THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 201/2016

In the matter between:

MACASSAR LAND CLAIMS COMMITTEE **APPELLANT**

and

MACCSAND CC **FIRST RESPONDENT**

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA **SECOND RESPONDENT**

Neutral citation: *Macassar Land Claims Committee v Maccsand CC* (201/2016) 2016 ZASCA 167 (23 November 2016)

Coram: MAYA AP, WALLIS JA and FOURIE, SCHOEMAN and DLODLO AJJA

Heard: 7 November 2016

Delivered: 23 November 2016

Summary: Restitution of Land Rights Act 22 of 1994 – Land Claims Court – powers – claim for restitution of commonage – mining right in terms of Mineral and Petroleum Resources Development Act 28 of 2002 – whether Land Claims Court has power to order the expropriation of right and its expungement.

ORDER

On appeal from: Land Claims Court (Mpshe AJ sitting as court of first instance):

(a) The order of the Land Claims Court is altered to read as follows:

'The special plea is upheld and the following portions of the amended particulars of claim are struck out, namely: in para 16.1 the words 'exploited the mineral and natural resources of the commonage by inter alia utilizing the mineral wealth of the sand dunes by extracting limestone and utilizing and selling sand'; in para 45 the underlined words; paras 52(2) to 52(11) and 72; the underlined words in prayer (a); and, prayer (f).'

(b) The appeal is otherwise dismissed.

(c) The Appellant is ordered to pay the costs of the First Respondent, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (Maya AP and Fourie, Schoeman and Dlodlo AJJA concurring)

[1] The appellant, the Macassar Land Claims Committee (the Committee) is a voluntary association representing members of the community of Sandvlei, Macassar. It claims that this community is descended from a group of freed slaves on the farm Zandvliet and that,

after they were freed, they enjoyed rights of commonage over Zandvliet that were reflected in the title deed of the farm. However, after the declaration of Macassar as a Coloured Group Area in terms of the Group Areas Act 41 of 1950, the various erven that incorporated parts of the commonage were transferred either to members of the Coloured group or to the Community Development Board, a statutory body. When this was done the references in the title deeds to the land being or including commonage were deleted. As a result the Committee claims that the community of Sandvlei was dispossessed of their rights in the commonage in terms of a piece of racially discriminatory legislation.

[2] On 23 June 2003 the Committee launched an application before the Land Claims Court (LCC), in terms of the provisions of the Restitution of Land Rights Act 22 of 1994 (the Act), seeking restitution of a right in land in respect of the commonage previously forming part of erven 1195, 1196, 1197, 1198 and 1191 Macassar. The application cited 11 respondents. Of those only two, Maccsand CC (Maccsand) and the Government of the Republic of South Africa, represented by the Department of Mineral and Energy (the Department), are relevant to and participated in this appeal as the first and second respondents respectively.

[3] Maccsand holds a mining right granted in terms of the Minerals and Petroleum Resources Development Act 28 of 2002 (the MPRDA), that entitles it to engage in sand mining operations on Erf 1197, Macassar, which is one of the erven in respect of which the Committee advances its claim. As part of the relief that it sought in the LCC the Committee claimed the following orders:

'(a) An order directing the second and third defendants[1] to acquire, or if necessary to expropriate erven 1195, 1196, 1197, 1198 and 1991 Macassar *as well as the entitlement, alternatively the right of the first defendant to mine erf 1197 Macassar*.

…

(b) Restitution of the lost commonage rights in land on the former farm Zandvliet, Macassar, by restoration of erven 1195, 1196, 1197, 1198 and 1991 Macassar . . . into the name of a communal property association to be formed to administer same on behalf of the community of Sandvlei, Macassar.

(c) Alternatively, restitution of the lost commonage rights in land on the former farm Zandvliet by amending all present title deeds and diagrams that comprise land that previously formed part of the commonage that existed on the former farm Zandvliet . . . with the following words:

"Subject to the Zandvliet commonage".

