Reportable

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **4217/2009**
5932/2009

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
MACCSAND (PTY) LIMITED	First respondent
MINISTER OF MINERALS AND ENERGY	Second Respondent
NATIONAL MINISTER OF WATER AFFAIRS AND ENVIRONMENT	Third Respondent
MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE	Fourth Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Fifth Respondent

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JUDGMENT delivered on the 20th day of August 2010

DAVIS J

INTRODUCTION

Second Respondent granted first respondent, a black empowerment mining company, mining rights in terms of section 23 of the Mineral and

Petroleum Resources Development Act 28 of 2002 (MPRDA) in respect of Erven 1210 and 9889 Mitchell's Plain and Erf 1848 Schaapkraal together with a mining permit in terms of section 27 of MPRA in respect of Erf 13625 Mitchell's Plain. Applicant and fourth respondent contend that the Land Use Planning Ordinance 15 of 1985 (LUPO) requires, in addition to any right acquired under the MPRDA, that authorisation by applicant be procured before any exercise of these mining rights can take place.

Thus, the central dispute in this application is whether a mining permit or mining right granted under the MPRDA exempts the holder from having to obtain authorisation for its mining activities in terms of laws which regulate the use of that land, in particular the provisions of LUPO and the National Environment Management Act 107 of 1998 (NEMA).

The application, which was initially brought by the applicant, was for an order interdicting and restraining first respondent from conducting mining activities on the relevant erven, unless and until the necessary authorisations in terms of LUPO had been sought and obtained together with certain ancillary relief.

The initial application was brought in respect of Erf 13625, the so called Rocklands Dune. Applicant subsequently brought an application in

respect of the other three erven and these two applications were then consolidated. Fourth respondent was joined as a party on the insistence of second respondent. Having been so joined, fourth respondent then brought certain conditional counter-applications, one of which counter-applications necessitated the joining of a further party, the fifth respondent.

These counter applications are brought only on condition that this Court finds in the main application that, upon a proper interpretation of, firstly, section 27(2) of the Physical Planning Act, No. 125 of 1991 (*"the PPA"*), and secondly, the MPRDA, either the provisions of LUPO and the regulations of the zoning schemes promulgated thereunder do not apply in respect of any right of any person to prospect for or to mine any mineral, or a person undertaking mining operations is exempt from the requirement to comply with the provisions of LUPO and the regulations of the zoning schemes promulgated thereunder, for an order declaring-

6.6.1 that the PPA is inconsistent with the Constitution and invalid to that extent; and/or

6.6.2 that the MPRDA is inconsistent with the Constitution and invalid to that extent.

Fourth respondent, in a further alternative, and, in the event of the Court finding that the conditional relief sought falls within the exclusive

jurisdiction of the Constitutional Court, seeks to interdict Maccsand from commencing or continuing mining operations on the Rocklands and Westridge dunes until the matter is determined by the Constitutional Court.

Notwithstanding the submissions of fourth respondent, applicant insists that the dispute can and should be decided on the narrow basis as envisaged in the original applications, namely that (i) mining activity may not be carried out unless authorisation has been granted under land use and environmental legislation; and (ii) in this case, no such authorisation has been so granted.

THE FACTUAL BACKGROUND

A brief explanation of the facts is necessary to understand the full extent of the dispute. The Rocklands Dune (Erf 13625) is vacant land of 3.643 hectares in extent and is located in the residential area of Mitchell's Plain, adjacent to private homes and situated between two schools.

The Westridge Dune (Erven 1210, 9889 Mitchell's Plain and 1848 Skaapskraal) are continguous erven also located in the residential area of Mitchell's Plain. These erven constitute 16.3 hectares in extent. The

northern, southern and eastern sides of this dune abut onto private homes. The area to the west of the dunes is vacant land or, in this case, the dune abuts onto a major road. There is an informal settlement on Erf 1210.

On 16 October 2007 first respondent was granted a mining permit in respect of Erf 13625 in terms of Section 27 of MPRDA. On 29 August 2008, first respondent was granted a mining right in respect of Erven 1210, 9889 and 1848 in terms of Section 23 of MPRDA. The city owns or has the right to ownership of all of these erven. Erven 13625, 1848 and 9889 are all zoned public open space and Erf 1210 is zoned "*rural*".

Applicant and first respondent have engaged through correspondence with regard to the possible exploitation of the mining rights and permits since June 2006. It appears that first respondent applied for these rights in September 2006. Applicant refused to support the application and informed both first and second respondent of its position. It further informed both parties that authorisation in terms of LUPO was required before mining activities could be conducted on the erven.

Applicant was not notified by either first or second respondent that a permit in respect of Erf 13625 had been granted until first respondent delivered the permit to applicant's law enforcement office in Mitchell's

Plain, less than two weeks before it commenced mining. On 17 February 2009 first respondent started mining activities on the erven but did not give applicant any notification for such commencement in terms of Section 5(4) of the MPRDA.

This action prompted applicant to launch an urgent application to interdict and restrain first respondent from continuing mining activities on Erf 13625 unless and until it obtained the requisite authorisations in terms of LUPO. On 4 March 2009 applicant's attorney wrote to first respondent requesting an undertaking that they would not commence mining activities on the remaining erven, an undertaking which first respondent then failed to furnish. This omission prompted a further application for an interdict which was brought by applicant on 24 March 2009, in this case seeking to prevent first respondent from conducting mining activities on the remaining erven until the necessary authorisations had been procured.

