

**IN THE HIGH COURT OF SOUTH AFRICA  
[GAUTENG DIVISION, PRETORIA]**

30/5/14

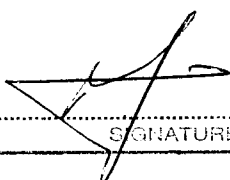
**CASE NUMBER: 14612/2013**

In the matter between:

**AQUILA STEEL SA (PTY) LTD**

and

**SOUTH AFRICAN STEEL COMPANY (PTY) LTD**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO. <input checked="" type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO. <input checked="" type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
(3) REVISED. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
30/05/2014 DATE	 SIGNATURE

Applicant

Respondent

**JUDGMENT**

**CILLIERS AJ**

**Introduction**

[1] This is an application by the Respondent for leave to appeal against the judgment delivered in the main application on 14 March 2014. I shall refer to the parties as they are cited in the main application.

[2] In applications for leave to appeal the grounds of appeal should be set out clearly and succinctly in clear and unambiguous terms so as to enable the

court and the other party to be fully informed of the case the Respondent seeks to make out.<sup>1</sup> In the present application this was not done.

[3] The Respondent elected to merely list various findings that it contends constitutes errors by the court and to list a number of aspects that the court, according to the Respondent, ought to have considered or should have made findings on.

[4] The Respondent does not furnish the reasons for the lists of errors by the court on which it relies as the grounds of appeal in the application for leave to appeal.

[5] The application for leave to appeal is accordingly not an example of clarity and the grounds raised also seem to overlap in some respects.

[6] I shall deal with the grounds for the appeal with reference to the subject-matter addressed in each of the grounds on which reliance is placed.

### **The abandoned ground of appeal**

[7] The first issue that was raised in the notice of appeal was that the court, so the Respondent contended, found itself unable to agree with the reasoning of

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<sup>1</sup> Songono v Minister of Law and Order 1996 (4) SA 384 (E) at 385I-J.

the Constitutional Court in *Maccsand v City of Cape Town 2012 (4) SA 181 (CC)*. This ground of appeal is clearly unfounded and wrong. Mr Putter, who appeared at the hearing of the application leave to appeal on behalf of the Respondent, did not persist with this ground on which reliance was initially placed in the application.

**The Town Planning and Townships Ordinance (Tvl), 15 of 1986 as a relevant law**

- [8] The following grounds of appeal seem to address the same subject-matter:
- (i) the ground of appeal that the court erred in not considering that section 23(6) of the Act requires the holder of the prospecting right to comply with relevant laws;
  - (ii) the ground of appeal that the finding was effectively made that the *Town Planning and Townships Ordinance (Tvl), 15 of 1986* (“*the Ordinance*”) is not a relevant law;
  - (iii) the ground of appeal that the court assumed that the mere granting of a prospecting right excludes the application of the Ordinance resulting in the Ordinance ceasing to apply to the land in question.
- [9] It is settled that a holder of a mining right or a mining permit has to comply with zoning requirements in addition to the relevant provisions of the

Mineral and Petroleum Resources Development Act, 28 of 2002 (as amended by Act 49 of 2008) (*“the Act”*).<sup>2</sup>

[10] The Ordinance applies to the properties.

[11] In relation to the above I have held that regard must be had to each provincial ordinance to ascertain whether there is compliance or should be compliance with zoning requirements, because each ordinance is different and the result of any enquiry into whether or not land use approval by the local authority is required will depend upon the wording of the particular provincial legislation.<sup>3</sup>

[12] It follows that the Ordinance was clearly dealt with as a relevant law as contemplated by the provisions of section 23(6) of the Act.

### **Land use approval**

[13] The following grounds of appeal seem to address the same subject-matter:

- (i) the ground of appeal that the court erred in finding that the provisions of sections 21 and 22 of the Ordinance excludes the

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<sup>2</sup> Maccsand (Pty) Ltd v City of Cape Town and Others 2012 (4) SA 181 (CC) and Minister for Mineral Resources v Swartland Municipality and Others 2012 (7) BCLR 712 (CC).

<sup>3</sup> South African Mineral and Petroleum Law MO Dale and Others [Issue 14] at 197.