(d) . . .

(e) . . .

(f) *An order expunging the mining rights granted to the first defendant* [Maccsand] pursuant to the expropriation that had been sought in respect thereof in prayer (a) prior to the conversion of such.' (My emphasis.)

[4] In response to these prayers the Department delivered a special plea in which it contended that the LCC had no power to grant the relief claimed in respect of Maccsand's mining rights. Maccsand made common cause with the Department in this regard and the issue was dealt with separately before Mpshe AJ on 13 April 2015. He delivered a judgment on 15 September 2015 upholding the point and granting the following order:

'This court does not have jurisdiction to acquire the erven as stated nor to expropriate the mining right as exercised by First Defendant.'

This appeal is with his leave.

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[1] The Minister and the Minister of Land Affairs respectively.

The Act

[5] The LCC was constituted by the Act and its powers are set out in the Act. Unlike the High Court it has no general jurisdiction. The outcome of the case therefore depends upon a proper construction of the powers vested in it. One of its functions in terms of s 22(1)*(a)* of the Act is to determine any right to restitution of any right in land in accordance with the Act. In terms of s 2(1)*(d)* of the Act a person is entitled to restitution of a right in land (as defined) if it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices. The Committee claims that the Group Areas Act dispossessed the community it represents of its commonage rights. That is the foundation for its claim.

[6] In order to see the powers of the LCC in context it is helpful to start by examining the provisions of the Act dealing with claims for restitution. The following definitions appear in s 1 thereof:

'"**claim"** means-

(a) any claim for restitution of a right in land lodged with the Commission in terms of this Act; or

(b) any application lodged with the registrar of the Court in terms of Chapter IIIA for the purpose of claiming restitution of a right in land;

"restitution of a right in land" means-

(a) the restoration of a right in land; or

(b) equitable redress.

"restoration of a right in land" means the return of a right in land or a portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices;

"right in land" means any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.'

[7] Three important principles emerge from the definitions. The first is that the definition of 'right in land' encompasses everything from full ownership of land to unregistered rights such as the interest of a labour tenant or sharecropper, or even continuous residence for a period of not less than ten years prior to the dispossession. The expression must be given a broad meaning in accordance with the remedial purpose of the Act.[2] It is undoubtedly wide enough to encompass the commonage rights that are in issue in this case.

[8] The second point is that the ambit of the entitlement to restitution is to be found within the four corners of the Act. In *Florence*,[3] Zondo J, giving the judgment of the Constitutional Court, said:

'The "restitution of a right in land" as defined is the full redress cognisable by the Restitution Act for the dispossession of a right in land. Where a statute creates a new cause of action and prescribes a specific remedy for that cause of action, the prescribed remedy is the only remedy available for that cause of action.'

In other words, the LCC is a creature of statute having only the powers conferred by the Act. It has no inherent jurisdiction to redress perceived grievances in regard to the dispossession of a right of land, save in the manner contemplated by the Act.

[9] The third point, flowing from *Florence* and the definitions, is that restitution of a right in land must either take the form of the restoration of the right in land of which the claimant was dispossessed or equitable redress. Where restoration of a right in land is claimed that requires

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[2] *Department of Land Affairs and others v Goedgelegen Tropical Fruits* [2007] ZACC 12; 2007 (6) SA 199 (CC) (*Goedgelegen*) para 53; *Alexkor Ltd and others v Richtersveld Community and others* [2003] ZACC 18; 2004 (5) SA 460 (CC) para 98.

[3] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC) paras 166-170, especially 170.

'return' of the right of which the claimant was dispossessed. In other words the claimants are to be restored to the position they would have been in had they not been dispossessed of their right.

[10] There may be instances where, as a result of intervening events, it is not possible to restore everything that was taken away or to restore it in precisely the same form as it was when the claimants were dispossessed, but the purpose of the Act's mechanism is to achieve restitution. It is not to be used to obtain more than was taken away by the act of dispossession.

