Case notes

The judiciary's gritty efforts to erode the mining authority's continued aversion to cooperative environmental governance in the Cape dunes

Hugo Wiehahn Louw NO v Swartland Municipality and *Maccsand (Pty) Ltd v City of Cape Town*

1 Introduction

Some two years ago, and in the context of *Swartland Municipality v Hugo Wiehahn Louw*,[1] I bemoaned the extent to which the actions of the national mining authorities illustrated disrespect for the constitutional status, institutions, powers and functions of the local sphere of government; an attempt to assume power over an area of competence not conferred on them in terms of the Constitution of the Republic of South Africa[2] (Constitution); an encroachment on the geographical, functional and institutional integrity of local government; a failure to co-operate with local government in mutual trust and good faith; and a flagrant disregard of the statutory dictates of co-operative governance enshrined in the Constitution[3] and the National Environmental Management Act[4] (NEMA).[5] Notwithstanding a string of recent jurisprudence that has subsequently confirmed the nature and constitutional status of local government's competence over municipal planning,[6] I concernedly again have recourse to do so. The setting: again, the sand-mining operations in the Western Cape's dune landscapes. The

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[1] *Swartland Municipality v Louw* 2010 5 SA 314 (WCC).
[2] 1996.
[3] Chapter 3.
[4] Act 107 of 1998.
[5] Paterson 'Undermining land-use planning and co-operative governance' (2010) 25 *SAPL* 692-697.
[6] These cases include: *Intercape Ferreira Mainliner (Pty) Ltd v Minister of Home Affairs* 2010 5 SA 367 (WCC); *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC); *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC); and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC).

parties: again, the successful holders of mining authorisations acting together with the Minister of Mineral Resources against the local planning authority. The main issue: again, primarily whether the grant of a mining authorisation obviates the need to obtain local land-use planning approval prior to commencing with mining operations. The cases: *Hugo Wiehahn Louw NO v Swartland Municipality*[7] (*Swartland* case) (the appeal of the judgment considered two years ago) and *Maccsand (Pty) Ltd v City of Cape Town*[8] (*Maccsand* case).

2 The facts

The facts of both the cases are very similar. In the *Swartland* case,[9] the first to fourth appellants are trustees of the Hugo Wiehahn Louw Trust, which owns a farm in the vicinity of Malmesbury in the Western Cape. The first appellant is also one of the Directors of Elsana Quarry (Pty) Ltd, the fifth appellant, which was in 2009 granted a mining right over a portion of the farm by the sixth appellant, the erstwhile Minister of Minerals and Energy, acting under the Mineral and Petroleum Resources Development Act[10] (MPRDA).

Prior to commencing its mining activities, Elsana had in 2000 also submitted an application to the Swartland Municipality, the respondent, under the Cape's Land Use Planning Ordinance[11] (LUPO), read together with the relevant municipal Zoning Scheme Regulations, in order to rezone the land from Agricultural I to Industrial III. Elsana withdrew its rezoning application in 2008 on the advice of the mining authorities that no such additional approval was necessary as the regulation of mining activities fell within their exclusive purview. Shortly thereafter, Elsana commenced its mining operations, which triggered the Swartland Municipality's approach to the Western Cape High Court for an interdict compelling Elsana to cease its mining operations until such time as it had obtained the requisite land-use planning approval under LUPO.

In the *Maccsand* case, Maccsand (Pty) Ltd, the first appellant, was granted a mining permit to mine sand on two pieces of land by the second appellant, the Minister of Mineral Resources. The land was owned by the first respondent, the City of Cape Town. The first piece of land, the Westridge Dune, comprises of three erven, two of which are zoned as rural and one as public open space. The second piece of land, the Rocklands Dune, comprises of one erven zoned as open space. Both pieces of land abut residential suburbs. As in the *Swartland* case, Maccsand asserted that having secured a mining permit it did not require any further land-use planning approval prior to commencing its mining operations.

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[7] Unreported judgment of Plasket AJ in the Supreme Court of Appeal under Case no 650/2010, dated 2011-09-23.
[8] 2011 6 SA 633 SCA.
[9] For a comprehensive summary of the facts of this case see: Paterson (2010) *SAPL* 692-693.
[10] Act 28 of 2002.
[11] Ordinance 15 of 1985.

