Maccsand: Intergovernmental relations and the doctrine of usurpation

Maccsand (Pty) Ltd v City of Cape Town CCT 103/11
[2012] ZACC 7; 2012 7 BCLR 690 (CC)

1 Introduction

Maccsand (Pty) Ltd v City of Cape Town involved an appeal to the Constitutional Court against an interdict initially granted by the Western Cape High Court and affirmed on appeal by the Supreme Court of Appeal. The dispute between the parties revolved around the application of the Land Use Planning Ordinance 15 of 1985 (LUPO) and the National Environmental Management Act 107 of 1998 (NEMA) to land that had also become the subject of mining authorisations granted in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). (The focus of this note falls on the conflict between the LUPO and the MPRDA and the NEMA issues will not be elaborated upon further.[1])

It would be a mistake, however, simply to view this case as a precedent about whether one piece of legislation supersedes another. Rather, the core of this matter can be described as an emerging doctrine of usurpation in the context of intergovernmental relations, a set of concepts and principles that is applicable whenever there is an overlap of power, particularly between the national and local spheres.[2] This note outlines the *Maccsand* decisions before discussing the nature of this doctrine in the context of other recent Constitutional Court jurisprudence on national-local intergovernmental relations.

2 The *Maccsand* decisions

The facts in this matter were fairly straightforward. In 2007 and 2008 respectively, the Department of Mineral Resources (DMR) had granted Maccsand (a sand and

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[1]The issues pertinent to the conflict between the MPRDA and the NEMA are discussed by the present author in an article entitled '*Maccsand* in the Constitutional Court: Dodging the NEMA issue'. The article is currently under review.

[2]Section 40(1) of the Constitution establishes government in South Africa in terms of a national, provincial and local sphere.

stone supplier based in Somerset West), first a mining permit[3] and then a mining right[4] to mine sand on two dunes (the Rocklands and the Westridge dunes) in Mitchell's Plain. The dunes formed part of the Cape Flats Dune Strandveld ecosystem[5] and the land on which they were situated was owned by the City of Cape Town (the City). In terms of the zoning scheme applicable to the area under the LUPO, the erven upon which the dunes were situated were zoned as 'public open space' or 'rural' – designations that did not encompass the use of the land for mining. The mining areas on both dunes were also situated close to residences and schools. The City was opposed to the grant of both mining authorisations insisting that before mining could commence either the zoning scheme had to be amended, or a departure from the zoning scheme had to be granted. Maccsand and the DMR, however, argued that exploitation of minerals could not take place effectively unless mining was regulated solely by the MPRDA and for this reason the MPRDA should 'supersede' the LUPO.

Notwithstanding the City's opposition, Maccsand commenced mining operations on the Rocklands Dune in February 2009. The City subsequently applied in the Western Cape High Court for an interim interdict *pendente lite* and a final interdict prohibiting Maccsand from commencing or continuing its mining activities on the dunes until it had obtained an authorisation under LUPO.

The City of Cape Town found favour in the High Court. Noting the contention advanced by the City's counsel that allowing the MPRDA to override LUPO would make it extremely difficult for the local sphere to perform its constitutionally mandated function of 'municipal planning',[6] the court turned to the interpretation of this term in the Constitutional Court decision of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*.[7] Rejecting the contention that 'municipal planning' referred only to the function of 'forward planning', the Constitutional Court had held that 'planning' in the context of municipal affairs, had assumed a 'particular, well-established meaning which includes the zoning of the

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[3] A mining permit is an authorisation granted in terms of s 27 of the MPRDA. It is meant for smaller scale mining and is valid for no longer than two years.

[4] A mining right is an authorisation granted in terms of s 23 of the MPRDA and may authorise mining for up to 30 years.

[5] The Cape Flats Dune Strandveld ecosystem has been classified as 'Endangered' in the national list of ecosystems that are threatened and in need of protection in terms of the National Environmental Management: Biodiversity Act 10 of 2004 (see GN 1002 *GG* 34809 of 2011-12-09 at 53).

[6] *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC) 69G.

