REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA Case No: 10629/2012

In the matter between:

MTUNZINI CONSERVANCY Applicant

and

TRONOX KZN SANDS (PTY) LTD First Respondent

UMLALAZI MUNIUCIPALITY Second Respondent

JUDGMENT

Delivered on 8 January 2013

Vahed J:

[1] The first respondent conducts business, *inter alia*, as an extractor of minerals from the earth. In ordinary parlance, it is in the mining business. One of its areas of operation is described in the papers as the "Fairbreeze mining enterprise", or more simply as the "Fairbreeze mine", where the mining operations are, as described in its answering affidavit, "… directed at extracting the heavy minerals from five ore bodies present in what are technically described as 'mineralised sand dunes'. It should be clarified, however, that these dunes are not the first dunes from the beach, but are in fact ancient accumulations of soil situated almost exclusively more than a kilometre from the high water mark of the sea … [and] … the soil or sand in the mining area is very much like the well-known red-coloured 'Berea sand' …" familiar to most. The Fairbreeze mine extends over a number of adjacent

immovable properties, which lie immediately south of the townlands of Mtunzini on the KwaZulu-Natal north coast, and the parcel of land, taken as a whole, in part straddles the N2 National Highway ("the Fairbreeze properties"). They all fall within the area of jurisdiction of the second respondent. The five iron ore bodies are, however, not contiguous.

[2] This application concerns the applicant's entitlement to an interdict restraining the first respondent from commencing or continuing any development, as defined in section 1, read with section 38(3), of the KwaZulu-Natal Planning and Development Act, No 6 of 2008 ("the KZNPD Act"), including, but not limited to, the carrying out of construction, mining or any other operations on any portion of the Fairbreeze properties until the first respondent has applied for and has been granted approval for its proposed development by the second respondent in terms of section 38(1) of the KZNPD Act. Section 1 of the KZNPD Act defines *Development* in the following terms:

' "**development**" in relation to any land, means the erection of buildings and structures, the carrying out of construction, engineering, mining or other operations on, under or over land, and a material change to the existing use of any building or land for non-agricultural purposes;'

and section 38 of that Act says:

'**38. Development of land situated outside area of scheme permissible only In accordance with this Chapter.—**

(1) The development of land situated outside the area of a scheme may only occur to the extent that it has been approved by a municipality in whose area the land is situated.

(2) A municipality may approve the development of land situated outside the area of a scheme only in accordance with this Act.

(3) For the purposes of this Chapter development means the carrying out of building, construction, engineering, mining or other operations on, under or over any land, and a material change to the existing use of any building or land without subdivision, but it does not include—

(*a*) the construction or use of the first dwelling and outbuildings or improvements usually associated therewith on a separately registered subdivision, including a secondary self contained residential unit which may be attached or detached but must be clearly associated with the first dwelling house and may not exceed 80m^2;

(*b*) the construction or use of any dwelling and outbuildings usually associated therewith for the settlement of a traditional household on land on which a traditional community recognised in terms of section 2 (5) (*b*) of the KwaZulu-Natal Traditional Leadership and Governance Act, 2005 (Act No. 5 of 2005), lawfully resides;

(*c*) land used for the cultivation of crops or the rearing of animals;

(*d*) the carrying out of works required for the maintenance or improvement of an existing road within its existing boundaries;

(*e*) the provision of any engineering services in accordance with the municipality's integrated development plan; and

(*f*) the maintenance and repair of engineering services.'

[3] The first respondent opposes the relief sought. The second respondent, cited as an interested party, has not delivered any affidavits. That is most unfortunate. In my view, given the importance of and the complexities involved in this matter, I would have expected the second respondent to have applied its mind to the matters in issue and concluded that the fitting and responsible approach, as the concerned local government body, was to assist the Court, through an affidavit deposed to by a responsible official, by placing all the relevant information at its disposal and under its control before the Court. Indeed, I would have thought, having been cited as an interested party, that common sense and common courtesy dictated that it had a duty to do so.

THE PARTIES

[4] The applicant was an association incorporated under section 21 of the Companies Act of 1973. I assume that with the repeal of that Act it continues to exist as a non-profit company in terms of section 8(1), read with section 10 and schedule 1 of the Companies Act, 71 of 2008. It describes its main business as being the promotion of a wildlife and environmental conservancy in the greater Mtunzini area. Acting in that interest it was a registered interested and affected party, submitting comments, objections and detailed representations in opposition to a number of applications for approvals, authorisations and/or permissions made by the first respondent relating to *inter alia*, the environment, mining, water use and land use.

[5] The first respondent's business is the production of mineral commodities, which include feedstock to the pigment industry, low manganese pig iron, zircon and rutile. It was formerly known as EXXARO Sands (Pty) Ltd, before that as Ticor South Africa (Pty) Ltd and before that as Iscor Heavy Minerals (Pty) Ltd, when its business was first established and planned in the late 1990s.

[6] As indicated earlier, the second respondent is the local authority within whose area of jurisdiction the affected operations occur.

THE FAIRBREEZE PROPERTIES

[7] The founding papers suggest, largely correctly, that a number of immovable properties make up the parcel of land referred to as the Fairbreeze properties and upon which the Fairbreeze mine exists. The properties are owned by different entites; a large number by Mondi Limited, three by the first respondent, but still registered under its former name, EXXARO, one by SANRAL (which is in essence the N2 National Road) and one by a person known as Murray, and in respect of which a servitude exists in favour of ESKOM.

[8] During argument it became common cause that the application did not extend to the SANRAL and ESKOM properties and one of the properties, described as “Sarcola 16183”, registered in the name of EXXARO, and thus owned by the first respondent.

[9] The five ore bodies referred to above are described as FBA, FBB, FBC, FBC Extension (“FBC Ext”), and FBD. The ore body identified as FBC Ext lies closest to the town of Mtunzini and extends over the remaining two properties owned by the first respondent (EXXARO). All the other ore bodies extend over the properties owned by Mondi Limited.

THE BACKGROUND FACTS

[10] The first respondent also conducts identical (or at the very least, similar) mining operations at its Hillendale mine which is situated "… a little to the south of Richards Bay."

[11] According to the first respondent, it invested capital in its mining operations and in a central processing complex (involving two 36 megawatt electric arc furnaces) in Empangeni. The capital investment was justified by the presence of the ore bodies at both Hillendale and Fairbreeze. It commenced mining at Hillendale and intended a seamless transition of mining activities from Hillendale to Fairbreeze. Hillendale is approaching the end if its mining life.

[12] During March 1998 the first respondent, in terms of the then applicable Minerals Act, No. 50 of 1991 ("Minerals Act"), obtained mining authorisations from the Department of Mineral and Energy Affairs. These authorisations were in respect of the Hillendale mine and in respect of the land encompassing ore bodies FBA, FBB, FBC and FBD at the Fairbreeze mine. In addition, it contends that from as far back as 1998 it held an approved Environmental Management Programme, also issued by the Department of Minerals and Energy Affairs.

[13] The first respondent goes on to state that mining authorisations approved and granted under the Minerals Act are generally referred to as "old

order mining rights". The Mineral and Petroleum Resources Development Act, 28 of 2002 ("MPRDA") came into force on 1 May 2004. It repealed the Minerals Act and provided (in the Second Schedule thereof) for the conversion of an "old order mining right" into a mining right as defined in MPRDA. This could only be achieved if the relevant Minister was satisfied that the holder of the "old order mining right" had, *inter alia*, conducted mining operations in respect of the right in question and was in possession of an approved environmental programme. The first respondent's "old order mining rights" were converted in July 2008.