These included a consent use in respect of the Rocklands Dune and a departure from the zoning scheme restrictions in respect of the Westridge Dune, both authorisations regulated under LUPO. Maccsand commenced its mining operations and was met with an urgent interdict application filed by the City of Cape Town to cease its activity until such time as it had obtained not only the requisite land-use planning approval under LUPO, but furthermore an environmental authorisation under NEMA read together with its Environmental Impact Assessment Regulations[12] (EIA Regulations).

Both the above interdict applications were heard in the Western Cape High Court within a couple of months of one another and the outcome was almost identical. The court *a quo*[13] in the *Swartland* case held that the grant of a mining right under the MPRDA did not obviate the need for Elsana to obtain the requisite land-use planning approval under LUPO from the Swartland Municipality prior to commencing with its mining activity. The court *a quo*[14] in the *Maccsand* case came to a similar decision and ordered in addition that Maccsand obtain the requisite EIA approval under NEMA, read together with its EIA Regulations, prior to doing so. The local authorities in both cases accordingly succeeded in their interdict applications against the mining companies thereby confirming their constitutional competence to regulate land-use planning within their municipal boundaries.

Disgruntled by the decisions of the Western Cape High Court, both mining companies (together with the Minister of Mineral Resources) sought to appeal the decisions to the Supreme Court of Appeal.[15] The appeals were filed under separate case numbers but were argued jointly before the Court of Appeal on 16 August 2011, owing to the fact that they involved almost identical factual scenarios and legal arguments. In both instances, the appellants argued that the MPRDA, being legislation concerned with a competence vested in the national sphere of government (namely mining), trumped LUPO to the extent that the two laws conflicted with one another. They furthermore argued that the reference to 'relevant law' in the MPRDA, being those additional laws with which applicants for mining authorisations must comply, did not include LUPO.[16] As a result, the appellants argued that having obtained the requisite mining approval under the

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[12]The prayer specifically referred to *GG* no 28753, 2006-04-21 GNR 386-388.

[13]*Swartland Municipality v Louw* 2010 5 SA 314 (WCC). For a discussion of the decision of the court *a quo*, see: Paterson (2010) *SAPL* 692-697; and De Visser and Singiza 'Undermining local planning?' (2010) 12/1 *Local Government Bulletin* 5-6.

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

[15]Shortly before the appeals were to be heard, the Trust and Elsana in the *Swartland* case tendered costs and withdrew as appellants. The Minister of Mineral Resources however persisted with the appeal in her sole capacity.

[16]Sections 23(6) and 25(2)(d) of the MPRDA respectively provide that the grant of a mining right is 'subject to … any relevant law' and that the holder of a mining right must 'comply with … any other relevant law'.

MPRDA, they were entitled to commence and/or continue with their mining operations without the need to obtain any form of land-use planning approval under LUPO. The appellants contended that to find otherwise would result in a duplication of effort by mining authorities (administering the MPRDA) and local authorities (administering LUPO), which could not have been intended by the legislature. In the context of the *Maccsand* case the appellants[17] argued further that the MPRDA incorporates several aspects contained in NEMA in order to give effect to the environmental right enshrined in section 24 of the Constitution, and that those aspects not expressly incorporated into the MPRDA (such as NEMA's provisions regulating EIA) did not apply to mining. The respondents in both matters naturally argued exactly the contrary.

Given the similarity of the factual scenarios and the arguments presented before the court, the judgments not surprisingly are almost identical. I shall therefore deal with them jointly below.[18]

3 The judgment

The Supreme Court of Appeal was accordingly called upon to rule on two main issues. The first related to the relationship between the MPRDA and LUPO and specifically whether the former trumps the latter. The second related to the relationship between the MPRDA and NEMA and specifically whether the latter's EIA regime is applicable to mining activities.

3.1 Relationship between the MPRDA and LUPO

The court proceeded by exploring the contemporary structure of government under the Constitution and confirmed that it 'represents a significant change from the hierarchical structure of government that existed under the pre-1994 constitutions in which the national legislature was sovereign and all-powerful' and provincial and local government effectively subordinate.[19] Referring to an array of jurisprudence emanating from the Constitutional Court,[20] the court reaffirmed that the contemporary structure of government consists of a partnership between the three spheres 'oiled by the principles of co-operative government', principles

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[17]Specifically the Chamber of Mines which was admitted to the proceedings as an *amicus curiae*.
[18]References that follow are mainly to the relevant paragraphs of the *Maccsand* case judgment as the *Swartland* case judgment simply cross refers (in para 11) to the relevant paragraphs in the former judgment (paras 10-35) rather than addressing the issues separately.
[19]*Maccsand* case para 11.
[20]This jurisprudence included: *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 43; *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 82; *Fedsure Life Assurance Ltd v Greater Johanneburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 26-40; and *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 289.

