MACCSAND (PTY) LTD & MINISTER OF MINERAL RESOURCES v CITY OF CAPE TOWN & OTHERS (CHAMBER OF MINES AS *AMICUS CURIAE*) (709/2010, 746/2010) [2011] ZASCA 141 (23 September 2011)

Importance	The Supreme Court of Appeal's decision in this case reverses some of the gains made in the court of first instance in respect of the same matter (see *City of Cape Town v Maccsand (Pty) Ltd & others* 2010 (6) SA 63 (WC)). While the court affirmed that the MPRDA cannot override the power of municipal authorities to regulate land uses in their areas of jurisdiction, it upheld the appeal in respect of the relationship between the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the National Environmental Management Act 107 of 1998 (NEMA). The appeal was upheld on the basis of a technicality, because the listing notices in respect of which the interdict was granted had been repealed 18 days before the judgment was handed down in the Western Cape High Court. As a result, there is still uncertainty whether mining operations can commence or continue without having obtained the necessary environmental authorizations in terms of NEMA.
Parties	**First appellant:** Maccsand (Pty) Ltd **Second appellant:** Minister of Mineral Resources **First respondent:** City of Cape Town **Second respondent:** Minister of Water and Environmental Affairs **Third respondent:** MEC for Local Government, Environmental Affairs and Development Planning (Western Cape Province) **Fourth respondent:** Minister of Rural Development and Land Reform
Facts	The essential facts of this case are set out in the fact sheet for the case *City of Cape Town v Maccsand (Pty) Ltd & others* 2010 (6) SA 63 (WC).
Relief Sought	Appeal against a decision of the Western Cape High Court which found that both LUPO and NEMA apply to mining operations.
Legal Issues & Judgment	***Issue 1:*** Does the grant of a mining right or mining permit entitle the holder to undertake mining operations without obtaining authorization in terms of the Land Use Planning Ordinance 15 of 1985 (LUPO)? ***Judgment:*** Following the terminology adopted by Cameron J in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), the court found that mining is an 'exclusive national legislative competence'. Maccsand and the Minister had argued that a necessary component of mining as an exclusive national legislative (and executive) competence was the power to power to determine mining-related land uses. There was consequently no room for the land use planning regime of LUPO in respect of mining (para 29). The court, however, found that as a matter of interpretation the MPRDA did not purport to determine questions of land use dealt with under LUPO (para 33). Not one of the considerations which the Minister is required to take into account when deciding to grant a mining right or permit, for instance, is concerned with municipal planning. As a result, it cannot be said that the MPRDA provides a 'surrogate municipal planning function' that displaces LUPO (ibid). Once a mining right or permit has been issued, therefore, the successful applicant will not be able to mine unless

	LUPO allows for the use of that land in question (ibid).
	Issue 2: Is the holder of a mining right or mining permit precluded from commencing or continuing with mining operations without first obtaining environmental authorizations in terms of the NEMA in respect of activities listed under s 24(2)(a)? ***Judgment:*** Essentially, the court dispensed with this issue on the basis of a technicality. Argument in the *Maccsand* case in the Western Cape High Court had taken place over a number of days in April 2010. The prayers for the interdicts related to activities identified in terms of Government Notice R386 promulgated in *Government Gazette* 28753 of 21 April 2006. The judgment in the matter in the Western Cape High Court was handed down on 20 August 2010. In the meantime, R386 had been repealed and replaced by the 2010 listed activities published in *Government Gazette* 33306 of 18 June 2010. The repeal took place on 2 August 2010. As a result, the court held, the activities which the first appellant was contravening 'were no longer in operation and could not be contravened in the future' (para 37). This rendered the prayers for the interdicts redundant and the declarators academic. Although specifically asked to give guidance on the relationship between the MPRDA and NEMA by way of declaratory relief, the court declined, holding that in terms of s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 the courts will not deal with or pronounce upon abstract or academic points of law (para 39). Citing Corbett CJ in *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam & another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg & another* 1995 (4) SA 1 (A) at 14F – G, the court endorsed the view that its function is not to 'act as an advisor' and that there should be 'interested parties' upon whom the declaratory order would be binding (ibid). It was not clear to the court that any of the parties had 'the type of interest required by s 19(1)(a)(iii), and the 'hypothetical nature' of the dispute entitled the court to refuse to engage with it (ibid).
Outcome	The appeal in respect of the first issue was dismissed, while the appeal on the relationship between the MPRDA and NEMA was upheld.
Obiter	None