COUNTRY REPORT: SOUTH AFRICA
Developments in Environmental Law during 2012

MICHAEL KIDD*

Introduction

Although there was no new significant environmental legislation during 2013, there were several judgments that warrant discussion. There are several important environmental Bills in the pipeline, but discussion of those can be held over until later.

Cases

In the two previous South African Country Reports, I discussed the *Maccsand* decisions in the High Court and then in the Supreme Court of Appeal (SCA). In 2012, the matter was decided by the Constitutional Court.[1] As expected by most commentators, the court reached a finding on the principal issue that did not depart from the decisions of the two courts a quo. In brief, this issue was whether the holder of a mining right (in general terms - this could include any mining-related right, including a prospecting right) was required to obtain the relevant land-use planning authorisation before commencement of mining, or whether the granting of the mining right rendered such authorisation unnecessary. In both previous decisions, the courts held that the holder was not relieved of having to obtain land use planning permission under the relevant legislation (in this case, the *Western Cape Land Use Planning Ordinance*[2] (LUPO)).

The Constitutional Court characterized the principal issue as 'whether a holder of a mining right or permit granted in terms of the Mineral and Petroleum Resources Development Act[3] (MPRDA) may exercise those rights only if the zoning scheme made in terms of LUPO permits mining on the land in respect of which the mining right or permit was issued'.[4]

---

* Professor of Law, University of KwaZulu-Natal, South Africa. Email: kidd@ukzn.ac.za.

[1] *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) (this judgment will be referred to as *Maccsand* throughout the rest of this article).
[2] See *City of Cape Town v Maccsand (Pty) Ltd* 2010 (6) SA 63 (WCC) and *Maccsand (Pty) Ltd and another v City of Cape Town and Others* (2011) 6 SA 633 (SCA).
[3] *Act* 28 of 2002.
[4] *Maccsand,* para 34.

The court held that the regulation of land use (the function of LUPO) 'constitutes municipal planning, a functional area which the Constitution allocates to the local sphere of government'.[5] Because (most) mining takes place on land, there would inevitably be an overlap between the functions of the LUPO and the MPRDA, but this overlap 'does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments'.[6] The court observed that there was nothing in the MPRDA that excluded the application of LUPO in respect of the granting of mining rights. Moreover, the MPRDA in section 23(6) provides that a mining right in terms of the Act is 'subject to this Act, *any relevant law*, the terms and conditions stated in the right and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years'.[7]

Maccsand's arguments as to why LUPO should not be applicable were dealt with by the court as follows. First, the argument that LUPO was not a 'relevant law' because it does not apply to mining (as opposed to something like the *Mine Health and Safety Act*, for example) was rejected by the court as there is nothing in the MPRDA that confines the phrase 'relevant law' to laws regulating mining only. Consequently, the ordinary grammatical meaning is applicable.[8] The second argument posited that mining being subject to compliance with LUPO would result in local government usurping the functions (mining, in this case) of national government in a constitutionally impermissible manner. The court rejected this argument because LUPO does not regulate mining – it regulates land use. LUPO and the MPRDA operate alongside each other.

A further argument was raised to the effect that allowing the municipality to exercise land use decisions in terms of LUPO would enable the local government to 'veto' decisions of the national sphere on a matter that falls within the exclusive competence of the latter. The response of the court was that -

> 'the Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government

[5] Ibid, para 42.
[6] Ibid, para 43.
[7] Emphasis added.
[8] Ibid, para 45.

> to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another'.[9]

Maccsand argued further that, since LUPO provided for the landowner to apply for the rezoning of land, a holder of mining rights that was not the landowner (as was the case in *Maccsand*) would never be able to exercise those rights. The court observed, however, that land may also be rezoned at the instance of the municipality and the province. Since, in this case, the municipality was opposed to rezoning, 'it is still open to Maccsand to request the Provincial Government to intervene and have the rezoning effected'.[10]

Maccsand's final argument was, if both the MPRDA and LUPO apply to land use for mining, then the application of the two laws gives rise to a conflict that must be resolved by means of section 146 or section 148 of the *Constitution*. The main reason for dismissing this argument was that, according to the court, there is no conflict between the two statutes as each 'is concerned with different subject matter'.