THE CORE DISPUTE

Applicant's case is that neither of the zones applicable in respect of the Rocklands or Westridge Dunes authorises the use of this land for mining. Applicant avers that two actions would have to be taken before lawful mining activity could take place; either the zoning scheme would have to

be amended to authorise mining on the relevant land or a departure would have to be granted from the existing zoning scheme to allow mining to take place on the land.

By contrast, both first and second respondent contend that, once second respondent or his or her delegate have granted a mining right or permit, the holder is granted a right to undertake mining at the location and that no other law or authority may "*veto*" the decision taken by the relevant Minister or delegate.

Mr. **Rose-Innes,** who appeared together with Ms. **Bawa** on behalf of first respondent, submitted that, in this case, there were three different legal regimes which operated at different spheres of government, all of which were relevant to mining, being NEMA, LUPO and the MPRDA. Mr. **Rose-Innes** submitted that, if there was a clash between these three regimes, then if second respondent, pursuant to the powers granted in terms of the MPRDA, approved the application for mining, this decision put an end to the case; that is this decision trumped all other considerations.

In amplification of this submission, Mr. **Rose-Innes** contended that the MPRDA had introduced a new mineral order when it came into effect on 1 May 2004, repealing the 1991 Minerals Act, and much of the common

law. The State is now the custodian of mineral resources and, thus, ownership of minerals vests in the State. The Act deals with the regulation of mineral resources as a whole and, of necessity, with the regulation of land use where the mining takes place.

Mr. **Rose-Innes** submitted further that, without the land use being regulated by the MPRDA, exploitation of the mineral resource could not effectively take place. He submitted further that the entitlement to use the land in the manner required for the exercise of mining rights, was inherently part of the exercise thereof and hence the grant of the mineral right without this entitlement could mean that mining rights might not be capable of being exercised at all. Certainly, in his view, they would not be exercised in a nationally, uniform manner.

Mr. **Rose-Innes** then referred to Chapter 4 of the MPRDA (Sections 9 – 56) which deals with mineral and environmental regulations. In his view, the provisions of this chapter were comprehensive and self-contained. In particular, he referred to section 48, entitled *"Restriction or prohibition on prospecting and mining on certain land"*. Subsection (1) provides

> *"Subject to section 20 of the National Parks Act, 1976 (Act No. 57 of 1976), and subsection (2), no reconnaissance permission, prospecting right, mining right or mining permit may be issued in respect of*
>
> *(a) land comprising a residential area;*

(b) any public road, railway or cemetery;

(c) any land being used for public or government purposes or reserved in terns of any other law; or

(d) areas identified by the Minister by notice in the Gazette in terms of section 49."

Section 48(2) provides that a mining right or permit may be issued in respect of land as contemplated in section 48(1), if the Minister is satisfied that-

"(a) having regard to the sustainable development of the mineral resources involved and the national interest it is desirable to issue it;

(b) the reconnaissance on prospecting or mining will take place within the framework of national environmental management policies, norms and standards; and

(c) the granting of such rights or permits will not detrimentally affect the interests of any holder of a prospecting right or mining permit."

Mr. **Rose-Innes** contended that section 48 thus contemplated the granting of mining rights and permits without the zoning of such land being affected in circumstances where the requirements of section 48(2) have been met.

By contrast, Mr. **Budlender,** who appeared together with Ms. **Van Huyssteen** for the applicant, submitted that land could not be used for mining activities without the authorisation by applicant, acting pursuant

to the provisions of LUPO. He referred to the long title of LUPO which states that its purpose 'is to regulate land use planning and to provide for matters incidental thereto'. In particular, section 11 of LUPO provides

> *"11 General purpose of zoning scheme*
>
> *The general purpose of a zoning scheme shall be to determine use rights and to provide for control over use rights and over the utilisation of land in the area of jurisdiction of a local authority."*

Pursuant to the applicable provisions of LUPO, erven 13625 and 9899 are zoned public open space. In terms of applicants' zoning scheme, regulations promulgated under LUPO, Erf 1848 is zoned public open space and Erf 1210 is zoned rural in terms of the Divisional Council Cape's zoning scheme regulations under LUPO.

These zoning categories do not permit mining. Thus, Mr. **Budlender** submitted that the only way in which mining activities could take place, contrary to the zoning scheme, was by way of recourse to section 15 of LUPO, which reads:

> *"15 Applications for departure*
>
> *(1)(a) An owner of land may apply in writing to the town clerk or secretary concerned, as the case may be-*

(i) for an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned, or

(ii) to utilise land on a temporary basis for a purpose for which no provision has been made in the said regulations in respect of a particular zone."

Much was made by both first and second respondent that, were the applicant's approach to be correct, the effect of LUPO and the relevant zoning schemes would be to confer on the owner of a property, such as the applicant, a *veto* power on the exercise of a mining right. This power would follow because only the owner could apply, in terms of section 15 for a departure from the zoning scheme which prohibited mining activity.

