (4) SA 795 (CC) para [76].

111. If section 146 of the Constitution finds no application to the conflict between the MPRDA and the LUPO, the only other constitutional provision which then becomes relevant is the one contained in section 148 of the Constitution.

112. Section 148 of the Constitution stipulates that if a dispute concerning a conflict cannot be resolved by a court, the national legislation prevails over the provincial legislation.

See: Section 148 of the Constitution.

113. We submit that section 148 of the Constitution provides a default solution, applicable as a deadlock-breaking mechanism, where no constitutional conflict resolution directives are available for a court to resolve a dispute about conflicting laws:

113.1 Under a dedicated heading (namely "*Conflicting Laws*") in Chapter 6 of the Constitution, a comprehensive legislative framework is introduced which is clearly intended to provide for the possibilities of legislation conflicting as a result of the allocation of functional areas of legislative competence to the different spheres of government.

113.2 Firstly, provision is made for rules to resolve a dispute in respect of conflicting laws where a concurrent legislative competence is at stake.

See: Section 146 of the Constitution.

113.3 Secondly, provision is made for rules to resolve a dispute in respect of a conflict between national legislation and a provision of a provincial constitution, the national legislation being:

- national legislation on a matter which the Constitution specifically requires or envisages the enactment of national legislation;
- interventions in terms of section 44(2) of the Constitution; and
- national legislation on a matter within a functional area listed in Schedule 4 of the Constitution to which section 146 thereof applies.

See: Section 147(1) of the Constitution.

113.4 Thirdly, provision is made for rules to resolve a dispute in respect of conflicting laws where an exclusive provincial legislative competence is at stake.

See: Section 44(2) and 147(2) of the Constitution.

113.5 There is no specific rules, established in terms of the Constitution, for the situation where there is a conflict between laws of which one is national legislation derived from the exclusive legislative competence of the national

sphere of government - this dispute, we submit, is the one for which section 148 of the Constitution caters, namely a dispute where interpretation and constitutional directives to address conflict provide no answer, so that in such an instance a conflict is present which cannot be resolved by a court.

114. Consequently and in terms of section 148 of the Constitution, because there are no other prescripts for a court to apply, the MPRDA (as national legislation) prevails over the LUPO (as provincial legislation).

115. Also in this instance the LUPO and its zoning schemes are not invalidated but become temporarily inoperative in relation to any mining-related land use under the MPRDA for as long as the conflict remains, which will essentially be for the period from the date upon which a mining authorisation came into effect in terms of the MPRDA to the date of mine closure (after completion of rehabilitation) in terms of section 43 of the MPRDA.

See: Section 149 of the Constitution.

116. Inasmuch as the relevant functional area may be municipal planning, which falls within Part B of Schedule 4 of the Constitution, it is clear that the executive authority granted to the municipalities in terms of section 156(1)(a) of the Constitution, in respect of local government matters listed in Part B of Schedule 4 thereof, is not exclusive:

See: *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) 419 footnote 81 and footnote 82;
***Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2008 (4) SA 572 (W) para [49];**
Section 151(3) of the Constitution.

117. Furthermore the Constitution itself, by necessary implication, recognises that mining as a functional area, of which the use of land for mining purposes forms an integral part,

falls within the exclusive competence of the national legislature.

118. Lastly this outcome, that the MPRDA prevails whilst the LUPO is temporarily inoperative, is dictated by the express provisions of the Constitution.

119. In the premise there is nothing constitutionally objectionable against the MPRDA regulating and controlling mining-related land use rights and the use of land under a mining right granted in terms thereof for as long as may be necessary, even if there is some overlap with the functional area of municipal planning: the national sphere of government retains its exclusive legislative competency over mining, the local authority does not have unlimited plenary powers in respect of all matters relating to local government affairs (including municipal planning) and either section 146 or section 148 of the Constitution allows for the MPRDA to prevail.

120. We submit **in the further alternative** that, inasmuch as the LUPO may, literally interpreted, be applicable to the use of the land subject to a mining authorisation granted in terms of the MPRDA, the MPRDA as a later statute impliedly repealed the earlier LUPO in this respect: *Lex posterior derogat priori*.