[7] [2010] ZACC 11; 2010 6 SA 182 (CC); 2010 9 BCLR (CC) (henceforth referred to as the *Gauteng Development Tribunal* case). This case constituted a challenge to chapters V and VI of the Development Facilitation Act 67 of 1995 (DFA) on the basis that it unlawfully intruded upon the function of 'municipal planning', which as a functional area listed in Schedule 4, Part B falls within the exclusive executive competence of the local sphere of government. The court found that the provisions of the DFA were indeed unconstitutional.

land and the establishment of townships'.[8] This involved the use of executive power to control and regulate the use of land. Two principles therefore flowed from this case for application to the *Maccsand* matter: (1) that municipal planning includes the control and regulation of the use of land that falls within the jurisdiction of a municipality; and (2) that the national and provincial levels of government cannot by legislation give themselves the power to exercise executive municipal powers.[9] Maccsand and the Department of Mineral Resources had nevertheless argued that even if municipal planning encompassed the regulation of all land in the jurisdiction of a municipality, mining trumps this power of local government by virtue of it being an 'exclusive national competence'.[10] Davis J rejected this argument, however, questioning the accuracy of the concept of 'exclusive national competence' and pointing to the absence of an express 'national legislative override' in the MPRDA.[11] He thus concluded that the LUPO had clear application to the dispute. This did not preclude the possibility of an 'overlap' between the powers of national and local government. Support for this further proposition could be found in the Constitutional Court's *dicta* in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*[12] in which the court observed that 'There is no reason why the two spheres of control cannot coexist even if they overlap and even if, in respect of the subdivision of agricultural land, the one may in effect veto the decision of the other. It should be borne in mind that one sphere of control operates from a municipal perspective and the other from a national perspective, each having its own constitutional and policy considerations.'[13] A similar vision of different spheres of government operating from different perspectives animated the Constitutional Court's observations in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*[14]

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[8] *Id* para 57.
[9] See (n 6) 71E.
[10] *Id* 71F.
[11] *Id* 71F-72F.
[12] [2008] ZACC 12; 2009 1 SA 337 (CC); 2008 11 BCLR 1123 (CC) (henceforth referred to as the *Wary Holdings* case). This case involved a dispute over whether the power to authorise the subdivision of agricultural land continued to vest in the Minister of Agriculture in terms of the pre-constitutional Sub-division of Agricultural Land Act or whether it had been transferred to the sphere of local government in the new constitutional order. The case turned on a Presidential proclamation that had amended the definition of 'agricultural land' in the Act one day before the elections for transitional councils were held in terms of the Local Government Transition Act 209 of 1993. Kroon AJ, writing for the majority, found that national control over the subdivision of agricultural land should be preserved. Yacoob J wrote a dissenting judgment (in which Nkabinde J and O'Regan ADCJ concurred), which found that the retention of this power in the Minister was inconsistent with the restructuring, decentralisation and democratisation of power that the Constitution requires.
[13] *Id* para 80.
[14] [2007] ZACC 13; 2007 6 SA 4 (CC); 2007 10 BCLR 1059 (CC). This case involved a challenge brought on behalf of the Fuel Retailers Association against a decision by the Mpumalanga environmental authority to allow the development of an additional filling station in a particular area.

when it remarked that while the local authority considers the need and desirability of land use change from a town-planning perspective, the provincial authority considers it from an environmental perspective, and that while it could pass muster on the first it might fail on the second.[15]