[14] The correspondence exchanged between the attorneys representing the applicant and the first respondent, shortly before the present application was launched, demonstrate how that point was reached. In a letter dated 18 September 2012 the applicant's attorneys wrote to the first respondent's attorney in the following terms:

'We refer to the above matter in which you act for Tronnox (formerly EXXARO).

Our clients are most concerned that your client intends construction of the Fairbreeze Mine in the near future. In that regard, we refer to an article which appeared in the Zululand Observer on 14 September 2012. In that article, your client is quoted as saying that the approval of its amended environmental management programme (EMPR) and environmental authorisation, entitled it to commence with "selected construction activities while awaiting further authorisations".

Our clients vehemently deny that your client is entitled to commence with any construction activities whatsoever on the affected properties, until such time as it has applied for, and been granted, the necessary development approval in terms of the KwaZulu-Natal Planning and Development Act NO.6 of 2008 (the "PDA"). It is clear that our clients are correct in this regard, if one has regard to the provisions of *inter alia* Chapter 4 of the PDA read with the definition of "development" as contained in section 1 of the PDA.

Furthermore, in the light of the Constitutional Court's ruling in the recent *Maccsands's* case, it cannot be contended that your client is not bound by the provisions of both the PDA and the uMlalazi Town Planning Scheme.

On our client's instructions, we recently wrote to the uMlalazi Municipality and we enclose a copy of the reply received from the Municipal Manager dated 13 September 2012, together with a copy of our original request. The Municipality has unequivocally supported our client's view that no development may take place on the affected properties until such time as your client has been granted the necessary development approval in terms of the PDA.

In the circumstances, we have been instructed to write to you to obtain your confirmation that your client will not commence any activity falling within the definition of "development" as defined in the PDA, on any of the properties in respect of which environmental authorisation was granted, until such time as your client is in possession of the necessary development approval in terms of the PDA and the current EIA appeals have been resolved. We would be most grateful if you would let us have such confirmation as a matter of urgency.

We have been instructed to place on record that if your client does attempt to commence "development" without the necessary PDA approval, our client will have no alternative but to seek appropriate relief in the High Court in the event that the Municipality itself fails to take such action timeously. We trust however that this will not be necessary.'

[15] The letter dated 13 September 2012 addressed by the second respondent's Municipal Manager to the applicant's attorneys, referred to in the fifth paragraph of that letter, reads as follows:

'I refer to your letter, dated 31 August 2012, where you have requested that the uMlalazi Municipality confirm the following:

1. "Confirm whether EXXARO does indeed require development authorisation in terms of the PDA before it commences titanium mining on the listed properties"

   It is confirmed that EXXARO does need development authorisation, in terms of appropriate legislation, before it commences titanium mining on the listed properties.

2. "Confirm whether you have been approached by representatives of EXXARO with a view to launching such a PDA Application"

The Municipality's appointed town planning service provider, Mr Coenraad Strachan from Inhloso Planning cc, did have a PDA Pre-Application Meeting with Mr Henri Cullinan from Vuka Planning Africa Inc., acting, it is understood, on behalf of EXXARO, on the 22 February 2012, at which the technical requirements of a potential PDA Application for Mining rights on Fairbreeze Ext. C, was discussed.

3. "Confirm that you will ensure that we receive notice of any such PDA application, in addition to any notice required to be delivered to any of our client's individual members;

   It is confirmed that you will receive notification via the public notification process stipulated in Section 5 of Part 1 of Schedule 1 of the PDA.

4. Confirm that you will take prompt action against EXXARO in terms of chapter 8 of the PDA should any person attempt to commence "development" of the properties (as defined) without the necessary development approval"

   It is confirmed that the uMlalazi Municipality will take prompt action, in terms of Section 8 of the PDA, should any person attempt to commence "development" of the properties (as defined) without the necessary development approval.

I trust the above has satisfactory answered your queries.'

[16] On 28 September 2012 the applicant's attorney sent another letter to the first respondent's attorneys in the following terms:

'We refer to our letter to you of 18 September 2012, to which we have not yet received any substantive response.

We are instructed that our clients today attended a communications meeting at the Tradewinds Hotel, Mtunzini. We are instructed that your client's representatives J. Beukes and E. Scholtz informed the meeting that Tronox would be commencing the mining development on 1 October 2012. When asked how it could do so without the necessary planning approval, the said representatives stated that they had "no comment". They then said the matter was in the hands of your firm.

In the absence of any response from you, our client must assume that your client has been advised that it may commence the development prior to obtaining planning approval. We require your confirmation or rebuttal urgently.

We are instructed to state once again that if any attempt is made to commence the development, our client will approach court as a matter of urgency for an interdict. Please confirm by return that in that event we may serve the papers on your offices.'

[17] On 5 October 2012 the first respondent's attorneys replied in the following terms:

'We refer to your letters dated 18 and 28 September 2012 under the above heading.

We confirm that our client has noted the contents, but denies them. In so doing it has sought advice on its legal position, which advice includes that of senior counsel. Its reasons are as follows:

1. With respect to the mining blocks known as FBA, FBB, FBC and in so far as any activities will occur on it, FBD, mining commenced lawfully well before the amendment of section 11 of the Town Planning Ordinance 29 of 1949. At that time mining did not fall within the ambit of that section and as such no development permission was required.

2. This was confirmed at that time by the KwaZulu-Natal Department of Local Government and Traditional Affairs in a letter dated 15 February 2006, which you are already in possession of.

3. Support for this contention is found in the 2008 amendment of the Ordinance which brought mining within its scope.

4. Whilst the successor to the Ordinance, the Kwazulu-Natal Planning and Development Act 6 of 2008 ("KZN PDA"), does indeed require mining developments to obtain planning permission, it is not retrospective, and consequently the fact that mining on the aforesaid blocks had commenced prior to its introduction, once again means that no permission under the Act is required.

5. For the mining block known as Fairbreeze C Extension (FBCX) held under a separate mining right, our client has however acknowledged that planning authority is required in terms of the KZN PDA as mining activities did not commence on this site prior to such permission being required. Our client has accordingly appointed a professional to compile the application in terms of the requirements of this Act.

Consequently our client will not provide you with the undertaking you seek, and has appointed a contractor to undertake certain aspects of the project on the basis that it

holds the necessary permission for these activities. These activities, which commenced on 1 October 2012, are as follows:

- establishing platforms on the primary wet plant area;
- construction of the link or access road between the proposed N2 off-ramp and the plant site;
  and
- construction of a temporary access road.

We do not believe the municipality had an opportunity to apply its mind to the aforementioned facts before addressing its letter of 13 September 2012 to you. Our client is accordingly engaging with it to discuss the matter.

In the interim, should your client approach the high court for an interdict this will be opposed, and an appropriate costs order sought. We confirm that you may serve papers on our offices, and kindly ensure that notice is given.'

[18] In paragraph 2 of that letter reference is made to a letter dated 15 February 2006 from the KwaZulu-Natal Department of Local Government and Traditional Affairs. That letter advised the first respondent in the following terms:

'With reference to your letters dated 18 November 2005, and subsequent information supplied in your letter dated 19 January 2006.

