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MACCSAND (Pty) Ltd v CITY OF CAPE TOWN 2012 (4) SA 181 (CC)

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1 Background

The Maccsand series of cases started with an application by the City of Cape Town in the High Court[1] for an order interdicting and restraining Maccsand (Pty) Ltd (hereafter Maccsand) from conducting mining activities until the authorisations in terms of the *(Western Cape) Land Use Planning Ordinance* 15 of 1985 had been granted. Maccsand and the Minister of Mineral Resources (hereafter the Minister) lodged an appeal in *Maccsand (Pty) Ltd and Another v City of Cape Town*,[2] and Maccsand eventually approached the Constitutional Court in *Maccsand (Pty) Ltd v City of Cape Town*[3] for relief.

This case note deals with the High Court and Supreme Court of Appeal cases, but specifically focuses on the judgement by the Constitutional Court. For the purposes of the discussion only the following aspects will be dealt with: (a) the implications of the differences between the old order and the new MPRDA (*Mineral and Petroleum Resources Development Act* 28 of 2002) rights: (b) the relationship between the owner of the land concerned (the so-called surface owner) and the holder of an MPRDA mining right; and (c) the impact of the existence of various sets of legislation (at national and provincial level), each of which requires the issuing of authorisations by functionaries other than the Minister of Mineral Resources, and the related implications for decisions taken in terms of the MPRDA, within the context of the

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1 *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC).
2 *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) (hereafter *Maccsand* SCA).
3 *Maccsand (Pty) Ltd v City of Cape Town (*CCT 103/11) 2012] ZACC 7 (hereafter *Maccsand* CC).

constitutional arrangements relating to co-operative government and intergovernmental relations.

2 Facts

The Constitutional Court (hereafter the CC) had to deal with the key question of whether or not a mining right issued in terms of section 23(1) of the *Mineral and Petroleum Resources Development Act* 28 of 2002 (hereafter MPRDA)) and a mining permit issued in terms of section 27 of the MPRDA by the Minister (as a functionary) trump the need to comply with other legislation relating to land use and rezoning. In this case, the Minister issued such a mining right and a mining permit in respect of two land parcels (Westridge Dune and Rocklands Dune respectively) situated in a proclaimed residential area. The mining right and permit were issued in terms of national legislation. Upon the issue of such a mining right or permit, approval of the environmental management programme or environmental management plan, respectively, and notice and consultation with the owner or lawful occupier of land,[4] the holder is in terms of the MPRDA entitled to mine upon the land.[5] Both land parcels were owned by the City of Cape Town (hereafter the CCT). Rocklands was zoned as public open space in terms of the *Land Use Planning Ordinance* 15 of 1985 (hereafter LUPO) and Westridge as public open space and rural. Neither of the two land parcels was appropriately rezoned for mining.[6] A conflict of land use therefore arose, because mining was not permissible in terms of LUPO.

It is necessary to note that LUPO, as provincial legislation, applies in the Western Cape, parts of the Eastern Cape and parts of the North West (with similar provincial laws in other provinces), while the MPRDA is a national Act.[7]

The CCT was responsible for ensuring compliance with LUPO and approached the High Court for an interdict restraining Maccsand from mining until the land was rezoned.[8] Maccsand was of the view that the issuing of the mining right and permit

4 Section 5(4) *Mineral and Petroleum Resources Development Act* 28 of 2002 (hereafter MPRDA).
5 See s 5(3)(b) and s 27(7(d) of the MPRDA.
6 *Maccsand* CC 7, 20-21.
7 See also *Maccsand* CC 38.
8 *Maccsand* CC 22.

had the result of obviating the need to require any other authorisations (in this case, from the CCT in accordance with the rezoning and use authorisation provisions of LUPO).[9] The Minister and Maccsand argued that one sphere of government cannot interfere with the exercise of power by another sphere, and argued that LUPO does not apply to land used for mining as it regulates a municipal functional area.[10]

Two interdicts were granted to the CCT after Maccsand had started mining on the Rocklands Dune without applying in terms of LUPO for a consent use (Rocklands Dune) and a departure from the zoning scheme restrictions (Westridge Dune).[11] As regards the Westridge Dune interdict, the Western Cape Minister of Local Government, Environmental Affairs and Development Planning (hereafter the MEC) was joined with the CCT (both of them based their application on non-compliance with LUPO and the *National Environmental Management Act* 107 of 1998 (hereafter the NEMA)).[12]

The Supreme Court of Appeal (hereafter the SCA), as discussed below, confirmed the HC decision in part. The CC confirmed the SCA decision and dismissed the appeal.

3 The Court *a quo*

In the court *a quo* the Western Cape High Court (hereafter the High Court),[13] the Minister and Maccsand argued that "to construe LUPO as applying to land used for mining would be inconsistent with the scheme of the Constitution [of the Republic of South Africa, 1996 (hereafter the Constitution)]" and "where it [the Constitution] does not permit a concurrent exercise of powers, one sphere cannot interfere with the exercise of power by another sphere". According to them, "mining falls under the exclusive competence of the national government and therefore LUPO does not apply to land used for mining because it regulates a municipal functional area".[14] The High Court rejected their argument and found that both LUPO and the NEMA apply

9 *Maccsand* SCA 4.
10 *Maccsand* CC 24.
11 *Maccsand* SCA 4-5.
12 *Maccsand* SCA 5.
13 *City of Cape Town v Maccsand (Pty) Ltd* 2010 6)SA 63 (WCC).
14 *Maccsand* CC 24.

to land used for mining. The High Court relied on section 39(2) of the *Constitution* and made it clear that the MPRDA and the NEMA "must be construed in a manner that both laws apply to mining activities".[15]

The High Court found that the Minister's view that the MPRDA prevailed over LUPO was incorrect:[16]

> …because it undermined the division of powers envisaged by the Constitution and would have the effect of eradicating a municipality's planning function whenever a national competence impacted on land use.

