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LLM (ENVIRONMENTAL LAW) DISSERTATION

TITLE: *MACCSAND (PTY) LTD v CITY OF CAPE TOWN AND OTHERS –* A MISSED OPPORTUNITY FOR CO-OPERATIVE GOVERNANCE

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I hereby declare that I have read and understood the regulations governing the submission of Masters in Law (LLM) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations.

Signed by candidate

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1. INTRODUCTION AND BACKGROUND

1.1 BACKGROUND

1.1.1 UNITARY STATE v FEDERAL STATE

In the period leading up to the first democratic elections in South Africa and the adoption of the Constitution[1] as the supreme law of the country, there was heated debate and protracted negotiations regarding the form of government that would suit the new democratic South Africa and best protect the interests of all parties concerned. The governance model of the apartheid era had been one of a unitary state, taking its cues from the governance model of the former colonial rulers of the area, the United Kingdom. 'A unitary state is one in which the legislative power is concentrated exclusively in one location. In such a state there is no entrenched division of legislative power between the central government and the regional units of the country'.[2] The unitary state option employed by the previous government of South Africa allowed for power to be devolved to the provincial units, but this power could be revoked at the discretion of national government. In a move to break with the past, a form of federal constitutional governance was chosen for the post-apartheid South Africa. The particular configuration of governance crafted for implementation was 'unique and completely unlike anything that [had] been experienced by the country during the last three centuries'.[3]

To understand how the chosen system of governance works, one must have an understanding of the parts that combine to create it, starting with the concept of federalism. Devenish explains that

> in a federation there is an entrenched legislative division of power between the central government and the regional units, be they called provinces, states or regions. Federalism is in essence a mode of sharing and organising political power. In its broadest sense, it encapsulates a linkage of people and institutions in a lasting but limited union by mutual consent. It guarantees their respective autonomies, but simultaneously advances their mutual interests.[4]

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[1] The Constitution of the Republic of South Africa Act 108 of 1996.
[2] G E Devenish *A commentary on the South African Constitution* at 19.
[3] B De Villiers (ed) 'Intergovernmental Relations: A Constitutional Framework' in *Birth of Constitution* at 256.
[4] Devenish note 2 supra at 20.

'So-called integrated federal states generally provide for the exercise of both exclusive and concurrent powers by different levels of government and develop procedures designed to enhance co-operation between levels and organs of state.'[5]

1.1.2 THE INTRODUCTION OF CO-OPERATIVE GOVERNANCE

An important factor in federal systems is therefore that 'policies can only be made and implemented through negotiation and co-operation ... in such a way that member states or regions share in the making and executing of decisions'.[6] This factor paves the way for the introduction of a novel concept into the South African governance structure, ie co-operative governance. The result is a form of governance structure for South Africa that has been labelled 'co-operative federalism', as opposed to 'competitive federalism'.[7] The co-operative governance model finds its roots in the unified but decentralised approach to governance typical of international organisations with a myriad of member states. The governing style has been adopted by the European Union in the form of a 'process' model which favours a method of 'engaging all actors ... in an ongoing process of deliberation, negotiation, compromise and consensus' rather than 'imposing, from on high, predetermined decisions on passive recipients at the bottom'.[8] '"Co-operative government" emphasises and facilitates inter-governmental co-operation and co-ordination rather than competitive political conduct precipitated by the division of legislative power found in a conventional federal model of government. Co-operative government is premised largely on the German Constitution.'[9] It is clear therefore that in choosing a governance model best suited to delivering on the objects of the new democratic ideal, the engineers of South Africa's democratic political dispensation had regard to internationally proven governance models recognised for furthering the goals of 'co-operative federalism'. With particular reference to German federalism, De Villiers notes that '[o]ne of the essential features of German federalism is ... a well-developed system of intergovernmental relations'.[10] This important feature is echoed in the South

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[5] Woolman et al *Constitutional Law of South Africa* 'Co-operative governance' at 14-5.
[6] Devenish note 2 supra at 20.
[7] G E Devenish *The South African Constitution* at 215.
[8] Orchard B 'From Globalization to Global Peace?' available at http://www.vision.org/visionmedia/article.aspx?id=18193 (last accessed on 09 December 2011).
[9] Devenish note 7 supra at 215.
[10] De Villiers note 3 supra at 265.

African governance system and co-operative governance and intergovernmental relations are considered so vital to the successful implementation of the governance model that they are encapsulated in the supreme law of the country, the Constitution.[11]

1.1.3 THE SOUTH AFRICAN GOVERNANCE MODEL

Taking the cues from the international examples, the South African governance model of 'co-operative federalism' was crafted to suit the vision, needs and objectives of the country. There are three spheres of government in the South African system of governance: national government, provincial government and local government. Of the three spheres of government, the one which operates closest to the electorate is local government. In their interactions with local government, ordinary citizens experience many of the effects of policy and legislation made and implemented by all three spheres of government. For municipalities, as Steytler indicates, there are 'two key values of decentralisation, namely that municipalities are best placed to gauge community needs and, secondly, that they should be sites of innovation and creativity in formulating localised responses to meeting those needs'.[12] The Constitutional Court has also recognised this unique role of local government. In *Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development of the Republic of South Africa; Executive Council of KwaZulu-Natal v President of the Republic of South Africa*[13] the Court stated that 'local government is the closest government can get to the people. That is where delivery must be seen to be taking place.'[14] It is accordingly important, for a sense of legitimacy and culture of trust to be established, that citizens experience, in the conduct of local government, the decisions and actions of government to be consistent, administratively sound and supported by legislation and policy which has been properly interpreted and fairly applied.

Any hope of fostering this positive impression of government in action will be hamstrung by any doubt created as a result of inconsistent application of the law, uncertainty regarding the competency to grant authorisations and unnecessary

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[11] The Constitution note 1 supra at Chapter 3.
[12] N Steytler 'The Strangulation of local government' in (2008) Vol 10 *Tydskrif vir die Suid-Afrikaanse Reg* 518 at 520.
[13] 1999 (12) BCLR 257 (CC).
[14] Ibid at para [44].

bureaucracy resulting from turf wars between spheres of government. The Constitution now provides that the three spheres of government are 'distinctive, interdependent and interrelated'[15] and assigns specific competencies to the different spheres. However, given the fact that the governance structure of South Africa's pre-constitutional era was hierarchical and tiered with national government being the pinnacle of authority, it is quite probable that vestiges of this approach to governance remain, despite a new dispensation having been introduced by the Constitution. This may make it difficult for the previously 'lesser' spheres of government, ie the provincial and local spheres of government, to assert their distinctive authority, act in terms of their constitutional competencies and deliver on their mandates.

'The difficulties that face [the] present-day government require greater co-operation, co-ordination, joint planning and the sharing of resources.'[16] The concept of 'co-operative governance' is introduced by the Constitution to promote the functioning of the different spheres as a cohesive whole, thereby fulfilling the objective to assist the cultivation of good relationships between the spheres of government and promote a culture of good governance, taking the particular historical perspective of the country into account. 'South Africa with its history of separate development and Apartheid will have to take special measures to encourage the development of a co-operative relationship and spirit between the ...' various spheres of government.[17]

The three spheres of government, despite being distinct, are required to 'function together as a cohesive unit'[18] in order to deliver on obligations. The Constitution provides specific principles which must be adhered to in order to foster co-operative governance[19]and Parliament has enacted specific complementary legislation to give content and guidance to the implementation of the constitutional imperative. Adherence to the co-operative governance model is necessary to deliver effectively on all the obligations placed on all the spheres of government, particularly since the Constitution makes it a point of allocating concurrent functional areas across the spheres of government. As the Constitutional Court stated: 'Intergovernmental co-operation is

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[15] The Constitution note 1 supra at section 40(1).
[16] De Villiers note 3 supra at 270.
[17] Ibid at 280.
[18] B Bekink *Principles of South African Local Government Law* at 89.
[19] The Constitution note 1 supra at section 41.

implicit in any system where powers have been allocated concurrently to different levels of government and is consistent with the requirement ... that national unity be recognised and promoted.'[20]

Despite the importance of co-operative governance to the success of the governance model, there is contrary opinion that a real commitment to foster co-ordination rather than competition is still lacking. The main reason for this opinion is the fact that the primary source of funds remains centred at national government. As Woolman et al indicate: 'Despite the emphasis on "spheres" with particular, and sometimes exclusive, competencies the Constitutional Assembly did not create a strong federal state. ... [T]he national government retains both the power of the purse and the ability to override provincial and local government decisions.'[21]

Using the principles articulated in the Constitution and the processes provided by supporting legislation like the Intergovernmental Relations Framework Act[22] (Intergovernmental Relations Act), the spheres of government are given the tools to deal with any disputes which may arise between spheres on the interpretation or ambit of competencies or which sphere has the authority to exercise authority in circumstances where there may be an overlap in competencies. But the spheres of government are not always embracing the opportunities to use these tools.