After careful consideration of your application, we wish to inform you that no development or subdivision application is required in terms of Town Planning Ordinance 27 of 1949 to conduct mining operations on land located outside of Town Planning Scheme areas. As you indicated that this land is to be used for "bona fide mining purposes" no change of land use application is required at this stage. Should you or any future owners wish to use this land for non-agricultural purposes, a development application will be required at that stage for the Municipality, Department of Agriculture and Environmental Affairs, and our consideration in terms of the relevant legislation.'

[19] And so the scene was set for the present application, which was commenced under a certificate of urgency dated 11 October 2012.

THE ISSUES

[20] The applicant has defined the issues that require determination in the following terms:

'1. Whether the applicant has *locus standi* and a "*protectable interest"* in the relief sought.

2. Whether, when the first respondent commenced mining activities in 2002, it required prior authorisation in terms of Section 11(2) of the Town Planning Ordinance, No. 27 of 1949 (KZN).

3. In the event that the first respondent is operating unlawfully, whether the Court should exercise its discretion against granting the relief sought.'

[21] The first respondent has preferred to state the issues thus:

'a. When it commenced mining in 2002 did the first respondent require planning authorisation in terms of section 11(2) of the Town Planning Ordinance, 27 of 1949?

b. If the question set out in (a) above is answered in favour of the applicant, can any order follow? This turns only partly on the question whether the applicant has a "protectable interest". The decision probably turns on the question of whether the applicant is the right person seeking the right relief in the right proceedings. The question as to the court's discretion may or may not arise in dealing with that issue.'

[22] Mr *Salmon* SC appeared for the applicant while Mr *Olsen* SC (with Ms *Gabriel* SC) appeared for the first respondent. Counsel have provided me with extensive and well-researched heads of argument for which I am grateful. I am mindful of the *caveat* that judges ought not to slavishly adopt counsels' heads of argument but nevertheless consider it appropriate, from time to time,

to borrow freely from that furnished to me. Where I do so I shall, in most cases, refrain from acknowledging any specific source, contenting myself that this paragraph constitutes sufficient, and appreciative acknowledgement.

[23] There seems to be no material difference between the applicant and the first respondent in their statement of the issue relating to authorisation in terms of section 11(2) of the Town Planning Ordinance, No. 27 of 1949 (KZN) ("the TPO"). Such difference that the two statements may intend is so subtle that it escapes me.

[24] The remaining issues are markedly different.

[25] I propose dealing with the TPO issue first.

THE TPO ISSUE: DID THE FIRST RESPONDENT REQUIRE AUTHORISATION?

[26] In 2002 section 11 of the TPO (which had last been amended in 1992) read as follows:

'**11. Establishment of private townships and development of land.**

(1) No person shall establish a private township without the approval of the Administrator.

(2) (a) No person shall, without the prior authorisation of the Administrator, develop within the meaning of this section any land whether inside or outside a local authority area; provided that the preceding provisions of this subsection shall not apply if-

(i) a town planning scheme applies to such land, or

(ii) such land is situate in an approved private township in respect of which there is no town planning scheme and such development complies with the conditions of establishment relating to use of such township applicable at the time at which such development is proposed to be undertaken,

unless the Administrator has-

(aa) in relation to a local authority area or any other area specified by him, generally, or

(bb) specially,

directed that application for such authorisation shall be made.

(b) The authorisation contemplated by paragraph (a) shall be applied for in the form prescribed by regulation.

(3) The provisions of this Ordinance shall apply to any development as defined in subsection (6) as if it were a private township: Provided that the Administrator may exempt such an application from one or more provisions of this Chapter subject to such conditions as he may impose.

(4) The Administrator, in authorising any development in terms of this section, may do so subject to any conditions not inconsistent with the provisions of this Chapter, or he may stipulate that application be made for permission to establish a private township in terms of this Chapter prior to such development.

(5) The local authority, if any, shall not approve a building plan relating to the proposed development until notification has been given to such local authority by the Director-General: Provincial Administration of Natal that the conditions, if any, subject to which the Administrator has authorised such development, have been complied with to the satisfaction of the Administrator.

(6) For the purpose of this section, the word "development" means the erection of buildings or the use of land without subdivision for non-agricultural purposes but does not include the erection of a first dwelling house and the usual outbuildings on the land.'

[27] In summary, the first respondent's argument is as follows:

i. In 1992, when the TPO was amended, to a form which it retained until 2008, the only authority required to mine was furnished under the Minerals Act;

ii. The Minerals Act in turn required adherence to certain other pieces of national legislation, but furnished an absolute right to mine once a mining authorisation was granted;

iii. Because provincial laws were absolutely subservient to national laws until the Interim Constitution of 1993, section 11(6) of the TPO cannot be read to have covered mining and cannot be read to have been intended to cover mining;

iv. The Constitution (ie. the final Constitution of 1996) gave legal force to laws which existed when it came into effect, but restricted the scope of such legal force to what it was *immediately before the Interim Constitution* came into force. The reach of such pre-constitutional legislation could only be extended by amendment, which was only done in 2008.

v. In the result the first respondent did not require planning permission, and it is common cause that subsequent legislation does not affect the position because it is not retrospective in effect.

[28] The applicant's counter to this, again in summary, is that it is nonsensical to suggest that the Minerals Act and the TPO are so conflicted with the result that the term *non-agricultural purposes* in section 11(6) of the TPO must be interpreted to exclude *mining*, or be deemed to be of no force in relation to *mining*. It contends that the first respondent has exaggerated the importance and status of the Minerals Act. It also contends that in comparing the two pieces to legislation, it is necessary to draw a distinction between mining as a land use and mining as a process of mineral extraction. Finally it submits that in construing the Minerals Act, it is of paramount importance to distinguish between the definitions and the word use of *mine* when used as a noun from when it is used as a verb.

[29] In analysing the arguments it is necessary to make extensive reference to the Minerals Act.

[30] In section 1 the following relevant terms are defined:

' **"mine"** means, when-

(a) used as a noun-

(i) any excavation in the earth, including the portion under the sea or under other water or in any tailings, as well as any borehole, whether being worked or not, made for the purpose of searching for or winning a mineral; or

(ii) any other place where a mineral deposit is being exploited,

including the mining area and all buildings, structures, machinery, mine dumps, access roads or objects situated on such area and which are used or intended to be used in connection with such searching, winning or exploitation or for the processing of such mineral: Provided that if two

or more such excavations, boreholes or places, or excavations, boreholes and places, are being worked in conjunction with one another, they shall be deemed to comprise one mine unless the Director: Mineral Development notifies the owner thereof in writing that such excavations, boreholes or places,or excavations, boreholes and places, comprise two or more mines; and

(b) used as a verb, the making of any excavation or borehole referred to in paragraph *(a)* (i) or the exploitation of any mineral deposit in any other manner, for the purpose of winning a mineral, including any prospecting in connection with the winning of such mineral;

"mineral" means any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, in or under water or in tailings and having been formed by or subjected to a geological process, excluding water, but including sand, stone, rock, gravel and clay, as well as soil, other than topsoil;

"mining area" means the area comprising the subject of any prospecting permit or mining authorization, including-

(a) any adjacent surface of land;

(b) any non-adjacent surface of land, if it is connected to such area by means of any road, railway line, power line, pipe line, cableway or conveyor belt; and

(c) any surface of land on which such road, railway line, power line, pipe line, cableway or conveyor belt is located,

under the control of the holder of such permit or authorization and which he is entitled to use in connection with the operations performed or to be performed under such permit or authorization;

"mining authorization" means any authorization granted under a mining permit or a mining licence;

"mining licence" means any authorization issued in terms of section 9 for any period exceeding two years;

"mining permit" means any authorization issued in terms of section 9 for a period not exceeding two years;

"mining right" means any right or any share therein acquired under any section mentioned in section 47 (1) or (5) or any right to dig or to mine acquired under a tributing agreement as defined in section 1 of the Mining Titles Registration Act, 1967 (Act 16 of 1967), or any other subgrant acquired by virtue of the first-mentioned right or any share therein;'

[31] As indicated earlier, the first respondent obtained a mining authorisation under the Minerals Act in March 1998.

