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Developments in South African Environmental Law during 2010: Focus on Two Decisions Relating to Mining

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Introduction

There are several noteworthy developments during 2010 in South African environmental law. Although there have been no new environmental Acts, there has been considerable legislative activity at the administrative rule-making (delegated legislation) level. This is important since many of the Acts are of a framework nature, leaving the detail to regulations. The most noteworthy regulations promulgated during the year are: the air quality emission standards in terms of the *National Environmental Management: Air Quality Act* (39 of 2004); draft norms and standards for hunting in terms of the *National Environmental Management: Biodiversity Act* (10 of 2004); the commencement of the licensing provisions in the *Air Quality Act* and the identification of polluting activities, together with publication of minimum emission standards for those activities; new EIA regulations and listing notices (listing those activities for which some form of assessment is required) and the environmental management framework regulations made in terms of the *National Environmental Management Act* (107 of 1998); and a set of regulations under the *National Water*

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Act (36 of 1998) for the establishment of a water resource classification system. At the policy level, South Africa has seen the publication of a draft *National Strategy for Sustainable Development*, and, just before the deadline for this piece, a *Green Paper on Climate Change*.

Notable new cases either reported or handed down during the year include: the case of *Sea Front for All and Another v MEC: Environmental and Development Planning, Western Cape Provincial Government*[1] which concerned the validity of an environmental authorisation (based on an EIA process) for a development in Cape Town; and two cases dealing with the relationship between provincial land-use planning legislation and national minerals legislation: *Swartland Municipality v Louw NO and Others*[2] and *City of Cape Town v Maccsand (Pty) Ltd*.[3] The discussion in this report will focus on the latter two cases.

The Relationship Between Land-use Planning and Mining

Mining is probably the biggest area of environmental concern in South Africa right now. Many parts of the country, including productive agricultural land, protected areas and wetlands, are under threat of mining. In the province of Mpumalanga, for example, vast swathes of the province are under either prospecting or mining operations. Moreover, there are concerns that the amount of money set aside for rehabilitation post closure (as required by law) is, in most cases, inadequate. The importance of the funding of rehabilitation and the addressing of post-closure impacts is highlighted by the enormous problem of acid mine drainage, particularly on the reef (Gauteng province, including Johannesburg and its immediate surrounds), where there have already been decants. Research suggests that the centre of Johannesburg is under threat of decanting within a few years. The proliferation of mining seems to be happening hand in hand with significant 'black economic empowerment' deals and widespread suggestions of corruption. The latter seems to have been the reason for the decision of the Minister of Minerals in August of this year to declare a moratorium on the issue of any new mining rights (including

[1] Unreported Case No. 15974/07 (WC).
[2] Unreported Case No. 13703/9 (WC).
[3] Unreported Case No. 4217/2009 (WC).

prospecting rights). It is in this broad context that the two cases discussed below must be seen.

Before dealing with the judgments, it will be instructive to discuss, very briefly, the legislation governing the situation. In terms of the *Constitution of the Republic of South Africa* of 1996, mining and minerals is a 'functional area' of exclusive national legislative competence. Mineral rights are granted in terms of the *Minerals and Petroleum Resources Development Act* (28 of 2002) (*MPRDA*). This is national legislation governing the entire country. On the land-use planning side, the provinces have exclusive legislative competence in terms of the Constitution in the field of provincial planning. All provinces have town planning legislation pertaining to each province's area of jurisdiction. This legislation contains provision for town planning, which includes subdivision control and zoning regulation. Town planning schemes, which zone land into different land-use zones, are promulgated in terms of the provincial town planning laws and themselves have the force of law. 'Municipal planning', on the other hand, is a functional area of concurrent national and provincial legislative competence, regarded as a local government matter.