To this argument, Mr. **Budlender** submitted that the Provincial Minister, in this case fourth respondent, could amend the scheme conditions so that mining was permissible on the land in question. Fourth respondent could act in terms of the powers granted to the Provincial Minister pursuant to section 9(2) of LUPO. If the Minster so refused, it was possible that his decision could be taken on review. Further, Mr. **Budlender** submitted that the Premier may rezone the land to make mining permissible, acting pursuant to section 18 of LUPO on his or her own initiative. It would then be open to an aggrieved party, such as first respondent, or the holder of the mining right, to approach the Premier and request that he or she

exercise this power. Again, the possibility of a review could be contemplated, if the Premier so refused.

Mr. **Budlender** further submitted that the applicant could re-zone the land to make mining permissible in terms of section 18 of LUPO, of which a refusal to do so, could again trigger a review application. Furthermore, section 55(1) of the MPRDA was of application, if the extraction of the minerals concerned was of such importance that other policy considerations should be over-ridden. Second respondent could thus expropriate the land, a power which was available, if it was necessary for the achievement of the objects contained in sections 2(d), (e), (f), (g), (h) of the MPRDA.

Viewed within the context of these submissions, the critical decision for resolving this dispute turned on a determination of a clash, as Mr. **Rose-Innes** described it, between the legislative regimes set out respectively in the MPRDA and LUPO.

In further framing this dispute, Mr. **Budlender** correctly noted that the very nature and purpose of LUPO was that it represented the key mechanism for municipal planning, in this case, for the Province of the Western Cape. If LUPO was over-ridden, it would make it extremely

difficult for authorities such as applicant to fulfil their constitutional function with regard to municipal principal planning.

It is thus to the question of the respective constitutional responsibilities of an authority, such as applicant, and second respondent, to which I must turn for a resolution of this problem.

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY ET AL: THE CONSTITUTIONAL COURT DISPOSES OF PART OF THE PROBLEM

In order to determine the respective competence of national, provincial and local government, a considerable debate took place between counsel concerning the meaning of 'municipal planning' as listed in Part B of Schedule 4 of the ***South African Constitution Act*** 108 of 1996 ("the Constitution").

In particular, section 156 (1)(a) of the Constitution provides that a municipality has executive authority in respect of these matters. First and second respondents contended that legislation like LUPO had to give way to the MPRA if the objectives of the latter were to be properly fulfilled.

Hence the debate turned on two questions: the meaning of the phrase 'municipal planning' and the fit between the former and the national power dealing with mining. Subsequent to oral argument in the present dispute, the Constitutional Court delivered a judgment in ***The City of Johannesburg Metropolitan Municipality*** *and* ***The Gauteng Development Tribunal and Others*** ([2010] ZACC 11, judgment delivered on the 18th June 2010) which gave clear meaning to the term municipal planning.

The main issue in this case was the constitutionality of Chapters V and VI of the Development Facilitation Act 67 of 1995 which authorised provincial development tribunals to determine applications for the rezoning of land and the establishment of townships. A dispute arose between the City of Johannesburg Metropolitan Municipality and the Gauteng Development Tribunal which had been created by the Development Facilitation Act, the dispute concerning which sphere of government was entitled, in terms of the Constitution, to exercise the powers relating to the establishment of townships and the rezoning of land within the municipal area of the City.

In order to determine the dispute, the Constitutional Court was obliged to examine the constitutional scheme relating to the levels and powers of the

three tiers of government. As **Jafta J** said, in terms of section 40 of the Constitution, which defines the model of government so contemplated:

> *"the government consists of three spheres: the national, provincial and local spheres of government. These spheres are distinct from one another and yet interdependent and interrelated. Each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Furthermore, each sphere must respect the status, powers and functions of government in the other spheres and "not assume any power or function except those conferred on [it] in terms of the Constitution."* (para 43).

Of equal importance is a further observation by **Jafta J**:

> *"the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed."* (para 44).

The starting point for the determination of ***The City of Johannesburg*** case was section 156(1) of the Constitution which affords municipality's original constitutional powers. It reads thus:

> *"(1) A municipality has executive authority in respect of, and has the right to administer-*
>
> *(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and*
>
> *(b) any other matter assigned to it by national or provincial legislation."*

Part B of Schedule 4 includes the following functional area, "Municipal Planning".

In determining the meaning of "municipal planning", a term not defined in the Constitution, **Jafta J**, on behalf of a unanimous Constitutional Court, found as follows:

> *"But "planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use "planning" in the municipal context, they were aware of its common meaning. Therefore, I agree with the Supreme Court of Appeal that in relation to municipal matters the Constitution employs "planning" in its commonly understood sense. As a result I find that the contested powers form part of "municipal planning"."* (para 57).

Two significant implications flow from this judgment for the purposes of the present dispute: Firstly, municipal planning includes the control and the regulation of the use of land which falls within the jurisdiction of a municipality and secondly, the national and provincial spheres of government cannot by legislation give themselves *the power to exercise executive municipal powers nor the right to administer municipal affairs. A mandate of these two spheres of government should ordinarily be limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by local authorities.*

MINING: A TRUMP?

But even if municipal planning includes the regulation of all land under the jurisdiction of a municipality, the first and second respondents contend that mining is a national competence and hence trumps the relevant power of local government. Much was thus made by the first and second respondents that mining was *"an exclusive national competence"*. This argument was employed for the justification that a national competence such as mining could over-ride municipal planning, even if the latter phrase was given the extensive meaning accorded to it by the Constitutional Court.