[32] That was obtained and granted in terms of section 9 of the Minerals Act which provided for the Director: Mineral Development, upon application in the prescribed form, to issue a mining authorisation to the holder of the right to minerals, or to a person who has acquired the written consent of such holder to mine therefor.

[33] Section 9 reads as follows:

'**9 Issuing of mining authorization**

(1) The Director: Mineral Development shall, subject to the provisions of this Act, upon application in the prescribed form and on payment of the prescribed application fee, issue a mining authorization in the prescribed form for a period determined by him authorizing the applicant to mine for and dispose of a mineral in respect of which he-

(a) is the holder of the right thereto; or

(b) has acquired the written consent of such holder to mine therefor on his own account and dispose thereof,

in respect of the land or tailings, as the case may be, comprising the subject of the application.

(2) If the State is the holder of the right to any mineral, the consent referred to in subsection (1) *(b)* may, upon written application, be granted by the Minister, subject to such terms and conditions as may be determined by him.

(3) No mining authorization shall be issued in terms of subsection (1), unless the Director: Mineral Development is satisfied-

(a) with the manner in which and scale on which the applicant intends to mine the mineral concerned optimally under such mining authorization;

(b) with the manner in which such applicant intends to rehabilitate disturbances of the surface which may be caused by his mining operations;

(c) that such applicant has the ability and can make the necessary provision to mine such mineral optimally and to rehabilitate such disturbances of the surface; and

(d) that the mineral concerned in respect of which a mining permit is to be issued-

(i) occurs in limited quantities in or on the land or in tailings, as the case may be, comprising the subject of the application; or

(ii) will be mined on a limited scale; and

(iii) will be mined on a temporary basis; or

(e) that there are reasonable grounds to believe that the mineral concerned in respect of which a mining licence is to be issued-

(i) occurs in more than limited quantities in or on the land or in tailings, as the case may be, comprising the subject of the application; or

(ii) will be mined on a larger than limited scale; and

(iii) will be mined for a longer period than two years.

(4) Section 7 shall apply *mutatis mutandis* in relation to the performance of mining operations under a mining authorization.

(5) Any application for a mining authorization shall be lodged with the Director: Mineral Development concerned and shall, in addition to the other information and documents which may be required by him, be accompanied by-

(a) proof of the right to the mineral in respect of the land or tailings, as the case may be, comprising the subject of the application;

(b) a sketch plan indicating the location of the intended mining area, the land comprising the subject of the application, the lay-out of the intended mining operations and the location of surface structures connected therewith;

(c) particulars about the manner in which and scale on which the applicant intends to mine such mineral under such mining authorization optimally and to rehabilitate disturbances of the surface which may be caused by the intended mining operations;

(d) particulars about the mineralization of the land or tailings, as the case may be, comprising the subject of the application;

(e) particulars about the applicant's ability to make the necessary provision to mine such mineral optimally and to rehabilitate such disturbances of the surface; and

(f) particulars about the applicant's ability to mine in a healthy and safe manner,

acceptable to the Director: Mineral Development.

(6) The Director: Mineral Development may exempt any applicant for a mining authorization from one or more of the provisions of subsection (5) *(b)*, subject to such conditions as may be determined by him.

(7) The Director: Mineral Development shall consult as to the issuing of a mining authorisation with the Chief Inspector of Mines, and no mining authorisation may be issued unless the Chief Inspector of Mines is satisfied that the applicant has the ability and can make the necessary provision to mine in a healthy and safe manner.

(8) Subsection (7) shall apply *mutatis mutandis* in relation to the issuing of a prospecting permit in terms of section 6 or a permission in terms of section 8.'

[34] The first respondent submits that such authorisation was the instrument which allowed the practical exercise of the rights referred to in section 5(1) of the Minerals Act and which, stripped of the irrelevancies, covered the entire scope of mining (from prospecting through to the establishment of infrastructure and the disposal of the fruits of such mining), speaking directly to the facts of this case. Significantly, section 5(2) provides that no person shall prospect or mine without the necessary authorisation granted in accordance with the Minerals Act.

[35] Section 5 of the Minerals Act reads as follows:

‘5 Right to prospect and mine for and to dispose of minerals

(1) Subject to the provisions of this Act, the holder of the right to any mineral in respect of land or tailings, as the case may be, or any person who has acquired the consent of such holder in accordance with section 6 (1) *(b)* or 9 (1) *(b)*, shall have the right to enter upon such land or the land on which such tailings are situated, as the case may be, together with such persons, plant or equipment as may be required for purposes of prospecting or mining and to prospect and mine for such mineral on or in such land or tailings, as the case may be, and to dispose thereof.

(2) No person shall prospect or mine for any mineral without the necessary authorization granted to him in accordance with this Act: Provided that-

(a) the South African Roads Board established by section 2 of the South African Roads Board Act, 1988 (Act 74 of 1988), and any provincial administration shall not require any such authorization for the searching for and the taking of sand, stone, rock, gravel, clay and soil for road-building purposes under the laws applicable to them: Provided further that the said Roads Board or provincial administration shall, in any such case for the purposes of this Act, be deemed to be the holder of or applicant for a prospecting permit or mining authorization, in respect of the mineral and land concerned; and

(b) the occupier of land who otherwise lawfully takes sand, stone, rock, gravel, clay or soil for farming purposes or for the effecting of improvements in connection with such purposes on such land, shall not require any such authorization and the provisions of this Act shall not be applicable in any such case.

(3) Any person mining any mineral under a mining authorization may, while mining such mineral, also mine and dispose of any other mineral in respect of which he is not the holder of the right thereto, but which must of necessity be mined together with the first-mentioned mineral: Provided that such person shall compensate the holder of the right to such other mineral for his mineral to an amount mutually agreed upon or, if no agreement can be reached, to an amount determined by arbitration in accordance with the Arbitration Act, 1965 (Act 42 of 1965), or by any competent court if the last-mentioned person prefers the last-mentioned procedure: Provided further that in determining the last-mentioned amount, section 12 of the Expropriation Act, 1975 (Act 63 of 1975), shall *mutatis mutandis* apply as if an expropriation of property or the taking of a right has taken place in terms of the last-mentioned Act.’

[36] The MPRDA introduced a markedly different scheme. Section 23 of the MPRDA provides:

'**23. Granting and duration of mining right.—**

(1) Subject to subsection (4), the Minister must grant a mining right if—

(*a*) the mineral can be mined optimally in accordance with the mining work programme;

(*b*) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally;

(*c*) the financing plan is compatible with the intended mining operation and the duration thereof;

(*d*) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment;

(*e*) the applicant has provided financially and otherwise for the prescribed social and labour plan;

(*f*) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996);

(*g*) the applicant is not in contravention of any provision of this Act; and

(*h*) the granting of such right will further the objects referred to in section 2 (*d*) and (*f*) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan.