The High Court granted the interdict (until authorisations have been granted in terms of LUPO for the land to be used for mining and environmental authorisations had been granted in terms of the NEMA).[17] The High Court decided that there was no constitutionally permissible override (probably with reference to sections 146(2) and (3) of the *Constitution*).[18] With respect to the NEMA, the High Court also found that, although a significant part of the NEMA had been incorporated into the MPRDA, compliance with section 24 of the NEMA (obtaining environmental authorisations in respect of mining activities) was still required.[19]

4 The Supreme Court of Appeal

On appeal,[20] both the Minister and Maccsand took the view that the MPRDA as national legislation (regulating a functional area vested in the national sphere of government) prevailed over LUPO (provincial legislation), and that section 24 of the NEMA was in actual fact already incorporated into the MPRDA, resulting in their approach that the MPRDA authorisation obviated the need to comply with any LUPO and/or NEMA requirements. In addition, they argued that LUPO is not a "relevant law" in terms of section 23(6) of the MPRDA. The Chamber of Mines of South Africa (hereafter the Chamber), as an *amicus curiae*, also argued that the NEMA was not

15 *Maccsand* CC 25.
16 *Maccsand* SCA 7.
17 *Maccsand* CC 26.
18 *Maccsand* SCA 7.
19 *Maccsand* SCA 7.
20 *Maccsand* SCA.

applicable to mining as the MPRDA gave sufficient effect to section 24 of the *Constitution*.[21]

On the other hand, the CCT and the MEC were of the view that there was no conflict between the MPRDA and LUPO as the MPRDA did not deal with land use planning, and that, even if the provisions of the MPRDA were to be found to be in conflict with LUPO, the MPRDA would be unconstitutional to the extent that it infringed on the (exclusive) municipal planning function.[22] As regards the NEMA, they were of the opinion that LUPO was indeed a relevant law to be considered in accordance with section 23(6) of the MPRDA, and, in addition, that NEMA compliance was still required in respect of those NEMA parts that had not been incorporated into the MPRDA.[23]

As regards the LUPO issue, the SCA gave a discussion of the post-27 April 1994 division of legislative and executive powers within the context of the three spheres of government.[24] The court continued:[25]

> As Ngcobo J held in *Doctors for Life International v Speaker of the National Assembly & others*[26] the 'basic structure of our government consists of a partnership' between the three spheres of government, oiled by the principles of co-operative government. These principles require, *inter alia,* that the various spheres of government "exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere".[27]

The SCA emphasised that the allocation and distribution of powers in some instances led to the reservation of powers to a specific sphere of government, resulting in the following:[28]

21 *Maccsand* CC 27.
22 *Maccsand* SCA 9.
23 *Maccsand* SCA 9.
24 *Maccsand* SCA 10.
25 *Maccsand* SCA 11.
26 *Doctors for Life International v Speaker of the National Assembly* 2006 6)SA 416 (CC) 82.
27 *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) 289; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6) SA 182 (CC) 43. See also s 41(1)(g) of the *Constitution*.
28 *Maccsand* SCA 12.

> A necessary corollary of this is that one sphere may not usurp the functions of another, although intervention by one sphere in the affairs of another is permitted in limited circumstances.[29]

The SCA stated that conflict-breaking mechanisms had been provided for in sections 146 to 150 of the *Constitution*.[30] After identifying the mechanism to determine which functional areas are in the exclusive national domain,[31] the SCA found that mining regulation is an exclusive national legislative and executive functional domain.[32]

The SCA indicated that LUPO differed from the MPRDA in respect of LUPO's being:

a) old order legislation (the continued application of which is provided for in terms of item 2(2) of Schedule 6 of the *Constitution*); and
b) provincial legislation (after having been assigned in accordance with section 235 of the 1993 (interim) *Constitution*).[33]

LUPO provides a framework for vesting powers in municipalities to regulate land use subject to provincial oversight. Within this context, a municipality may prepare structure plans which lay down "guidelines for future spatial development" and authorises the rezoning of land by a municipality.[34] The Western Cape Premier (hereafter the WC Premier) may also make scheme regulations (applicable to municipalities) relating to control over zoning.[35] Applications for an amendment to land use restrictions or for the temporary use of a property (if no such use has been provided for in the scheme regulations) may be approved by the municipal council if authorised (if not, the WC Premier has to decide).[36] A landowner may apply for rezoning or a use departure if he or she wants to use the land for a purpose not provided for by the zoning scheme regulations. If such an application is successful, the land must be used for the permitted purpose within two years, otherwise the rezoning lapses. In addition, the municipality or provincial government concerned may initiate the rezoning. In terms of LUPO, municipalities must enforce compliance

29 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) [44]; ss 100 and 139 of the *Constitution*.
30 *Maccsand* SCA 12.
31 *Maccsand* SCA 13.
32 *Maccsand* SCA 14-15.
33 *Maccsand* CC 15.
34 *Maccsand* CC 16.
35 *Maccsand* CC 16.
36 *Maccsand* SCA 19.

with LUPO's provisions, and land may not be used for purposes other than those permitted in the zoning scheme.[37]

The SCA, with reference to section 25 of the *Local Government: Municipal Systems Act* 32 of 2000 (hereafter the LGMSA), emphasised (a) the broader context within which local government functions; and (b) the key role of an integrated development plan (hereafter an IDP), which must reflect, amongst other things, a spatial development framework.[38] The IDP, according to section 35(1)(a) of the LGMSA:[39]

> …is the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality.