The court thus held that the appeal must fail. There is little new or surprising in the judgment as it essentially echoes what had been decided in the SCA and the High Court before. The reasoning process of the court outlined above is, in my opinion, unassailable and the decision is supported.

The Constitutional Court also dealt with the issue of the application of the *National Environmental Management Act*[11] (NEMA) and its provisions relating to environmental impact assessment to the mining application. The Constitutional Court agreed with the position taken by the SCA - since the applicable provisions of NEMA were not applicable to the mining activities at the time, NEMA was not applicable. In the course of reaching this conclusion, the court made some rather confusing (and incorrect) statements about the applicability of NEMA vis-à-vis the MPRDA. The legal position in this respect is an absolute minefield and it is hoped that proposed amending legislation will clarify issues. At the end of the day, potential mining must be subject to environmental impact assessment, but the crucial issues to be determined by the legislative amendments will be the standards applicable and, probably most importantly, who will make the decision – the Minister of Mineral Resources (who is responsible for the promotion of mining in the country) or the competent environmental authorities (national or provincial). Watch this space.

---

[9] Ibid, para 47.
[10] Ibid, para 49.
[11] Act 107 of 1998.

A second case, *Minister of Mineral Resources v Swartland Municipality and Others*[12] dealt with essentially the same issue as the *Maccsand* case and the court came to the same conclusion.

Still on the subject of land-use planning (this time without the added complexity of mining), the judgment in *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning*[13] involved an attempt at unravelling interwoven spatial planning regimes. It concerned a planned development within the Bitou Municipality, just outside of the urban area of Plettenberg Bay. The applicant sought to have the Knysna-Wilderness-Plettenberg Bay Regional Structure Plan (RSP) amended to have the relevant properties, at the time designated for 'recreation' use changed to 'township development'. Although the municipality supported the application, the MEC (provincial minister) refused the application.

For present purposes, only one aspect will be considered – the argument that the RSP was invalid because it was 'based upon and informed by race-based separate development [apartheid] planning principles'. The court identified that the RSP had been prepared and approved in 1982-3, when the 'full panoply' of apartheid legislation, including the *Group Areas Act*, was in force. The Applicant thus argued that the RSP is rooted in apartheid policy and thus is in conflict with several aspects of the *Constitution*. In response, it was argued on behalf of the MEC, that (in short) the race-based elements of the RSP had been ignored since the *Group Areas Act*'s repeal in 1991 and that no decisions taken in terms of the RSP since then had been informed by apartheid thinking.

In a detailed analysis of the RSP, the court highlighted aspects that were grounded in apartheid thinking and concluded, in short, that it was not possible to divorce individual planning decisions from the underlying racial basis of the plan. Although recognising that individual decisions had been taken without direct reference to apartheid considerations, any amendments to the RSP had been ad hoc and there had not been a comprehensive review of the plan after the demise of apartheid, which would have been necessary to remove the underlying race-based assumptions in the document. The conclusion of the court was, therefore, that the RSP is -

> 'an instrument that violates the founding values of human dignity and non-racialism in s 1 of the Constitution and the fundamental rights of equality and dignity in ss 9 and 10 of the

[12] [2012] ZACC 8.
[13] 2012 (3) SA 441 (WCC).

> Constitution. … If past laws sanctioning racial segregation materially influenced the content of the RSP, as I find to be the case, inconsistency with the Constitution is manifest'.[14]

The same RSP was involved in the case of *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning.*[15] The case involved a review under section 6 of the *Promotion of Administrative Justice Act*[16] against a decision dismissing the applicant's appeal against a refusal of an environmental authorisation[17] for which it had applied. The activity for which authorisation was required was a retirement village, to be established on a property currently zoned for agricultural use. The relevant RSP had been amended to allow for 'township development'.