1.1.4 GOVERNANCE CHALLENGES WHEN CO-OPERATIVE GOVERNANCE IS ABSENT

One instructive example of the consequences of the overlapping competencies in the area of planning and environmental authorisations where the principles of co-operative governance are not utilised in the interactions between the spheres of government is the sequence of court challenges involving Maccsand (Pty) Ltd and the City of Cape Town (hereinafter referred to as 'the *Maccsand* matter'[23]). Maccsand (Pty) Ltd (Maccsand) obtained mining rights and mining permits from the Minister of Mineral Resources (the Minister of Minerals) in terms of sections 23 and 27 of the Mineral and Petroleum

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[20] *In re: Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) at para [290].
[21] Woolman et al note 5 supra at 14-2.
[22] Act 13 of 2005.
[23] *City of Cape Town v Maccsand (Pty) Ltd and Others* 2010 (6) SA 63 (WCC) and *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* [2011] JOL 27912 (SCA).

Resources Development Act[24] (MPRDA) to mine sand on land owned by or alternatively under the control of the City of Cape Town Metropolitan Municipality (the City). The City argued that the mining could not commence or continue without the proper land use authorisations being applied for and granted in terms of the Land Use Planning Ordinance[25] (LUPO). The City claimed authority in this area not only by virtue of the fact that it was the implementation authority for LUPO but also because it had been assigned the competency 'municipal planning' by Schedule 4B of the Constitution. Maccsand and the Minister of Minerals argued that the MPRDA dealt with the regulation of mineral resources as a whole, including the regulation of the land on which such mining takes place and therefore the entitlement to use the land over which the mining right had been granted in a manner which facilitated the exploitation of that right was an inherent part of the right granted.

The Minister of Local Government, Environmental Affairs and Development Planning, Western Cape (the provincial Minister) and the City further argued that an environmental authorisation in terms of the National Environmental Management Act[26] (NEMA) was required since the mining activity contemplated was a listed activity.[27] The Minister of Minerals argued to the contrary that the MPRDA incorporated the provisions of NEMA which indicated that it applied to the exclusion of NEMA.[28] It was contended that 'with respect to the regulation of the environment specifically affected by prospecting and mining operations, that the MPRDA ... [forms] special statutory measures to deal with the management of the environment in respect of prospecting and mining operations'.[29] This difference in position, founded on overlapping competencies and legislative provisions, formed the basis of a legal dispute which came before the Western Cape High Court and the Supreme Court of Appeal for decision and is now en route to the Constitutional Court for final determination.

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[24] Act 28 of 2002.
[25] Ordinance 15 of 1985.
[26] Act 107 of 1998.
[27] Items 12 and 20 in GNR 386 of GG 28753 of 21 April 2006.
[28] *City of Cape Town v Maccsand* note 23 supra at 78C.
[29] Ibid at 78H.

1.2. RESEARCH QUESTION

The formulation of the research question for this paper begins with the understanding that each sphere of government is assigned constitutional competencies for specific functional areas[30] but these areas are not always distinct and separate. More often than not, the functional areas are interrelated and overlapping. This raises questions, in the absence of a strict hierarchical structure, regarding which sphere of government has the authority to set determining factors in those functional areas. This confusion, and sometimes clash of wills, has significant governance implications, since authorisations may remain undetermined or be challenged where different spheres of government claim competencies in overlapping functional areas. The Constitution is explicit on the principles of co-operation to be promoted in interactions and disputes between spheres of government in the pursuit of good governance.[31] But to what extent are the spheres of government embracing this new approach to governance? Are they sometimes passing up on the opportunity to practice the principles of co-operative governance as set out in the Constitution, and, if so, what guidance is being given by the courts on this issue?

1.3. RATIONALE

The choice to explore this topic stems from an interest in the intricate and carefully balanced governance model towards which the Constitution and the complimentary legislation aspire and a frustration at the apparent lack of appreciation of the fact that when it comes to fulfilling the needs of the citizens of the country, more can be achieved by co-operative gestures than a stubborn assertion of rights and obligations. An exploration of the arguments put forward by the parties to the *Maccsand* matter reveals that they largely gloss over, or don't mention at all, the issue of co-operative governance. This is so even though the implementation of co-operative governance principles and mechanisms could have been instrumental in avoiding litigation in the matter and guarding against prejudice to the non-governmental party. A frank discussion of the issues leads to the inescapable conclusion that, as much as it may sought to be avoided, co-operative governance is a foundational element of system of governance chosen for

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[30] The Constitution note 1 supra at Schedules 4 and 5.
[31] Ibid at section 41.

this country and that the decentralised model of power and service delivery will not succeed without it. It is necessary to emphasise this point.

1.4. METHODOLOGY

The methodology employed to research the material necessary for the discussions and assertions in this paper is desk top research into case law, legislation, academic articles and texts, as well as copies of the pleadings filed at court in the *Maccsand* matter. Insights are also drawn from the working experiences of the writer gained during the course of her role as legal advisor at the City of Cape Town.

1.5. OUTLINE

Following the introductory chapter, the paper is structured in the following manner.

Chapter 2 is titled 'legislative framework and potential governance challenges' and will explore the legislative provisions which provide the legal framework applicable in the circumstances. The chapter will detail (1) the provisions of the Constitution providing for the competencies of the three spheres of government and how such spheres should interact in exercising those competencies; (2) the provisions of the Constitution which set out the principles of co-operative governance; (3) the provisions of the Intergovernmental Relations Framework Act which gives content to and puts processes in place to implement the co-operative governance principles articulated in the Constitution; (4) the provisions of the National Environmental Management Act which set out the processes involved in obtaining environmental authorisations, how the principles of co-operative governance will be applied in the environmental context and procedures to manage conflict situations which may arise; (5) the provisions of the Land Use Planning Ordinance which regulate land use planning and the provision of land use approval in the circumstances; and (6) the provisions of the Mineral and Petroleum Resources Act which provide for the issue of mining rights and mining permits. The chapter will further detail the governance challenges occasioned by the overlap of competencies set out in the legislative framework. It will specifically discuss how the Constitution assigns competencies relating to 'planning' issues to all three spheres of government and how this could result in conflict and challenges. Particular attention will be paid to the provisions in the Mineral and Petroleum Resources Act, the Land Use Planning Ordinance

and NEMA which could potentially conflict with each other and present governance challenges.

Chapter 3 will discuss the facts, arguments and judgments in the sequence of *Maccsand* matters (in the High Court, Supreme Court of Appeal and destined for argument before the Constitutional Court) which provides a clear example of the challenges and conflicts created by the overlapping competencies and conflicting legislative provisions outlined in chapter 2. The *Maccsand* matter will provide the background against which the particular governance challenges created by the overlapping competencies and legislative provisions, as well as the consequences of not engaging in co-operative governance mechanisms, will become apparent.

Chapter 4 is headed 'the road not taken' and will outline how the parties involved in the *Maccsand* matter missed the opportunity to employ co-operative governance principles and processes as detailed in the Constitution, the Intergovernmental Relations Act and the NEMA. The chapter will discuss the options, other than litigation, that were open to the parties to the matter to deal with the issues in dispute which could have been more desirable from a co-operative governance perspective. Particular examples of successful intergovernmental engagements will be specified to support the argument in favour of employing co-operative governance measures to achieve better integration of systems and enhance service delivery.