See: ***New Modderfontein Gold Mining Company v Transvaal Provincial Administration*** **1919 AD 367 at 400.**

121. The MPRDA manifestly intends to regulate the whole subject to which it relates:

> "*[I]t necessarily supersedes and repeals all former Acts, so far as it differs from them in its prescription.*"

See: ***New Modderfontein Gold Mining Company v Transvaal Provincial Administration*** **1919 AD 367 at 400.**

122. We submit that the legislative intent with the MPRDA, to provide for the comprehensive

and exhaustive control of mining and mineral resources, is so manifestly inconsistent with the provisions of the LUPO that a court will be justified in coming to the conclusion that the earlier LUPO has been impliedly repealed (or amended) by the later MPRDA in so far as mining-related land use under the MPRDA is concerned.

See: ***Government of the Republic of South African v Government of Kwazulu*** **1983 1 SA 164 (A) 200-201;**
Steyn *Uitleg van Wette* (1981) 188-191.

II. MPRDA PREVAILS IN CASE OF CONFLICT WITH NEMA

123. On the hypothesis that the existing conflict between the MPRDA and the NEMA cannot be resolved through interpretation, there is a conflict between national legislation made under the *exclusive* legislative competence of the legislature (the MPRDA in respect of mining) and national legislation made under the *concurrent* legislative competence of the *same* legislature (the NEMA in respect of the environment) - for which conflict section 146-150 the Constitution does not provide.

124. In turning to the common law for a solution, one should take into consideration:

124.1 section 173 of the Constitution, which recognises that the Constitutional Court, the Supreme Court of Appeal and the High Courts have the inherent power to develop the common law; and

124.2 section 4(2) of the MPRDA, which stipulates that, in so far as the common law is inconsistent with the MPRDA, the MPRDA prevails.

125. The relevant solution provided for by the common law, to resolve a remaining conflict or an inconsistency between two laws emanating from the same legislature, is summarised

in two maxims, namely:

125.1 the maxim *lex posterior derogat priori* - a later *lex specialis* or *lex generalis* amends or repeals an earlier *lex generalis* to the extent of such conflict or inconsistency; and

125.2 the maxim *generalia specialibus non derogant* - a later *lex generalis* does not amend or repeal an earlier *lex specialis* but, to the extent of such conflict or inconsistency, allows for the earlier *lex specialis* to operate as an exception to the later *lex generalis*.

See: Steyn *Uitleg van Wette* (1981) 188-191.

126. Although the MPRDA and the NEMA can be described as legislation dealing with specialised topics (the mining and the environment), we submit that, in relation to each other, the MPRDA is to be regarded as the *lex specialis* whilst the NEMA should be regarded as the *lex generalis*: whereas the NEMA allows the listing and control of *potentially any activity* with potential consequences for or impacts on the environment, the MPRDA is in comparison concerned specifically with *mining activities* and their potential consequences for or impacts on the environment.

127. In our submission the MPRDA should also be regarded as a *lex specialis* because of its origin in the *exclusive* nature of the legislative competence from which it flows and which accords it a higher status than national legislation which flows from a legislative power held *concurrently* with the provincial sphere of government.

128. The NEMA commenced on 29 January 1999 and the MPRDA on 1 May 2004, with the result that in accordance with the maxim *lex posterior derogat priori* the MPRDA, as a

later *lex specialis*, amended or repealed the NEMA, as an earlier *lex generalis*, to the extent of such conflict or inconsistency.

129. Subject to **paragraph 66 above**, any amending statute of the NEMA, commencing on or after 1 May 2004, will in accordance with the maxim *generalia specialibus non derogant* result therein that any such amending statute, as a later *lex generalis*, did not amend or repeal the MPRDA as an earlier *lex specialis* but, to the extent of the conflict or inconsistency between them, allowed for the MPRDA to operate as an exception to the NEMA as amended.

130. On this interpretation and application of the rules of the common law, preference is given to the MPRDA as a *lex specialis* in a functional area of exclusive national comptence and it, in the result, effectively prevails over the NEMA.

E. CONCLUSION

131. In the premises it is respectfully submitted that the appeal be upheld with costs, including the costs of two counsel in respect of the second respondent, and that the order of the court *a quo* be set aside and replaced with an order in terms of which the application is dismissed with costs, such costs to include the costs attendant upon the employment of two counsel.

Chambers
Pretoria
20 April 2011

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