(2) The Minister may, having regard to the nature of the mineral in question, take into consideration the provisions of section 26.

(3) The Minister must refuse to grant a mining right if the application does not meet all the requirements referred to in subsection (1).

(4) If the Minister refuses to grant a mining right, the Minister must, within 30 days of the decision, in writing notify the applicant of the decision and the reasons.

(5) A mining right granted in terms of subsection (1) comes into effect on the date on which the environmental management programme is approved in terms of section 39 (4).

(6) A mining right 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.'

[37] As will be seen, section 23(6) of the MPRDA stipulates that a mining right is subject to the Act itself and to ***any relevant law***. It was submitted that this was in stark contrast to the Minerals Act, which provided for mining rights to be absolute, subject only to the dictates imposed by the Minerals Act itself and to other ***national*** legislation related to the specific mining activity. Examples include the references in section 19 of the Minerals Act to the 1983 Coal Act, the 1982 Atomic Energy Act and the 1987 Energy Act.

[38] The result, so the submission went, was that the Minerals Act provided that mining was regulated solely by national legislation, to the exclusion of all other law, and that that regulation was sacrosanct. Section 23 of the Minerals Act underscored that submission. I was reminded that at the time there were no "wall-to-wall municipalities" and that the only concern that could have been held by national government was the potential for increased cost if mining land was incorporated into urban areas.

[39] Section 23 of the Minerals Act provides as follows:

'**23 Power of Minister in case of exercising of surface rights contrary to object of optimal exploitation of minerals**

(1) If any person in any manner uses or causes to be used or intends to use or to cause to be used the surface of any land or includes or causes it to be included or intends to include or to cause it to be included into any town planning scheme which may, in the opinion of the Minister, detrimentally affect the object of this Act in relation to the optimal exploitation of any mineral which occurs or may occur in economically exploitable quantities in or on such land or in tailings on such land, the Minister may-

(a) cause an investigation to be held into the matter; and

(b) after consideration of the comment contemplated in subsection (2), if any, and the result of the investigation contemplated in paragraph *(a)*, issue a direction ordering such person to take such rectifying steps within a period specified in the direction as may be required by the Minister.

(2) Before any direction referred to in subsection (1) *(b)* is issued, the Director: Mineral Development shall serve a written notice on the person referred to in that subsection, whereby he is notified of the steps being contemplated by the Minister and whereby he is given the opportunity to comment on the intention of the Minister regarding such steps within a period specified in the notice, which shall not be less than 30 days.'

[40] That concern appears to be reinforced by section 7 of the Minerals Act which reads as follows:

'**7 Prohibition or restriction on prospecting on certain land**

(1) Subject to section 20 of the National Parks Act, 1976 (Act 57 of 1976), no person shall prospect in or on land which-

(a) comprises a township or urban area;

(b) comprises a public road, a railway or a cemetery;

(b) has been reserved or is being used under this Act or any other law for government or public purposes; or

(d) may be defined and so determined by the Minister by notice in the *Gazette*,

except with the written consent of the Minister and in accordance with such conditions as may be determined by him.

(2) The Director: Mineral Development concerned shall have power to determine or cause to be determined and point out or cause to be pointed out the boundaries of the places referred to in subsection (1).'

[41] Against that backdrop of the national legislation one can evaluate the development of, and the amendments over time to, the TPO.

[42] In its original form the TPO only prohibited the establishment of a private township without the approval of the Administrator of the Province. It read:

'No person shall establish a private township or sell or lease or offer for sale or lease any site in a private township (other than an existing private township) unless the establishment of such private township was approved by the Administrator under any Ordinance repealed by this Ordinance or, after the commencement of this Ordinance, unless the establishment of such private township has been approved by the Administrator and notified by him as approved in terms of this Ordinance.'

[43] In 1974 the TPO was amended and the structure then resembled that quoted at paragraph 26 above. However, in the 1974 version section 11 provided:

'(1) No person shall establish a private township without the approval of the Administrator.

(2) No person shall without the authorisation of the Administrator develop within the meaning of this section any land whether inside or outside a local authority area, unless such land is situate in and complies with the conditions of establishment relating to use, of an approved private township or, in the absence of such conditions, with the town planning scheme applicable at the time of such establishment. Such authorisation shall be applied for in such form as may be prescribed by regulation.

(3) The provisions of this Ordinance shall apply to any development as defined in this section as if it were a private township: Provided that the Administrator may, if he is of the opinion that the granting of an application in terms of subsection (2) will not prejudice anyone, including in particular the owners of property in the vicinity of the land concerned in the application. dispense with the requirement that the application be advertised: Provided further that the Administrator may also exempt such an application from one or more other provisions of this Chapter subject to such conditions he may impose.

(4) The Administrator, in authorising any development in terms of this section, may do so subject to any conditions not inconsistent with the provisions of this Chapter, or he may stipulate that application be made for permission to establish a private township in terms of this Chapter prior to such development.

(5) The local authority, if any, shall not approve a building plan relating to the proposed development until notification has been given to such local authority by the Provincial Secretary that the conditions, if any, subject to which the Administrator has authorised such development, have been complied with to the satisfaction of the Administrator.

(6) For the purpose of this section, the word "development" means the development of land without subdivision tor building purposes or urban settlement or deemed by the Administrator to be destined for such purposes or settlement but does not include the erection of a first dwelling house and the usual outbuildings on the land.

(7) The provisions of this section relating to development shall not apply to any area under the control and jurisdiction of a local authority which has in operation an approved town planning scheme or a town planning scheme in course of preparation unless the Administrator otherwise directs.'

[44] It will be noted that the 1974 version of the TPO was markedly different from that quoted at paragraph 26 above.

[45] On 7 May 1992 the TPO was amended to take the form quoted in paragraph 26 of this judgment.

[46] The first respondent submits that it is relatively easy to discern the legislative purpose behind the 1992 amendment of the TPO. Prior to the amendment the Administrator's permission was required for the use of land "for building purposes or urban settlement". However, disputes could easily arise as to what comprised "building purposes" or "urban settlement". In

addition, the section could easily interfere with genuine agricultural development. Accordingly, it appears that the mischief at which the section was aimed, would be better targeted by requiring provincial approval for any non-agricultural use of land.

[47] The first respondent submits further that it must be assumed that the provincial government was fully aware of the fact that at the time mining was governed exclusively by national mining legislation, particularly the Minerals Act. On the face of it section 11(6) of the TPO had wide meaning, but in context it could not have been intended to convey that, contrary to section 5 of the Minerals Act, the Provincial Executive Council was going to impose its own power of control over mining.

[48] The Minerals Act was promulgated when the Republic of South Africa Constitution Act, 110 of 1983 was still in force. Section 30 of Act 110 of 1983 provided that:

'[t]he legislative power of the Republic is vested in the State President and the Parliament of the Republic which, as the sovereign legislative authority in and over the Republic, shall have full power to make laws for the peace, order and good government of the Republic; provided that the powers of Parliament in respect of any bill contemplated in section 31 shall be exercised as provided by that section.'

Section 31 dealt with provisions relating to what was then called "own affairs of a population group".

[49] The 1983 Constitution did not deal with provincial government. As the first respondent correctly points out, Provincial Councils and their

Executive Councils were still regulated by the earlier 1961 Constitution, which was re-named the “Provincial Government Act, 32 of 1961. Section 85 of that Act provided that:

‘’[a]ny Ordinance made by a Provincial Council shall have the effect in and for the Province as long and as far only as it is not repugnant to any Act of Parliament.’