However, as Mr. **Budlender** correctly observed, the Constitution does not refer expressly to exclusive national competences. Schedule 4 of the Constitution provides for functional areas of concurrent national and provincial legislative competence. Schedule 5 provides for functional areas of exclusive provincial legislative competence. In Part B of both Schedules a list of *"local government matters"* is contained. Both of these schedules need to be read together with sections 155 and 156 of the Constitution. For completion, mention shall be made that certain of the provincial powers can be gleaned from Schedules 4 and 5 read together with sections 104 and 146 of the Constitution.

When these sections are examined together, it is clear that the Constitution does not detail exclusive national competence but carves out areas for provinces and municipalities, leaving the balance, being areas which are not so specified, to national government. In other words, the functional competence of the national government is defined by way of an examination of the functional competences of the local and provincial governments and not the other way round. In terms of section 44(1)(a)(2) of the Constitution, national government can pass legislation with regard to any matter, including the matters within the functional area listed in Schedule 4 which would include municipal planning.

As **Jafta J** pointed out at para 54 in the ***City of Johannesburg Metropolitan Municipality*** case, *supra,* the national sphere can regulate the exercise of executive municipal powers and the administration of municipal spheres by municipalities but cannot abrogate to itself the power to exercise executive municipal powers nor assume the right to administer municipal affairs by way of legislation outside of the scope of the Constitution.

The Constitution does not give national legislation the right to take away the planning function of municipalities. In this connection, much was made of section 25 of the MPRDA which provides, in terms of sub-section (2), that the holder of a mining right must (d) comply with the relevant provisions of this Act, any other relevant law under terms and the conditions of the mining right. Thus, had Parliament wanted to ensure that the MPRDA overrode legislation such as LUPO, the question arises as to why it would have phrased the MPRDA in the fashion set out in section 25(2)(d). To over-ride the provisions of LUPO, Parliament would have been required to directly insert a provision, such as 'notwithstanding the provision of any other law'. This was not the case in the present dispute. By contrast, the relevant legislation includes, within the potential supervisory scope, the provisions of *"any other law"*.

CONCLUSION

The absence of a national legislative over-ride read, together with the decision in ***City of Johannesburg Metropolitan Municipality***, *supra,* leads to a conclusion that LUPO has clear application to the present dispute. This finding does not of course preclude the possibility of an overlap between the powers of national and local government. To the contrary, as the Constitutional Court held in ***Wary Holdings (Pty) Ltd*** *vs* ***Stalwo (Pty) Ltd and Another*** 2009(1) SA 337 (CC) at para 80:

> *"There is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the subdivision of 'agricultural land', the one may in effect veto the decision of the other. It should be borne in mind that the one sphere of control operates from a municipal perspective and the other from a national perspective, each having its own constitutional and policy considerations."*

This approach also finds an echo in ***Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*** 2007 (6) SA 4 (CC), in particular where the Court held at para 85:

> *"The local authority considers need and desirability from the perspective of town-planning, and an environmental authority considers whether a town-planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town-planning perspective and yet fail from an environmental perspective."*

For it to be held that LUPO has no application to the use of land in a case such as the present dispute, the very idea of concurrent powers as envisaged in Schedule 4 of the Constitution would be called into question. The following example is illustrative of this concern. An examination of Schedules 4 and 5 reveals that correctional services, including the construction of prisons, is considered as an exclusive national competence; that is, it clearly not a provincial nor a local competence. Could it then be suggested that the construction of a prison by the Department of Correctional Services could take place in circumstances where the municipality, in whose jurisdiction the prison is proposed to be constructed, would have no say at all about the location of the proposed prison? Such a conclusion would not simply limit but eradicate the municipality's powers of municipal planning, allowing prisons to be located in, for example, an area zoned residential, no matter the views of the duly elected local government.

MINING AS A LAND USE

The approach that I have adopted leads thus to the further question as to whether mining is a land use, which in turn would fall within the scope of applicant's constitutional powers.

Mr. **Rose-Innes** submitted that mining is not a *"land use"*. In his view, nowhere do the provisions of LUPO authorise mining nor does LUPO characterise mining in matters incidental thereto as a *"land use"*. Both Mr. **Rose-Innes** and Mr. **Oosthuizen,** who appeared together with Mr. **Warner** on behalf of second respondent, submitted that, were it otherwise and LUPO was interpreted so that the use of land for mining was included within the range of land uses controlled by LUPO, so that use restrictions were applied in respect of the use of land for mining, this would effectively result in LUPO controlling mining activity. A mining right inherently consists of the use of the land for mining. Hence, it would be constitutionally impermissible for the national competence relating to the regulation of mining to be subjected to the provisions of LUPO, which in turn could result in the prohibition of nationally authorised mining in the designated area. Whatever the rights granted under the MPRDA, an authority like applicant could then invoke powers under LUPO to prevent the exploitation of these rights.

The scheme regulations which had been promulgated in terms of section 8 of LUPO recognise mining as a land use and have created a special zone for it. In more specific terms, Schedule 3 to LUPO deals with planning control. It then provides "*The following provision shall apply in the relevant zones*". There then appears as para 3.15, 'Industrial Zone III Primary use mining'. Mining is then defined in the Regulations as "*an enterprise which practises the extraction of raw materials, whether by means of surface or underground methods and includes the removal of stone, sand, clay, kaolin, ores, minerals or precious stones*". LUPO recognises mining as a land use and thus, on the strength of ***The City of Johannesburg*** case, such land use falls within municipal planning and applicants' as well as fourth respondents' concurrent powers.

