

**Reportable**

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

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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 20<sup>th</sup> day of August 2010**

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**DAVIS J**

**INTRODUCTION**

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

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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 even 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 contiguous 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.

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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 terms 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 Minister 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