[50] Thus it was contended that any interpretation of the TPO that had the effect contended for by the applicant was of no force because it would be repugnant to the Minerals Act.

[51] The Provincial Government Act, 69 of 1986 again reorganised the structure of provincial government. Administrators and Executive Committees appointed by the State President replaced Provincial Councils. This obtained until its repeal by the Interim Constitution of 1993. The force of ordinances was not expanded upon.

[52] Accordingly it was clear, so the submission goes, that in 1992 when the TPO was amended, it could not have been intended to bring mining within the scope of application of section 11. The ordinance had no force in that regard. The first respondent continues the submission by saying that the State President’s appointees could legislate in the broad terms that they did, safe in the knowledge that the section could not be interpreted to convey that mining was a “non-agricultural” activity. It was unlikely that they governed the province, ignorant of the provisions of the Minerals Act.

[53] With the advent of the 1996 Constitution a new legislative scheme obtained. The transition to this new scheme was controlled by Schedule 6 of the Constitution, which defined "old order legislation" as being legislation enacted before the advent of the 1993 Interim Constitution. Item 2 of Schedule 6 of the Constitution provides that all law that was in force when the Constitution took effect continues in force subject to amendment or repeal and consistency with the Constitution and provides further in subitem 2(2)(a) that

'[o]ld order legislation that continues in force …

(a) does not have a wider application territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application …'

[54] The argument is developed further that before the 1993 Interim Constitution came into force section 11 of the TPO did not require provincial planning approval for mining and that consequently the effect of Schedule 6 of the 1996 Constitution was that that situation persisted. In other words it *gained no (otherwise) wider application*, which it could only do by subsequent amendment.

[55] That amendment occurred in 2008 with the passing of the KwaZulu-Natal Town Planning Ordinance Amendment Act, 3 of 2008. The amendment Act cosmetically amended the TPO by, *inter alia*, substituting the expression "responsible Member of the Executive Council" for the expression "Administrator", "municipality" for "local authority", "municipal area" for "Natal", and so forth. Insofar as section 11 was concerned the key amendment was to sub-section 11(6) which in the 2008 amendment now read:

'(6) For the purposes of this section **"development"** means the carrying out of building, construction, engineering, mining or other operations on, under or over any land, and a material change to the existing use of any building or land without subdivision, but it does not include—

(*a*) the construction or use of the first dwelling and outbuildings or improvements usually associated therewith on a separately registered subdivision, including a secondary self contained residential unit which may be attached or detached but must be clearly associated with the first dwelling house and may not exceed $80m^2$;

(*b*) the construction or use of any dwelling and outbuildings usually associated therewith for the settlement of a traditional household on land on which a traditional community recognised in terms of section 2 (5) (*b*) of the KwaZulu-Natal Traditional Leadership and Governance Act, 2005 (Act No. 5 of 2005), lawfully resides;

(*c*) land used for the cultivation of crops or the rearing of animals;

(*d*) the carrying out of works required for the maintenance or improvement of an existing road within its existing boundaries;

(*e*) the provision of any engineering services in accordance with the municipality's integrated development plan; and

(*f*) the maintenance and repair of engineering services.'

[56] It will immediately be appreciated that sub-section 11(6) of the TPO, after the 2008 amendments, is identical to section 38(3) of the KZNPD Act, which followed but eighteen months later.

[57] The 2008 amendment of the TPO is indicative of the provincial government's appreciation of the correct position in law when it introduced mining as an activity requiring provincial planning authorisation. Accordingly, when mining commenced in 2002, the TPO did not envisage planning approval from the provincial government.

[58] The first respondent's argument is most persuasive.

[59] That the Minerals Act trumped everything else (barring specific other national legislation) is in my view reinforced by the provisions of the other sections of the Minerals Act. In particular, section 39 which deals with an environmental management programme, section 40 dealing with the removal of buildings and other structures when mining ceases temporarily or permanently, section 41 which gives the Director: Mineral Development wide powers concerning the issuing of directives and the laying down of conditions with regard to the surface of the land and section 63 which allows the Minister to promulgate regulations dealing with an extensive range of issues, including water sources, equipment and the environment, suggest the prevailing importance and status of the Minerals Act.

[60] Sections 39, 40, 41 and portions of 63 of the Minerals Act read as follows:

'**39 Environmental management programme**

(1) An environmental management programme in respect of the surface of land concerned in any prospecting or mining operations or such intended operations, shall be submitted by the holder of the prospecting permit or mining authorization concerned to the Director: Mineral Development concerned for his approval and, subject to subsection (4), no such operations shall be commenced with before obtaining any such approval.

(2) The Director: Mineral Development may-

(a) on application in writing and subject to such conditions as may be determined by him, exempt the holder of any prospecting permit or mining authorization from one or more of the provisions of subsection (1) or grant an extension of time within which to comply with any such provision;

(b) approve an amended environmental management programme on such conditions as may be determined by him; or

(c) without application being made therefor, but after consultation with such holder, amend any approved environmental management programme.

(3) Before the Director: Mineral Development-

(a) approves any environmental management programme referred to in subsection (1) or any amended environmental management programme referred to in subsection (2) *(b)*; or

(b) grants any exemption or extension of time under subsection (2) *(a)* or any temporary authorization under subsection (4); or

(c) effects an amendment under subsection (2) *(c)*,

he or she shall consult as to that with the Chief Inspector of Mines and each department charged with the administration of any law which relates to any matter affecting the environment.

(4) The Director: Mineral Development may, pending the approval of the environmental management programme referred to in subsection (1), grant temporary authorization that the prospecting or mining operations concerned may be commenced with, subject to such conditions as may be determined by him.

(5) *(a)* The Director-General may, pending the approval of an environmental management programme referred to in subsection (1), require that an environmental impact assessment be carried out in respect of the intended prospecting or mining operations by a professional body designated by the Director-General.

(b) Any costs in respect of an environmental impact assessment referred to in paragraph *(a)* shall be borne by the holder of the prospecting permit or mining authorization referred to in subsection (1).

40 Removal of buildings, structures and objects

Whenever a prospecting permit or mining authorization which is held is suspended, cancelled or terminated or lapses, and the prospecting for or exploitation of any mineral which was authorized under such permit or authorization finally ceases, the person who was the holder of such permit or authorization immediately prior to such suspension, cancellation, termination or lapsing, as the case may be, shall demolish all buildings, structures or any other thing which was erected or constructed in connection with prospecting or mining operations on the surface of the land concerned and shall remove all debris as well as any other object which the Director:

Mineral Development concerned may require and, as far as is practicable, restore any such surface to its natural state to the satisfaction of and within a period determined by such Director: Mineral Development: Provided that such demolition or removal shall not be applicable in respect of buildings, structures or objects-

(a) which shall, in terms of any other law, not be demolished or removed;

(b) as may be determined by such Director: Mineral Development, or in respect of which he has granted exemption subject to such conditions as may be determined by him; or

(c) which the owner of the land wishes to retain and which has been agreed upon accordingly in writing with such former holder of such permit or authorization.

41 Restrictions in relation to use of surface of land

(1) The Director: Mineral Development may issue directives and determine conditions in relation to the use of the surface of land comprising the subject of any prospecting permit or mining authorization in order to limit any damage to or the disturbance of the surface, vegetation, environment or water sources to the minimum which is necessary for any prospecting or mining operations or processing of any mineral: Provided that such directives and conditions shall not be construed as placing the holder of any such prospecting permit or mining authorization, in a better position *vis-à-vis* the owner of such land in relation to the use of the surface thereof.