which require these spheres to 'exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity' of another sphere.[21] It furthermore held, quoting the Constitutional Court in *City of Cape Town v Robertson*,[22] that under the constitutional dispensation, a municipality 'is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial and national legislation' but rather an organ of state enjoying '"original" and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits'.[23]

The court then briefly summarised the relevant provisions of the Constitution that provide for the allocation of national, provincial and local legislative and executive competence, and promote cooperative governance.[24] It confirmed that mining, as an issue, falls within the exclusive residual competence of the national executive[25] and the 'national character' of the MPRDA.[26] Considering the objects of the MPRDA and the nature of the powers accorded to the Minister of Mineral Resources under it, the court held that the MPRDA: is concerned with regulating mining; does not seek to regulate municipal planning; and does not oblige or even empower the Minister to consider municipal planning issues when making decisions regarding the grant of mining authorisations.[27] It accordingly concluded that 'it cannot be said that the MPRDA provides a surrogate municipal planning function that displaces LUPO and it does not purport to do so'.[28]

Having canvassed the nature of the national government's constitutional competence over mining and the nature of the powers under the MPRDA, the court considered the nature of local government's authority over municipal planning and the nature of the powers accorded to them under LUPO. Reaffirming the constitutional status and competence of the local sphere of government,[29] the court considered the precise nature and ambit of their competence over 'municipal planning'. Referring to a string of recent cases that have considered the meaning of these words,[30] as 'municipal planning' is not defined in the Constitution, the court confirmed that they should be accorded their

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[21] *Maccsand* case para 11.
[22] 2005 2 SA 323 (CC).
[23] *Maccsand* case para 22.
[24] *Id* para 12.
[25] *Id* paras 13-14.
[26] *Id* para 15.
[27] *Id* paras 29-33.
[28] *Id* para 33.
[29] *Id* paras 22-26.
[30] These cases were: *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) paras 28, 41 and 57; and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 131.

common meaning, that is, the control and regulation of the use of land through zoning, subdivision and the establishment of townships.[31] Regarding LUPO, the court held that this law differed from the MPRDA in several respects, namely: it is old order legislation; it is provincial legislation; and it regulates specific aspects of municipal planning such as structure plans, zoning schemes, subdivision and applications for departures from or amendments to these plans, schemes and subdivision requirements.[32] The court furthermore highlighted the important role played by municipalities through LUPO in regulating land-use planning in their area of jurisdiction,[33] a role appropriately accorded to them owing to their 'knowledge of local conditions and their intimate link with the local electorate whose interests they represent'.[34]

Given the distinct constitutional status of the national and local spheres of government, their respective distinct constitutional competence over mining and municipal planning and the decidedly different purposes of the MPRDA (to regulate mining) and the LUPO (to regulate municipal planning), the court not surprisingly held that there was no inherent conflict between the operation of the two laws.[35] It deemed that they effectively 'operate alongside' one another and dispensed with the appellants' contentions that such apparent duplication of administrative effort could never have been intended by the legislature.[36] The court accordingly held that securing any mining authorisation is 'logically anterior to the procurement of consents that may be necessary for its execution', such as securing a land-use planning approval from the municipal authority.[37] Furthermore, it confirmed that 'dual authorisations by different administrators, serving different purposes, are not unknown, and not objectionable in principle – even if this results in one of the administrators having what amounts to a veto'.[38] Quoting Kroon AJ in *Wary Holding Pty (Ltd) v Stalwo (Pty) Ltd*,[39] the court highlighted that in this constitutional era, there is no reason why 'two spheres of control cannot co-exist', one operating from a 'municipal perspective and the other from a national perspective' – each applying their own 'constitutional and policy considerations'.[40]

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[31] *Maccsand* case paras 27-28.
[32] *Id* paras 16-19.
[33] In this regard, the court specifically quoted Rogers AJ in *Intercape Ferreira Mainliner (Pty Ltd v Minister of Home Affairs* 2010 5 SA 367, to the effect that land use contrary to LUPO would frustrate the very purpose of town planning and potentially jeopardise 'the character of the area and the welfare of the members of the community' residing in it (para 21).
[34] *Maccsand* case para 21.
[35] *Id* paras 33-34.
[36] *Ibid*.
[37] *Id* para 34.
[38] *Ibid*.
[39] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 80.
[40] *Maccsand* case para 35.