Maccsand and the Minister of Mineral Resources then appealed to the Supreme Court of Appeal but, again, their arguments for the overriding power of the MPRDA met with no success. Proceeding from the Constitution's division of state power into national, provincial and local spheres, the court underlined the significance of this model in light of the pre-1994 position in which the national legislature was all-powerful and provincial and local governments exercised only those powers which had been allocated to them. The 'partnership' that now obtains among the separate spheres requires that they do not 'encroach' upon the geographical, functional or institutional integrity of government in another sphere.[16] The allocation of powers among the spheres in terms of the Constitution, which includes the delineation of functional areas in Schedules 4 and 5, is both a distribution but at times also a *reservation* of power to a particular sphere. 'A necessary corollary of this is that one sphere of government may not usurp the functions of another,' said the court, 'although intervention by one sphere in the affairs of another is permitted in limited circumstances'.[17] Turning to the nature of the pieces of legislation before them, the court found that the 'national character' of the MPRDA could clearly be discerned from its objects in section 2.[18] By contrast, the LUPO was both 'old order' as well as 'provincial legislation' that granted important powers to municipalities to regulate land use within their areas of jurisdiction subject to the provincial government's oversight.[19] Having regard to municipalities' powers in terms of the LUPO, as seen within the broader context of their constitutional obligations as well as the obligation to prepare an integrated development plan in terms of section 25(1) of the Local Government: Municipal Systems Act 32 of 2000, the court concluded that municipalities not only play a central role in land use planning in their areas of jurisdiction, but that it is appropriate for them to do so given their knowledge of local conditions and their

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The case turned on whether the environmental authority was confined to a consideration of the environmental impacts of a particular development or whether it was bound, by virtue of the concept of sustainable development, to also consider economic and social aspects. The Court came down in favour of an interpretation of the mandate of the environmental authority that encompassed environmental, economic and social aspects of development and the inter-linkages between them.

[15] *Id* para 85.

[16] *Maccsand (Pty) Ltd and Minister of Mineral Resources v City of Cape Town (Chamber of Mines as Amicus Curiae)* [2011] ZASCA 141 para 11. The prohibition against 'encroachment' is articulated in s 41(1)(g) of the Constitution.

[17] *Id* para 12.

[18] *Id* para 15.

[19] *Id* para 16-17.

'intimate link' with the local electorate whose interests they represent.[20] The court therefore aligned itself with the interpretation of 'municipal planning' adopted by the High Court.[21] This time, however, Maccsand and the Minister of Mineral Resources argued that the MPRDA vests the power to determine mining-related land use rights as a 'necessary component' of the power to regulate mining in the national interest. If this argument was correct, the court cautioned, 'it raised the spectre of the MPRDA being in conflict with the Constitution's division of powers'.[22] An examination of the legislation, however, revealed this was not the case. The MPRDA made no provision for a 'surrogate municipal planning function'. The concern of the MPRDA is mining while the concern of the LUPO is municipal planning and they operate alongside each other.[23] Countering Maccsand's and the Minister's objection that this results in a duplication of administrative functions, the court found that there was no duplication because the MPRDA and the LUPO are directed at different ends. For as long as the Constitution *reserved* the administration of municipal planning functions as an exclusive competence of local government, applicants for a mining right or permit would need to comply with the LUPO in the provinces in which it operates. Extant case law (including *Wary Holdings*) demonstrated that dual authorisations by different administrators serving different purposes was not unknown nor objectionable in principle, even if this amounted to a 'veto' by one sphere of government of a decision by the other.[24]

Seemingly undeterred, Maccsand and the Minister appealed to the Constitutional Court. Having found that the case raised issues of great constitutional importance and that it was in the interests of justice to decide the matter,[25] the court moved on to a consideration of the merits of the MPRDA-LUPO dispute. Once again, the applicants raised a number of arguments. These were of three basic types: The first involved reference to the text of the MPRDA, and especially section 23(6), which states that mining authorisations are subject to 'any relevant law';[26] the second involved an attempt to invoke section 146 of

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[20] *Id* para 21.

[21] The court further noted that this interpretation (ie of municipal executive control over zoning and the establishment of townships), was consistent with that adopted by Yacoob J in *Wary Holdings* (n 13 para 131) and by Nugent JA in *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) para 54.

[22] See (n 16) para 29.

[23] *Id* para 33.

[24] *Id* para 34.

[25] *Maccsand (Pty) Ltd v City of Cape Town* CCT 103/11 [2012] ZACC 7; 2012 7 BCLR 690 (CC) paras 37-39. The court pointed out that the issues arising in the matter were not confined to the Western Cape Province. While the LUPO applied in at least three provinces, there were similar provincial laws dealing with town-planning in other provinces as well. Further, in order to provide investor certainty, a decision of the court giving clarity on the issue was desirable.