Chapter 5 will review the guidance provided by the courts on the issues at the heart of the *Maccsand* matter challenge, particularly with regard to those issues impacting on the implementation co-operative governance principles and mechanisms. Judgments indicating the value attached by the court to the constitutional obligation to adhere to co-operative governance will be discussed, as well as the expressions of courts relevant to the concurrent exercise of competencies. Drawing from the dicta of the courts, the chapter will argue for a greater adherence to the principles of co-operative governance in order to guarantee the success of the governance model implemented in the country and the effective implementation of the legislative provisions aimed at the protection of the environment.

Chapter 6 will provide a conclusion to the paper, affirming that the element of co-operative governance is at the very heart of the recipe for the successful functioning of

the governance model operating in the country and that the spheres of government have to realise that the focus needs to be on co-operation and integration for the benefit of service delivery.

2. LEGISLATIVE FRAMEWORK AND POTENTIAL GOVERNANCE CHALLENGES CREATED

Taking the background set out above into consideration, it is now necessary to look more closely at the legislative framework which sets the stage for the dispute in the *Maccsand* matter, providing an instructive example of legislative overlap and interplay in which co-operative governance was meant to facilitate beneficial solutions. Various legislative provisions are relevant in building the legislative framework in terms of which the spheres of government are allocated competencies and exercise those competencies. There are also many legislative provisions that provide for and give content to co-operative governance. In order to limit the ambit of this paper to the issues relevant to the *Maccsand* matter, only the legislative framework relevant to the planning issues and the environmental authorisation in that matter will be set out.

2.1 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 108 OF 1996

Since it is the supreme law of the country, it is apt to begin a discussion on the applicable legislative framework with a consideration of the relevant provisions contained in the Constitution of the Republic of South Africa Act 108 of 1996.

Section 44 of the Constitution provides that the 'national legislative authority as vested in Parliament confers on the National Assembly the power to amend the Constitution and pass legislation with regard to any matter, including a matter listed within a functional area listed in Schedule 4'.[32] The section provides further that 'when exercising legislative authority; Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution'.[33] Similarly, the legislative authority of provinces is set out in section 104 of the Constitution. The provincial legislature is given the power to 'pass legislation for its province with regard to

[32] Ibid at section 44(1)(a)(i) and (ii).
[33] Ibid at section 44(4).

any matter within a functional area listed in Schedule 4 ...[and] 5 [and] any matter outside those functional areas, and that is expressly assigned to the province by national legislation'. [34] The powers and functions of municipalities are set out in section 156 of the Constitution. In terms of the section, municipalities have executive authority and the right to administer 'the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and any other matter assigned to it by national or provincial legislation'.[35] The schedules to the Constitution referred to in the sections outlined above, detail the functional areas of competence assigned to the three spheres of government by the Constitution.[36] Schedule 4 Part A lists the functional areas of concurrent national and provincial legislative competence. This includes areas such as agriculture, consumer protection, the environment, health services, housing, public transport, tourism, trade and welfare services. Functional areas of exclusive provincial legislative competence are listed in Schedule 5 Part A. Included in this list are ambulance services, liquor licences, provincial sport and provincial roads and traffic.

Schedule 4 Part B and Schedule 5 Part B provide for areas of local government competence, including air pollution, child care facilities, fire fighting services, cemeteries, cleansing, markets, noise pollution, public places, refuse removal and street lighting. Some of these competencies are clearly circumscribed and exclusive to a sphere of government, but often the competencies are not clearly defined and are interrelated and overlapping. For example, in areas of environmental concern, the environment and pollution control are areas of concurrent national and provincial competence, while air pollution, noise pollution and refuse dumps are areas of local government competence. Hence, the environment generally and specifically pollution control are within the concurrent purview of national and provincial government, but at the same time, the control of pollution of the environment in the areas of air pollution, noise and waste disposal in refuse dumps are within the competence of local government. In the exercise of competency to control certain elements of environmental pollution, there is accordingly a clear overlap between the authorities allocated to the three spheres of

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[34] Ibid at section 104(1)(b)(i) – (iii).
[35] Ibid at section 156(1)(a) and (b).
[36] The provisions of Schedules 4 and 5 are set out in Annexure A attached.

government. Also, in the area of planning there may be overlap since regional planning and development is an area of concurrent national and provincial competence, provincial planning is an area of exclusive provincial competence and municipal planning is an area of local government competence.

Such overlapping and interrelated competencies create the opportunity for confusion and competition, if not managed correctly. The view has been expressed that this overlap arises from the fact that the functional areas are listed in a minimalist manner which leads to problems defining the functional areas and their ambit. In addition, political agendas may also add to the conflict as this may lead to functional areas being interpreted to suit a particular objective. It is advised that the determining factor in interpreting functional areas should be whether the interpretation provided enables the relevant sphere of government to discharge its obligations successfully and completely.[37]

In addition to ensuring that they perform within their own functional areas, national and provincial government have the added responsibility 'to see to the effective performance by the municipalities of their functions in respect of the matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority'.[38] This does not however mean that local government is to be dictated to by national and provincial government, since the Constitution also provides that 'a municipality has the right to govern, on its own initiative, the local government affairs of its community...as provided for in the Constitution'[39] and further that national or provincial government 'may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions'.[40] In fact, 'national and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions'.[41]

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[37] N Steytler and Y Fessha 'Defining local government powers and functions' in (2007) vol 124 *SALJ* 320 at 321 – 325 (paraphrased).
[38] The Constitution note 1 supra at section 155(7).
[39] Ibid at section 151(3).
[40] Ibid at section 151(4).
[41] Ibid at section 154(1).

This ethos of oversight complemented by empowerment and support is further bolstered by the provisions relating to co-operative government contained in the Constitution. Chapter 3 of the Constitution provides that government in South Africa is 'constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated'[42] and that 'all spheres of government must observe and adhere to the principles of [Chapter 3] and must conduct their activities within the parameters that the Chapter provides'.[43] The Chapter then goes on to articulate the principles of co-operative government and intergovernmental relations.[44] Of particular relevance in this discussion are the obligation of the spheres of government to adhere to the principles to 'respect the constitutional status, institutions, powers and functions of government in other spheres'[45]; 'not [to] assume any power or function except those conferred on them in terms of the Constitution'[46]; 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'[47]. The spheres of government are expected further to

> co-operate with one another in mutual trust and good faith by fostering friendly relations; assisting and supporting one another; informing one another of, and consulting one another on, matters of common interest; co-ordinating their actions and legislation with one another; adhering to agreed procedures; and avoiding legal proceedings against one another. [48]

To emphasise the last point, the Chapter goes even further to provide that 'an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute'.[49] If a court to which the dispute is referred is not satisfied that this requirement has been met, 'it may refer a dispute back to the organs of state involved'.[50] It has been determined that municipalities are 'organs of state in the local sphere of government' and

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[42] Ibid at section 40(1).
[43] Ibid at section 40(2).
[44] Ibid at section 41.
[45] Ibid at section 41(1)(e).
[46] Ibid at section 41(1)(f).
[47] Ibid at section 41(1)(g).
[48] Ibid at section 41(1)(h)(i)-(vi).
[49] Ibid at section 41(3).
[50] Ibid at section 41(4).

that national Ministers are 'organs of state in the national sphere of government'.[51] In the circumstances being discussed therefore, the City of Cape Town and the national and provincial Ministers fall within the ambit of the provisions.

In addition to the provisions requiring co-operation in circumstances where there may be disputes, the Constitution also provides for situations where there are conflicting laws, mindful of the fact that the overlapping competencies may lead to authorities making laws which may conflict with those of other authorities. Section 146 of the Constitution deals with conflicts between national and provincial legislation falling within a functional area of competency listed in Schedule 4.[52] The section sets out the circumstances under which national legislation would prevail over provincial legislation in the event of a conflict between the two, viz:

> [where] the national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the ... provinces; [where] the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation [and establishes] norms and standards, frameworks or national policies; [where] the national legislation is necessary for the maintenance of national security [or] ... economic unity, the protection of the common market in respect of the mobility of goods, services, capital and labour, the promotion of economic activities across provincial boundaries, ... or the protection of the environment.[53]

The section further provides further for national legislation to prevail over provincial legislation in circumstances where the national legislation is geared towards preventing unreasonable action by a province.[54] Should the court be asked to interpret legislation where there is a conflict, the Constitution directs that 'every court must prefer any reasonable interpretation ... that avoids a conflict'.[55] With regard to conflicts that

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[51] Woolman et al note 5 supra at 14-10 citing *Uthekela District Municipality v President of the Republic of South Africa* 2002 (1) BCLR 1220 (CC) at para [18].