The court therefore dismissed the appeals insofar as they related to the MPRDA trumping local government authority over municipal planning through the operation of LUPO.[41] Having ruled that there was no inherent conflict between the MPRDA and LUPO, the court did not deem it necessary to consider the issue of statutory interpretation, namely, whether the reference to 'relevant law' in the MPRDA included LUPO.

3.2 Relationship between the MPRDA and NEMA

While constituting an integral component of the decision of the court *a quo* in the *Maccsand* case,[42] this aspect was dispensed with very fleetingly by the Supreme Court of Appeal. The court *a quo* had held that Maccsand's mining activities triggered two listed activities[43] and that it was accordingly interdicted from continuing and/or commencing its mining activities on both the Westridge Dune and Rocklands Dune sites until such time as it had obtained the necessary environmental authorisation issued under NEMA. The Court of Appeal however held that it was unable to confirm the interdicts as the regulations providing for the listing of these activities,[44] on which they were based, had been repealed just over two weeks prior to the handing down of the court *a quo's* judgment.[45] The Court of Appeal accordingly ruled that the interdicts were granted 'in the erroneous belief' that the government notices on which they were based were valid. Having come to this conclusion, the Court of Appeal declined to accede to the parties' request to provide clarity on the relationship between the MPRDA and NEMA, specifically their respective environmental impact assessment requirements.[46] Notwithstanding having heard extensive arguments on the issue, the court was of the view that its 'hypothetical' nature entitled the court to refuse to engage with it.[47]

4 Considering the outcome

4.1 Relationship between the MPRDA and NEMA

The Supreme Court of Appeal's ruling in respect of the nature of the relationship

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[41] *Maccsand* case paras 34-35 and *Swartland* case paras 11-12.
[42] *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC) (74H-80D). This aspect was not raised and accordingly consider by either the court *a quo* or the court of appeal in the *Swartland* case.
[43] Item 12 ('transformation or removal of indigenous vegetation of 3 hectares or more …') and item 20 ('transformation of an area zoned for use as public open space or for a conservation purpose to another use') listed in *GG* no 28753, 2006-04-21 GN 386.
[44] *GG* no 28753,2006-04-21 GN 386.
[45] GN 386 was expressly repealed and replaced by *GG* no 33306, 2010-06-18 GNR 544, which commenced on 2010-08-02 (see *GG* no 33411, 2010-07-30 GNR 661).
[46] *Maccsand* case para 38.
[47] *Id* para 39.

between the MPRDA and NEMA in the *Maccsand* case is noteworthy in two main respects.

The first relates to the applicability of NEMA's 'old' EIA regime. Whilst strictly correct, it does clearly highlight the problems posed by the perpetually transient nature of South Africa's environmental impact assessment regime. At the time the parties formulated their papers and argued the matter before the court *a quo* during April 2010, the 'old' EIA regime was applicable.[48] The 'old' EIA regime was similarly applicable when the court *a quo* formulated its judgment. Just over two weeks prior to handing down its judgment on 20 August 2010, this 'old' EIA regime was repealed and replaced with a 'new' EIA regime,[49] which commenced on 2 August 2010.[50] The timing of these legislative reforms *vis-à-vis* the judicial process in this matter was clearly unfortunate. While new legislative frameworks generally contain intricate transitional provisions to guide the administration on how to treat old authorisations, pending applications and appeals,[51] these are unfortunately of no utility to the judiciary tasked with formulating their judgments during periods of statutory transition.

Given the unfortunate timing of these legislative developments, the attitude of the Supreme Court of Appeal to the issue seems rather strict and narrow when compared to the flexible and proactive attitude of some courts in the past when formulating their judgments on matters dealing South Africa's transient EIA regime.[52] With the 'new' EIA regime effectively listing the exact same activities as its predecessor,[53] why the court did not deem it appropriate simply to substitute references to the 'old' EIA regime with the references to the 'new' EIA regime is unclear. Perhaps this was due to the fact that at the end of the day it had no real consequences as both mining companies were nonetheless interdicted from continuing with their mining activities on the basis of non-compliance with LUPO. What is further unclear is why the respondents' legal representatives did not request leave of the court to supplement or amend their prayers in light of the legislative developments which intersected the passage of the matter through the judicial process.

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[48]The 'old' EIA regime comprised of NEMA (chapter 5) read together with its EIA Regulations promulgated in *GG* no 28753, 2006-04-21 GNR 385-387.