The SCA referred to *Intercape Ferreira Mainliner (Pty) Ltd v Minister of Home Affairs*[40] where it was said "that land use contrary to LUPO would frustrate the very purpose of town planning".[41]

The SCA gave a discussion of the constitutional position of municipalities and the vesting of powers and functions in them (as organs of state, no longer creatures of statute but, since 27 April 1994, with constitutionally defined original objects, powers, functions and duties, as a separate sphere of government).[42] The executive authority and exclusive powers of a municipality to administer Schedule 4 (Part B) matters (e.g. municipal planning) were analysed and the following *dictum* (referring to the relationship between national and provincial government on the one hand, and the municipal planning function on the other) in *Johannesburg Municipality v Gauteng Development Tribunal*[43] was confirmed:[44]

> It will be apparent, then, that, while national and provincial government may legislate in respect of the functional areas in Schedule 4, including those in Part B of that schedule, the executive authority over, and administration of, those functional areas is constitutionally reserved to municipalities. Legislation, whether

37 *Maccsand* CC 17.
38 *Maccsand* SCA 20.
39 *Maccsand* SCA 20.
40 *Intercape Ferreira Mainliner (Pty) Ltd v Minister of Home Affairs* 2010 5 SA 367 (WCC).
41 *Maccsand* SCA 21.
42 *Maccsand* SCA 22-24.
43 *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) At 28.
44 *Maccsand* SCA 26.

> national or provincial, that purports to confer those powers upon a body other than a municipality will be constitutionally invalid. None of that is controversial.

Municipal planning is defined as to include "the zoning of land and the establishment of townships" and "the control and regulation of the use of land".[45]

The SCA dismissed the approach taken by the Minster and Maccsand that the planning function was a necessary component of the power to regulate mining and mining-related land uses, and found that the Minister was empowered to take into account only the requirements as set out in sections 23 and 27 of the MPRDA (as well as an environmental management plan (hereafter the EMP)).[46] The SCA found that:[47]

> It is clear, in my view, from a reading of s 23 and s 27 [of the MPRDA] that not one of the considerations that the Minister is required to take into account is concerned with municipal planning. She does not have to, and probably may not, take into account a municipality's integrated development plan or its scheme regulations…

The SCA stated that the remedy of administrative review would in principle be available if the Minister were to have taken into account considerations not referred to in the MPRDA,[48] and concluded that:

a) the MPRDA did not contain any municipal planning function, and cannot be said to have displaced LUPO.[49]

As a result, it cannot be said that the MPRDA provides a surrogate municipal planning function that displaces LUPO and it does not purport to do so. Its concern is mining, not municipal planning.

b) LUPO exists parallel to and operates alongside the MPRDA. LUPO authorisations must be obtained, even if an MPRDA authorisation has been

45 *Maccsand* SCA 28.
46 *Maccsand* SCA 29-32.
47 *Maccsand* SCA 33.
48 *Maccsand* SCA 33, fn 38.
49 *Maccsand* SCA 33.

issued. (Holders of mining rights or permits cannot proceed to mine unless such mining is permitted in accordance with LUPO.)[50]

That being so, LUPO continues to operate alongside the MPRDA. Once a mining right or mining permit has been issued, the successful applicant will not be able to mine unless LUPO allows for that use of the land in question.

c) There is no duplication of functions between LUPO and the MPRDA (as the Minister alleged) on account of the fact that they have different objectives, and, consequently, as the Constitution explicitly confers municipal planning exclusively on local government, compliance with LUPO (in the provinces to which it has been assigned) is required. The underlying principle is that all authorisations required in terms of different sets of legislation (each with its own focus, functional domain and responsible administrator) have to be obtained.[51]

In any event, as the cases (including the *Kyalami Ridge* case)[52] demonstrate, dual authorisations by different administrators, serving different purposes, are not unknown, and not objectionable in principle – even if this results in one of the administrators having what amounts to a veto.[53] In *Wary Holdings*[54] Kroon AJ made the point that there is no reason why "two spheres of control cannot co-exist" and that where, as in that case and this case, one operates from "a municipal perspective and the other from a national perspective" they each apply their own "constitutional and policy considerations".[55]

d) With regard to the NEMA issue, the SCA found that the NEMA provisions referred to in the court *a quo*'s decision had already been repealed when the matter was heard in the HC [37-38]. The SCA declined to "give guidance by

50 *Maccsand* SCA 33, *Maccsand* CC 28.
51 *Maccsand* SCA 34.
52 *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)* 2001 3 SA 1151 (CC).
53 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) 80.
54 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1)SA 337 (CC) 80.
55 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) 82.

> way of declaratory relief on the relationship between the MPRDA and NEMA".[56]

The SCA set aside the interdicts based on the NEMA as the Government Notice on which they were based had been repealed before the HC judgement was delivered.[57] The declarator sought by the MEC to the effect that no person may commence or continue with a mining activity listed in terms of section 24 of the NEMA without an environmental authorisation was refused as the matter was of a hypothetical nature.[58]

The LUPO issue was, therefore, decided against Maccsand and the Minister in favour or the CCT and the MEC.[59]

In *Louw v Swartland Municipality*[60] the SCA *Maccsand* decision was followed. In this case, the land concerned (Lange Kloof) was zoned as "agricultural 1". A mining right was issued by the Minister in terms of section 23 of the MPRDA without obtaining the relevant LUPO authorisation.[61] With reference to paragraphs 10 to 35 of the *Maccsand* decision,[62] the SCA found that the MPRDA and LUPO operate alongside one another and that full compliance with the requirements of both is necessary.[63]

5 Constitutional Court

5.1 Background

All of the judges of the CC concurred with the judgement written by Jafta J. Maccsand sought leave to appeal against the part of the order by the SCA that dismissed its appeal.[64] The Chamber and AgriSA were admitted as *amici curiae*. The MEC sought leave to cross-appeal against (a) the same part of the order if the CC

56 *Maccsand* SCA 38, 39.
57 *Maccsand* CC 28.
58 *Maccsand* CC 29.
59 *Maccsand* SCA 35.
60 *Louw v Swartland Municipality* 2011 ZASCA 142.
61 *Louw v Swartland Municipality* 2011 ZASCA 142 1.
62 *Louw v Swartland Municipality* 2011 ZASCA 142 11.
63 *Louw v Swartland Municipality* 2011 ZASCA 142 12.
64 *Maccsand* CC 1.

found that LUPO is not applicable to land on which an MPRDA mining right or a mining permit has been granted, as well as (b) the SCA's refusal to grant a declaratory order.[65] In addition, the MEC applied for direct access to the CC to apply for the declarator.[66]

The CC analysed the statutory framework relevant to the issue at hand and stated that the MPRDA contains a number of transformative objects (e.g. expanding opportunities for historically disadvantaged persons to enter the mineral and petroleum industries and benefit from South Africa's mineral and petroleum resources, (section 2(d)) and promoting employment and advancing the social and economic welfare of all South Africans (section 2(f)) (these are also requirements for granting a mining right)).[67] The Minster is empowered to control and regulate access to mineral and petroleum resources.[68] Section 24 of the 1996 *Constitution* is also promoted by the MPRDA by its purpose *inter alia* of protecting the environment.[69]

Jafta J stated that:[70]

> Section 23(1) of the MPRDA empowers the Minister for Mineral Resources to grant mineral (*sic*) rights if certain listed conditions are met. If all the conditions are satisfied, the Minister is bound to issue the mineral right (*sic*).