[52] The Constitution note 1 supra at section 146(1).

[53] Ibid at section 146(2)(a) – (c).

[54] Section 146(3) provides:

'National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by the province that –

(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or

(b) impedes the implementation of national economic policy.'

[55] The Constitution note 1 supra at section 150.

cannot be resolved by the court, the Constitution provides that the national legislation prevails over the provincial legislation.[56]

Therefore, the Constitution provides the framework for legislative and administrative authority in the South African governance model. The distinctive administrative and legislative functions of each sphere of government are set out, but an overarching power is reserved for national government to pass legislation on any matter. The Schedules to the Constitution allocate specific functional areas to the spheres of government as well as indicating whether those spheres will have exclusive competency in those functional areas or share competency with another sphere. The functional areas are not clearly defined or neatly circumscribed and this leads to overlap between the functional areas of different spheres as well as different spheres having the competency to legislate and administer interrelated functional areas.

The grant of distinctive administrative and legislative competency to all the spheres of government, combined with the overarching national power to legislate on any matter and the oversight role to be played by national and provincial government in respect of local government, is complicated by the allocation of functional competencies that sometimes overlap and are interrelated and seems to be a recipe for conflict. This potential conflict is however tempered and managed by the provisions of Chapter 3, which cautions that the different spheres must respect and not undermine each other's integrity and functional competencies. The Chapter further provides for the rules in terms of which any intergovernmental dispute should be resolved. In doing so, the Constitution echoes the decentralised model of power inherent in the federal model of governance adopted by the Republic and recognises the importance of the role of co-operative governance in enabling the system to function effectively. Chapter 3 of the Constitution presents a

> new philosophy of co-operative government [that] is governed by two basic principles. First, one sphere of government ... may not use its powers in such a way as to undermine the effective functioning of another sphere... . Second, the actual integrity of each sphere of government ... must be understood in the light of the powers and purpose of that entity.[57]

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[56] Ibid at section 148.

[57] Woolman et al note 5 supra at 14-6.

2.2 THE INTERGOVERNMENTAL RELATIONS FRAMEWORK ACT 13 OF 2005

Utilising the starting point provided by Chapter 3 of the Constitution, the concept of co-operative governance and the resolution of intergovernmental disputes is given more content by the Intergovernmental Relations Act. The preamble to the Act reiterates the 'distinctive, interdependent and interrelated' nature of the spheres of government and the title of the Act declares the intention of the Act to be the provision of mechanisms and procedures for the settlement of intergovernmental disputes. The Act provides for a range of intergovernmental forums, implementation protocols and the co-ordination of intergovernmental relations and devotes an entire chapter to the settlement of intergovernmental disputes. It stipulates that '[a]ll organs of state must make every reasonable effort to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and to settle intergovernmental disputes without resorting to judicial proceedings'.[58]

For the purpose of the application of the Act, 'intergovernmental dispute' is defined as 'a dispute between different governments or between organs of state from different governments concerning a matter arising from a statutory power or function assigned to any of the parties; or an agreement between the parties regarding the implementation of a statutory power or function; and which is justiciable in a court of law'.[59] 'Organ of state' is defined with reference to section 239 of the Constitution[60] and it is arguable that both the Minister and the City fall within the ambit of this definition. Despite efforts to avoid intergovernmental disputes, they may still arise, and in those circumstances an alternative dispute resolution mechanism is proposed by the legislation. Before the intergovernmental dispute is formally declared[61], every reasonable effort to

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[58] Intergovernmental Relations Act note 22 supra at section 40(1)(a) and (b).

[59] Ibid at section 1(1) '**intergovernmental dispute**'.

[60] The Constitution at section 239 provides:

'**organ of state**' means –

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution –

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer'.

[61] Intergovernmental Relations Act note 22 supra at section 41(1).

settle the dispute, including negotiation, must be made in good faith.[62] Once the intergovernmental dispute is declared, a mechanism or procedure must be determined to settle the dispute and a facilitator chosen to drive the process[63] and assist the parties to settle the dispute in any manner necessary[64]. It is only after all efforts to settle the formally declared intergovernmental dispute have failed that the parties may approach the courts for relief.[65]

Acknowledging the reality that disputes may arise between spheres of government and organs of state, the provisions of this Act accordingly provide the mechanisms for dispute resolution in order that good intergovernmental relations, and consequently good governance, may be maintained. 'The importance of intergovernmental provisions in a new constitutional dispensation dare not be overlooked. Various federal-type ... dispensations have proved just how important sound intergovernmental relations are in modern society.'[66] The ultimate goal would be for all spheres, observing the principles and tools of co-operative governance and intergovernmental relations as provided, to recognise their interdependency and embrace opportunities to work together and resolve disputes amicably for the benefit of all the citizens of the country. There are certain successful intergovernmental forums operating in the country, most notably the various sector MinMecs (ie the intergovernmental body created for interaction between the national Ministers and the MECs). This is a forum where regional concerns and implementation strategies and challenges may be discussed and solutions considered. The conclusion of various intergovernmental protocols (discussed in greater detail in chapter 4 below) also facilitate the smoothing of governance processes and enhancement of service delivery.

One of the most notably examples of the use of the provisions of the Intergovernmental Relations Act recently was the City of Cape Town's challenge to the erection of tolling stations on the N1 and N2 national roads in the Western Cape

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[62] Ibid at section 41(2).
[63] Ibid at sections 42(1).
[64] Ibid at section 43(1)(a).
[65] Ibid at section 45(1).
[66] De Villiers note 3 supra at 271.

Province.[67] Following an interdict application to halt the construction of the toll plazas in order to create a window of opportunity within which to negotiate, the City declared a formal intergovernmental dispute in terms of the Intergovernmental Relations Act, obliging all concerned government entities to follow the provisions of the Act and negotiate around critical issues such as the socio-economic impact of the proposed toll roads. This process continues to date.

2.3 THE LAND USE PLANNING ORDINANCE 15 OF 1985

Aside from the competencies assigned in the Constitution, other pieces of legislation also provide authority for certain spheres to administer certain functional areas, which may lead to or enhance the overlap or intersection of competencies, resulting in disputes to be resolved by engagements utilising co-operative governance mechanisms. One of these additional pieces of legislation is LUPO.

Local government is assigned the competency to administer 'municipal planning' in the Constitution and the manner in which local government exercises this competency in the Western Cape is via the provisions of LUPO. LUPO was enacted in 1985 to regulate land use planning matters. It applied in the area of the former Province of the Cape of Good Hope, including the area that is now known as the Western Cape Province. The President, acting under section 235(8) of the interim Constitution[68], assigned the administration of the whole of LUPO to a competent authority in the Western Cape Province. Section 11 of LUPO sets out the general purpose of a zoning scheme, viz, to determine use rights and to provide for the control over such use rights and over the manner in which land is exploited in the area of jurisdiction of a local authority administering LUPO. In the Western Cape, every user of land must have the right to use the land in the particular manner it is being used under the applicable zoning scheme or pursuant to a departure from the provisions of the zoning scheme granted under section 15 of LUPO[69]. If the purpose for which the land is to be used cannot be

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[67] 'Cape Town approaches court over toll road' available at http://www.timeslive.co.za/local/articles2569809.ece (last accessed on 09 February 2012).

[68] The Constitution of the Republic of South Africa Act 200 of 1993.

[69] Section 15(1)(a) of LUPO provides:

'An owner of land may apply in writing to the town clerk or secretary concerned, as the case may be—

(i) for an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned, or

accommodated as a departure, then an application must be made to have the land rezoned.[70]

It is important to note that the owner of the land must apply for such departure or rezoning, except if the rezoning is initiated by the Administrator or the Council of a municipality in terms of section 18 of LUPO. In many cases where mining permits are granted, such as in the *Maccsand* matter, the holder of the permit is not the owner of the land. This makes it impossible for the holder of the permit to therefore initiate the relevant land use application. The only alternative left would be for the holder of the permit to apply to the provincial Minister in terms of section 9(2) of LUPO to amend the zoning scheme conditions to allow for mining. However, if proper co-operative governance principles were employed, particularly in circumstances where mining is contemplated, the sphere of government issuing the mining permit could liaise effectively with the sphere of government administering the land use in the area for which the permit is granted to ensure that the land concerned is properly zoned and suitable for mining. This removes the burden from the permit holder to try and convince the land use authority to change the zoning and prevents the situation arising, as it did in the *Maccsand* matter, where the holder of the permit cannot act in terms of the permit granted because the zoning did not allow for mining.

