

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 103/2011

SCA Case No: 709/2010 & 746/2010

In the matters between:

THE MINISTER OF MINERAL RESOURCES

Applicant

and

SWARTLAND MUNICIPALITY

First Respondent

THE CITY OF CAPE TOWN

Second Respondent

**THE MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT
PLANNING, WESTERN CAPE PROVINCE**

Third Respondent

MACCSAND (PTY) LIMITED

Fourth Respondent

THE CHAMBER OF MINES OF SOUTH AFRICA

Fifth Respondent

and

MACCSAND (PTY) LIMITED

Applicant

and

THE CITY OF CAPE TOWN

First Respondent

**THE NATIONAL MINISTER OF WATER AFFAIRS
AND ENVIRONMENT**

Second Respondent

**THE MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT
PLANNING, WESTERN CAPE PROVINCE**

Third Respondent

**THE MINISTER OF RURAL DEVELOPMENT AND
LAND REFORM**

Fourth Respondent

THE MINISTER OF MINERAL RESOURCES

Fifth Respondent

**THE CHAMBER OF MINES OF SOUTH
AFRICA (*amicus curiae*)**

Sixth Respondent

FILING NOTICE

FILED BY:

CLIFFE DEKKER HOFMEYR INC.

DOCUMENT FILED HEREWITH: **MACCSAND'S AFFIDAVIT IN ANSWER TO THIRD RESPONDENT'S APPLICATION FOR LEAVE TO CONDITIONALLY CROSS-APPEAL, TO CROSS-APPEAL AND FOR DIRECT ACCESS**

DATED at CAPE TOWN on this 10th day of NOVEMBER 2011.

**CLIFFE DEKKER HOFMEYR
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And to: **CULLINAN & ASSOCIATES**
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(Ref: Mr A Vos)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 103/2011
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In the matters between:

THE MINISTER OF MINERAL RESOURCES Applicant

and

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

and

MACCSAND (PTY) LIMITED Applicant

and

THE CITY OF CAPE TOWN	First Respondent
THE NATIONAL MINISTER OF WATER AFFAIRS AND ENVIRONMENT	Second Respondent
THE MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE	Third Respondent
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Fourth Respondent
THE MINISTER OF MINERAL RESOURCES	Fifth Respondent
THE CHAMBER OF MINES OF SOUTH AFRICA (<i>amicus curiae</i>)	Sixth Respondent

**MACCSAND'S AFFIDAVIT IN ANSWER TO THIRD RESPONDENT'S
APPLICATION FOR LEAVE TO CONDITIONALLY CROSS-APPEAL, TO
CROSS-APPEAL AND FOR DIRECT ACCESS**

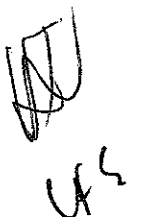


I, the undersigned,

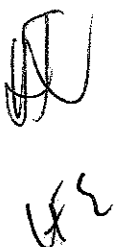
LIONEL FREDERICK EGYPT,

do hereby state under oath that:

1. I am the attorney of record for Maccsand (Pty) Limited ("*Maccsand*"). I deposed to the affidavit in support of Maccsand's application for leave to appeal from the Supreme Court of Appeal under case number 103/11.
2. The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are both true and correct.
3. Maccsand does not oppose the applications by the Minister of Local Government, Environmental Affairs and Development Planning, Western Cape Province ("*the Province*") to cross appeal and for direct access and abides the decision of this Court in relation thereto.
4. However, should leave be granted Maccsand will oppose the relief being sought by the Province.
5. I do not intend to deal with all the legal arguments advanced on behalf of the Province and Maccsand will deal with such arguments at the hearing of the matter, should the Province's applications be granted.

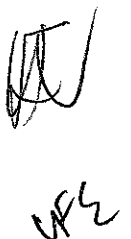
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6. Maccsand will persist with the argument that upon a proper interpretation of the Minerals and Petroleum Resources Development Act, No. 28 of 2002 (*“the MPRDA”*), the holder of a mining right or permit issued thereunder is exempted and in fact precluded from meeting the requirements to comply with the provisions of the Land Use Planning Ordinance, No. 15 of 1985, Cape (*“LUPO”*), and the regulations and zoning schemes promulgated thereunder.
7. Maccsand will also oppose any application to declare the MPRDA to be unconstitutional and inconsistent with the Constitution of the Republic of South Africa, 1996 (*“the Constitution”*), to the extent that it does not require LUPO approval.
8. Moreover, as indicated in Maccsand’s application for leave to appeal to this Court, there is no practical means by which Maccsand can in any event obtain LUPO approval notwithstanding the City of Cape Town (*“the City”*) and the Province contending that Maccsand must obtain such approval prior to being able to give practical effect to the mining right and permit issued to Maccsand pursuant to the MPRDA.
9. The decisions of this Court in Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC) (*“Gauteng Development Tribunal CC”*) and in Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another 2009 (1) SA 337 (CC) did not deal with an exclusive national competence. It will be submitted that these matters



are distinguishable from the present case in that mining does not fall within the powers of either the provincial or local authority to regulate. To the extent that mining can only occur on or under land, does not mean that the approvals in relation to mining necessarily constitute an infringement of either municipal or provincial planning powers as contemplated in the Constitution. Mining conducted on land would not legally change the zoning which applies to such land.