Mr. **Breitenbach,** who appeared together with Mr. **Paschke** on behalf of fourth respondent, submitted that the implication of ***Wary Holdings***, which judgment needs to be read together with ***Gauteng Development Tribunal***, *supra* (the decision of the CC) suggested that 'provincial planning' as listed in schedule 5A, as an exclusive provincial legislative competence, includes all the functions assigned to the provinces under the four provincial Ordinances that survived the transition to the present constitutional regime, including LUPO. These would include the powers to amend zoning schemes (section 9(2) of LUPO) and the powers to

consider and determine appeals against municipal decisions to grant or refuse applications for departures from zoning schemes (section 44(1)(a) of LUPO).

As mining would entail the use of land, it follows, particularly on the basis of the approaches adopted both in ***Wary Holdings*** and ***Fuel Retailers Association of Southern Africa***, *supra,* that, in addition to the control of mining by the national sphere of government under the MPRDA, the use of mining would also be subject to control by the provincial and municipal spheres of government, in the present case under LUPO. Further, although it is not relevant to this dispute, the Transvaal Provincial Ordinance expressly recognises mining as a land use, which provisions supports the point that this level of legislation an implicate the exercise of mining.

Significantly, section 6 of the Physical Planning Act 88 of 1967 which provided for restrictions upon the use of land in controlled areas exempted from the provision *"the use of land for prospecting or mining for base minerals or for any other purpose for which authority, permission or consent is required in terms of any other law or condition contained in the title deed of the land (section 6(2)(c)).*

In summary, the finding that LUPO is applicable to the use of land, including mining, is congruent with the constitutional scheme of concurrent powers. In ***Fuel Retailers*** *supra,* as in this case, unless there is a direct invocation of powers to override LUPO and the MPRDA, both legislative schemes operate as concurrent powers.

FOURTH RESPONDENT'S APPLICATION

Both applicant and the fourth respondent have contended that environmental authorisation in terms of NEMA is required for the mining on the Rocklands Dunes and the Westridge Dunes, because these activities fall within item 20 of GNR 386 of GG 28753 of 21 April 2006 as amended ('activity 20'). In addition, fourth respondent contends that the environmental authorisation in terms of NEMA is required for the mining on the Westridge Dunes because it will entail an activity described in item 12 of GNR 386.

The application of NEMA is made more difficult by virtue of the fact that it has been amended three times since the operation of the MPRDA which commenced on 1 May 2004. The provisions of NEMA which appear to be relevant to the determination of this dispute are complex. It is thus helpful to set them out fully:

"'24 Environmental authorisations

(1) In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential impact on the environment of listed activities must be considered, investigated, assessed and reported on to the competent authority charged by this Act with granting the relevant environmental authorisation.'

'(2) The Minister, or an MEC with the concurrence of the Minister, may identify-

(a) activities which may not commence without environmental authorisation from the competent authority;

'(4) Procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment-

(a) must ensure, with respect to every application for an environmental authorisation-

(b) must include, with respect to every application for an environmental authorisation and where applicable-

'(7) Compliance with the procedures laid down by the Minister or an MEC in terms of subsection (4) does not absolve a person from complying with any other statutory requirement to obtain authorisation from any organ of state charged by law with authorising, permitting or otherwise allowing the implementation of the activity in question.'

'(8) (a) Authorisations obtained under any other law for an activity listed or specified in terms of this Act does not absolve the applicant from obtaining authorisation under this Act unless an authorisation has been granted in the manner contemplated in section 24L.

(b) Authorisations obtained after any investigation, assessment and communication of the potential impacts or consequences of activities, including an exemption granted in terms of section 24M or permits obtained under any law for a listed activity or specified activity in terms of this Act, may be considered by the competent authority as sufficient for the purposes of section 24(4), provided that such investigation, assessment and communication comply with the requirements of section 24(4)(a) and, where applicable, comply with section 24(4)(b).'

'24K Consultation between competent authorities and consideration of legislative compliance requirements of other organs of state having jurisdiction

(1) The Minister or MEC may consult with any organ of state responsible for administering the legislation relating to any aspect of an activity that also requires environmental authorisation under this Act in order to coordinate the respective requirements of such legislation and to avoid duplication.

(2) The Minister or an MEC, in giving effect to Chapter 3 of the Constitution and section 24(4)(a)(i) of this Act, may after consultation with the organ of state contemplated in subsection (1) enter into a written agreement with the organ

of state in order to avoid duplication in the submission of information or the carrying out of a process relating to any aspect of an activity that also requires environmental authorisation under this Act.

(3) The Minister or an MEC may-

(a) after having concluded an agreement contemplated in subsection (2), consider the relevance and application of such agreement on applications for environmental authorisations; and

(b) when he or she considers an application for environmental authorisation that also requires authorisation in terms of other legislation take account of, either in part or in full and as far as specific areas of expertise are concerned, any process authorised under that legislation as adequate for meeting the requirements of Chapter 5 of this Act, whether such processes are concluded or not and provided that section 24(4)(a) and, where applicable, section 24(4)(b) are given effect to in such process.