The Minister is empowered by section 23(1) of the MPRDA to grant mining rights, and, as a result, the reference to mineral rights is incorrect. It is submitted that the generic term "rights to minerals" could be used to distinguish it from the common law mineral rights and statutory mining rights of the old order. A mining right is one of the rights to minerals. According to Jafta J, the right "so granted comes into effect on the date on which the environmental management programme is approved".[71] As correctly indicated by the CC, this is stated in section 23(5) of the MPRDA. This subsection, however, has been interpreted to mean that the exercise of a mining right as a real right, and not contractual rights (such as the right to have the

65 *Maccsand* CC 2.
66 *Maccsand* CC 30-33.
67 *Maccsand* CC 4.
68 *Maccsand* CC 3.
69 *Maccsand* CC 5.
70 *Maccsand* CC 6.
71 *Maccsand* CC 6.

environmental management programme approved) granted by the MME and already in existence is postponed until approval of the environmental management programme and notice and consultation by the holder of mineral rights has taken place.[72]

The CC did not treat a mining permit as an independent statutory right to minerals entitling the holder to mine. The CC at the outset regarded a mining permit as a statutory permission that has to be obtained after the grant of a mining right in order to mine. Such a permit is issued by the Minster if the following three requirements are met: (a) the mineral is capable of being mined optimally within a two-year period; (b) the area concerned does not exceed 1.5 ha; and (c) the applicant has submitted an environmental management plan.[73]

The CC examined the interplay between the MPRDA and the NEMA. In terms of the MPRDA, the Minster must (a) consult with the Minister of Environmental Affairs and Tourism (the MEAT) when considering an environmental management plan or programme; and (b) request written comments on the environmental management plan or programme from the relevant Head of Department under the MEAT.[74] The Minster may approve an environmental management plan or programme only after considering the HOD's comments and the Regional Mining and Development Committee's recommendation.[75]

The NEMA, on the other hand, amongst others things, provides principles applicable to intergovernmental decision-making specifically relating to activities which may affect the environment (see also Chapter 3 of the 1996 *Constitution*).[76] With regard to integrated environmental management, the MEAT may identify activities which require an environmental authorisation (with the concurrence of the MEC concerned).[77] The MEAT has the responsibility to identify the competent authorities

72 See *Meepo v Kotze* 2008 1 SA 104 (NC) 46.4 and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) 77.
73 *Maccsand* CC 7.
74 Section 40 of the MPRDA.
75 *Maccsand* CC 8, s 39(4)(b).
76 *Maccsand* CC 9.
77 *Maccsand* CC 10, s 24(2). According to the CC, the Minister, with the concurrence of the MEC, may identify such activities. However, NEMA provides for the MEAT, or an MEC with the concurrence of the MEAT, to identify the said activities.

responsible for granting environmental authorisations regarding each listed activity. (In this regard, section 24 stipulates that the Minister must be the competent authority for mining activities or related activities occurring within mining, and as a result the Minister is the only authority to grant authorisations in respect of these activities, and must be consulted before any mining-related activity is listed).[78] In terms of section 24O of the NEMA, the MEAT or the Minister, as the case may be, is (a) required to comply with the provisions of the NEMA and consider the factors enumerated therein when determining an application for an authorisation; and (b) consult every government department that administers a law relating to the environment (such department must submit written comments). The last-mentioned consultation "guarantees co-ordinated and integrated environmental governance and management".[79] In the event that a consulted department objects to a mining application, the Minister must refer such an objection to the Regional Mining Development and Environmental Committee for consideration and a recommendation to the MMR for a final decision.[80]

LUPO permits mining on land only if the mining is permitted by the zoning scheme or a departure is granted. Otherwise, rezoning must be obtained prior to the commencement of any mining operations. LUPO only controls and regulates the use of land, and the zoning in terms thereof does not license mining or determine mining rights.[81]

5.2 Issues

The CC had to decide whether:

(a) to grant the MEC direct access;

(b) a holder of a mining right or permit (issued in terms of MPRDA) may exercise his or her rights (which will be possible only if the zoning scheme in terms of LUPO permits mining on the land concerned); and

78 *Maccsand* CC 11.
79 *Maccsand* CC 14.
80 *Maccsand* CC 12-13.
81 *Maccsand* CC 18.

(c) in the particular circumstances, the general declarator sought by the MEC should be granted.[82]

5.3 Condonation

The CC granted condonation for the late filing of the application for leave to cross-appeal and direct access (by the MEC), and of the written argument by the CCT.[83]

5.4 LUPO

5.4.1 Leave to appeal

The CC confirmed that constitutional issues had been raised, and reiterated the fact that the crux of the case concerned the interface between the MPRDA and LUPO. There might seem to be tension between the MPRDA and LUPO where a mining right or permit had been granted under MPRDA and the land has not been zoned to be used for mining in terms of LUPO. With reference to section 41(1)(g) of the 1996 *Constitution*, the CC stated as follows:[84]

> The administration of these laws falls under different spheres of government, which are under a constitutional obligation to exercise their powers in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

As the determination of the dispute would have an effect beyond the parties in this case, and as a decision would give clarity and establish certainty, especially for mining investors, the CC found it to be in the interests of justice to grant leave to appeal.[85]

82 *Maccsand* CC 34.
83 *Maccsand* CC 36.
84 *Maccsand* CC 37.
85 *Maccsand* CC 39.