Almost five years after the application had been lodged, the environmental authorisation was refused on the following grounds: fynbos vegetation on the site required conservation; part of the property comprised a critical biodiversity area; and there were concerns about urban sprawl, and provision of water and sewage. Moreover there was opposition to the development taking place outside the 'urban edge' and the 'no go' alternative would enable the area to retain a rural setting. An (administrative) appeal against the decision was unsuccessful, the appeal decision essentially reiterating the points outlined above.

The applicant had several arguments as to why the decision ought to be set aside but only one will be discussed here - that there were relevant considerations which the Minister failed to take into account, viz. the surrounding land usages and recent structure plan amendments. The court took into account a number of surrounding developments and structure plan amendments as well as the apparent fact that the MEC regarded previous land use decisions having been taken in the area as having been wrongly decided. The MEC's department was on record as having indicated that the effects of these previous incorrect decisions would be, in effect, corrected by making use of the environmental authorisation process to refuse developments. This rather complex situation was further complicated by the fact that the relevant RSP had been declared unconstitutional in the *Shelfplett* case, discussed above, although the invalidity had not been declared at the time the administrative decision in the *Clairison's* case was made. The court decided that the MEC had erred in not taking into account the factual aspect of the existing surrounding

[14] Ibid, para 51.
[15] Unreported case 26165/2010 (WCC). Judgment handed down on 16 May 2012.
[16] Act 3 of 2000.
[17] An 'environmental authorisation' is the authorisation envisaged by section 24 of NEMA, following an environmental assessment process.

developments, although some of the legal reasoning leading to this conclusion is, in my view, dubious. The applicant's other arguments were also accepted by the court, and the decision was set aside.

Overall, while one can sympathise with the applicant on the basis that its proposed development would appear to be in keeping with the existing surrounding developments, this decision would make it very difficult for an official to make decisions that prevent further unlawful development in the face of the factual presence of such developments. Moreover, even if the surrounding developments were lawful, surely there could be circumstances in which an MEC is entitled to decide that there is a need to prevent further development in an area?

If the decision in *Clairison's* was debatable, there can be little argument that the decision in *Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West*[18] is plain wrong. The case involved the illegal construction of a lodge (the Kgaswane Lodge) in the Magaliesberg, in a protected environment.[19] The activity in question had been 'rectified' in terms of section 24G of NEMA and an appeal by the applicant against the section 24G rectification decision had been dismissed. The effect of this was that the development was authorised, despite not having gone through the environmental assessment process it ought originally to have followed. The application in this case was a review against the decision to dismiss the applicant's appeal and a request for an order requiring demolition of the lodge, which was all but complete at the time of the application. This case is not only a weak judgment but also highlights the problems with the section 24G process, which urgently needs an overhaul.

For purposes of this article, discussion will focus on three main issues. The first is the environmental management framework (EMF) for the area in question and whether or not it ought to have been taken into account in the decision. The second is the question of ecotourism, and the third the matter of costs.

The applicant argued that the MEC, in deciding the appeal against the s 24G decision, ought to have taken the relevant EMF into account. The EMF indicates, inter alia,-

[18] Unreported *Case 1776/2010 (NWM).*
[19] A protected environment is a protected area in terms of the *National Environmental Management: Protected Areas Act* 57 of 2003 (see sections 28-30). It is possible for development to take place in such a protected area, subject to authorisation.

> 'that the area where the Lodge is located, is a zone marked "highly sensitive" on the Environmental Sensitivity Map, and further that the EMF for the MPE [Magaliesberg Protected Environment] indicates the types of activities that would be undesirable in that particular area, which listed activities are identified and include hotels, public and private resorts and conference facilities'.[20]

The main problem with the applicability of the EMF in this case was its timing. The EMF was published in the *Gazette* on 17 March 2009, a few days after the Chief Director had decided on the section 24G application on 9 March 2009. The appeal decision by the MEC was, however, handed down on 19 January 2010.