Judgment in the *Swartland Municipality* case was delivered on 21 December 2009 in the Western Cape High Court, per La Grange J. The central issue in this case was whether the issue of mining rights in terms of the *MPRDA* resulted in the owners of the land being exempt from applying for a change in land use in terms of the *Western Cape Land Use and Planning Ordinance* (15 of 1985) (*LUPO*). The applicant sought an interdict preventing the fifth respondent (Elsana Quarry (Pty) Ltd) from continuing mining activities on a farm within the applicant's jurisdiction that had not been properly rezoned from Agricultural I to Industrial III (which permits mining) in terms of the relevant town planning scheme under the *LUPO*. From the facts it appeared that Elsana had submitted a rezoning application, but had withdrawn this when advised (in effect) by the Department of Minerals that this was unnecessary, since (in the view of the Department of Minerals) the province's ability through *LUPO* to regulate mining as a land use is constitutionally impermissible.

Applicant's view was that *LUPO* was 'relevant law' applying to mining operations, which was thus required by the *MPRDA* to be observed (sections 23(6) and 25(2)(d) of the *MPRDA* subject the holder of a mining right to observe any 'relevant law'). The argument of the respondents was that the functional area of mining and minerals being an area of exclusive national competence, the *MPRDA*'s reference to 'relevant law' did not include *LUPO*, since *LUPO* is inconsistent with the *MPRDA* and *Constitution*. The Court decided that, in the light of the municipality's responsibilities in respect of municipal planning, and the fact that the *LUPO* was in existence at the time that the *MPRDA* was promulgated, that *LUPO* was a 'relevant law' as contemplated by the *MPRDA*.

The Court then turned to the question as to whether there was a conflict between the *MPRDA* and *LUPO*, requiring resolution in terms of section 146 of the *Constitution*. The Court considered that the planning role of the Municipality (as regulated by *LUPO*) is required by the *Constitution*, and hence there was no question of *LUPO* being unconstitutional. The Court also held that *LUPO* does not unlawfully intrude into the area of national competence – such as mining. Rezoning, according to the Court –

> 'can … not be regarded as a matter connected to the issuing of mineral rights to such an extent that it is also regulated thereby and in fact renders provincial and municipal planning legislation as provided for constitutionally, superfluous. The MPRDA is silent on the issue of rezoning. The MPRDA can therefore not be read as impliedly having repealed legislation with LUPO's character and aim'.[4]

The Court also indicated that –

> 'given the fact that the object and focus of the MPRDA and LUPO are not the same, as well as the fact that provincial and local spheres of government are given considerable constitutional latitude to regulate areas of interests, the impact of which

[4] At paragraph 38.

can only be locally determined, the MPRDA cannot be regarded as water-tight to the exclusion of relevant zoning legislation'.[5]

Consequently, the Court granted the interdict.

In the *Maccsand* case, the issue was similar to that in the *Swartland Municipality* case: whether the issue of mining rights in terms of the *MPRDA* resulted in the owners of the land being exempt from having to obtain authorization for the use of that land, primarily in terms of the *LUPO* and the *National Environmental Management Act* (*NEMA*). The applicant and fourth respondent (Minister of Local Government, Environmental Affairs and Development Planning, Western Cape) brought an interdict restraining the first respondent from commencing or carrying on mining activities on three erven (plots) in the Mitchell's Plain area (part of Cape Town's municipal jurisdiction) until such time as the respondent had obtained the necessary authorization under *LUPO* and *NEMA*. The first respondent had been granted mining rights in terms of the *MPRDA* by the second respondent (Minister of Minerals and Energy). Neither of the areas in which these mining operations were to take place was zoned for mining in terms of LUPO.

The essential thrust of the respondent's arguments was that the *MPRDA* 'trumps' other legislation and that a change in the zoning under *LUPO* was therefore not necessary. Were it to be otherwise, it was argued, then *LUPO* could essentially 'veto' mining where the mining rights had been granted. It was pointed out by counsel for the applicant that there were provisions for departure from the zoning scheme that could be exercised in relevant circumstances, which would remove (in effect) the alleged 'veto'.