5.4.2 The merits

The CC summarised the legal question as follows:[86]

> The question that arises is whether upon the grant of those rights [mining rights and permits] to M, the application of LUPO to the land concerned ceased.

Maccsand and the minister, with the support of the Chamber, argued that:

(a) LUPO is not applicable to land in respect of which mining rights have been granted as it does not regulate mining;[87]

(b) Mining falls under the exclusive competence of national government. If LUPO is applicable, it "would amount to permitting an unjustified intrusion of the local sphere into the exclusive terrain of the national sphere of government". In this regard, they argued, the Constitution provides that the different spheres of government must exercise their powers without encroaching on the other spheres' functional areas;[88]

(c) LUPO is not a "relevant law" to which a mining right is subject in terms of section 23(6) of the MPRDA, as it does not apply to mining;[89]

(d) The SCA endorsed a duplication of functions and enabled local government to veto decisions made by national government on a matter in the exclusive competence of national government;[90] and

(e) In the event that the CC found that both the MPRDA and LUPO are applicable, their application gives rise to a conflict, and section 146 (conflicts between national legislation and provincial legislation falling within a functional area listed in Schedule 4) or 148 (national legislation prevails over provincial legislation if the conflict cannot be resolved by a court) of the Constitution must be invoked.[91]

86 *Maccsand* CC 40.
87 *Maccsand* CC 40.
88 *Maccsand* CC 41.
89 *Maccsand* CC 45.
90 *Maccsand* CC 47.
91 *Maccsand* CC 50.

In addition, Maccsand argued that:

(a) The SCA in its order "permitted a local authority to usurp the functions of national government in a manner which is not contemplated in the Constitution";[92] and

(b) The holder of the mining right or permit is not the landowner, and will therefore not be able to apply for rezoning.[93]

The CC confirmed that mining is an exclusive competence of national government, while LUPO does not regulate mining but "governs the control and regulation of the use of all land in the Western Cape Province", which in turn falls under municipal planning, which is allocated to local government.[94]

LUPO controls and regulates the use of land,[95] and provides that an owner of land is entitled to use the land for the purpose permitted in terms of the zoning scheme or regulations.[96] The use of land for purposes other than those permitted is prohibited.[97] If an owner of land wants to use land for a purpose not so permitted, he or she has to apply to the municipality for rezoning or for a use departure.[98] More specifically in terms of LUPO, it was decided that mining may be undertaken on land only if the zoning scheme permits it (or a departure is granted).[99] If not, appropriate rezoning of the land must be obtained before the commencement of mining operations.[100] The fact that mining may not take place until rezoning takes place was held to be permissible as being in accordance with the constitutional order.[101] Even though the CC conceded that a holder of a mining right cannot apply for rezoning of the land which belongs to another person, it was indicated that land may be rezoned at the instance of the provincial government or the municipality in whose jurisdiction it is located.[102] If zoning does permit the use of land for mining, it does not "license

92 *Maccsand* CC 46.
93 *Maccsand* CC 49.
94 *Maccsand* CC 42.
95 *Maccsand* CC 18.
96 *Maccsand* CC 17, 46.
97 *Maccsand* CC 17.
98 *Maccsand* CC 17.
99 *Maccsand* CC 18.
100 *Maccsand* CC 18.
101 *Maccsand* CC 48.
102 *Maccsand* CC 49.

mining" or determine mining rights.[103] These activities take place in terms of the MPRDA.

The argument that insofar as LUPO does not regulate mining, it does not apply to land in respect of which a mining right has been granted,[104] was rejected by the CC. It was decided that the MPRDA governs mining whilst LUPO regulates the use of land;[105] in other words, "each is concerned with different subject matter".[106] Even though an overlap between functions was found to be occurring, it was not perceived as "an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments".[107] The CC clearly decided that the mere granting of a mining right does not cancel out the application of LUPO.[108] The CC reasoned that the MPRDA confirms that a mining right granted is subject to relevant laws, instead of providing that LUPO will cease to apply to land upon the granting of a mining right or a mining permit.[109] The CC also rejected the argument that there was conflict between LUPO and the MPRDA,[110] as well as the argument that LUPO is not "relevant law" because it does not apply to mining.[111]

The CC concluded that:

(a) The MPRDA (governing mining) and LUPO (governing land use) serve different purposes within the competence of the relevant two spheres.

(b) The overlap is a result of the fact that mining occurs on land, but "does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments".[112]

(c) The granting of a mining right does not cancel out the application of LUPO as LUPO governs municipal land planning and applies to the land concerned.[113]

(d) The MPRDA does not stipulate that LUPO is not applicable when a mining right or permit is granted – "[b]y contrast section 23(6) of the MPRDA

103 *Maccsand* CC 18.
104 *Maccsand* CC 40.
105 *Maccsand* CC 41.
106 *Maccsand* CC 51.
107 *Maccsand* CC 43.
108 *Maccsand* CC 44.
109 *Maccsand* CC 44.
110 *Maccsand* CC 50-51.
111 *Maccsand* CC 45.
112 *Maccsand* CC 43.
113 *Maccsand* CC 44.

proclaims that a mining right granted in terms of that Act is subject to it and other relevant laws".[114] The ordinary meaning of the phrase "relevant law" must be used as the MPRDA does not contain a definition thereof.[115]

(e) The SCA did not, as a matter of fact, find that LUPO governs mining, but rather stated that the MPRDA and LUPO have different objects, do not serve the purpose of each other, and operate alongside each other. The CC stated that:[116]

> [b]ecause LUPO regulates the use of land and not mining, there is no merit in the assertion that it enables local authorities to usurp the functions of national government. All that LUPO requires is that land must be used for the purpose for which it has been zoned.