[26] The Constitutional Court dismissed this argument by pointing out that 'any relevant law' should not be narrowly construed to refer only to laws applicable to mining such as the Mine Health and Safety Act 29 of 1996, but should rather be accorded an ordinary, wide meaning (*id* para 45).

the Constitution;[27] while the third, of greatest interest for purposes of this note, relied on concepts and principles associated with intergovernmental relations. The applicants argued that to hold that LUPO applies to land upon which mining has been authorised amounts to permitting an 'unjustified intrusion' of the local sphere into the exclusive terrain of the national sphere of government which was contrary to the constitutional prohibition against 'encroachment' contained in section 41(1)(g).[28] The court did not agree. Stating that while the MPRDA governs mining, the LUPO regulates the use of land, it noted that a potential overlap between the two functions occurs because mining is carried out on land. This overlap was not an 'impermissible intrusion', however, because 'spheres of government do not operate in sealed compartments'.[29] The applicants further argued that subjecting mining to compliance with the LUPO would permit a local authority to 'usurp' the functions of national government in an unconstitutional manner. The court, however, pointed out that this argument was based on a misinterpretation of the judgment of the Supreme Court of Appeal. The latter had not found that LUPO regulates mining, but that the MPRDA and LUPO have different objects 'and that each did not purport to serve the purpose of the other.' The assertion of usurpation would only have any merit if LUPO aimed to regulate mining.[30] Finally, the applicants contended that requiring LUPO compliance would enable the local sphere to 'veto' decisions of the national sphere on a matter that fell within their exclusive competence. While finding this argument attractive 'at face value', the court concluded that it 'lacked substance'. Once again invoking the metaphor of power not being contained in 'hermetically sealed compartments' and the possibility of the exercise of powers by two spheres resulting in an overlap, the court reiterated that when this happens neither sphere is intruding into the functional area of another.[31] In our constitutional order it is proper, the court said, for one sphere of government to take a decision whose implementation rests upon the consent of another. If consent is refused there can in fact be no talk of a 'veto': Each sphere would have exercised its respective powers. The difficulties which non-implementation of the first decision can then pose can be resolved through co-operation between the organs of state concerned, failing which the refusal could be challenged on review.[32]

Furthermore, there was nothing in the MPRDA suggesting that LUPO would cease to apply to land upon the granting of a mining right or permit (para 44).

[27]The Constitutional Court easily dispensed with this argument on the basis that s 146 of the Constitution deals with legislation falling within the concurrent functional areas of provincial and national legislative and executive competence outlined in Schedule 4. As the MPRDA deals with mining, an exclusive national competence, it fell outside the ambit of this provision (*id* para 50).

[28]*Id* para 41.

[29]*Id* para 43.

[30]*Id* para 46.

[31]*Id* para 47.

[32]*Id* para 48.

3 Discussion

One can perhaps understand Maccsand and the Minister of Mineral Resources hammering away at the point of the supremacy of the MPRDA if one takes into account the historically privileged position mining has enjoyed in the history of South Africa. The common law as well as the complex network of mining legislation that emerged in the statute books was geared toward the 'vigorous' development of the mining industry.[33] This was reflected in local government and town planning legislation. Section 97 of the repealed Local Government Ordinance 17 of 1939 (Transvaal), for instance, required referral of proposed by-laws to mining companies when mining land was affected. Commenting on this provision in *Coupen Holdings v Germiston City Council*[34] the judge remarked that 'what the provincial legislature had in mind was to prevent a hampering of the mining industry in its mining operations. This industry is the lifeblood of the country and particular solicitude for it is only natural …'.[35] It is not merely repealed legislation that reflects such 'solicitude'. The Town-planning and Townships Ordinance 15 of 1985 (Transvaal), which still applies in Gauteng, Limpopo, Mpumalanga and parts of the North West Province for instance, contains a provision that prohibits the preparation of a town planning scheme in respect of land which is 'proclaimed land'[36] or on which prospecting, digging or mining operations are being carried out unless the land is situated within an approved township. If land included in a town planning scheme becomes proclaimed land, the town-planning scheme will no longer apply to it.[37] [38]