[49]This 'new' EIA regime comprised of NEMA (chapter 5) read together with its EIA Regulations promulgated in *GG* no 33306, 2010-06-18 GNR 543-546.

[50]This 'new' EIA regime commenced on 2010-08-02 (*GG* no 33411, 2010-07-30 GNR 661-664).

[51]See specifically Regulations 72-76 in *GG* no 33306, 2010-06-18 GNR 543.

[52]Take for instance the *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products* 2004 2 SA 393 (E) in which Leach J deemed it appropriate to simply delete that wording in the applicant's prayers which referred to the incorrect EIA regime when formulating the court order.

[53]Listed activities no 12 and no 20 contained in the 'old' EIA regime (specifically *GG* no 28753 2006-05-21 GNR 386) are duplicated almost verbatim in the 'new' EIA regime (see specifically Listed Activity no 24 in GNR 544 and Listed Activities no 12-14 in GNR 546, both published in *GG* no 33306 of 2010-06-18).

The second issue relates to the court's refusal to provide clarity on the befuddled relationship between the MPRDA and NEMA, specifically relating to the applicable EIA regime governing mining activities.[54] Having dispensed with the court *a quo's* order dealing with the old EIA regime, the matter was clearly academic. Accordingly, the Supreme Court of Appeal was clearly legally entitled not to address the issue.[55] However, had it ruled differently on the applicability of NEMA's EIA regime to the Appellant's mining activities, the court would have been compelled to address this issue. This would have brought into question the desirability of the judiciary having to fathom the relationship between legislation promulgated by different national government authorities. The promulgation of legislation falls within the domain of the legislature and not the judiciary. Surely it is therefore far more preferable for these relationships to be proactively and clearly enunciated by the legislature when formulating the legislation, especially where the legislative aftermath is the outcome of fraught political negotiations between different government departments. Calling upon the judiciary retrospectively to unravel the convoluted aftermath draws it involuntarily into the realm of politics, and provides further fodder to those politicians seeking any opportunity to chastise the judiciary for stepping outside its domain. The Court of Appeal's circumnavigation of the issue is accordingly not only unsurprising, but I would argue also politically astute in the country's current political climate.

4.2 Relationship between the MPRDA and LUPO

The Supreme Court of Appeal's decision on the relationship between the MPRDA and LUPO, which occupied the bulk of the court's attention, is similarly not surprising as it does not 'raise particularly convoluted legal issues'.[56] What is surprising, however, is how this issue again landed up before the judiciary given the clear constitutional dictates of cooperative governance and the myriad statutory[57] and non-statutory[58] mechanisms that have been introduced in the past

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[54]For a discussion of the nature and problems caused by this befuddled relationship, see: Humby 'The black sheep comes home: Incorporating mining into the Environmental Impact Assessment regime under the National Environmental Management Act, 1998' (2009) 24 *SAPR/PL* 1-32.

[55]The court relied on *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, Maphanga v Officer Commanding, SA Police Murder and Robbery Unit, Pietermaritzburg* 1995 4 SA 1 (AD) as precedent. In this case, the court of appeal held that the courts will not deal with or pronounce on abstract or academic points of law (paras 14F-G).

[56]I argued to this effect in relation to the court *a quo* decision in the *Swartland* case (see Paterson (2010) 25 *SAPL* 696-697). Given the similarity of the issues raise in the *Maccsand* case and both appeal decisions, the same argument would accordingly apply.

[57]Statutory mechanisms expressly aimed at facilitating cooperative governance are numerous. A full discussion falls outside the purview of this note. In summary, they are principally enshrined in the Intergovernmental Relations Framework Act 13 of 2005 and the National Environmental Management Act 107 of 1998. The former Act, which is administered by the Department of

decade to promote this ideal. This concern is heightened further by the following contemporary developments, which intersected the decisions of the court *a quo* and the Court of Appeal in both matters.