(f) Powers were allocated to the different spheres of government by the Constitution "in accordance with the functional vision of what is appropriate to each sphere". The exercise of powers by different spheres may overlap, as they "are not contained in hermetically sealed compartments"; however, this does not amount to an intrusion into the functional area of another government sphere as each sphere exercises its powers within its own competence. Section 41 of the 1996 Constitution obliges the three spheres to cooperate with each other and coordinate their actions.[117]

(g) The Constitution permits that mining may take place only if the land concerned is appropriately zoned. The CC stated as follows:[118]

> It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed. If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power, which does not extend to the power of the other functionary. This is so in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through cooperation between the two organs of state, failing which, the refusal may be challenged on review.

114 *Maccsand* CC 44.
115 *Maccsand* CC 45.
116 *Maccsand* CC 46.
117 *Maccsand* CC 47.
118 *Maccsand* CC 48 (footnotes omitted).

(h) In terms of LUPO, a landowner may apply for rezoning. However, the provincial government or the municipality concerned may also rezone land. Maccsand could have requested provincial government to intervene and have the rezoning effected (even though the CCT was opposed to the mining).[119]

(i) Section 146 of the 1996 *Constitution* is not applicable as the MPRDA does not fall within a functional area listed in Schedule 4.[120] Neither section 146 nor section 148 applies as there is no conflict between the MPRDA and LUPO (they concern different subject matters, and the exercise of a mining right is subject to LUPO).[121]

For the above reasons, the appeal failed.[122]

6 Discussion

During October 2007, an MPRDA mining permit (in terms of section 27 of MPRDA) was issued to Maccsand to mine sand on the Rockland dunes,[123] whilst an MPRDA mining right (in terms of section 23) to mine sand on the Westridge dune was issued in August 2008.[124] In the previous dispensation, under the *Minerals Act* 50 of 1991 (hereafter the Minerals Act), a holder of a mining right (whether common law or statutory in origin) had to obtain a mining authorisation from the state before the right could be exercised.[125] The MPRDA introduced a new administrative system which has completely superseded the previous system of mineral rights.[126] In terms of the new MPRDA system:

(a) the common law mineral rights were replaced by similar rights granted by the State; and

(b) the statutory authorisation to prospect or mine granted under the previous dispensation was fused into prospecting or mining rights thus granted.[127]

119 *Maccsand* CC 49.
120 *Maccsand* CC 50.
121 *Maccsand* CC 51.
122 *Maccsand* CC 51.
123 *Maccsand* CC 20.
124 *Maccsand* CC 21.
125 Section 5(2) *Minerals Act* 50 of 1991.
126 *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* 2011 1 All SA 384 (SCA).
127 *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* 2011 1 All SA 384 (SCA) 20.

Thus, the new MPRDA composite right contains what was previously held separately by means of (a) the mining authorisation and (b) a mining right.[128] It is important to distinguish between these two types of "mining rights" insofar as an MPRDA mining right is subject to "relevant laws",[129] whilst such a provision does not occur in the case of an MPRDA mining permit. In deciding that the exercise of a mining right granted in terms of the MPRDA is subject to LUPO and other relevant laws, the CC relied on the fact that this was proclaimed to be the case in section 23(6) of the MPRDA.[130] The same finding was not made in respect of an MPRDA mining permit. The CC decision does not indicate what the court may have decided if only a mining permit had been issued.

The outcome of the CC decision in *Maccsand* provides some protection to an owner of land in the age-old conflict between the owner of land and the holder of mineral rights wanting to exercise conflicting entitlements in respect of the same land. It is submitted that the common law principles regarding the exercise of rights to minerals are applicable to the exercise of MPRDA mining rights and MPRDA mining permits.[131] These principles briefly entail that in a case of irreconcilable conflict between the owner of the land and holders of mining rights, the surface rights must be subordinated to mineral exploitation.[132] The fact that the use to which the owner of land puts the property at an earlier point of time cannot derogate from the rights of the holder of the rights to minerals.[133] A holder of a mining right or mining permit must exercise his or her entitlements reasonably, in good faith, and in a manner least onerous or injurious to the owner of the land.[134] A holder of a mining right or mining permit is entitled to do anything which is reasonably necessary to remove the minerals from the land.[135] The owner of the land is thus bound to allow the holder of mining rights to do whatever is reasonably necessary for the purpose of the exercise of his entitlements.[136] The holder of a mining right or mining permit, in turn, is bound to exercise his entitlements *civiliter modo*, that is reasonably viewed, in a manner

128 *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* 2011 1 All SA 384 (SCA) 21.
129 Section 23(6) of the MPRDA.
130 *Maccsand* CC 44, 51.
131 Badenhorst and Mostert *Mineral and Petroleum Law* 13-24B.
132 *Hudson v Mann* 1950 4 SA 485 (T) 488E/F.
133 *Hudson v Mann* 1950 4 SA 485 (T) 488H.
134 *Hudson v Mann* 1950 4 SA 485 (T) 488F-G.
135 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 263 (SCA) 377I-J.
136 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 263 (SCA) 373A.

least injurious to the interest of the owner of the land.[137] The common law principles do not oblige the holder of mining rights to pay compensation to the owner of land for damage caused in the course of prospecting or mining operations.[138] These common law principles are supplemented by section 54 of the MPRDA. It has been shown that the MPRDA, and specifically the limited protection afforded by section 54 of the MPRDA to owners of land, is skewed in favour of mining companies at the expense of owners of land.[139] At least – in accordance with the *Maccsand CC* decision - an owner of land may now insist that his land may not be used for mining purposes if it is not zoned for such purposes. This would prevent the practice of the DME of granting prospecting rights or mining rights in respect of land that is clearly not suitable for prospecting or mining.

The CC judgement also provides protection to landowners and occupiers in general to the extent that any proposed change in land use can be implemented only if all the authorisations required in terms of a range of legislative instruments have been issued by the individual authorities responsible for the administration of such statutory instruments.

