

'Municipal planning' and 'regional planning and development'

Where does municipal planning end and provincial planning begin?

Lagoon Bay Lifestyle Estate (Pty) Ltd v the Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Two Others [Case number: 10751/2011, Western Cape High Court]

of Chapters V and VI of the Development Facilitation Act encroached on 'municipal planning' powers of municipalities by purporting to vest such powers in development tribunals established by the Act.

The facts

Lagoon Bay Lifestyle Estate (Pty) Ltd (Lagoon Bay), a developer and applicant in this case, had applied for the rezoning and subdivision of certain properties within the jurisdiction of George Municipality, and the application was approved by the municipality on 14 July 2010. The municipality referred the application to the Minister for Local Government, Environmental Affairs and Development Planning in the Western Cape Province for further attention. However, acting on an amended 'George and Environs Urban Structure Plan', which empowered the province to make final decisions on development plans with 'extra-municipal' effects, the provincial minister rejected the application on 28 April 2011. Lagoon Bay challenged the refusal.

Lagoon Bay argued that only the municipality had the power to approve the application and noted that under section 4(1) of the Land Use and Planning Ordinance (LUPO), the minister had no legal basis for his action. Lagoon Bay also argued that the minister's action was unconstitutional since the Constitution empowered municipalities alone to make 'municipal planning' decisions. Lagoon Bay sought to rely on an earlier decision by the Constitutional Court, *Johannesburg Municipality v Gauteng Development Tribunal (GDT)* (see *LGB 12(2)* p 13) where the Court held that the provisions

Decision

The Court noted that contrary to the argument of Lagoon Bay with regard to LUPO, section 42(1) of LUPO actually empowered the minister to impose whatever conditions he thought fit. With regard to the constitutionality of the minister's decision, the Court agreed that municipalities have powers to control and regulate the use of land, including zoning and the establishment of townships. However, the Court agreed with the minister that the proposed development plan (655 hectares of land, consisting of two golf courses, residential housing development, a hotel, private parks and a private nature reserve) exceeded the bounds of municipal planning and fell within the ambit of 'regional planning and development' and 'provincial planning', which the Constitution allocated to provinces. The Court also emphasised that the 'legislative and executive authority' of provinces to regulate the exercise of functions by municipalities through 'supervision', 'monitoring' and 'support', and even interventions, formed the basis of the minister's decision.

The Court further noted that while *GDT* affirmed 'municipal planning' powers, the case never engaged with the complex relationship between the local and provincial spheres in regard to planning, and this distinguished the *GDT* from the current matter. Accordingly, the Court held that Lagoon Bay had failed to raise sufficient grounds to set aside the minister's decision of 28 April 2011.



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Municipal approval required even with a mining permit

Maccsand and Another v City of Cape Town and Others (709/10; 746/10) [2011] ZASCA 141 (23 September 2011)

Louw NO v Swartland Municipality [20011] ZASCA 142 (23 September 2011)

The facts

Maccsand Pty Ltd, a mining corporation, was given a mining right by the Minister of Mineral Resources in terms of section 23(1) of the Minerals and Petroleum Resources Development Act (Act 28 of 2002) (MPRDA), and a mining permit was issued to it to mine sand on two pieces of land under the jurisdiction of the City of Cape Town. Maccsand asserted that it was entitled to mine without further authority, but the City of Cape Town insisted that it could not do so without obtaining land use authorisation in terms of the Land Use Planning Ordinance No. 15 of 1985 (LUPO). Maccsand began to mine without attempting to obtain such authorisation. The City of Cape Town insisted that Maccsand also needed environmental authorisation in terms of the National Environmental Management Act (Act 107 of 1998) (NEMA).

The City launched an application for an interdict to stop the mining. During the course of the litigation, the Western Cape provincial Minister of Local Government, Environmental Affairs and Development Planning joined the City as a party, on the grounds that Maccsand did indeed require environmental authorisation to conduct such activities. The appeal from the Western Cape High Court in Cape Town was brought before the Supreme Court of Appeal.

Similarly in the *Louw* case, the Minister of Mineral Resources granted the Hugo Louw Trust (Louw) mining rights authorising it to mine

granite on a piece of land falling under the jurisdiction of Swartland Municipality. The municipality argued that Louw also needed to obtain authorisation in terms of LUPO. Louw said that they did not need LUPO authorisation and commenced mining activities. Louw were requested to halt their activities and apply to the municipality for authorisation before proceeding.

Both cases were brought before the Supreme Court of Appeal.

Decision

In respect of the LUPO issue, the Supreme Court of Appeal held that constitutionally, the municipality's planning function was important whenever a national competence impacted on a use of land. It held that the holder of a mining right in terms of the MPRDA need not obtain authorisation in terms of LUPO. In fact, the holder of a mining right issued by the Minister of Mineral Resources in terms of the MPRDA did not have the constitutional backing to carry out mining activities without obtaining additional authorisation from the municipality in terms of LUPO. The municipality's planning function was recognised constitutionally and required the holder of a mining right to also obtain authorisation in terms of LUPO before carrying out mining activities in a municipality. LUPO therefore applied.

The Court added that LUPO remained provincial legislation and gave powers to municipalities to regulate land use in their areas of jurisdiction, subject to supervision by the provincial government.

Similarly in the *Louw* case, the Court held that Louw had to abide by LUPO despite having received mining rights from the Minister of Mineral Resources.



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