The court decided that the EMF was not applicable, in essence because it was not yet 'in force' when the section 24G decision was made.[21] While this may be accurate as far as the initial decision is concerned, it certainly is not in regards to the appeal decision. The court reasoned: 'As to whether or not the EMF of the MPE area should have been considered by the MEC on appeal because of the fact that it had become operational when he was seized with the appeal, is an issue that has to be considered by establishing whether or not the EMF for the MPE area could be applied retrospectively, in that regard'.[22] But the retrospectivity of the application of the EMF is completely irrelevant in this case. As the court, correctly, recognised later in the judgment,[23] the appeal provided for in section 43 of NEMA, and which was applicable in this case, is a 'wide' appeal: the appeal is essentially a new decision and the review of the decision is the review of the appeal decision.[24] The application for review recognized this in that it asked for the *appeal* decision to be reviewed and set aside. This required the MEC on appeal to take the EMF into account, not because there was a rule allowing for its retrospective application, but because it was applicable when the MEC decided the matter. The result of the MEC not taking it into account is that the decision failed to take into account a (critically) relevant consideration and, consequently, the decision must be invalid. The review application ought, therefore, to have been granted.

Related to this aspect is the applicant's argument that, although the EMF was not gazetted at the time of the initial section 24G decision, the factual matrix on which it was based must have been known to the decision-makers (the EMF originated in the same department that

[20] *Magaliesberg Protection Association*, para 45(d).
[21] Ibid, para 49.
[22] Ibid, para 50.
[23] Ibid, para 53.
[24] See C. Hoexter, *Administrative Law in South Africa* 2nd ed (2012) 68-70.

made the section 24G decision). Ultimately, taking into account the relevant considerations in this regard is not only taking into account considerations that are in existence in a legal sense, but factual considerations. The facts upon which the drafters of the EMF concluded that the zone was 'highly sensitive' did not emerge only when the EMF was published, but were well-known when the initial decision was made. This argument is very compelling and was not really considered by the court.

The second noteworthy aspect is the emphasis given by the court to the argument that the lodge was an example of ecotourism and, consequently, a desirable development in the area in question.[25] This is problematic because the assertion was not interrogated at all by the court. A recreational development in a protected area is not axiomatically an ecotourism development. The court seems completely oblivious to this.

Finally, the court, in considering an order as to costs, felt that section 32(2) of NEMA was not applicable because, in essence, the applicant was unreasonable in asking for the demolition of the lodge.[26] (I say 'in essence' because it is very difficult to follow the 'reasoning' of the court in this regard). While it may have been tactically ill-advised for the applicant (apparently) to ask only for a demolition order, the court was able to make any order that was just and equitable in the circumstances.[27] Moreover, the applicant was not only asking for the demolition of the lodge, it was also asking for the review and setting aside of the decision. This latter aspect is important because, even if the court had no appetite to order demolition, declaring the decision invalid does send an important message.

A subsequent judgment refused leave to appeal and whether this matter is taken further will be interesting. For such a weak judgment not to be ventilated further on appeal will be a travesty.

---

[25] Ibid, paras 67, 68 and 75.

[26] Section 32(2) of NEMA reads: A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.

[27] Promotion of Administrative Justice Act 3 of 2000, section 8(1).

Conclusion

The *Maccsand* decision on the mining/land use planning interface was welcome and important, but legislative amendments might change the effect of the judgment. As for the other judgments discussed here, several involving the simultaneous application of environmental legislation and administrative law, the courts are still often not getting it right. When faced with imperfect application of environmental law by the administrative bodies responsible for its implementation, it is important for courts to be able to lay down markers for appropriate administrative action. If the courts fail to do this, it need hardly be said that the effectiveness of environmental law is severely compromised.