Section 35(1)(*a*) of the Act

[11] Against that background, I turn to the provision of the Act on which the Committee relies in claiming that the LCC has the power to order the expropriation of Maccsand's mining right. It is s 35(1)*(a)*, which provides that:

'(1) The Court may order-

(a) the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land or right in land . . .'

[12] Counsel for the Committee, Mr Rosenberg SC, submitted that what was being sought in this case was restitution of land, specifically the properties mentioned in the order, including Erf 1197. As these were not in the ownership of the State they could only be restored if they were first acquired. Their acquisition or expropriation was therefore necessary in order to give effect to the order for restitution. There was no difference between counsel over this approach to the construction of s 35(1)*(a)*. It

accords with several carefully drawn distinctions in the Act. First, the Act provides for the restitution of a right in land, not the restitution of land *simpliciter*. When a claim for restitution of a right in land is upheld, the LCC can order its restoration, and restoration means the return of the right of which the claimant was dispossessed. Frequently the right that was dispossessed will have been ownership and that is why s 35(1)*(a)* empowers the LCC to order the 'restoration of land, a portion of land or any right in land'. The latter expression must refer to any 'other' right in land, that is, any right other than a right to land or a portion of land. To hold otherwise would mean that s 35(1)*(a)* introduced a concept of a 'right in land' different from the one in the definition in s 1. When the LCC is asked to order the restoration of land or a portion of land that is because the right in land asserted by the claimant is ownership of the land concerned or that portion of land.

[13] An order for the acquisition or expropriation of land in terms of s 35(1)*(a)* may only be made by the LCC where that is necessary in order to implement an order for the restitution of land. The language of the section is clear. It refers to the power of the LCC to make an order for the restitution of land, the restitution of a portion of land and the restitution of a right in land, and then says that *where necessary* an order can be made for the acquisition or expropriation of *the* land, portion of land or right in land. Acquisition or expropriation is only necessary when there is to be restitution of a particular piece of land or portion of land or other right in land. The use of the definite article means that what may be expropriated refers back to the land, portion of land or right in land that is the subject of the restoration order.

[14] On behalf of Maccsand it was submitted that this was fatal to the claim for an order compelling the acquisition or expropriation of Maccsand's mining right. The community had never held or exercised a mining right in respect of Erf 1197 and was not asking to have a mining right, as a right in land, restored to them. As the power to order expropriation may only be exercised when necessary in order to restore the right in land that is the subject of the claim for restitution of that right, it is simply unavailable in this situation. Even more is it unavailable for the purpose of expunging a mining right. For the Department, Mr Warner made the point that it is only rights in land of which people were dispossessed by racially discriminatory legislation and measures that can be the subject of a claim for restitution. He submitted that the mining right possessed by Maccsand was not in existence prior to the enactment and coming into force of the MPRDA and therefore it could not be the subject of a claim for restitution. As such it could not be the subject of an order for its acquisition or expropriation.

[15] These arguments are undoubtedly correct if the Committee's claim for restitution was a claim in respect of the right in land constituted by the commonage rights that the community had previously enjoyed over various erven of the farm Zandvliet. In my view it was. The Constitutional Court held in *Goedgelegen*[4] that it is vital to characterise the claim for restitution accurately. In this case the restitution being sought by the Committee was not restitution of ownership of land. That was made clear in its particulars of claim and in the relief that it sought. As to the former it was alleged that 'the community were deprived of the usage of the commonage'. As to the latter both prayers (b) and (c)

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[4] *Goedgelegen* para 20.

embodied claims for ‘restitution of the lost commonage rights’. It was alleged that the community exercised both registered and unregistered commonage rights in land and were dispossessed of that right in land. The manner of their dispossession was by erecting fences and removing references to the commonage from diagrams of the affected erven. In regard to erf 1197, which is the erf on which Maccsand has mining rights, the Community Development Board acquired this in 1975 and the Surveyor General issued a new diagram omitting the commonage in 1974. Had this not occurred the rights of the community to the commonage would have remained in force. Instead there was a refusal to recognise those rights.