24L Alignment of environmental authorisations

(1) If the carrying out of a listed activity or specified activity contemplated in section 24 is also regulated in terms of another law or a specific environmental management Act, the authority empowered under that other law or specific environmental management Act to authorise that activity and the competent authority empowered under Chapter 5 to issue an environmental authorisation in respect of that activity

may exercise their respective powers jointly by issuing-

(a) separate authorisations; or

(b) an integrated environmental authorisation.

(2) An integrated environmental authorisation contemplated in subsection (1) (b) may be issued only if-

(a) the relevant provisions of this Act and the other law or specific environmental management Act have been complied with; and

(b) the environmental authorisation specifies the-

(i) provisions in terms of which it has been issued; and

(ii) relevant authority or authorities that have issued it.

(3) A competent authority empowered under Chapter 5 to issue an environmental authorisation in respect of a listed activity or specified activity may regard such authorisation as a sufficient basis for the granting or refusing of an authorisation, a permit or a licence under a specific environmental management Act if that specific environmental management Act is also administered by that competent authority.

(4) A competent authority empowered under Chapter 5 to issue an environmental authorisation may regard an authorisation in terms of any other legislation that meets all the requirements stipulated in section 24(4)(a) and, where applicable, section 24(4)(b) to be

an environmental authorisation in terms of that Chapter.'

(Emphasis added)."

Section 24F(1) thus provides under the heading *"Offences relating to commencement or continuation of listed activity"* that, notwithstanding any other Act, no person may commence an activity listed in terms of section 24(2)(a), unless the competent authority has granted *"environmental authorisation"* for the activity. Environmental authorisation is defined as follows: *"when used in Chapter 5, means the authorisation by a competent authority of a listed activity or specified activity in terms of this Act, and includes a similar authorisation contemplated in a specific environmental management Act"*.

It therefore follows from this provision that, notwithstanding any other Act, no person may commence an activity which has been listed in section 24(2)(a), save where the competent authority has granted an environmental authorisation for the activity under NEMA or a similar authorisation contemplated in a specific environmental management Act. Significantly, in the definition of *"specific environmental management Acts"* the MPRDA is not included.

Section 24(8)(a) of NEMA (which was inserted by section 2 of Act 62 of 2008; that is after the enactment of the MPRDA and which commenced

on 1 May 2009), provides expressly that an authorisation obtained under any other law (such as the MPRDA) for an activity listed in terms of NEMA, does not absolve the person concerned from obtaining authorisation under NEMA, unless an authorisation has been granted in the manner contemplated in section 24L of NEMA.

Briefly, section 24K(1) permits the National Environment Minister or a MEC responsible for environmental affairs to consult with any organ of state responsible for administering *"legislation relating to any aspect of an activity that also requires environmental authorisation under NEMA"* to co-ordinate the respective requirements in such legislation and to avoid duplication. Section 24K(3)(b) empowers the competent authority to take account of any process which was authorised under other legislation as being adequate for meeting the requirements of Chapter 5 of NEMA.

Section 24L of NEMA seeks to clarify the concept of *"the alignment of environmental authorisations"* in cases where a listed activity as set out in section 24 of NEMA is also regulated by another law. Section 24L(1) provides that, if the carrying out of the listed activity contemplated in section 24 NEMA *"is also regulated in terms of another law"* the respective authorities may exercise their powers by *inter alia* issuing an integrated environmental authorisation.

When these provisions are read together, they support Mr. **Breitenbach's** argument that Parliament recognised that activities which required environmental authorisation under NEMA may also be regulated by other legislation which required similar authorisation. Where the requirements for authorisation in terms of legislation other than NEMA would meet the requirements of such authorisation under NEMA, the legislation indicated the desirability for the organs of state responsible for issuing these authorisations to avoid duplication and to integrate their decision making. But critically, the requirement for environmental authorisation under NEMA in respect of listed activities was not removed because the activity may now be regulated in terms of another law.

NEMA IN TERMS OF ITS RELATIONSHIP TO THE MPRDA

First respondent relied upon amendments to NEMA which relate to mining, and when implemented (which is not yet the case), would transfer environmental authorisations relating to mining to third respondent. However, when the 'mining related amendments' to NEMA commence, mining activity will not be absolved from the requirement that authorizations under NEMA are obtained if mining or related operations will entail activities listed under NEMA. All that will happen is that the power to issue those authorizations will be transferred from the

National Environment Minister or the provincial MECs, to the Mining Minister. The authorizations, which he or her successor in that office will issue, will be authorizations in terms of NEMA.

Second respondent relied on the environmental provisions in the MPRDA to contend that this Act has now "incorporated NEMA", which was "an indication that it applies to the exclusion of NEMA". In this regard, Mr. **Oosthuizen** referred to sections 2(h), 5(4)(a), 23(1)(d) and 37 to 39 of the MPRDA. In particular, section 37(1), provides that the principles in section 2 of NEMA apply to all mining and serve as guidelines for the interpretation, administration and implementation of the environmental requirements of the MPRDA.

Mr. **Oosthuizen** also referred to section 38(1)(a), which provides that the holder of a mining concession must, at all times, give effect to the general objectives of integrated environmental management laid down in Chapter 5 of NEMA. Section 38(1)(b), provides that the holder of a mining concession must consider, investigate, assess and communicate the impact of his or her prospecting or mining on the environment as contemplated in section 24(7) of NEMA.