Chapter 2 of LUPO, which deals with zoning schemes, does not indicate any intention to exempt any land from the control of the local authority in question. Furthermore, there is no provision in LUPO that articulates any intention to exempt any person from the control of the provisions and the local authority in question, should the matter be situated in the Western Cape. On the contrary, s 39(2)(a) of LUPO provides that no person shall contravene or fail to comply with the provisions incorporated in a zoning scheme.

Guidance is given to the decision-maker in section 36 of LUPO with regard to the factors that need to be taken into account in deciding applications for departures and rezoning. Section 36(1) provides that an application for a departure or rezoning may be

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(ii) to utilise land on a temporary basis for a purpose for which no provision has been made in the said regulations in respect of a particular zone.'

[70] LUPO note 25 supra at section 16.

refused solely on the basis that the intended use of the land is not desirable or on the basis of the effect such intended use would have on existing rights. Should the application pass this hurdle, the decision-maker is guided by section 36(2) to take the following aspects into consideration when deciding on the application, viz, the 'safety and welfare' of the members of the community where the land forming the basis of the application is situated and the 'preservation of the natural and developed environment concerned'. Where a departure or rezoning application is granted, section 42 allows the decision-maker to make such departure or rezoning subject to conditions 'as he may think fit'. The needs of the community are an important consideration when deciding on the conditions to impose, if any. This allows the decision-maker to pay particular attention to any negative consequences which may flow from the approval of the relevant application that may have been raised by the local community. The local authority must enforce compliance with LUPO, the relevant applicable zoning scheme and any conditions imposed upon any departure or rezoning granted. Any person who contravenes the provisions of a zoning scheme or conditions imposed on any rezoning or departure, shall be guilty of an offence.[71]

LUPO is accordingly the mechanism utilised in the Western Cape to give effect to the administrative competence of 'municipal planning' allocated to local government in the Constitution. The provisions of the legislation are fairly emphatic, making compliance with LUPO mandatory and making non-compliance with any zoning scheme provision or condition stipulated in terms of the Ordinance an offence. There does not seem to be any appreciation in the legislation itself for the fact that other relevant legislation and powers may intersect and overlap with those administered under the Ordinance, nor is there any obligation placed on the decision-maker in terms of the Ordinance to consult or employ co-operative governance principles. There is also no mention of any of the oversight functions of provincial and national government provided for in the Constitution. This, in all probability, stems from the fact that the Ordinance was promulgated a while before the Constitution was enacted and set the tone for the new constitutional democracy. However, the decision-maker is given fairly expansive powers to set any conditions 'as he may think fit' and to consider the 'desirability' of any application. It is therefore possible

[71] Ibid at section 46.

that elements such as constitutionality, co-operative governance and functional competencies may yet find room for consideration within this system.

2.4 MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT 28 OF 2002

The Mineral and Petroleum Resources Development Act 28 of 2002 is another piece of legislation that expands on the constitutionally allocated competencies and constitutes the national legislation regulating the mining of minerals, hydrocarbons and gas and matters connected therewith. The preamble to the Act clearly recognises the State as the custodian of mineral resources and that the State has the obligation to 'ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development'[72]. This is confirmed by the provisions contained in sections 2 and 3 of the Act.[73] When it comes to interpreting any provision of the Act, the interpretation which is reasonable and consistent with the objects of the Act must be preferred over any interpretation that is not so.[74] When a mining right is granted

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[72] MPRDA note 24 supra, preamble.

[73] The relevant provisions of sections 2 and 3 provide:

> '2. The objects of this Act are to—
>
> (*a*) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
>
> (*b*) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;...
>
> (*e*) promote economic growth and mineral and petroleum resources development in the Republic;...
>
> 3. (1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.
>
> (2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may—
>
> (*a*) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and
>
> (*b*) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament.
>
> (3) The Minister must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.'

[74] MPRDA note 24 supra at section 4(2).

in terms of the Act, the holder thereof acquires a limited real right in respect of the relevant mineral resource which is the subject of the mining right and the land to which such right relates.[75] The holder of the mining right may enter onto the land to which the right relates and mine and extract the relevant mineral or perform any activity incidental thereto but may do so only after notifying and consulting with the owner or lawful occupier of the relevant land.[76] As mentioned in the section above, the allocation of mining permits and mining rights therefore may encounter implementation problems when subjected to the provisions of LUPO.

Section 23(1) sets out the considerations to be taken into account by the Minister in order to determine whether or not to grant a mining right. In terms of the section, the Minister must grant the mining right if, inter alia, 'the mineral can be mined optimally in accordance with the mining work programme; the mining will not result in unacceptable pollution, ecological degradation or damage to the environment; the applicant is not in contravention of any provision of this Act;'[77] and if the granting of the right can 'substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources'[78]. The mining right is subject to any conditions imposed thereon by the Minister and 'any relevant law'[79]. The holder of the mining right also has to comply with the provisions of the Act, any conditions imposed and 'any other relevant law'[80].

Similarly, the Minister must issue a mining permit if 'the mineral in question can be mined optimally within a period of two years; and the mining area in question does not exceed 1,5 hectares in extent'[81] and 'the applicant has submitted an environmental management plan'[82]. Again there is a requirement to notify and consult with the landowner or occupier of the land over which the permit is granted[83]. The holder of a

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[75] Ibid at section 5(1).
[76] Ibid at sections 5(3) and 5(4)(c).
[77] Ibid at section 23(1).
[78] Ibid at section 2(d).
[79] Ibid at section 23(6).
[80] Ibid at section 25(2)(d).
[81] Ibid at section 27(1).
[82] Ibid at section 27(6).
[83] ibid at section 27(5)(b).

mining permit 'may enter the land to which such permit relates together with his or her employees, and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface or underground infrastructure which may be required for purposes of mining'[84], and also mine 'on or under that mining area for the mineral for which such permit relates'[85].

The provisions of the MPRDA therefore effectively regulate the mining of minerals and all activities associated therewith, including the grant of mining rights and mining permits. In promulgating the MPRDA, national government gave effect to its constitutional competency articulated in section 44 of the Constitution to legislate on 'any matter'. Since the functional competency of 'mining' is further not allocated to any sphere in the Schedules to the Constitution, it is deemed to be reserved exclusively for national government. But, as is evident from the discussion above, the authority given by the provisions of the MPRDA intersects with competencies allocated exclusively or concurrently to provincial and local government. So the mining of minerals in terms of permissions granted in terms of the MPRDA may have distinct land use implications or environmental consequences, all without an attendant obligation being stated in the Act to co-operate with the spheres exercising these competencies in terms of their constitutional obligation. In the circumstances it could only have been assumed by the Legislature that any overlaps or conflicts must be managed and resolved employing the principles of co-operative governance and intergovernmental relations mechanisms.

2.5 NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998

Since ecological degradation, pollution and damage to the environment are elements to be considered as part of the process set out in the MPRDA for the granting of a mining right and the MPRDA further provides for the submission of an environmental management plan before a mining permit can be granted, it is relevant to consider the provisions of NEMA relating to environmental authorisations. The purpose of this is to facilitate a comparison of the processes required by the two pieces of legislation to determine whether a process under the MPRDA may supplement the process required under NEMA.

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[84] Ibid at section 27(7)(a).
[85] Ibid at section 27(7)(d).