Added to this context is the lowly pre-1994 status of local government. Although local government had been in existence as an identifiable form of government since at least 1836, until the Interim Constitution (1993) local

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[33] Dale *An historical and comparative study of the concept of and acquisition of mineral rights* (1979) LLD thesis submitted in the Faculty of Law of the University of South Africa 75.

[34] 1961 2 SA 659 (T).

[35] *Id* 661, quoted in Dale (n 33) 75.

[36] Provision for the 'proclamation' of land for mining purposes was made in pre-Union legislation and carried through to the Mining Rights Act 20 of 1967. Proclamation of land had far-reaching effects, essentially suspending the owner's beneficial use of the surface while mining operations were being conducted. See Franklin and Kaplan *The mining and mineral laws of South Africa* (1982) 39.

[37] Section 21(1) Town-planning and Townships Ordinance 15 of 1986 (T).

[38] Another example of the reflection of the supremacy of the mining industry in local government and town-planning legislation was the (repealed) Expropriation of Mineral Rights (Townships Act) 96 of 1969 which was passed in order to come to the assistance of landowners who sought to establish a township on land over which the right to minerals was held by a third party. Following the decision in *Transvaal Property and Investment Co Ltd and Reinhold v SA Townships Mining and Finance Corporation Ltd and the Administrator* 1938 TPD 512, the legislature recognised that a landowner could be completely frustrated in his attempt to develop the land as a result of the mineral rights holder refusing to consent to the development of a township or making exorbitant demands for compensation. The Act therefore allowed the Administrator in each province to expropriate minerals rights in any province if this was in the public interest and connected with the establishment or development of a township. See Franklin and Kaplan (n 36) 693.

authorities were 'creatures of statute' subject to the direction and control of both national and provincial governments.[39] The 'formal and substantive revolution'[40] that local government has undergone as a result of its recognition as a distinct sphere of government alongside the national and provincial spheres is widely recognised but as the *Maccsand* decisions demonstrate the implications of its new status are still being worked out.

According to Woolman and Roux, the model that the 1996 Constitution institutes with its recognition of three spheres of government creates space for two competing forms of federalism that invoke different conceptions of intergovernmental relations and co-operative governance.[41] The 'co-operative' model assumes relative parity of power between the national, provincial and local spheres. The principles of co-operative government and intergovernmental relations outlined in section 41(1) of the Constitution seemingly support this model, emphasising as they do the need for all spheres of government to '*respect* the constitutional status, institutions, powers and functions of government in the other spheres';[42] not to '*assume* any power or function except those conferred in terms of the Constitution'[43]; and to 'exercise their powers and perform their functions in a manner that does not *encroach* on the geographical, functional or institutional integrity of government in another sphere' (my emphasis).[44] The 'coercive' model, by contrast, harks back to a hierarchical distribution of power where the national government is dominant. Woolman and Roux contend that several subsequent pieces of national legislation[45] taken together with ANC-dominance of political structures align the current system more closely with that of the coercive model.[46]

The reasoning that the Constitutional Court has been developing in the suite of decisions constituted by the *Wary Holdings*, *Gauteng Development Tribunal* and *Maccsand* cases however seems to be pulling in the opposite direction. And what emerges most clearly from the *Maccsand* case, although the reasoning is nascent in the previous cases as well, is what might be termed a doctrine of usurpation in the context of intergovernmental relations between the national and local spheres.[47]

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[39]Steytler and Visser 'Local government' in Woolman, Bishop and Brickhill *Constitutional law of South Africa* (2012) (2nd ed) RS 4 at 22-1.

[40]*Ibid*.

[41]Woolman and Roux 'Co-operative government and intergovernmental relations' in Woolman, Bishop and Brickhill *Constitutionall law of South Africa* (2012) (2nd ed) RS 4 at 14-6.