Although the land in question in the above-mentioned SCA decision of *Louw v Swartland Municipality* was zoned for agricultural purposes, and the SCA referred to the CC decision of *Wary Holdings* (which deals specifically with the continued existence and application of the *Subdivision of Agricultural Land Act* 70 of 1970 (hereafter SALA) (after the introduction of wall-to-wall municipalities on 5 December 2000 with the commencement of the final phase of local government, as provided for in Chapter 7 of the 1996 *Constitution*), the SCA did not discuss SALA and its application. However, it would probably be correct to assume the principle of the continued existence and enforceability of other non-MPRDA legislation, and the related powers of functionaries in terms of such other legislation should also apply to SALA. This Act, which provides for the regulation of, and the obligation to obtain authorisations in respect of, all envisaged subdivisions of, and applications for change in land use, of agricultural land, is national legislation. The administration of

137 *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 263 (SCA) 373A, 373G.
138 Franklin and Kaplan *Mining and Mineral Laws* 135; Kaplan and Dale *Guide to the Minerals Act* 190; Badenhorst and Mostert *Mineral and Petroleum Law* 13-24B.
139 Badenhorst 2011 *TSAR* 337-341.

SALA has been assigned to the national sphere of government by means of Proclamation R100 of 31 October 1995 (issued by the President in terms of section 235(9) of the Interim Constitution). In terms of the *Wary* decision, the prior written approval of the Minister responsible for agriculture is an absolute requirement for both applications for subdivision and applications for the change of land use (from agricultural use to any other type of use).

The court in the *Maccsand* CC decision made it clear that mining rights or mining permits granted by the Minister in terms of MPRDA do not obviate the obligation to require authorisations in terms of other legislation that deals with functional domains other than minerals, mining and prospecting. This applies to all other legislation, irrespective of whether the responsible administrator for such legislation is in the national, provincial or local sphere of government. The effect of the CC decision is that planning and other authorities which derive their statutory mandate and powers from other (non-MPRDA) legislation (such as LUPO) retain all their powers as regards planning and rezoning, for instance. In addition, the Minister cannot make a decision on behalf of or for such functionaries

The implication of the CC decision in *Maccsand* is thus that legislation dealing with specific functional domains, each requiring authorisations by its functionary (whether national legislation (eg SALA), provincial legislation (such as LUPO), or municipal legislation (enacted in accordance with section 156(2) of the *Constitution*, read with Schedule 4 (Part B) and Schedule 5 (Part B)), remains valid and enforceable. There must be full compliance as regards all matters regulated by such statutory instruments, irrespective of whether mining rights or mining permits have been issued by the Minister in terms of the MPRDA.

The question of conflicts between the MPRDA and these other sets of legislation should arise only in instances where the subject matter of the legislation concerned is substantially identical, in which event section 146 of the *Constitution* (which deals with the conflict between national and provincial legislation) and section 156(3) of the *Constitution* (which deals with the conflict between municipal by-laws, on the one hand, and national or provincial legislation, on the other) would apply.

In the absence of such conflicts at the legislative level, the principles of cooperative government and intergovernmental relations contained in Chapter 3 of the *Constitution* must determine the manner in which the various executive authorities within and between the three spheres of government should administer the functional domain specific legislation assigned to them, with the point of departure being that the South African "government is constituted as national, provincial and local spheres of government which are distinctive, inter-dependent and interrelated" (section 40 of the *Constitution*). Within this context, greater use should be made of the provisions of Chapter 3 of the *Constitution* and the enabling framework provided for in the *Intergovernmental Relations Framework Act* 13 of 2005.

As regards the allocation of municipal planning function (as provided for in Schedule 4 (Part B) of the *Constitution*) the constitutionality of certain sections of the *Development Facilitation Act* 67 of 1995 (hereafter the DFA) was challenged in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*.[140] The CC found that parts of the DFA were in conflict with the constitutional reservation of the "municipal planning" function (ie the control and regulation of the use of land, including zoning) to municipalities. The declaration of invalidity was suspended for 24 months until 18 June 2012. The Department of Rural Development and Land Reform's (hereafter the DRDLR) response to the CC judgement is the *Spatial Planning and Land Use Management Bill* (which provides that, in case of a conflict with other legislation, national legislation would prevail).[141] At the meeting of Parliament's Portfolio Committee on Rural Development and Land Reform a briefing on the *Spatial Planning and Land Use Management Bill* [B14-2012] was given by the DRDLR, during which the DRDLR Minister indicated that the Department had failed to meet the 18 June 2012 deadline. The Portfolio Committee decided "that public hearings would be held in Parliament and in selected municipal metros to encourage further submission on the Bill".[142] It is hoped that the final version of the envisaged national framework planning legislation, after enactment, will provide guidance and clarity on the relationship between the constitutionally allocated functional domains of "regional planning and development" (Schedule 4 (Part A) – concurrent national

140 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC).
141 Clause 76 *Spatial Planning and Land Use Management Bill* B14 of 2012.
142 PMG 2012 www.pmg.org.za.

and provincial); "provincial planning" (Schedule 5 (Part A) – exclusive provincial) and "municipal planning" (Schedule 4 (Part (Part B) – municipal, and in respect of which both national and provincial government have legislative and executive authority to the extent set out in sections 155(6) (a) and (7)). Within this context, section 155(7) states as follows:

> The national government, subject to section 44, and the provincial governments have the legislative and executive authority 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).

Such an outcome from the final (still to be enacted) national framework planning legislation would also assist in informing the processing of developing an intergovernmental framework that would indicate how the process of making executive decisions (in terms of planning (including zoning) legislation) should interface with executive decisions made in terms of legislation dealing with other functional domains.

The CC judgement in *Maccsand* has resulted in clarifying the question of whether or not a national Act (the MPRDA) can supersede provincial legislation (LUPO) dealing with a distinctly different functional domain. In principle, the decision also indicates that the fact that a range of authorisations is required in terms of separate statutory instruments (each with its own functional domain and administered by its own functionary) does not necessarily give rise to conflicts among these instruments. The reality that various other authorisations (issued by their respective functionaries within the same or within another sphere of government, in terms of the specific legislation concerned) may be required prior to the utilisation of an authorisation granted by a specific functionary (eg the Minister, in accordance with the MPRDA), should be dealt with within the context of the constitutional (and concomitant national statutory) framework for cooperative government and intergovernmental relations.