(2) No person shall contravene or fail to comply with any directive or condition referred to in subsection (1).

63 Regulations

(1) The Minister may, by notice in the *Gazette*, make regulations regarding-

….

*(b*A*)* the conditions on which equipment, structures, surface of land and water sources may be undermined, the prohibition on or restriction of the erection of equipment and structures and the use of the surface of land and water sources in the vicinity of the working places of a mine;

(c) the protection of equipment, structures, the surface of land and water sources and the making safe of undermined ground and of dangerous excavations, tailings, waste dumps, ash dumps and structures, of whatever nature, made in the course of prospecting or mining operations or which are connected

therewith, the imposition of monetary and other obligations in connection with such safe-making on persons who are or were responsible for the undermining of such ground or the making of such excavations, tailings, waste dumps, ash dumps or structures or for the dangerous condition thereof, or who will benefit from such safe-making, and the assumption by the State of responsibility or co-responsibility for such safe-making in particular cases;

(d) (i) the conservation of the environment at or in the vicinity of any mine or works;

(ii) the management of the impact of any mining operations on the environment at or in the vicinity of any mine or works;

(iii) the rehabilitation of disturbances of the surface of land where such disturbances are connected to prospecting or mining operations;

(iv) the prevention, control and combating of pollution of the air, land, sea or other water, including ground water, where such pollution is connected to prospecting or mining operations;

(v) pecuniary provision by the holder of a prospecting permit or mining authorization for the carrying out of an environmental management programme;

(vi) the establishment of accounts in connection with the carrying out of an environmental management programme and the control of such accounts by the Department;

(vii) the assumption by the State of responsibility or co-responsibility for obligations originating from regulations made under subparagraphs (i), (ii), (iii) and (iv) of this paragraph; and

(viii) the monitoring and auditing of environmental management programmes;'

[61] The applicant argues that the Minerals Act drew a distinction in its employment of the word ***mine*** when used as a verb and when used as a noun. It supported that argument not only by reference to the definitions in the Act but also by reference to the substantive sections already discussed earlier in this judgment. The essence of this aspect of the argument is that while the first respondent may be correct in the assertion that the Minerals Act was all

encompassing when it legislated for the activity of mining (ie. the verb); it had to yield to applicable planning legislation in all aspects that related to the physical presence and attributes of a mine (ie. the noun).

[62] That argument, although superficially attractive, flounders at the first hurdle. The right granted to a holder of mining rights, in terms of the Minerals Act, could do anything and everything set out in section 5 of the Act. In paragraph 34 above I set out the section in full and summarised the first respondent's argument in that regard. It is appropriate to repeat section 5(1) (stripped of the irrelevancies I referred to) to illustrate the point:

'Subject to the provisions of this Act, the holder of the right to any mineral in respect of land … or any person who has acquired the consent of such holder in accordance with section … 9 (1) *(b)*, shall have the right to enter upon such land … together with such persons, plant or equipment as may be required for purposes of … mining and to … mine for such mineral on or in such land … and to dispose thereof.'

[63] In my view, armed with that right, and given that the Minerals Act also legislated for all the other controls (including physical and environmental ones), the holder of a mining authorisation needed no other permissions. Everything was ***subject to the provisions of the Act***, and adequately catered for in the Act.

[64] The applicant also argues that if I were to find that a conflict exists between the Minerals Act and the TPO, I ought to hold that it was inconceivable that in 2002 the TPO remained frozen in time until altered by subsequent amendment.

[65] However, I adopt the first respondent's argument that no conflict existed. The TPO simply did not apply to mining, which was regulated exclusively by the Minerals Act.

[66] As against that Mr *Salmon* argues that a conflict exists because the TPO is legislation (see section 239 of the Constitution) and as such a court is enjoined, in terms of section 39(2) of the Constitution, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights.

[67] That argument overlooks the provisions relating to old order legislation as set out in Schedule 6 of the Constitution (see paragraph 53 above) as the TPO could not enjoy wider ***or otherwise*** application until amendment. In any event, and even if there is a conflict, then section 150 of the Constitution supports the interpretation that the Minerals Act held sway.

[68] In the correspondence that preceded the application (see paragraph 14 above) the applicant referred to the decision in *Maccsand (Pty) Ltd v City of Cape Town & Ors* 2012 (4) SA 181 (CC), contending that the conclusion was inescapable that the first respondent had to comply with the TPO and thereafter the KZNPD Act.

[69] *Maccsand* dealt with the Land Use Planning Ordinance, 15 of 1985 (Western Cape) ("LUPO") and the Constitutional Court concluded, *inter alia*, that the relevant national mining legislation and the provincial ordinance were

not in conflict and that the national legislation did not override the provincial ordinance.

[70] In his heads of argument Mr *Salmon* conducted a detailed analysis of LUPO and the Mining Rights Act, 20 of 1967, the latter being the applicable national legislation at the time concerned. He concluded that that detailed analysis demonstrated that the identical situated obtained here and that the Minerals Act ought not to override the TPO. In doing so he relied principally upon the following extracts from *Maccsand* (footnotes omitted):

‘15. LUPO is a pre-Constitution legislation, which came into force in July 1986. It constitutes provincial legislation that was enacted by the Provincial Council of the former Cape of Good Hope. The interim Constitution permitted it to continue in force subject to amendment or repeal by the competent authority. Later the President assigned its administration to the provincial government of the Western Cape.

15. LUPO authorises municipalities to prepare structure plans which are submitted to the provincial government for approval. The purpose of the structure plan is to lay down guidelines for future spatial development. It may also authorise rezoning of land by a municipality. In Chapter 2 LUPO empowers the provincial government to make scheme regulations which determine the use to which land may be put in accordance with the zoning applicable to the land. The main object of scheme regulations is to control zoning.

17. If a landowner wants to use land for a purpose not permitted in terms of the zoning scheme or regulations, she or he must apply to the municipality for rezoning or for a use departure. If either is granted, the land must be used for the permitted purpose within a period of two years, failing which that rezoning lapses. But a rezoning may also be initiated by the municipality in whose jurisdiction the land falls or the provincial government. LUPO obliges municipalities to enforce compliance with its provisions. More importantly it prohibits the use of land for purposes other than the one permitted in terms of the zoning scheme.

18. Therefore in terms of LUPO, mining may only be undertaken on land if the zoning scheme permits it (or a departure is granted). If not, rezoning of the land must be obtained before the commencement of mining operations. The

zoning that permits that land to be used for mining does not, however, license mining nor does it determine mining rights. The role played by LUPO is limited to the control and regulation of the use of land.

….

40. It is apparent from the present facts that long before the MPRDA was passed, LUPO applied to land falling within the municipal area of the City. The Rocklands dunes and part of the Westridge dunes were zoned for use as public open spaces before Maccsand was granted the mining right and permit. The question that arises is whether upon the grant of those rights to Maccsand, the application of LUPO to the land concerned ceased. Maccsand and the Minister for Mineral Resources, supported by the Chamber, contended that because LUPO does not regulate mining, it does not apply to land in respect of which mining rights have been granted.