[42]Section 41(1)(e) Constitution of the Republic of South Africa.

[43]*Id* s 41(1)(f).

[44]*Id* s 41(1)(g).

[45]In particular, the Intergovernmental Relations Framework Act 13 of 2005, the Provincial Tax Regulation Process Act 53 of 2001; the Intergovernmental Fiscal Relations Act 97 9f 1997 and the annual Division of Revenue Act (taken together with various amendments to the constitutional provisions that determine the parameters of provincial and local fiscal autonomy).

[46]See (n 41) 14-6.

[47]It is likely that this doctrine applies between the national and provincial spheres as well, but for the purposes of this note only the three Constitutional Court decisions dealing with national-local intergovernmental relations are considered.

In short, these three cases now provide a fairly clear indication of what constitutes an unconstitutional assumption of power by the national sphere or an unconstitutional encroachment upon the municipal sphere's integrity. The set of concepts and principles that have emerged also point to the nature of the power exercised by both spheres as necessarily limited by the power of the other.

It is interesting to note that of the language used in the *Maccsand* decisions to capture the principles governing national-local intergovernmental relations – the references to 'overlap', 'veto', 'usurp', 'reservation', 'intrusion', 'encroachment' – only the last term can be found in the text of section 41(1) of the Constitution. This in itself is not a bad thing as greater lexical richness pertaining to a particular social phenomenon frequently points to a deeper and richer understanding of that phenomenon. And when the courts employ such terms they become woven into the lexicon of legal authority. The terms that have been employed, however, raise some interesting questions: Is reference to a particular sphere not to 'usurp' the functions or powers of another sphere similar to the reference not to 'assume' the functions or powers of another sphere in section 41(1)(f) or is it similar to the prohibition against 'encroachment' in section 41(1)(g)? Are assumption/usurpation and encroachment the same or different things, or possibly different grades of the same thing? The meaning of these terms in ordinary usage is not the same: Usurpation implies (illegal) taking by force, whereas assumption implies a 'taking on' of something, not necessarily by force. Encroachment, on the other hand, implies a gradual intrusion over time or space. Because these terms are used rather loosely and interchangeably in the judgments there is no basis for preferring one over the other to name a doctrine relevant to national-local intergovernmental relations. I prefer usurpation though because it seems to capture the most extreme (and thus most clearly discernible) instance of intergovernmental relations transgression. Its connotations of illegality resonate with unconstitutionality while its connotations of taking by force are not inappropriate to the force inherent in the assumption of power through an act of national legislative law making.

The context in which a doctrine of usurpation has meaning is the concurrency of national, provincial and local powers and the acceptance of duplication or overlap in the exercise of such powers. The Constitutional Court has repeatedly emphasised that an overlap of power is legitimate where the perspective from which the respective spheres operate in relation to the object of power is different. Thus in *Wary Holdings* Kroon J (majority judgment) intimated that the Minister's power to authorise the sub-division of agricultural land could co-exist with a municipality's power to authorise sub-division because while the former did so from the perspective of advancing agriculture, the latter did so from the perspective of municipal planning.[48] And in *Maccsand* the court was evidently at pains to point out that the foci of the MPRDA (mining) and the LUPO (use of land) were different. But

[48](N 12) para 80.

they have now also gone further in pointing out that it is not only permissible for different spheres of government to act upon the same object from different perspectives, it is also permissible for the implementation of one sphere to depend upon the consent of another without talk of a 'veto' of power.[49] Because the power of one sphere is not insulated (or to use one of the Court's favourite metaphors not 'hermetically sealed') from the sphere of another, instances will inevitably arise where the power of one sphere cannot extend to its ultimate object.