In order to provide certainty to land owners, developers and government functionaries, and to promote investor confidence (especially in the mining sector), an intergovernmental system (compliant with the Chapter 3 of the Constitution cooperative government and intergovernmental principles as well as the provisions

of the *Intergovernmental Relations Framework Act* 13 of 2005) needs to be developed as a high priority. Such a system should also be structured appropriately (preferably as a one-stop shop, where all applications would be submitted at the same time, in order to provide as far as possible for the simultaneous consideration thereof by the various functionaries in terms of their own domain-specific legislation) in order to expedite decision-making, to ensure that approved applications can be implemented without unnecessary delay, and to limit concomitant expenditure.

Bibliography

Badenhorst 2011 *TSAR*

Badenhorst PJ "Conflict resolution between owners of land and holders of rights to minerals: a lopsided triangle?" 2011 *TSAR* 326-341

Badenhorst and Mostert *Mineral and Petroleum Law*

Badenhorst PJ and Mostert H *Mineral and Petroleum Law of South Africa: Commentary and Statutes* Revision Service 8 (Juta Lansdowne 2004)

Franklin and Kaplan *Mining and Mineral Laws*

Franklin BLS and Kaplan M *The Mining and Mineral Laws of South Africa* (Butterworths Durban 1988)

Kaplan and Dale *Guide to the Minerals Act*

Kaplan M and Dale MO *A Guide to the Minerals Act 1991* (Butterworths Durban 1992)

Register of legislation

Constitution of the Republic of South Africa, 1996
Development Facilitation Act 67 of 1995
Intergovernmental Relations Framework Act 13 of 2005
Land Use Planning Ordinance 15 of 1985
Local Government: Municipal Systems Act 32 of 2000
Mineral and Petroleum Resources Development Act 28 of 2002
Minerals Act 50 of 1991
National Environmental Management Act 107 of 1998
Spatial Planning and Land Use Management Bill B14 of 2012
Subdivision of Agricultural Land Act 70 of 1970

Register of cases

Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd 2007 2 SA 263 (SCA)

Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 4 SA 113 (CC)

City of Cape Town v Maccsand (Pty) Ltd 2010 6 SA 63 (WCC)

Doctors for Life International v Speaker of the National Assembly 2006 6 SA 416 (CC)

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)

Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 6 SA 4 (CC)

Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd 2011 1 All SA 384 (SCA)

Hudson v Mann 1950 4 SA 485 (T)

Intercape Ferreira Mainliner (Pty) Ltd v Minister of Home Affairs 2010 5 SA 367 (WCC)

Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 6 SA 182 (CC)

Johannesburg Municipality v Gauteng Development Tribunal 2010 2 SA 554 (SCA)

Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening) 2001 3 SA 1151 (CC)

Louw v Swartland Municipality 2011 ZASCA 142

Maccsand (Pty) Ltd v City of Cape Town 2011 6 SA 633 (SCA)

Maccsand (Pty) Ltd v City of Cape Town (CCT 103/11) 2012 ZACC 7

Meepo v Kotze 2008 1 SA 104 (NC)

Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 1 SA 337 (CC)

Register of internet sources

PMG 2012 www.pmg.org.za

Parliamentary Monitoring Group 2012 Spatial Planning and Land Use Management Bill [B14-2012]: Briefing by Minister, 24 July 2012 www.pmg.org.za/node/33021 [date of use 2 Aug 2012]

List of abbreviations

CC	Constitutional Court
CCT	City of Cape Town
DFA	*Development Facilitation Act* 67 of 1995
DRDLR	Department of Rural Development and Land Reform
LGMSA	*Local Government: Municipal Systems Act* 32 of 2000
LUPO	*Land Use Planning Ordinance* 15 of 1985
MEAT	Minister of Environmental Affairs and Tourism
MEC	Western Cape Minister of Local Government, Environmental Affairs and Development Planning
MPRDA	*Mineral and Petroleum Resources Development Act* 28 of 2002
NEMA	*National Environmental Management Act* 107 of 1998
PMG	*Parliamentary Monitoring Group*
SALA	*Subdivision of Agricultural Land Act* 70 of 1970
SCA	Supreme Court of Appeal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

MACCSAND (Pty) Ltd v CITY OF CAPE TOWN 2012 (4) SA 181 (CC)

NJJ Olivier[*]
C Williams[**]
PJ Badenhorst[***]

SUMMARY

The Constitutional Court in *Maccsand (Pty) Ltd v City of Cape Town* (CCT 103/11) 2012 ZACC 7 decided that the granting of mining rights or mining permits by the Minister of Mineral Resources in terms of the *Mineral and Petroleum Resources Development Act* 28 of 2002 does not obviate the obligation on an applicant to obtain authorisations in terms of other legislation that deals with functional domains other than minerals, mining and prospecting. This applies to all other legislation, irrespective of whether the responsible administrator of such other legislation is in the national, provincial or local sphere of government. The effect of the decision is that planning and other authorities which derive their statutory mandate and powers from other legislation retain all their powers as regards planning and rezoning, for instance. In addition, the Minister of Mineral Resources cannot make a decision on behalf of, or for, such functionaries. The judgement also clarified the question of whether or not a national Act can supersede provincial legislation dealing with a distinctly different functional domain. In principle, the decision also indicates that the fact that a range of authorisations are required in terms of separate statutory instruments (each with its own functional domain and administered by its own functionary) does not necessarily amount to conflicts between these instruments. An owner of land may now insist that his land may not be used for mining purposes if it is not zoned for such purposes. It is submitted that, in order to provide certainty to land owners, developers and government functionaries, and to promote investor

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confidence (especially in the mining sector), an intergovernmental system for the consideration of applications by the functionaries responsible for the separate statutory instruments needs to be developed as a high priority.

KEYWORDS: co-operative government; conflict of laws; intergovernmental relations; *Land Use Planning Ordinance* 15 of 1985; land use; *Mineral and Petroleum Resources Development Act* 28 of 2002; mining; planning; rezoning