

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC Case No:
SCA Case Nos: 709/2010
and 746/2010

In the matters between:

MINISTER OF MINERAL RESOURCES	Applicant
and	
SWARTLAND MUNICIPALITY	First Respondent
CITY OF CAPE TOWN	Second Respondent
MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE	Third Respondent
MACCSAND (PTY) LTD	Fourth Respondent
CHAMBER OF MINES OF SOUTH AFRICA	Fifth Respondent

and in the matter between:

MACCSAND (PTY) LTD	Applicant
and	
CITY OF CAPE TOWN	First Respondent
NATIONAL MINISTER OF WATER AFFAIRS AND ENVIRONMENT	Second Respondent
MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE	Third Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Fourth Respondent
MINISTER OF MINERAL RESOURCES	Fifth Respondent
CHAMBER OF MINES OF SOUTH AFRICA	<i>Amicus Curiae</i>

FILING NOTICE

DOCUMENTS FILED HEREWITH:

1. Second Respondent's Answering Affidavit.

DATED AT CAPE TOWN THIS 8TH DAY OF NOVEMBER 2011.



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TO: **THE REGISTRAR OF THE CONSTITUTIONAL COURT**
Constitutional Court of South Africa
Constitutional Hill
Braamfontein
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AND TO: **STATE ATTORNEY, CAPE TOWN**
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(Applicant / Fifth Respondent)
And for **The National Minister of Water Affairs and Environment**
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C/O WERKSMANS, JOHANNESBURG

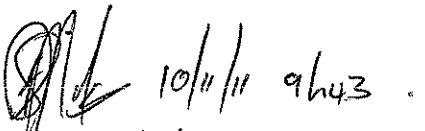
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Accepted
Without Prejudice
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AND TO: **TERBLANCHE SLABBER PIETERS**

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(First Respondent/ ...)

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AND TO: **CLIFFE DEKKER HOFMEYR INC**

Attorneys for **Maccsand (Pty) Ltd**

(Fourth Respondent / Applicant)

12th Floor

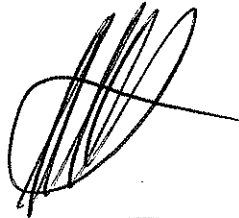
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AND TO: **NORTON ROSE SOUTH AFRICA**
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(Fifth Respondent / *Amicus Curiae*)
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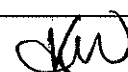
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MINISTER OF MINERAL RESOURCES	Fifth Respondent
CHAMBER OF MINES OF SOUTH AFRICA	<i>Amicus Curiae</i>

SECOND RESPONDENT'S ANSWERING AFFIDAVIT

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I, the undersigned,

KEITH ANTHONY WISEMAN

hereby make oath and say:

1. I am the Manager: Environmental Management Systems for the Second Respondent, the City of Cape Town ("the City"). I am duly authorised to make this affidavit on behalf of the City.
2. The facts deposed to herein are within my personal knowledge, unless stated to the contrary or otherwise appears from the context. To the best of my belief they are true and correct.
3. This affidavit is filed in response to the application by the Minister of Local Government, Environmental Affairs and Development Planning, Western Cape Province ("the Province"):
 - 3.1. for leave to conditionally cross-appeal to this Court, if the Court finds that the MPRDA exempts the holder of a right or permit issued thereunder from the duty to comply with the provisions of LUPO and the regulations and zoning schemes promulgated thereunder, for an order declaring the MPRDA to be inconsistent with the Constitution and invalid to that extent;

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- 3.2. for leave to cross-appeal against the refusal of the SCA, expressed in paragraphs 38 and 39 of its judgment, to determine the issue the Province sought to raise for decision by the SCA by means of its application, dated 21 July 2011, to amend its notice of counter-application dated 21 July 2009; and
 - 3.3. for direct access to this Court to apply, in the alternative, for declaratory relief in respect of compliance with the National Environmental Management Act 107 of 1998 ("NEMA") by holders of a mining permit or right issued in terms of the MPRDA, when their mining operations entail an activity listed in terms of sections 24(2) and 24D of NEMA.
4. The City has not opposed the applications by the Minerals Minister and Maccsand for leave to appeal, and abides the decision of this Court in that regard. The City will, however, oppose those appeals should this Court grant leave.

THE APPLICATIONS BY THE PROVINCE

5. The City supports the applications by the Province. They raise issues which are of very substantial importance to the City. If this Court grants leave in respect of those applications, the City will advance substantially the same position as the Province in respect of the issues which they raise. For that reason, I will make only brief submissions in respect of each of the Province's applications.

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Conditional cross-appeal: Constitutionality of the MPRDA

6. I respectfully submit that the High Court and the SCA correctly rejected the contention by the Minerals Minister and Maccsand that on a proper interpretation of the MPRDA, the holder of a mining permit or right is exempted from compliance with LUPO and the regulations and zoning schemes promulgated thereunder.

7. In this regard, the City submits that:

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

7.2. When the Minerals Minister grants a mining right or permit, she does not make a land use planning decision, or confer land zoning or land use authority.

8. The City submits that if the MPRDA does indeed purport to override the laws which govern land use or to determine land use, as is contended by the Minerals Minister and Maccsand, then it is inconsistent with the Constitution, and invalid to that extent.

9. Municipal planning is a matter in respect of which local government has executive authority. Section 156 of the Constitution provides that a municipality has executive authority in respect of, and has the right to administer, the local government matters

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listed in Part B of Schedules 4 and 5. Those matters include, in Schedule 4B, "municipal planning".