First, several court judgments (including two heard by the Constitutional Court)[59] confirmed the constitutional status of local government and the nature of their competence over 'municipal planning'. Notwithstanding this contemporary jurisprudence, the appellants (notably including the Minister of Mineral Resources) chose to proceed with the appeals. Secondly, several national and provincial environmental authorities, including the Minister of Mineral Resources, concluded the Outcome 10 Service Delivery Agreement in September 2010.[60]

Cooperative Governance and Traditional Affairs, provides for: the establishment of an array of intergovernmental structures such as the President's Coordinating Council and national, provincial and municipal intergovernmental forums (chapter 2); the prescription of protocols for conducting intergovernmental relations (chapter 3); and procedures for the settlement of intergovernmental disputes (chapter 4). The latter Act, which is administered by the DEA, provides for: a series of national environmental management principles with which all organs of state whose actions may significantly affect the environment must comply (chapter 1); the establishment of a national environmental management advisory forum (chapter 2); provision for the preparation, publication and implementation of environmental management and implementation plans by government authorities exercising powers which impact on or affect the environment (chapter 3); procedures for fair decision-making and conflict resolution (chapter 4); and procedures for integrated environmental management (chapter 5). For a full discussion on the above statutory mechanisms, see; Kotze 'Environmental governance' in Paterson and Kotze *Environmental compliance and enforcement in South Africa* (2009) 103-125; Du Plessis 'Legal mechanisms for cooperative governance in South Africa: Successes and failures' (2008) 23 *SAPR/PL* 87-110; Edwards 'Cooperative governance in South Africa, with specific reference to the challenges of intergovernmental relations' (2008) 27 *Politeia* 65-85; Department of Provincial and Local Government *Practitioners guide to intergovernmental relations in South Africa* (2007) 51-78; and Malan 'Intergovernmental relations and co-operative government in South Africa: The ten-year review' (2005) 24 *Politeia* 226-243.

[58] Non-statutory initiatives include the establishment of MINMEC structures and MINTECH structures and the signing of service delivery agreements between various national and provincial authorities. The MINMEC structures are 'political committees' generally comprising of the national line function Minister, Deputy Minister, nine provincial MECs in the same functional area and local government representatives. Their function is to achieve 'political harmony' through coordinated national, provincial and local decision-making. The MINTECH structures are 'technical committees' comprising of the national line function Director-General and his/her respective provincial Head of Departments. Their function is generally to achieve 'administrative or technical harmony' within the different spheres of government. For further information on these structures, see: *Practitioners guide to intergovernmental relations in South Africa* (2007) 66-67; and Malan (2005) *Politeia* 233-234. These initiatives have recently been complemented by the signing of service delivery agreements between national and provincial authorities to improve the coordination of the functions and responsibilities.

[59] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC).

[60] Department of Environmental Affairs and Provincial Environmental Departments and Conservation Agencies Service Delivery Agreement (Outcome 10 - Environmental Assets and Natural Resources that are Valued, Protected and Continually Enhanced), dated 2010-09-30.

This agreement specifically recognises the need for heightened management and regulation of the environmental impacts caused by mining[61] through *inter alia* the 'alignment and integration of regulatory processes' and the 'implementation of intergovernmental forums at and between the appropriate levels of government'.[62] Notwithstanding that these sentiments reinforce the constitutional dictate of cooperative governance, the Minister of Mineral Resources again chose to be party to court proceedings that directly seek to undermine this imperative.

As such, the two cases provide further evidence of the trends I bemoaned in the opening paragraph of this note. The cases do however also illustrate the important role of the judiciary in holding spheres of government to account where their actions seek to abrade the constitutional authority of other spheres and the ideal of cooperative governance. Long may the judiciary have the confidence and persuasion to hold the executive to account. However, perhaps when called upon to do so, the judiciary should be more overt in its criticism of the executive as matters of this nature damage public perception of key government structures, create administrative uncertainty and often ultimately prejudice citizens seeking to survive in this increasingly fragile economic climate.

Whether the judiciary will heed this call only the sands of time will tell. Hopefully, the need to answer the call too frequently will be silenced by recent moves to clarify the mandate of relevant spheres of government in the planning context through statutory reform.[63] This would appear to be a far more preferable, proactive and cooperative approach than dragging government spats before the judiciary. However, given the political dynamics at play between South Africa's mining authorities, environmental authorities and municipal authorities, the judiciary will no doubt be called upon once again to erode uncooperative attitudes where these arise.

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[61] Service Delivery Agreement (Outcome 10) 12-13.
[62] *Id* 31-32.
[63] The most important of this statutory reform is the Draft Spatial Planning and Land-Use Management Bill (2011) published in *GG* no 34270 2011-05-06 GN 280. Among other things, the express objects of the Bill are to: 'provide for a uniform, effective, efficient and integrated regulatory framework for spatial planning, land use and land use management in a manner that promotes the principles of co-operative government and public interest' 1.