[16] The Committee argued that its claim was a claim for the restitution of land founded on the dispossession of its commonage rights. If that was incorrect, as in my view it was, then for that reason alone there could never be a right to an order that the Minister acquire or expropriate Maccsand’s mining right and no basis for the further prayer that this mining right be expunged.

[17] Finally, under this head, recognition that the only purpose for which the power of expropriation in s 35(1)*(a)* may be used is in order to restore that which is to be expropriated to the person claiming restitution, creates a further obstacle in the path of the Committee’s argument. The purpose of the claimed acquisition or expropriation of Maccsand’s mining right is that it be expunged, not that it be transferred to the Committee or the suggested communal property association. The question of any exercise of mining rights thereafter is a matter for determination in accordance with the prescripts of the MPRDA. The Committee and the community it represents have made no decision on

whether any application will be made to secure those rights. Accordingly, the acquisition or expropriation of Maccsand's mining rights is not an acquisition or expropriation contemplated by s 35(1)*(a)*, because it is not an acquisition or expropriation directed at vesting the acquired rights in the applicant for restitution.[5]

Section 35 (4) of the Act

[18] Counsel for the Committee sought to meet the point that its claim was one for restitution of the right in land constituted by the community's rights of commonage, by drawing attention to the provisions of s 35(4) of the Act, which empowers the LCC, when ordering the restitution of a right in land, to 'adjust the nature of the right previously held by the claimant'. He submitted that even if the right of which the community had been dispossessed was a right of commonage it was open to the LCC, in granting restitution, to adjust that right by directing the acquisition of the land over which the commonage right existed.

[19] In my view section 35(4) does not support the argument. No doubt such adjustment may be necessary in some cases, to deal with events that have occurred since the dispossession and to effect as full and proper a restitution as is feasible. But adjusting a right means that the right remains the same, but in some matter of detail is altered. It does not mean that the nature of the right is so altered that a wholly different right comes into existence. For example, the right of a labour tenant – a person who, in exchange for their labour, enjoys rights of use of grazing or cropping

[5] As the suggestion is that the mining right is to be expropriated in order to be expunged it may be that this would not be an expropriation at all, in view of the majority judgment in *Agri SA v Minister for Minerals and Energy* [2013] ZACC 9; 2013 (4) SA 1 (CC) (*Agri SA – CC*) paras 58, 59, 67 and 68, which appears to have held that an expropriation only occurs when the expropriator acquires the substance or core content of what was previously held by the expropriatee. However, see para 63 and the apparent approval in footnote 94 of what was said in this regard in the SCA judgment.

land[6] – will on restitution have to be adjusted to take account of the provisions of the Land Reform (Labour Tenants) Act 3 of 1966. Something that would call for adjustment arises from s 3 of that Act, which permits a labour tenant to nominate someone other than themself to perform service to the owner of the farm in their stead. That may well not have been the basis upon which they, or their ancestors, became labour tenants. But in granting restoration of the labour tenancy account must be taken of changes in the law or circumstances that require some adjustment of the right being restored.

[20] It does not follow that s 35(4) empowers the LCC, when restitution is sought of a particular right in land, to adjust the right so as to alter its essential nature and restore something different from that which was taken away. Thus a tenant deprived of possession may recover possession, and a usufructuary deprived of use may recover use, but neither of them can be given ownership in place of their tenancy or usufruct. That would not be restitution, but something else entirely.