10. In relation to the request for a general declarator pertaining to the applicability of NEMA in relation to land on which mining activities are to be conducted, Maccsand has for many years found itself within the midst of a dispute between the respective organs of state. The respective organs of state appear to have been unable to resolve such dispute extra-judicially and give conflicting advice and instructions to entities which intend to pursue mining activities. This occurred in particular in the Province of the Western Cape.
11. In the Cape High Court it was not disputed that none of the sand mining companies currently mining in the Western Cape conduct mining with NEMA approval.
12. It was also not contested that it may very well be the position in the remaining parts of the country.

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13. It was contended on behalf of Maccsand that the relief sought may result in a significant number of sand mining operators (and for that matter other mining activities) in the Western Cape being compelled to stop mining until such time as the holder of the mining right and/or permit obtained the requisite NEMA approval.

14. Despite having raised this, and in the face of a constitutional attack on the MPRDA, the relevant government departments did not place evidence before the Court below in relation to the number of entities which would potentially be affected by orders of unconstitutionality as well as the impact of such relief on both the mining and building industries. This is in spite of the fact that this information is available to the respective government departments either separately or collectively. This information is relevant to this Court in the exercise of its powers under section 172 of the Constitution.

15. In respect of any finding of unconstitutionality of the MPRDA, this may have catastrophic consequences for the building and mining industries countrywide and paralyse developments and infrastructural projects. In the present context an appropriate case would exist for any orders of constitutional invalidity to be suspended specifically to give the Legislature an opportunity to bring into effect those provisions relating to mining which are not yet in force and to align them with the provisions of the MPRDA and NEMA.


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16. Notwithstanding the foregoing, it is reiterated that Maccsand remains of the view that the MPRDA is not unconstitutional.
17. At the time the application was launched in the High Court, Maccsand was in possession of both an approved environmental management programme and environmental management plan in respect of the mining sites on which it intended to mine.
18. These environmental approvals are deemed to have been approved in terms of NEMA.
19. The applicability of NEMA and whether environmental authorisation should be obtained in NEMA is not a simple matter. This dispute arose in relation to NEMA's predecessor, the Environmental Conservation Act, No. 74 of 1989, in which mining was not even a listed activity requiring environmental authorisation. It arose once again under NEMA and the listed activities requiring NEMA authorisation was amended to provide specific listed activities in GN R.386, which deals with mining activities conducted on mining areas as defined in the MPRDA. These provisions were never brought into force. These listed activities have now been repealed and replaced with Listing Notices 1, 2 and 3 (published in Government Gazette 33306 of 18 June 2010) which are currently in force. Whilst these Listing Notices make specific provision made for mining and activities on land on which

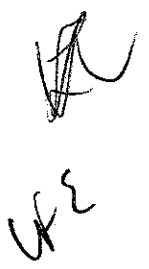

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mining and prospecting are conducted these items too are not yet in force.

20. Maccsand has been led to believe that this is because the requisite authorities cannot agree on which government department would ultimately be vested with the power to regulate the environmental impact of mining activities. A full explanation should be provided to this Court by the respective government bodies in the event the Court is inclined to consider and grant relief in respect of this aspect of the matter.

21. It will be argued by Maccsand that mining companies do not require environmental authorisation pursuant to section 24(2)(a) of NEMA for mining and mining-related activities on a mining area because the environmental matters which arise in respect of those activities and in respect of those areas are regulated by an environmental regime under the MPRDA. For that reason no separate environmental authorisation under NEMA is required. This has been the approach adopted by the Minerals Minister and the Department of Mineral Resources to date.

22. It follows that none of the other listed activities would apply in respect of mining as all such activities on land on which mining is conducted is subsumed under "*mining and related activities*" over which the Mineral Minister now has powers. If that is not the case, it would have the consequential effect that an application pursuant to section 24 of


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NEMA would have to be submitted to the Minerals Minister, the national Environmental Minister and conceivably the provincial Environmental Minister. Hence a miner would have to make three EIA applications.

23. It also means that even if the Minerals Minister approved and granted NEMA authorisation, then the proposed mining may still be stopped by the provincial or national Environmental Minister. This would create chaos within the mining industry. It would mean that even if the Minerals Minister approved the mining right or mining permit and is satisfied with the EMP and that the proposed mining would not result in unacceptable pollution, ecological degradation or damage to the environment, another functionary could veto the mining right or permit granted by the Minerals Minister based on a contrary view.
24. Moreover, a further consequence hereof is that both the Minerals Minister and another competent authority would have jurisdiction over the rehabilitation of the mining area as well as the mitigation measures to be implemented with the enforceability of the environmental requirements – both purporting to implement the same legislation.
25. In this regard Maccsand will submit that the approval of an EMP in terms of the MPRDA, as the law currently stands, constitutes the necessary environmental authorisation for purposes of mining. This is entirely consistent with the comprehensive regulations provided for in

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the MPRDA and the intention that it should cover the field. No further environmental authorisation is required by Maccsand pursuant to any other listed activity.



LIONEL FREDERICK EGYPT

I certify that the deponent acknowledged to me that he/she knows and understands the contents of this declaration, that he/she has no objection to taking the prescribed oath and considers it to be binding on his/her conscience.

Thus signed and sworn to before me at CAPE TOWN on this the 10th day of NOVEMBER 2011.



COMMISSIONER OF OATHS

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