Section 24(2) of NEMA provides that the now Minister of Water and Environmental Affairs (the Environmental Minister) may list certain activities which may not be commenced without proper authorisation from the competent authority. Mining is such a listed activity.[86] Section 24(8)(a) of NEMA provides that 'authorisations obtained under any other law for an activity listed or specified in terms of the Act does not absolve the applicant from obtaining authorisation under NEMA unless an authorisation has been granted in the manner contemplated in section 24L'. Section 24L in turn provides for the issuing of integrated environmental authorisations where more than one authority is empowered to authorise a listed activity. Section 24(7) provides that compliance with the procedural requirements set by the Environmental Minister does not absolve an applicant from complying with any statutory requirement of any other competent authority charged with authorising the listed activity in question. Section 24F(1)(a) makes it an offence to commence a listed activity without the proper authorisation. Section 24(4) states, inter alia, that

> procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment must ensure, with respect to every application for an environmental authorisation, coordination and cooperation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state,

while section 24K provides for consultation between competent authorities regulating listed activities.

NEMA also has some specific co-operative governance provisions. Chapter 3 of NEMA provides for the preparation of environmental implementation plans to harmonise policies and co-ordinate environmental programmes among the spheres of government in order to avoid duplication and promote consistency. Section 24K further provides for written agreements to be concluded between competent authorities to avoid duplications of process. Disputes may be referred to conciliation or arbitration in terms of Chapter 4 of NEMA.

It accordingly appears that for the listed activity of mining, at least two competent authorities exist, ie the Environmental Minister and the Minister of Minerals. NEMA however makes it very clear that compliance with the requirements set by one

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[86] GNR 386 note 27 supra.

competent authority in terms of one piece of legislation, say the requirements set by the Minister of Minerals in terms of the MPRDA, does not automatically absolve an applicant from compliance with the provisions of NEMA. The best manner in which to avert confusion and undue prejudice to applicants for environmental authorisations would be to employ the co-operative mechanisms provided for in NEMA to harmonise policies and integrate processes.

2.6 GOVERNANCE CHALLENGES CREATED

Even in the limited factual circumstances as existed in the *Maccsand* matter, the discussion above indicates how many overlapping and intersecting competencies are created by the Constitution and other relevant legislation. Even in the supreme law, the allocation of competencies by the Constitution is not always clear-cut and distinct and there are instances where the competencies assigned in the Constitution overlap. To refer once more to an example pointed out above, the Constitution assigns various planning competencies to each of the spheres of government. Regional planning and development is an area of concurrent national and provincial competence, provincial planning is an area of exclusive provincial competence and municipal planning is an area of local government competence. So, in theory, a planning authorisation to develop one piece of land may involve the exercise of competencies by all three spheres of government. This presents a difficulty not only for the developer, who has to decide which sphere of government to approach for planning approval, but also for the various spheres of government, since the relevant planning officials have to ascertain whether the application handed in by the developer is actually with the correct authority for approval.

The latter element is important since any planning permission given which falls outside the ambit of the authority of a specific sphere of government is invalid and any development conducted on the strength of such permission would be unauthorised. As the Constitutional Court stated in *City of Johannesburg v Gauteng Development Tribunal:*

'The constitutional scheme propels one ineluctably to the conclusion that ... each sphere of government is allocated separate and distinct powers which it alone is entitled to

exercise.'[87] The danger that an authorisation may be invalid can lead to much uncertainty. Furthermore, if one considers further that the various spheres of government may claim for themselves certain authority to decide on planning matters by employing expansive definitions of the terms used in the Constitution to describe their respective mandates, and that these definitions may be challenged by any of the other spheres seeking to curtail the ambit of authority, the situation is made that much more complicated, especially since the Constitution does not assign definitions to the terms it uses to assign competencies.

Aside from the obvious clash between the competencies directly assigned by the Constitution, authority to decide on planning matters may also be implied or specifically assumed in other legislation dealing with activities on land. An instructive example of this may be found in the area of mining. The MPRDA provides explicitly that upon the grant of a mining right or a mining permit, the holder of such right or permit may enter on the land covered by the right or permit in order to extract the relevant mineral. This means that the grant of the right or permit implies that the holder is also permitted to use the land in a manner required to exercise the right or permit. However, despite the fact that mineral resources are within the exclusive domain of national government, land use at the local level, where the mining right or mining permit will be exercised, is constitutionally assigned exclusively to local government. From a governance perspective, this translates into either the national sphere of government intruding upon the exclusive domain of local government or local government inadvertently having the power to impact upon the exploitation of the country's mineral wealth, an area which is within the exclusive domain of national government.

Since there is no option to automatically defer to national government as the pinnacle governance tier, the tiered government system having been abandoned in the new constitutional dispensation, the existence of seemingly competing competencies does present a challenge. The remedy for this situation can be found in the provisions relating to co-operative governance. 'Overlapping powers and functions are an integral part of any decentralised system of government. ... Effective intergovernmental relations

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[87] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (MEC of KwaZulu-Natal for Local Government and Traditional Affairs and Others Intervening; SA Property Owners Association and Another as amici curiae* 2010 (9) BCLR 859 (CC) at para [56].

and structures are an important method through which the effective co-ordination of overlapping competencies can be achieved.'[88] The principles to be adhered to are set out in the Constitution and oblige all spheres of government to conduct their activities within the ambit of those principles and the provisions of Chapter 3 of the Constitution. The principles of co-operative governance require the spheres of government to exercise their constitutional competencies in a manner that does not hinder the 'geographical, functional or institutional integrity of government in another sphere'.[89]

The focus therefore has to be on co-ordinating efforts in a manner to achieve a harmonious outcome rather than attempting to trump each other with superior power. Furthermore, 'with co-operative government the emphasis is placed on pragmatic considerations rather than ideological and party political ones'.[90] Chapter 3 of the Constitution and the provisions of the Intergovernmental Relations Act therefore provide the obligation to find co-operative solutions to intergovernmental disputes regarding conflicting authorities and supply the tools to meet this obligation. However, the obligation to co-operate and the provision of the mechanisms to achieve co-operative solutions do not necessarily translate into the spheres of government embracing either the ideology or the mechanisms. '[F]ragmentation, turf wars and the unwillingness of officials sometimes frustrate this ideal'.[91]

The success of the system is also impacted upon by the particular history of government in this country. 'Established and unequal intergovernmental relations have a tendency to become entrenched.' [92] The fact that the mechanism to find solutions to conflicts is not readily employed or embraced in itself constitutes a governance challenge, since it means that disputes remain unresolved while a tug of war goes on between different spheres of government regarding which sphere has authority to act in a particular situation. What the spheres of government need to cultivate is a sense that the provisions relating to co-operative governance and intergovernmental relations

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[88] Steytler and Fessha note 37 supra at 337 and 340.
[89] Devenish note 7 supra at 218.
[90] Ibid at 216.
[91] W du Plessis 'Legal mechanisms for cooperative governance in South Africa: Successes and failures' in (2008) 23 *SAPL* 87.
[92] A Chaskalson et al *Constitutional Law of South Africa* at 5A-32.

> is not meant to diminish power of one organ of state at the expense of another. Rather it presupposes and emphasises the willingness of all spheres of government to work together. ... One may argue that the designation of the different roles and responsibilities by the drafters was premeditated, since the principles on co-operative governance may be employed to preclude any confusion and resultant poor regulation... .[93]

For the 'co-operative federalism' system of governance to function effectively, there appears to be no alternative therefore but to employ the principles of co-operative governance and intergovernmental relations.

Similar arguments may be made for the issue of environmental authorisations. Schedule 4 of the Constitution allocates the competency to legislate in areas of 'environment' and 'pollution control' concurrently to provincial and national government. The Constitution further reserves, by omitting to allocate it to any other sphere of government in the Schedules, the area of mining for national competence. So particularly in the area of environmental matters relating to mining, there is great potential for an overlap, and clash, in competencies. Added to that, NEMA sets very specific requirements regarding environmental authorisations to the effect that an authorisation obtained in terms of other legislation does not oust the operation of NEMA. This potentially sets the scene for a dispute regarding competency to issue authorisations between two national departments, viz environmental affairs and minerals.

3. *MACCSAND*: THE FACTS, ARGUMENTS AND JUDGMENTS

The overlapping and intersecting competencies and the potential for conflict created by the legislation and the governance issues they give rise to have been discussed above with reference to a particular scenario involving land use, mining and environmental authorisations. All this has been sketched against a backdrop of the *Maccsand* matter and at this point it is apt to consider the specific factual scenario of that matter and the arguments put forward in the series of court challenges. This discussion will detail the apparent clash of competencies and the very cogent arguments being made by the

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[93] Bosman et al 'The failure of the Constitution to ensure integrated environmental management from a co-operative governance perspective' in (2004) vol 19 *SAPL* 411 at 413 and 420.

parties for the reason why there is such dire conflict in the law that only the Constitutional Court can sufficiently resolve the dispute.