41. Proceeding from the premise that mining falls under the exclusive competence of the national sphere of government, these parties argued that to hold that LUPO applies would amount to permitting an unjustified intrusion of the local sphere into the exclusive terrain of the national sphere of government. This, they argued, is contrary to the constitutional imperative that spheres of government must exercise their powers in a way that does not encroach on functional areas of other spheres.

….

46. Maccsand also contended that the Supreme Court of Appeal, by finding that mining is subject to compliance with LUPO, permitted a local authority to usurp the functions of national government in a manner which is not contemplated in the Constitution. This argument is based on a misinterpretation of the judgment of the Supreme Court of Appeal. That Court did not find that LUPO regulates mining. Instead, it held that the MPRDA and LUPO have different objects and that each did not purport to serve the purpose of the other. The MPRDA's concern, the Court found, was mining and not municipal planning, hence it held that the two laws operate alongside each other.[50] Because LUPO regulates the use of land and not mining, there is no merit in the assertion that it enables local authorities to usurp the functions of national government. All that LUPO requires is that land must be used for the purpose for which it has been zoned.

47. Another criticism levelled against the finding of the Supreme Court of Appeal by Maccsand and the Minister for Mineral Resources was that, by endorsing a duplication of functions, the Court enabled the local sphere to veto decisions of the national sphere on a matter that falls within the exclusive competence of the national sphere. At face value this argument is attractive but it lacks

substance. 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 to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.

48. The fact that in this case mining cannot take place until the land in question is appropriately rezoned is therefore permissible in our constitutional order. It is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed. If consent is, however, refused it does not mean that the first decision is vetoed. The authority from whom consent was sought would have exercised its power, which does not extend to the power of the other functionary. This is so in spite of the fact that the effect of the refusal in those circumstances would be that the first decision cannot be put into operation. This difficulty may be resolved through cooperation between the two organs of state, failing which, the refusal may be challenged on review.'

[71] *Maccsand* was concerned with a comparison of LUPO and the MPRDA and the Constitutional Court found there to be a relationship between the two. In paragraphs 42 to 45 of its judgment the Constitutional Court said (footnotes omitted):

'42. It is true that mining is an exclusive competence of the national sphere of government. It is also true that the MPRDA is concerned with mining and that LUPO does not regulate mining nor does it purport to do so. LUPO governs the control and regulation of the use of all land in the Western Cape Province. This function constitutes municipal planning, a functional area which the Constitution allocates to the local sphere of government.

43. These laws, as the Supreme Court of Appeal observed, serve different purposes within the competence of the sphere charged with the responsibility to administer each law. While the MPRDA governs mining, LUPO regulates the use of land. An overlap between the two functions occurs due to the fact that mining is carried out on land. 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.

44. If it is accepted, as it should be, that LUPO regulates municipal land planning and that, as a matter of fact, it applies to the land which is the subject matter of these proceedings, then it cannot be assumed that the mere granting of a mining right cancels out LUPO's application. There is nothing in the MPRDA suggesting that LUPO will cease to apply to land upon the granting of a mining right or permit. By contrast section 23(6) of the MPRDA proclaims that a mining right granted in terms of that Act is subject to it and other relevant laws.

45. Maccsand and the Minister for Mineral Resources argued that LUPO is not a "relevant law" envisaged in section 23(6) because it does not apply to mining. The words "any relevant law", they submitted, mean and are confined to a law applicable to mining like the Mine Health and Safety Act. The MPRDA does not define this phrase and consequently it must be accorded its ordinary wide meaning. There is no justification for limiting it to laws regulating mining only.'

[72] As was pointed out earlier in this judgment, the Minerals Act indicated that mining authorisations were subject ***only*** (my emphasis) to the provisions of the Minerals Act. It contained no provision similar to that in the MPRDA.

[73] The facts in *Maccsand* were very different. The City of Cape Town, acting in terms of LUPO, had zoned the area known as the Rocklands dunes as public open space. That was done quite properly and in the legitimate exercise of it power to exercise planning controls within its city limits. It was only in 2007, and after the MPRDA came into force, that the Minister for Mineral Resources, acting in terms of section 27 of the MPRDA, granted authority to Maccsand to mine sand on a portion of that land. At that stage the zoning had already attached to the land in question. Consequently, the

authorisation to mine could not, and did not, upset the earlier planning decision made in respect of that land.

[74] The position with the Fairbreeze mine is quite different. The Fairbreeze properties were not inside a municipal area and were never the subject of any zoning controls when mining authorisation was granted in 1988. That situation persisted until 2002 when mining activity commenced.

[75] Accordingly, the question as to whether the first respondent required any authorisation in terms of the TPO when mining commenced must be answered in the negative.

[76] It becomes unnecessary to decide the remaining issues.

COSTS

[77] The applicant has asked, in the event that it is unsuccessful, that it not be made to bear the first respondent's costs. That submission is underpinned by reference to the decision in *Biowatch Trust v Registrar, Genetic Resources, & Ors* 2009 (6) SA 232 (CC). There, in a unanimous judgment, *Sachs* J said:

'16. In my view, it is not correct to begin the enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in

constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.'

[78] In support of that submission the applicant contends that:

a. it is relevant that the first respondent itself urgently requires clarity as to whether it commenced mining lawfully;

b. it should be taken into account that the first respondent did not disclose the basis on which it contended that it had lawfully commenced mining until delivery of its heads of argument. Prior thereto the applicant had only the letter dated 5 October 2012 to go by;

c. there has been a reasonable and justifiable confusion on the part of the applicant as to when the first respondent commenced mining. It contends that had the first respondent issued a notice in terms of section 54(1) of the Minerals Act during 2002 the issues might have been resolved a long time ago.

[79] None of those arguments impress me.

[80] As indicated earlier (paragraph 19 above), the applicant rushed to court on urgent application a mere four court days after receipt of the letter of 5 October 2012. There is no indication on the papers of any attempt to engage the first respondent's attorneys in discussion on the contents of their letter, nor indeed, if that had been done, what might have come of that

discussion. The situation was, in my view, not so urgent as to require immediate recourse to litigation. That must have been the applicant's view as well because if it had thought differently about the question of urgency, the Notice of Motion would presumably have made some reference to some sort of interim relief. It did not. To my mind the contents of the letter of 5 October 2012 penned by the first respondent's attorneys dictated that the more prudent course would have been to embark upon some measure of enquiry and engagement. Had that been done the outcome might have been different. Had the enquiry and engagement process been rebuffed my attitude to costs might well have been different.

[81] The reference to section 54(1) of the Minerals Act is confusing. That section provides for the holder of any mining authorisation, at least 14 days before commencing with any operations, to notify the Director: Mineral Development and the Chief Inspector of Mines in writing of such intended commencement. There is simply no evidence in the papers that speaks to this topic. In any event, the applicant does not suggest how such notice, given the identity of the intended recipients, would have assisted it.

[82] In terms of *Biowatch*, I ignore the fact that the first respondent might well have "deep pockets". I ignore also the fact that the applicant might rely on public funding and that it purports to act in the interests of the public and the environment. Relevant too, is the fact that the applicant is not litigating against the State. Costs, in the ordinary case, ought to follow the

result; and to allow it to do so in this case would not hinder the promotion of constitutional justice.

[83] The issues have been complex and the consequences of the order sought were potentially devastating for the first respondent. It is entitled to the costs of two counsel.

[84] The application is dismissed with costs, such costs to include those consequent upon the employment by the first respondent of two counsel.

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Vahed J

CASE INFORMATION

Date of Hearing:	8 November 2012
Date of Judgment:	8 January 2013
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