[21] Counsel for the appellant sought to pray in aid of this argument the decision in *Goedgelelgen*. He submitted that the claimants in that case were labour tenants who had been evicted as a result of past discriminatory practices and that the relief they obtained was ownership of the farm on which they had previously been labour tenants. However, that was incorrect. It appears from the judgment that the individual claimants sought restitution of their rights as labour tenants and claimed to exercise the 'tenancy' where their homesteads had formerly been. In

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[6] *De Jager v Sisana* 1930 AD 71 at 81 and 83; *Goedgelegen* para 46. A labour tenant is defined in these terms in s 1 of the Land Reform (Labour Tenants) Act 3 of 1996.

addition they claimed the land immediately round their homesteads to be used jointly for ploughing and grazing.[7] They were not awarded ownership of that land. The court held that they had been dispossessed of occupation, ploughing and grazing rights in that land,[8] and in the result they did not press for relief beyond a declaratory order as to their rights, leaving it to the relevant government department to facilitate the resolution of the nature and extent of restitution or equitable redress.[9] While therefore the claimants had sought a right greater than the rights of which they had been dispossessed, that was not persisted in and was not granted by the court. The judgment was not authority for the submission that, in adjusting the right to be restored under s 35(4), an entirely different right may be given to the claimant.

[22] It follows that, contrary to the contentions of counsel for the Committee, a claim for restitution arising from dispossession of a right in land other than ownership cannot give rise to a claim for restitution of land.

The MPRDA

[23] The final string to appellant's counsel's bow was to submit that it was not open to us to take this view of the Committee's claim. He pointed out that in prayer (a) there was a claim for an order for the acquisition or expropriation of the various erven, including Erf 1197, and submitted that this made it clear that the claim for restitution was a claim for the restitution of land to be met by transferring the land in question to a communal property association. Although he did not mention this there

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[7] *Goedgelegen* para 25.
[8] *Goedgelegen* para 47.
[9] *Goedgelegen* para 82.

are one or two places in the particulars of claim where it is alleged that the community used the commonage as if they were the owners of it. It is therefore desirable to examine whether on this basis the prayers that are attacked in these proceedings could be justified.

[24] Assuming therefore that the Committee's claim is to be treated as a claim for the restitution of ownership of land, because that was the relief prayed for, its further argument took the following course. Restoration of the bare ownership of land (*dominium*) will be incomplete where the land is burdened with rights vested in third parties that detract from the right of ownership. Thus, if the land to be restored is now burdened with a registered long lease or a servitude, it is necessary in order to effect restitution not only that the land be acquired, either by agreement or expropriation, but also that the registered rights of the lessee or servitude holder be acquired in the same way. In that way the rights of possession of the lessee and the rights of the dominant tenement can be removed and transferred to the claimant, thereby securing that they will be extinguished by merger and the claimant will receive full restitution. For the purposes of the argument this can be accepted, without holding that it is necessarily correct.

[25] In terms of s 5(1) of the MPRDA a mining right is a limited real right in land capable of being registered against the title deeds of the property. Accordingly, so the argument ran, it was similar to a registered long lease or other real right in its limitation on the right of full *dominium* of an owner of property and fell to be dealt with in the same way. In order to restore the commonage rights to the Committee it was therefore necessary that the mining right be removed. Otherwise the restitution

would be incomplete and the community would not have the commonage rights of which it had been dispossessed restored to them.

[26] Mr Budlender SC, on behalf of Maccsand, first responded to this argument by drawing attention to the provisions of s 23 of the MPRDA and argued that it imposed an obligation on the Minister to grant a mining right over property whenever the requirements of s 23(1) were satisfied. As such he submitted that it was not the particular mining right enjoyed by Maccsand that burdened erf 1197, but the provisions of s 23, and that this section imposed the same burden upon every property in South Africa.

[27] Whilst having a superficial attraction, I do not think this point is correct. It is true that the Minister is obliged if the requirements of s 23(1) are satisfied to grant a mining right. It is also true that once a mining right is granted the holder of the right is entitled, subject only to giving notice and compliance with all other applicable obligations, to enter upon the land and act in terms of the mining right, notwithstanding any objection from the owner. However, the important point is that it is only once a mining right has been granted in respect of a particular property that the right to enter upon the land and engage in mining activities becomes operative. It is then that the owner's rights of ownership are diminished. Until a mining right is granted in respect of a property there is no diminution of ownership, but merely the possibility, distant in most cases, that it may become subject to a mining right in the future.