At the heart of the dispute in the *Maccsand* matter was the allocation of a sand mining permit in terms of the MPRDA, which the permit holder sought to act on without obtaining the appropriate land use permission from the local authority it terms of LUPO. The *Maccsand* matter also dealt with the application of certain provisions relating to environmental impact assessments and environment authorisations in terms of NEMA, particularly relating to the extent that these provisions intersect or are superceded by the relevant provisions in the MPRDA. In exploring the land use permission and environmental authority necessary for the mining activity concerned, particular attention will be paid to the assistance that co-operative governance mechanisms could provide in finding a mutually satisfying outcome for all parties concerned, government and private individuals alike.

3.1 THE FACTS

The Minister of Minerals granted Maccsand mining rights and a mining permit in terms of the MPRDA to mine sand on Erven within or close to the residential area of Mitchell's Plain in the Western Cape. The City of Cape Town metropolitan municipality (the City) is the owner or has ownership rights to all the Erven covered by the permits. The relevant portions of land were zoned either public open space or rural. The City and the Minister of Local Government, Environmental Affairs and Development Planning, Western Cape Province (the Provincial Minister) contended that LUPO required that authorisation by the local authority had to be obtained before the mining rights could be exercised. It was further contended that an environmental authorisation in terms of NEMA had to be obtained. When Maccsand nevertheless commenced mining activity on one of the sites in February 2009, the City applied to the Western Cape High Court for an interdict prohibiting Maccsand from conducting mining on the sites mentioned in the permits unless and until authorisations had been granted in terms of LUPO and NEMA. The dispute to be decided by the court in considering whether or not to grant the interdict was whether a mining permit or mining right granted under the MPRDA exempted the holder of such permit or right from having to obtain land use authorisation from the local authority and environmental authorisation in terms of NEMA for the mining activities.

3.2 THE ARGUMENTS BEFORE THE HIGH COURT

The City argued that the relevant land was not properly zoned to allow for mining and consequently either the zoning scheme had to be amended or a departure from the zoning scheme, applied for in terms of section 15 of LUPO, had to be authorised to allow for mining. LUPO, it was argued, was a special legislative construct used for the regulation of land use and incidental matters and represented a tool for municipal planning, a competency assigned to local government in terms of the Constitution.[94] Furthermore, it was contended that the provisions of the MPRDA did not oust the obligation placed on Maccsand by NEMA to obtain an environmental authorisation in terms of s 24 of that Act.[95] Maccsand argued that different legal regimes relevant to the matter operated at different spheres of government but if there was a clash between the regimes and the Minister of Minerals had approved a mining permit in terms of the MPRDA, that decision trumped all else, since mining was an exclusive national government competence.

It was argued that the MPRDA dealt with the regulation of mineral resources as a whole, including the regulation of the land on which such mining takes place. It was submitted that the entitlement to use the land over which the mining right had been granted in a manner which facilitated the exploitation of that right, was an inherent part of the right granted. Maccsand's counsel contended that section 48 of the MPRDA provided for the granting of mining rights and permits without any zoning of land being affected where the provisions of section 48(2) were met. [96] Provisions of LUPO had to

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[94] The Constitution note 1 supra Schedule 4B.

[95] *Maccsand v City of Cape Town* Note 23 supra at para [7].

[96] Section 48 of the MPRDA provides that:

'(1) Subject to section 20 of the National Parks Act, 1976 (Act No. 57 of 1976), and subsection (2), no reconnaissance permission, prospecting right, mining right or mining permit may be issued in respect of—

(*a*) land comprising a residential area;

(*b*) any public road, railway or cemetery;

(*c*) any land being used for public or government purposes or reserved in terms of any other law; or

(*d*) areas identified by the Minister by notice in the *Gazette* in terms of section 49.

(2) A reconnaissance permission, prospecting right, mining right or mining permit may be issued in respect of the land contemplated in subsection (1) if the Minister is satisfied that—

(*a*) having regard to the sustainable development of the mineral resources involved and the national interest, it is desirable to issue it;

yield to those of the MPRDA in order for the objectives of the latter to be properly fulfilled. In any event, so Maccsand proposed, mining did not constitute land use, since LUPO did not refer to mining or characterise mining and its related activities as land use. Should LUPO be held to apply, the result would be that LUPO would control mining activity and could potentially frustrate nationally authorised mining in a particular area. This was argued to be constitutionally impermissible. With regard to the environmental authorisation, it was contended that to avoid duplication of processes, it was not necessary to comply with the requirements of NEMA in addition to those requirements for the grant of a mining right or the issue of a mining permit provided for in the MPRDA.

3.3 THE FINDINGS OF THE HIGH COURT

The court (Davis J with Baartman J concurring) considered the constitutional responsibilities of the various parties in reaching a determination in the matter. The court referred to the judgment in the matter of *City of Johannesburg v Gauteng Development Tribunal and Others*[97] for the meaning to be assigned to the term 'municipal planning' as contained in Schedule 4B to the Constitution. The court drew two important conclusions from this judgment, ie that 'municipal planning' includes the control and regulation of the use of land falling within the area of the relevant municipality and that the national and provincial spheres of government could not, by means of legislation, give themselves the power to exercise municipal executive powers or administer municipal affairs.[98] The court determined that the Constitution did not allocate functional areas of exclusive national competence, but rather assigned areas of concurrent national and provincial competence, areas of exclusive provincial competence and areas of local government competence. This implied, according to the court, that the balance of competencies are left to national government and that the content of these competencies must be sought with reference to the functional areas of provincial and local government.[99] The

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(*b*) the reconnaissance, prospecting or mining will take place within the framework of national environmental management policies, norms and standards; and

(*c*) the granting of such rights or permits will not detrimentally affect the interests of any holder of a prospecting right or mining right.'

[97] *City of Johannesburg v Gauteng Development Tribunal* note 87 supra.
[98] *City of Cape Town v Maccsand* note 23 supra at 71D-E.
[99] Ibid at 71J – 72A.

implication of this is that any functional area not specifically mentioned in the Constitution and allocated to a specific sphere of government, is deemed to be allocated to national government.

The court referred to the provisions of section 25 of the MPRDA which provide that the holder of a mining right must comply with the provisions of the MPRDA and any other relevant law. The court expressed the opinion that had the Legislature intended the MPRDA to override all other legislation, the relevant section would not have been phrased in this manner but rather included words such as 'notwithstanding the provisions of any other law'.[100] Furthermore, the mining permit itself contained wording to indicate that the permit did not exempt the holder thereof from the requirements of any provision of any law enforced in the Republic of South Africa. This wording further bolstered the court's view that the provisions of LUPO were not meant to be excluded. Although LUPO does not mention mining, the relevant scheme regulations promulgated in terms of section 8 of LUPO do recognise mining as a land use and assign a particular zone to it. Mining was accordingly covered by LUPO and fell within the competency of 'municipal planning'. The court accordingly found that LUPO had clear application in the matter but that the possibility of an overlap between the powers of national and local government in the circumstances was not ruled out. [101]

The court determined that the City had shown a clear right to enforce the zoning conditions of LUPO in the interests of the local community. It found that if the mining were allowed to continue, the ability of the City to regulate matters within its jurisdiction in the public interest and to carry out its constitutional and statutory duties would be significantly undermined.[102] The court held that although significant parts of NEMA had been incorporated into the MPRDA, this did not oust the operation of NEMA or the requirement to apply for an environmental authorisation in terms of section 24 of NEMA for a listed activity.[103] In the absence of any reasonable alternative remedy being available, the court granted the interdict as requested.

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[100] Ibid at 72E- F.
[101] Ibid at 72G-H.
[102] Ibid at 81D-G.
[103] *Maccsand v City of Cape Town* note 23 supra at para [7].