10. Section 151(4) of the Constitution provides that *"The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."*
11. In terms of section 44, the national legislature has the power to legislate within a functional area listed in Schedule 4. However, that legislative power is circumscribed: the nature and extent of the power is described in section 155(7). It is the power *"to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1)".* It is not a power to confer on anyone else the exercise of that executive authority.
12. Thus, as held by this Court in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) para 44, the national and provincial spheres *"are not entitled to usurp the functions of the municipal sphere, except in exceptional circumstances, but then only temporarily and in compliance with strict procedures"*.
13. The reason why one of the matters listed in Part B of Schedule 4 is *"municipal planning"*, is that decisions as to the regulation and control of land use *"will necessarily be influenced by numerous local considerations"*, as held in *Johannesburg Municipality v Gauteng Development Tribunal and Others* 2010 (2) SA 554 (SCA) para 9. The Constitutional framework for the role, functions and

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powers of local government is aimed at establishing local democratic control over matters which affect the local community.

14. The City supports the general thrust of Province's submission but does not agree with Province's view of the manner in which the terms "municipal planning" and "provincial planning" are to be interpreted between Province and the City.
15. The recognition of the importance of local knowledge in decisions regarding land use planning is consistent with previous decisions of this Court, which has held that town planning schemes must be informed by "*local conditions*" (*Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para 61), and that the allocation of powers to the spheres of government resulted from "*a functional vision of what was appropriate to each sphere*" (*Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) para 51).
16. The City therefore supports the Province's submission that its conditional application for leave to cross-appeal raises a constitutional matter of substance and public importance on which a ruling by this Court is desirable, and that it has a reasonable prospect of succeeding.
17. In the premises, I submit that it would be in the interests of justice for this Court to grant the Province's conditional application for leave to cross-appeal.

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The City's interest in the NEMA issues

18. The City has a direct interest in the issues relating to the proper interpretation and application of NEMA. It bears responsibilities for the protection of communities in its area of jurisdiction. It is also the owner of the land in question. It was for these reasons that one of the grounds on which the City sought an interdict against Maccsand was its failure to comply with the requirements of NEMA.

Cross-appeal: Compliance with NEMA by holders of mining permits and rights

19. The City supports the application by the Province for leave to cross-appeal on this issue, and associates itself with the submissions made by the Province in this regard.
20. In particular, I respectfully submit that the City, like all of the parties in the appeal to the SCA, needs clarity as to its rights and obligations in this regard. It would be unfortunate if, as a result of the accident of a particular notice (GN R386) having been repealed and replaced by another after the case had been argued in the High Court, the underlying purely legal issue remained unresolved, when all of the parties are before the Court, the High Court has already addressed the issue, and all of the parties need to have it resolved. If the issue is not resolved, the inevitable consequence will be another application to the High Court, another appeal to the SCA, and another appeal to this Court, which will not then be in any better position to decide the matter than it is now. The only result of that will be the incurring of further costs, the use of further judicial resources, and a continued state of uncertainty on a matter which is of substantial public importance.

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21. Indeed, in any event, as the Province has pointed out, Maccsand's mining operations on the land in question still entail an activity listed in terms of sections 24(2) and 24D of NEMA. There is thus a live dispute between the parties as to whether a holder of a mining permit or right granted in terms of the MPRDA must also obtain an environmental authorisation in terms of NEMA for those of its activities which are listed in terms of sections 24(2) and 24D of NEMA.

22. The City therefore supports the Province's submission that it would be in the interests of justice for this Court to grant the Province's application for leave to cross-appeal on this issue, and that it is in the public interest that the matter be decided by this Court, because it is a matter of considerable practical significance for all the parties to these disputes as well as for the mining industry in general and the communities affected by mining.

23. The City associates itself with the Province's submission that a failure to apply NEMA to mining-related activities infringes the fundamental right in section 24(b) of the Constitution to have the environment protected through reasonable legislative measures. An environmental authorisation in terms of NEMA for listed activities (including those that happen to be related to mining operations) is a reasonable measure to protect the environment.

24. In the premises, I submit that it would be in the interests of justice for this Court to grant the Province's application for leave to cross-appeal on this issue.

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Direct Access: Alternative request for general declaratory relief concerning NEMA

25. The City supports the application by the Province, in the alternative, for direct access to determine the declaratory relief sought in respect of compliance with NEMA by holders of a mining permit or right issued in terms of the MPRDA, when their mining operations entail an activity listed in terms of sections 24(2) and 24D of NEMA. The City associates itself with the submissions made by the Province in this regard for the reasons set out above.
26. I submit that it would be in the interests of justice for this Court, in the alternative to dealing with the NEMA issues as a matter of appeal, to grant the Province's application for direct access in this regard.
27. Under the circumstances, the City respectfully supports the Province's request that it be granted an order in terms of the notice of motion filed on its behalf.



KEITH ANTHONY WISEMAN

I certify that the above affidavit was signed and sworn to by the deponent at Cape Town before me on this the 8th day of **NOVEMBER 2011**, after he had declared that he knew and understood the contents of this affidavit, that he had no objection to taking the prescribed oath which he regarded as binding on his conscience, and after he uttered the words: *"I swear that the contents of this affidavit are true, so help me God"*.



COMMISSIONER OF OATHS

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COMMISSIONER OF OATHS
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