[28] There is far more force in Mr Budlender's next two points which are based upon the impact of the MPRDA. The first was that even if the Committee was entitled to restitution of the land right of which it was

dispossessed, that would not give it any right to mine on erf 1197. Nor could it claim a right to prevent Maccsand from doing so in terms of its permit. The second, closely related to the first, was that any diminution in the rights for which the Committee is seeking restitution arises from a post-democracy statute and, if and when restitution is ordered, it cannot be restitution free from burdens imposed under legislation enacted by a democratic parliament and intended to remedy past racial discrimination. In order to address these arguments it is desirable to start by looking briefly at the history of mining rights in this country.

[29] In *Agri SA*,[10] speaking for the majority of this court, I held that the right to allocate mining rights, such as those arising under the MPRDA, has always been vested in the state and that:

'… [T]he MPRDA is merely the latest in along line of legislation and statutory instruments in South Africa that affirms the principle that the right to mine is controlled by the state, and allocated to those who wish to exercise it. The right to mine remains, as it always has been, ever since mining became an important part of the economy of South Africa, under the control of and vested in the state, which allocates it in accordance with current policy.'[11]

Apart from expressing a preference for the term 'exploitation rights' for 'the right to mine' and 'ownership of minerals' for 'mineral rights',[12] I do not discern anything in the subsequent judgment of the Constitutional Court to suggest that this was incorrect.[13]

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[10] *Minister of Minerals and Energy v Agri South Africa* [2012] ZASCA 93; 2012 (5) SA 1 (SCA) (*Agri SA – SCA*).
[11] *Agri SA – SCA* para 85.
[12] *Agri SA – CC* para 39.
[13] *Agri SA – CC* para 46 accepts that the exploitation of minerals was subject to the government's regulatory power

[30] The ability to exploit minerals has always been distinct from the ownership of minerals before they are mined and extracted. At most periods in South Africa's history the ownership of minerals and precious stones prior to mining and extraction has vested in the owner of the land, although sometimes by statute the state has taken such ownership for itself.[14] At times the state took for itself the exclusive right to mine and the ability to allocate that right; sometimes it vested ownership of minerals still in the ground in itself; sometimes it vested the right to mine in the owner or, where mineral rights had been separated from the land in terms of a notarial lease or other arrangement, the holder of the mineral rights.[15]

[31] These fluctuations in the impact of mining laws are illustrated by the claim in this case that the right of commonage included the right to win and remove sand. In 1942 (before the community's dispossession of its rights) sand was included in the definition of base minerals in the Base Minerals Act 39 of 1942.[16] In 1991, the definition of 'mineral' in the Minerals Act 50 of 1991 specifically included 'sand' and from that time the mining of sand was regulated in the same way as other minerals. The definition of 'mineral' in s 1 of the MPRDA also includes sand as a mineral. Even if the community that the Committee represents had enjoyed rights to commonage that included the right to mine and remove

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[14] *Agri SA – SCA* paras 38 and 42.
[15] *Agri SA – SCA* paras 38 to 48, which covered the situation from the earliest days until 1967 and the enactment of the Mineral Rights Act 20 of 1967. The impact of the 1967 Act is traced in paras 53 to 61 and the different arrangement from 1991 in terms of the Minerals Act 50 of 1991, which vested rights almost exclusively in the owner of the land where the mineral rights had not been separated from the land and the holder of the mineral rights when they had.
[16] Base minerals were there defined as 'any mineral substance' with certain exclusions that did not include sand.

sand,[17] and they had not been dispossessed of those rights at an earlier stage, from 1991 the right to mine sand on Erf 1197 would have vested in the owner of the erf and not the community. So also, after the MPRDA came into operation the right to mine sand would no longer have vested in the owner of the erf or the community. If anyone wished to mine sand on Erf 1197 they could only do so if they had the necessary mining right granted in terms of s 23 of the MPRDA.