“*Municipality*” from regulating land use as far as prospecting on agricultural land is concerned;

- (ii) the ground of appeal that the court erred in finding that, because the land on which the prospecting takes place falls outside a town planning scheme entitles the Applicant to exercise its prospecting right without notification to the “*Municipality*”;
- (iii) the ground of appeal that the court erred in finding that, where the Applicant wants to exercise prospecting rights on agricultural land outside of a town planning scheme, it is unnecessary to apply to the “*Municipality*” for such land use;
- (iv) the ground of appeal that the court erred in finding that the provisions of sections 21 and 22 of the Ordinance prohibits the “*Municipality*” from preparing a town planning scheme where the prospecting rights are taking place outside the boundaries of the town planning scheme;
- (v) the ground of appeal that the court erred in failing to accept that the Act and the Ordinance have different objects and that each does not purport to serve the purpose of the other;

(vi) the ground of appeal that the court erred in failing to consider the fact that prospecting cannot take place until the land use in question was appropriately considered by the “*Municipality*” and therefore permissible within the constitutional order.

[14] It does not follow from the fact that the Ordinance is a relevant law, as contemplated by the provisions of section 23(6) of the Act, that land use approval from the local authority is always required in consequence of this fact alone.

[15] The answer as to whether land use approval from the relevant local authority is required in a particular set of facts will depend on the wording of the particular provincial ordinance that applies and the zoning requirements, if any, in relation to the property in question.

[16] The Respondent did not include as a ground of appeal that the court erred in the finding that it is clear from the provisions of section 18 of the Ordinance that all land within the area of jurisdiction of a local authority do not automatically form part of a town-planning scheme or are zoned as such.

[17] It is common cause in the present matter that the land in question i.e. the farms Cornwall 313 KQ and Koedoevlei 128KQ (“*the properties*”) fall outside a town-planning scheme and not within a zoning scheme in terms of

the Ordinance. Although the properties are used as agricultural they are not zoned as such and they do not form part of a town-planning scheme.

[18] The judgment in *Maccsand (Pty) Ltd v City of Cape Town* (supra) makes it plain that the Act is concerned with mining and that the provincial ordinances do not regulate mining. These ordinances rather govern the control and regulation of the use of land.<sup>4</sup> The judgment further makes it clear that an overlap between the functions occur because mining is carried out on land<sup>5</sup> and that each is concerned with different subject-matter.<sup>6</sup>

[19] In consequence of the aforementioned findings in *Maccsand (Pty) Ltd v City of Cape Town* (supra) the zoning requirements in respect of the properties (with reference to the provisions of the Ordinance) fall to be considered with a view to ascertaining whether land use approval by the local authority concerned is required for the exercise of the prospecting right.

[20] Zoning requirements are not in existence in respect of the properties.

[21] The wording of sections 21 and 22 of the Ordinance unambiguously and expressly excludes from the ambit of municipal town planning land on which prospecting, digging or mining operations are being carried out, unless such

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<sup>4</sup> Paragraph [42] at 197B-C.

<sup>5</sup> Paragraph [43] at 197D.

<sup>6</sup> Paragraph [51] at 200B.

land is situated within an approved township or within a township in respect of which a notice as contemplated in section 111 of the Ordinance was published. In the recent, as yet unreported judgment, of *Coal of Africa Limited and Another v Akkerland Boerdery (Pty) Ltd (38528/2012) [2014] ZAGPPHC 510 (5 March 2014)* the Court in that judgment also came to the same conclusion to which I did in relation to the interpretation and the effect of the provisions of section 21 of the Ordinance.

- [22] The absence of zoning requirements in terms of the Ordinance regarding the properties renders the obtaining of land use approval by the local authority unnecessary.

### **The Spatial Development Framework**

- [23] The Respondent raised, as a further ground of appeal that the court erred in failing to accept that, what is required from a “*Municipality*” insofar as town planning is concerned, relates to a land use within its Spatial Development Framework.

- [24] Section 35(1)(d) of the Systems Act provides as follows:

#### **“35 *Status of Integrated Development Plan***

*(1) An integrated Development Plan adopted by the council of the municipality –*

*(a) ....*



*(b) Bind the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's Integrated Development Plan and national or provincial legislation, in which case such legislation prevails;*

*(c) ..... "*

[25] It follows from the provisions of Section 35(1)(b) of the Systems Act that the Ordinance (as provincial legislation) would prevail in the event of a conflict between an Integrated Development Plan (with a Spatial Development Framework as a core component thereof) and the Ordinance.

[26] The provisions of the Ordinance accordingly have precedence over the Spatial Development Framework.