According to Mr. **Oosthuizen,** an applicant for a mining right must in terms of section 39 of the MPRDA conduct an environmental impact

assessment and submit an environmental management programme, whilst a person applying for a reconnaissance permission, prospecting right or mining permit must submit an environmental management plan as prescribed. The environmental investigations, assessments and evaluations necessary for the environmental impact assessment, environmental management programme or environmental management plan, are set out in sub-section 39(3) to (5) of the MPRDA and Part III of 16 of MPRDA Regulations, specifically promulgated with respect thereto, which follow the well-known procedures of a scoping report and environmental impact assessment with public participation.

Mr. **Oosthuizen** thus argued that, with respect to the regulation of the environment specifically affected by prospecting and mining operations, the MPRDA and MPRDA Regulations thus form special statutory measures to deal with the management of the environment in respect of prospecting and mining operations. A special statute is indeed necessary in this regard, because prospecting and mining is a highly specialised field with highly specialised requirements in view of the various mining measures and methods which need highly specialised technical knowledge in order to assess the effect on the environment and the management of the consequences of prospecting and mining. The Department of Mineral Resources is well-placed to effectively regulate this aspect, as contemplated by section 24 of the Constitution.

In Mr. **Oosthuizen's** view, Parliament has entrusted the management of the environment, as contemplated in section 24 of the Constitution, to the Minister of Mineral Resources through the MPRDA inasmuch as the effect and management of prospecting and mining activities on the environment are concerned.

To evaluate these contentions, it is necessary to refer again to sections 24(8) and 24L(4) of NEMA. These provisions deal expressly with the question whether the obtaining of authorisations for activities under other laws, which include the processes for the investigation, assessment and communication of the potential impacts or consequences of the activities, absolves the holders of those authorisations from obtaining environmental authorisations under NEMA, if the activities are listed or specified under NEMA. In my view, these provisions make clear, notwithstanding the processes and authorisations under other laws including the MPRDA, that an environmental authorisation under NEMA must be obtained unless the competent authority, empowered to issue the NEMA authorisation, decides to regard the authorisation under another law as a NEMA authorisation because it meets all the requirements stipulated in section 24(4).

The further difficulty with an argument that a NEMA authorisation is, in effect, not necessary, is the provision of section 24F(1) which provides

that the requirement of an "environmental authorisation" (a term defined in section 1 to mean an environmental authorisation under NEMA or another specific environmental Act, which does not include the MPRDA) for activities listed or specified in terms of section 24(2) operates "notwithstanding any other Act".

To the extent that Mr. Oosthuizen's interpretation of the MPRDA has any linguistic attraction, particularly before the NEMA amendments begin to operate, then the equally plausible interpretation of Mr. **Breitenbach** must hold way. Environmental protection is enshrined as a right in the Constitution. Hence, this Court must interpret legislation to give as much tangible protection to this right as the language of the applicable statutes can reasonably bear. That is the effect of the mandate given to this Court by section 39(2) of the Constitution. In any event, there is no express provision that the provisions of the MPRDA outlined above, render the NEMA provisions redundant.

MINING ACTIVITY BY 1ST RESPONDENT

Activity 12 is defined as *"the transformation or removal of indigenous vegetation of three hectares or more of any size whether transformation or removal would occur within a critically endangered ecosystem listed*

in terms of section 52 of the National Environmental Management Biodiversity Act, 2004.

It has not been disputed that large parts of the dunes are covered with indigenous vegetation and that the vegetation will be removed during the mining operations. First Respondent contends that the size of the mining will result in the removal of 14.67 hectares of natural vegetation and, save for a dispute about the extent thereof, there appears to be no dispute that indigenous vegetation will be so removed. For these reasons therefore, Mr. **Breitenbach** was correct, in my view, to submit that the provisions of NEMA are applicable and thus require that environmental authorisation must be obtained in respect of each listed activity.

It also follows from the structure of NEMA, as I have outlined it, and the fact that the MPRDA did not require an environmental impact assessment before a mining right may be granted, that an authorisation under NEMA was required. See, in particular sections, 24(8)(A), section 24K and section 24L of NEMA.

I turn then to deal with whether the mining on the dunes falls within activity 20. Activity 20 is defined as *"the transformation at any area zoned for use as public open space or for a conservation purpose to another use"*. It is common cause that the erf upon which the Rockland

Dunes was situated and two or three erven on which the Westridge Dunes are situate are zoned public open space under the zoning scheme regulations of the Municipality of the City of Cape Town Zoning Scheme or the Town Planning Scheme of the Divisional Council of the Cape.

From the papers, it is clear that the nature of sand mining that is proposed will entail the removal of the indigenous vegetation in the mining areas and the removal of large quantities of sand comprising the dunes. At the very least, for the duration of the mining activities, the use of the surface of the mining area will be transformed. Neither first nor second respondent disputed fourth respondent's assertion that for *"the duration of the mining activities the land being mined will not be able to be used as public open space"*.

THE MINING PERMITS

As further support for the argument that it was not intended to exclude the land zoning and environmental legislation from the matrix of considerations dealing with mining in this case, the terms of the permits granted by second respondent need to be taken into account.