[32] It follows that whatever rights the community might have enjoyed to mine sand on Erf 1197 prior to the dispossession of their commonage rights, would in any event have been removed in 1991, even if that dispossession had not occurred. And in 2004, when the MPRDA came into operation, the situation under the 1991 legislation would have changed again to take account of altered priorities in regard to mining in South Africa. Even if, at any stage after that date, the community was awarded ownership of Erf 1197 by way of restitution, that would not carry with it a right to mine and exploit the sand on the property. Such a right could only arise through the grant of a mining right in terms of the MPRDA and, if that right had been granted to a third party, as was the case with Maccsand, the community would not have been able to prevent its mining activities. So the loss of the right to mine sand would have occurred irrespective of the dispossession of the community's commonage rights.

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[17] This would be a considerable extension of the conventional right of commonage. We have taken over commonage rights from English law. They are ordinarily rights of grazing and pasturage, rights of passage and recreation, the right to draw water and perhaps rights to gather firewood or wild plants. Depending on the nature of the commonage and the community it served it might possibly extend to growing crops. Commonage rights do not ordinarily extend to mining or quarrying. *Chaplin v Grant* (1882) 3 NLR 78.

[33] Turning to the second point, whatever motives and purposes may have underlain the Minerals Act 50 of 1991, they cannot be carried forward and attributed to the MPRDA. This statute is, like the Act, a measure aimed at remedying past discrimination. It is the product of a democratic parliament operating in a constitutional democracy and the legislative response to gross economic inequality in relation to the mining sector. As such it is designed to facilitate equitable access to opportunities in the mining industry.[18] It is impermissible to treat such legislation, passed after the advent of democracy and directed at remedying past injustices, as having the effect of dispossessing the community of its historic rights. It is also impermissible to treat it in the same way as the racially discriminatory legislation of the past. The past dispossession effected by racially discriminatory legislation is entirely different from the impact at the present day of legislative measures enacted after 1994 by a democratic parliament. Where a claimant under the Act seeks restitution of a right in land they cannot claim that the right be free from the impact of current regulatory legislation enacted after the inception of democracy. Nor can they demand that it be free of the impact of the MPRDA and free of rights properly granted under it.

[34] The Act is intended to provide a means to remedy past dispossession of land occasioned by racially discriminatory measures. Once the wrong of the past is remedied the successful claimant is restored to the right in land of which they were dispossessed, but they must exercise it in the legal environment that now exists. That environment is one in which ownership of land carries with it no right to exploit minerals

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[18] *Agri SA – CC* para 1. *Minister of Mineral Resources and Others v Sishen Iron Ore Co (Pty) Ltd and Another* [2013] ZACC 45; 2014 (2) SA 603 (CC) para 47.

situated on or under the land. It is also one in which others may acquire and exercise such rights without the consent of the owner of the land and, *a fortiori*, without the consent of persons holding rights less than ownership.

[35] The Committee's argument was based on the proposition that mining rights stood on the same footing as, for example, a registered long lease or usufruct. I agree with counsel's submission on behalf of Maccsand that this is a false analogy. A mining right under the MPRDA may, by virtue of the statute, enjoy the status of a limited real right in the minerals to which it relates, but in substance it is no more than a licence to conduct the mining activities identified therein in terms of the right and in accordance with the MPRDA. As such it bears a close similarity to other licences such as liquor licences, as to which Innes J said in *Fick v Woolcott and Ohlsson's Cape Breweries*:[19]

'Now, such a licence authorises the sale of liquor by the holder upon specified premises, for consumption there. It is a privilege granted to a particular person to sell liquor at a particular place. And the law attaches the greatest importance, and provides for the strictest supervision, in regard to both these elements. … No person can own a licence save as the Statute permits … Nor has the holder any such vested right in the permission to sell, as to entitle him to claim that it shall be prolonged beyond the currency of the licence. At its expiration, he must apply for a renewal, the grant of which, though in the absence of special circumstances generally accorded, is entirely at the discretion of the Licensing Court. Moreover, the privilege which he enjoys is purely personal; it involves the exercise by the authorities of a *delectus personæ*, so that he would have no power to assign his licence, were there no statutory provision for its transfer. He can only deal with it in such a manner as the Ordinance prescribes … And the law provides that the transfer of a licence can only be effected by the authority which sanctioned its issue.'