[27] The zoning requirements of the properties are regulated by the Ordinance and, in respect of the properties no zoning requirements are in existence.

### **The Constitutional interest of a local authority in land use**

[28] The ground of appeal that the court erred in not finding that the "Municipality" has a constitutional interest to consider a land use on agricultural land and the ground of appeal that the holder of a prospecting right is, by reason of the acknowledgement by the **Constitution of the Republic of South Africa, 108 of 1996** ("the Constitution") of the direct effect of the Ordinance in mining applications, not relieved from obtaining

the necessary land use planning authorisation from the “*Municipality*” addresses the same subject-matter.

[29] The judgment of the Constitutional Court in *Maccsand (Pty) Ltd v City of Cape Town* (supra) dealt conclusively with the constitutional framework of the overlap between the national sphere of government in regulating mining and the local sphere of government regulating land use as well as the different subject-matter that they are concerned with.

[30] It is within the context of the provisions of the Constitution, and the recognition therein of the constitutional interest of a local authority in land use within its area of jurisdiction, that it was held in *Maccsand (Pty) Ltd v City of Cape Town* (supra) that a holder of a mining right or a mining permit has to comply with zoning requirements in addition to the relevant provisions of the Act.

[31] The consideration of the applicable zoning requirements (if any) on the properties in terms of the provisions of the Ordinance is accordingly in consonance with the constitutional imperatives in this regard.

[32] The dispute in the main application did not concern a general consideration of the general constitutional interest that a local authority may have to consider a land use on agricultural land.

- [33] The Respondent did not challenge the constitutional validity of the Ordinance or any part thereof. In particular: the Respondent did not seek an order declaring the provisions of sections 21 and 22 of the Ordinance to be inimical to the notion of wall-to-wall municipalities decreed by the provisions of section 151 of the Constitution.<sup>7</sup>
- [34] In my view the constitutional validity, or not, of the provisions of sections 21 and 22 of the Ordinance has no bearing on the disputes as they presented in the present matter. The properties are not the subject of any town planning scheme or zoning scheme. Zoning requirements are accordingly not in existence in respect of the properties.
- [35] The absence of zoning requirements in terms of the Ordinance regarding the properties renders the obtaining of land use approval by the local authority unnecessary.

### **The National Heritage Act**

- [36] The grounds of appeal in relation to the findings regarding the reliance by the Respondent on the provisions of the National Heritage are mutually exclusive.

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<sup>7</sup> Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 (6) SA 186 (CC) at [78].

[37] The first ground of appeal is that the court ignored the provisions of the National Heritage Act, whilst the further grounds are directed at specific findings that were made with regards to the provisions of the National Heritage Act.

[38] The provisions of Section 36 of the National Heritage Act provide that graves and burial sites are protected.

[39] Section 36(3) of the National Heritage Act provides as follows:

*“(3) No person may, without a permit issued by SAHRA or a Provincial Heritage Resources Authority –*

*(a) Destroy, damage, alter, exhume or remove from its original position or otherwise disturb the grave of a victim of conflict, or any burial ground or part thereof which contains such graves;*

*(b) Destroy, damage, alter, exhume or remove from its original position or otherwise disturb any grave or burial ground older than sixty years which is situated outside the formal cemetery administered by local authority; or*

*(c) Bring onto or use at the burial ground or grave referred to in paragraph (a) or (b) any excavation equipment or any equipment which assists in the detection or recovery of metals. ”*

[40] The relevant provisions of Section 36 of the National Heritage Act prohibits the Applicant from undertaking certain activities at the burial ground or grave refer to in Section 36(3)(a) and (b) and from undertaking the actions described in Section 36(3)(a) and (b).

[41] The prohibition of certain conduct at the burial sites or graves contemplated in Section 36 of the National Heritage Act does not, however, in my view amount to a prohibition on the holder of a prospecting right to gain access to the property in respect of which he hold the prospecting right. The prospecting right can still be exercised outside of the burial grounds or graves contemplated by the provisions of Section 36 of the National Heritage Act.

### **Conclusion**

[42] In my view the Respondent does not have a reasonable prospect of success on appeal and it does not have a reasonable prospect that a different court may come to a different conclusion on the issues raised in the grounds of appeal. I am also not of the view that the Respondent established that another court might reverse or materially alter the order.

[43] In the result I make the following order:

1. The application for leave to appeal is dismissed;
2. The Respondent in the main application is ordered to pay the costs.

**CILLIERS AJ**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**