The mining permit issued to first respondent in respect of Erf 13625 was issued in terms of section 27 of the MPRDA. It expressly provides *"this*

permit does not exempt the holder from the requirements of any provision of any of the laws or from any restrictive provisional conditions contained in the Title Deed of the land concerned nor does it encroach upon the rights of any person who may have an interest in the land concerned". (my emphasis)

Insofar as erven 1210, 1848 and 9889 Mitchell's Plain (the Westridge Dune) are concerned, the mining right is contained in a 12 page document issued in terms of section 23(1) of the MPRDA. Of particular relevance is paragraph 16 thereof which is entitled *"compliance with the laws of the Republic". It provides that "the granting of this right does not exempt the Holder and its successors in title and/or assigns from complying with the relevant provisions of the Mine, Health and Safety Act . . . and any other law enforced in the Republic of South Africa* (my emphasis)".

Whatever the debate about the meaning of 'any other law', both of these clauses which are contained in the relevant permits clearly provide that restrictive provisions and conditions contained in the title deed might prevent the exercise of the mining right. Viewed accordingly, the permits appear to be based on the premise that legislation, including the MPRDA, do not over-ride such restrictive provisions or conditions.

Mr. **Budlender** correctly contended that, if a restriction in a title deed could prevent the exercise of the right to mine, it was difficult to see the basis by which it could be contended that another law such as LUPO or NEMA could not similarly prohibit mining from taking place, save with the permission of the relevant authority, in this case the local authority or, on appeal, the provincial government. It is equally difficult to conceive of a plausible response to the point that, while the rights of neighbours may be protected by virtue of a condition in a title deed, the rights of a broader constituency could not be protected by a specific piece of legislation, the very purpose of which is to provide such a form of protection to the community.

RELIEF

The basis of the relief sought by both applicant and fourth respondent is in the form of a final interdict. The requirements for a final interdict are trite; being the establishment of a clear right, an injury actually committed or reasonably apprehended and no other satisfactory remedy, that is, an absence of similar protection by any means other ordinary remedy. ***Setlogelo Setlogelo*** 1914 AD 221 at 227.

In this case, applicant has shown a clear right to enforce the zoning conditions of LUPO in the interests of the local community. It has

adopted the view that the conduct of unlawful mining activities may pose a danger to the public and hence it relies on a LUPO requisite approval to be obtained to mine. Without this authorisation, and were mining to continue, applicant's powers to comply with its statutory obligations in terms of LUPO would be undermined. In effect, its authority to regulate matters, within its jurisdiction, in the public interest as well as to carry out its constitutional and statutory duties will be significantly undermined.

The injury reasonable apprehended by both applicant and fourth respondent is first respondent's unlawful breach of the provisions of LUPO and NEMA on land owned by applicant and which lands falls within the applicant's area of jurisdiction. Applicant has already mined on Erf 13625. It is clear from the papers that it intends to undertake mining on all four erven, pursuant to the mining right or permit it possesses, without regard to the provisions of LUPO and NEMA. To the extent that applicant has made efforts to obtain an undertaking from first respondent to desist from mining, pending authorisation, these have proved unsuccessful.

There does not appear to be any effective, alternative remedy which is available to applicant and fourth respondent. It would be extremely

difficult to quantify the damages caused by the unlawful conduct of first respondent in order to bring a claim against it. Furthermore, damages which sought to address the injury suffered by applicant as the owner of the land would not deal with the continuing injury which may be caused to applicant as the local authority, by virtue of the breach of its land use legislation.

Given the conclusions to which I have come, there is no need to consider the conditional applications brought by fourth respondent.

ORDER

For these reasons the following order is made:

It is declared that:

1. the respondent may not commence or continue with mining operations on erf 13625, Mitchell's Plain; erf 9889, Mitchell's Plain; erf 1848, Schaapkraal; and/or erf 1210, Mitchell's Plain ('the properties') until and unless authorisation has been granted in terms of the Land Use Planning Ordinance 15 of 1985, Cape ('LUPO') for the land in question to be used for mining;

2. the first respondent may not commence or continue with mining operation on the properties until and unless an

environmental authorisation has been granted in terms of the National Environmental Management Act 107 of 1998 ('NEMA') for the carrying out of the activity identified in item 20 of Government Notice R386of 21 April 2006 on the land in question;

3. the first respondent may not commence or continue with mining operations on erf 9889, Mitchell's Plain; erf 1848, Schaapkraal; and erf 1210, Mitchell's Plain until and unless an environmental authorisation has been granted in terms of NEMA for the carrying out of the activity identified in item 12 of Government Notice R386 of 21 April 2006 on the land in question.

4. The first respondent is interdicted from commencing or continuing with mining operations on the properties until and unless;

   4.1 authorisation has been granted in terms of LUPO for the land in question to be used for mining.

   4.2 an environmental authorisation has been granted in terms of NEMA for the carrying out of the activity identified in item 20 of Government Notice R386 of 21 April 2006 on the land in question.

5. The first respondent is interdicted from commencing or continuing with mining operations on erf 9889, Mitchell's Plain; erf 1848, Schaapkraal; and erf 1210, Mitchell's Plain until and unless an environmental authorisation has been granted in terms of NEMA for the carrying out of the activity identified in item 12 of Government Notice R386 of 21 April 2006 on the land in question.

6. The costs of this application are to be paid by first and second respondents, jointly and severally with one another, including the costs of two counsel.

DAVIS J.

I agree.

BAARTMAN J.