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[19] *Fick v Woolcott and Ohlsson's Cape Breweries Ltd* 1911 AD 214 at 229-230.

[36] Subject to appropriate linguistic adjustment that seems to me to encapsulate the position in respect of mining rights under the MPRDA. They are licences given in terms of that statute. They must be exercised in accordance with their terms and the MPRDA itself. They are subject to strict regulatory oversight and they attach only to the person to whom the right is issued. They involve a *delectus personae* and can only be transferred in accordance with the provisions of the MPRDA. They do not vest in the holder by virtue of ownership of land, but in consequence of a grant by the Minister in accordance with the requirements of the MPRDA. They cannot be created by agreement as can leases and usufructs. Seen in that light the similarity arising from their being described as limited real rights in minerals is limited.

[37] In my judgement therefore even if the Committee is entitled to receive title to the disputed erven in satisfaction of its claim for restitution of the commonage rights of which the community was dispossessed, that will not, for the reasons given above, afford it any right in relation to the mining of sand on Erf 1197. Nor will it entitle it to interfere with the right that Maccsand has to mine Erf 1197 in terms of a mining right under the MPRDA.

Result

[38] In the result the appeal must fail. However, something must be said about the terms of the order granted by Mpshe AJ. It was in the form of a declaratory order but it left the offending prayers in place as well as the allegations in the particulars of claim on which those prayers were based. That is undesirable and an incorrect approach to the case from a procedural perspective. The LCC was adjudicating a special plea. In

substance it held that the special plea should succeed. As there are other issues in the case the litigation will have to proceed on those issues. But the issues surrounding the special plea are no longer part of the case. Accordingly the allegations in relation thereto and the prayers to which the special plea was directed should be struck out. It will to that extent be necessary to amend the order of the LCC.

[39] One last point relates to costs. The approach of the Department is that it is dealing with a community that claims to have been dispossessed of its rights by racially discriminatory legislation in the past. It is a poor community and its claim is in significant respects opposed by the Department. In those circumstances we were informed by Mr Budlender SC, and this was confirmed by Mr Rosenberg SC for the Committee, that the costs of the Committee are being borne by the Department and that as a result in earlier litigation, of which apparently there has been a considerable amount, Maccsand has in certain instances had its costs paid by the Department on behalf of the Committee. In those circumstances Maccsand sought an order for costs, including the costs of two counsel, and submitted that the *Biowatch* principle should be departed from. I agree that this is justified and accordingly Maccsand's success will carry with it an order for costs.

[40] I make the following order:

(a) The order of the Land Claims Court is altered to read as follows:

'The special plea is upheld and the following portions of the amended particulars of claim are struck out, namely: in para 16.1 the words 'exploited the mineral and natural resources of the commonage by inter alia utilizing the mineral wealth of the sand dunes by extracting limestone and utilizing and selling sand'; in para 45 the underlined

words; paras 52(2) to 52(11) and 72; the underlined words in prayer (a); and prayer (f).'

(b) The appeal is otherwise dismissed.

(c) The Appellant is ordered to pay the costs of the First Respondent, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	S P Rosenberg SC (with him J Krige)
Instructed by:	Igshaan Sadien Attorneys, Cape Town
	c/o Matsepes Attorneys, Bloemfontein
For first respondent:	G M Budlender SC (with him N Bawa SC)
Instructed by:	Cliffe Dekker Inc, Cape Town
	c/o Phatshoane Henney, Bloemfontein.
For second respondent:	Kevin Warner
Instructed by:	The State Attorney, Cape Town and Bloemfontein.