Following consideration of the definition of 'municipal planning' given to the term by the Constitutional Court in *The City of Johannesburg Metropolitan Municipality v The Gauteng Development Tribunal*[6], the Court concluded that municipal planning

[5] At paragraph 41.

[6] [2010] ZACC 11.

includes the control and regulation of the use of land falling within a municipality's jurisdiction and national and provincial spheres of government cannot legislatively furnish themselves with the power to exercise executive municipal powers nor the right to administer municipal affairs.[7]

The Court also observed that section 25(2) of the *MPRDA* provides that the holder of a mining right must comply with the provisions of 'any other relevant law under terms and the conditions of the mining right'. Had parliament wanted the *MPRDA* to override any other law, the Court observed, it would have provided so explicitly. The Court consequently concluded that *LUPO* does apply in the circumstances of the case, observing that the finding does not preclude the possibility of an overlap between the powers of local and national government. Having so concluded, it fell to the Court to decide on whether mining qualifies as a 'land use' and thus fall within the applicant's planning powers. Respondent contended that mining was not provided for as a land use in *LUPO*. The court did not agree and held that mining was a land use for present purposes.

It was also contended (by the provincial environment department – fourth respondent) that the mining activities in question constituted activities requiring environmental authorizations in terms of section 24 (and the relevant regulations) of *NEMA*. The Court considered the provisions of *NEMA* in some detail but, perhaps most critically, highlighted section 24(8)(a) as providing that 'authorisations or permits 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 and any such other authorisations or permits may only be considered by the competent authority unless an authorisation has been granted in the manner contemplated in section 24L [which deals with alignment of authorization procedures]'. The Court concluded, importantly, that the requirement for environmental authorization under *NEMA* in respect of listed activities was not removed because the activity may now be regulated in terms of another law.

In the face of arguments that the *MPRDA* had now 'incorporated' *NEMA* (and that the necessary environmental considerations were taken into account in the *MPRDA* application process), the court reverted to sections 24(8) and 24L of *NEMA* to

[7] At page 17 of the judgment (no paragraph numbers appear in the judgment).

conclude that the *MPRDA* did not incorporate *NEMA* and that a *NEMA* authorisation was required irrespective of whether the activity was approved in terms of other legislation.

The Court concluded that the mining activities did fall within the list of identified activities under *NEMA* (and there seemed to be no argument on this score). Moreover, the Court observed that the terms of the respondent's permits under *MPRDA* provided explicitly that the holder of the rights was not exempted from compliance with other relevant legislation. Consequently, the Court found in favour of the applicant. The effect of the order of the Court (Davis J, Baartman J concurring) is that the respondent is interdicted from commencing or continuing with mining activities until such time as the necessary approval is obtained in terms of *LUPO* and *NEMA*.

In my view, both the *Swartland Municipality* and *Maccsand* cases are correct. The court in *Maccsand*, unfortunately, did not address head-on the contention that *LUPO* was in conflict with *MPRDA*. This contention is misguided, in my opinion, because, if the appropriate zoning is in place, then there is no conflict. As pointed out in the judgment, there are various mechanisms available, both in *LUPO* and *MPRDA*, to override zoning obstacles in cases where mining is of national importance. It would be a sad day, however, if a relatively minor sand winning operation (as in this case) were seen to be so important as to trump legitimate local planning powers.

The facts of both of these cases are indicative of an apparent trend in the Department of Mineral Resources to regard the *MPRDA* as trumping all other legislation – there is anecdotal evidence to suggest that applicants for mineral rights are being told by the Department that they do not require water use licences (all mining operations inevitably involving at least one of the water uses defined in the National Water Act as requiring such licences). These cases go some way to disabusing the department of that view, but there is much still to be done in this regard. It may well be that either or both of these cases will end up in the Supreme Court of Appeal before long.