What then will constitute an impermissible usurpation of power? The short answer is as follows: Where one sphere of government takes on the executive power of another and attempts to operate *from the same functional perspective* as the encroached sphere in relation to an object of power. It is for this reason that the duplication of powers was permissible in *Maccsand* and *Wary Holdings* but not in *Gauteng Development Tribunal*. In the former two cases the national sphere could be said to be operating from a perspective distinct from 'municipal planning', but in *Gauteng Development Tribunal* the court found that the Development Facilitation Act authorised development tribunals to determine applications for rezoning and the application of townships[50] – precisely the functions that the court, by virtue of its interpretation of 'municipal planning' had found to inhere in the municipal sphere. It is also for this reason that the Supreme Court of Appeal's *obiter dictum* in the *Maccsand* matter – that were the MPRDA to attempt to provide for a 'surrogate municipal planning function' this would raise the spectre of it being in conflict with the Constitution – makes sense. Given that the meaning of the functional area of 'municipal planning' can now be taken as settled law, any attempt on the part of the Minister and the Department of Mineral Resources[51] to include land use planning as part of the jurisdictional criteria that guide the Minister in issuing prospecting or mining rights will be an unconstitutional usurpation of the municipal sphere's powers.

There is 'play' in the doctrine of usurpation, however, and it rests on two acts of interpretation. The first is an interpretation of the meaning of the functional areas in Schedules 4 and 5; the second involves an interpretation of the main thrust of the legislation that purports to give one sphere powers in the functional area of another. In the three judgments under consideration in this note, the Constitutional Court has not always treated each act of interpretation systematically or given each equal prominence. Regarding the interpretation of the functional areas, the court maintained in *Gauteng Development Tribunal* that the decision in *Wary Holdings* was not concerned with an interpretation of the

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[49](N 25) para 48.

[50](N 7) paras 49 and 69.

[51]The MPRDA is once again under review for reform. See Sikhakhane 'Nationalisation, Act amendment among major topics at conference' (2012) *Mining Weekly* 27 January, available at: http://www.miningweekly.com/article/nationalisation-infrastructure-development-and-act-amendment-among-major-topics-at-conference-2012-01-27 (accessed 2012-04-05). The proposed amendments have not yet been made public.

Constitution and its schedules,[52] for instance, but an unstated assumption of the content of the national functional area of agriculture underlies the court's deliberations in the latter judgment.[53] And in *Gauteng Development Tribunal* the differential attention given to the interpretation of the functional areas of 'municipal planning' as opposed to 'urban and rural development' is noticeable.[54] As to the interpretation of the main thrust of legislation under review, this is also not always made explicit in the court's reasoning although it is critical to the outcome. For instance, in *Wary Holdings* one of the key aspects that splits the majority from the minority decision is the latter's finding that in so far as the sub-division of Agricultural Land Act provides for the Minister to approve the sub-division of agricultural land, the Act is concerned with municipal planning, not agriculture.[55] One can see how the various parties to these cases are alive to the interpretive space involved in the characterisation of legislation as empowering a particular sphere in one functional area rather than another. In *Gauteng Development Tribunal*, for instance, the respondents argued that the Development Facilitation Act is not concerned with municipal planning, but rather with the establishment of institutions with adjudicatory powers to determine land development applications, but the court rejected this argument.[56] In *Maccsand* too, Maccsand and the Minister at some points appear to have tried to paint LUPO as a piece of legislation concerned with mining. Unfortunately, they then also tried to argue that the MPRDA covers the field of land use regulation, an argument that proved fatal to their case.

4 Conclusion

The Constitutional Court's decision in *Maccsand* coheres with the body of jurisprudence it has been developing in the area of national-local intergovernmental relations. The court's approach appears to be aligned with a co-operative model of federalism that affirms the role of local government as a co-equal to the national and provincial spheres. From the cases discussed in this note one can discern an emerging doctrine of usurpation that allows one to distinguish situations where an overlap of power is impermissible from situations where it is not. The concepts and principles that constitute the doctrine of usurpation are not confined to the relationship between the MPRDA and the LUPO, but are applicable whenever there is an overlap of powers between the different spheres.

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[52](N 7) para 68.
[53](N 12) paras 66 and 71.
[54](N 7) paras 60-63.
[55](N 12) para 129.
[56](N 7) para 69.