The Western Cape High Court therefore recognised the distinct planning competence of the City as local authority within the municipal sphere and that such competence could not be assumed to be overridden by national legislation in the absence of express provisions to that effect. The court further confirmed the role of NEMA in the arena of environmental authorisations. However, the court did recognise the possibility of an overlap of powers of national and local government and two national Ministers in the circumstances but rather than explore how this overlap should be dealt with from a co-operative governance perspective, the court confined itself to pronouncing on the applicability of LUPO and NEMA. Any reference by the court to the principles of co-operative governance and the processes of intergovernmental relations is noticeably absent from the judgment.

3.4 THE ARGUMENTS BEFORE THE SUPREME COURT OF APPEAL

Dissatisfied with the judgment of the Western Cape High Court, both Maccsand and the Minister of Minerals appealed to the Supreme Court of Appeal. Maccsand and the Minister of Minerals argued, with specific reference to the findings made by the High Court, that the MPRDA, as national legislation, prevailed in the event of a conflict between it and LUPO. It was further argued that LUPO was not 'relevant legislation' to be taken into account in terms of section 23(6) of the MPRDA and the holder of a mining permit accordingly had no obligation to comply with it. It was contended that the MPRDA vested in national government, as an essential part of the authority to regulate mining in the public interest, the power to determine mining-related land use rights and therefore there was no use for the land use planning system facilitated by LUPO in the area of mining. The City and the Provincial Minister argued in turn that the MPRDA dealt with mining and not land use planning and therefore there was no conflict between the MPRDA and LUPO. In the event that the MPRDA was deemed to deal with land use planning issues, they argued that the MPRDA would be unconstitutional to that extent, since municipal planning was a competence reserved for local government exclusively in the Constitution.

3.5 THE FINDINGS OF THE SUPREME COURT OF APPEAL

The Supreme Court of Appeal[104] considered the facts of the matter together with the judgment of the High Court and the arguments of the parties as well as the manner in which power was distributed among the spheres of government. The Court found that mining is an exclusive national legislative competence, appropriately so, with the administration thereof vested in the Minister of Minerals.[105] The Court further identified that municipalities played an important role in land use planning within their respective areas, specifically given their knowledge of local conditions and proximity to the electorate.[106] Every municipality has to have an integrated development plan in terms of the provisions of the Local Government: Municipal Systems Act which had to include a spatial development framework and guidelines for a land use management system in the municipality. The power to prepare structure plans to guide future spatial development comes from LUPO, as does the power to regulate land use in the particular municipal area, subject to oversight by provincial government. Scheme regulations promulgated in terms of LUPO effect control over zoning and may allow applications for departures from zoning schemes and subdivisions to be made to the Council of the relevant municipality.[107]

The Court examined the application process for a mining permit set out in section 27 of the MPRDA and determined that the aspects detailed by the legislation to be considered by the Minister of Minerals in deciding whether or not to grant the permit did not include any element of municipal planning. The Minister of Minerals was not even required, in terms of the MPRDA, to have regard to the current land use of the site for which the permit was granted or the impact which such mining would have on the surrounding inhabitants and future developmental plans.[108] As such, it was found, the MPRDA did not purport to replace LUPO and accordingly LUPO had to operate alongside the MPRDA.[109] The Court accordingly found that as long as the Constitution reserves the administration of municipal planning as an exclusive local government competency, an

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[104] Plasket AJA with Harms AP, Cloete JA, Shongwe JA and Wallis JA concurring.
[105] Ibid at para [14].
[106] Ibid at para [17] and [21].
[107] Ibid at para [20].
[108] Ibid at para [33].
[109] Loc cit.

applicant for a mining right or a mining permit in terms of the MPRDA will also have to apply for planning permission in terms of LUPO before exercising that right or acting in terms of the permit.[110] There was no reason identified why the two spheres of control could not co-exist, one applying from a national perspective and the other from a local perspective, both applying the policy and constitutional considerations relevant to each perspective in the circumstances.[111] The Supreme Court of Appeal accordingly upheld the decision of the High Court in this regard.

With regard to the environmental authorisation in terms of NEMA, the court found that the listing notice relied upon to bring the listed activity of mining within the purview of section 24 of NEMA had been repealed. The interdicts issued by the High Court in regard to this element were accordingly set aside.[112]

3.6 THE ARGUMENTS TO BE PRESENTED AT THE CONSTITUTIONAL COURT

Both the Minister of Minerals and Maccsand were dissatisfied with the judgment of the Supreme Court of Appeal and considered the principles at issue important enough to seek leave to appeal to the Constitutional Court. The matter is expected to be heard by the Constitutional Court in early 2012. Comprehensive heads of argument have already been filed by the parties[113] setting out the constitutional issues being referred to the Constitutional Court. The main issue being raised for consideration by the Minister of Minerals is whether it was constitutionally competent for local government to have what amounts to a veto power over an activity which falls within the exclusive domain of national government. This is what the Minister of Minerals claimed it would amount to should holders of mining rights and mining permits be required to apply for land use planning authorisation from local authorities in addition to fulfilling the requirements of the MPRDA before they are allowed to exercise their mining rights or act in terms of their mining permits. The Minister of Minerals further requires the Constitutional Court to consider whether there is a conflict between the relevant provisions of the MPRDA and LUPO and, if so, which legislative provisions prevail.

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[110] Loc cit.
[111] Ibid at para [34].
[112] Ibid at para [37].
[113] Heads of argument filed in case No 102/11 and case No 103/11 available at www.constitutionalcourt.org.za/uhtbin/cgisirsi/DrrR9gm4kR/MAIN/57/518/0/H-CCT103/11 (last accessed on 02 February 2012).

To enable the Constitutional Court to make a determination, the Minister of Minerals raises various arguments. The Minister of Minerals refers to the allocation of authority to different spheres of government by the Constitution, acknowledging that there may be some overlap in this allocation which may result in legislation being promulgated in terms of the constitutional authority which seeks to regulate the same or similar activity. When considering an apparent conflict between national and provincial legislation, the first step should be that any interpretation which seeks to avoid the conflict should be preferred. Therefore, the interpretation that should prevail in these circumstances was that the MPRDA, as special and later legislation under exclusive national competence, should be preferred in the area of the control and regulation of land use for mining purposes, rather than LUPO, as pre-Constitutional legislation of more general application. Should the conflict in the legislation persist, this needs to be resolved, the Minister of Minerals argues, by application of sections 146 and 148 of the Constitution, which provides that if a dispute on a conflict between two pieces of legislation cannot be resolved, the national legislation, ie the MPRDA, must prevail over the provincial legislation, ie LUPO as administered by local government.

The Minister of Minerals contended that mining was important for the national economy of the country and hence it was necessary to clarify the relationship between the various spheres of government as far as mining and the development of mineral resources was concerned. When mining rights were granted in terms of section 23 of the MPRDA, so it was argued, that also determined the mining-related land use rights for the mining right, since section 5(1) of the MPRDA provides that a mining right is a 'limited real right, with all the rights and benefits attached thereto, in respect of the mineral *and the land to which such right relates*' (emphasis added). Similarly, a mining permit granted in terms of section 27 of the MPRDA also confers certain mining-related land use rights. It was stressed that the preamble and the objects of the MPRDA conveyed the intention that the State should be the custodian of the country's mineral wealth, which required the Minister of Minerals to exercise uniform control over mining operations and authorisations under the MPRDA. What was not intended was that municipalities would exercise control over land where mining was permitted to take place in terms of LUPO. The Minister of Minerals also argued for a specific interpretation of the term 'relevant

law' which had played an important role in the decisions of the courts a quo. It was contended that 'relevant' law, as the term was used in the MPRDA, meant 'compatible or complementary law regulating the exercise of mining authorisations' and did not refer to pieces of legislation such as LUPO which could 'prevent, veto or prohibit' or ' impose further preconditions' for mining permits, mining rights or mining activities.

The Environmental Minister has now also entered the fray and filed papers at the Constitutional Court specifically arguing the environmental authorisation issue. The Environmental Minister contends that it is clear to see from the references to 'other relevant laws' in the provisions of the MPRDA that the Legislature, in framing the MPRDA, did not intend to absolve the holders of a mining right from compliance with any other law impacting upon such mining right.[114] It was argued further that the provisions of NEMA itself display that Parliament was alive to the fact that activities regulated by other legislation may also require authorisation under NEMA.[115] While some overlap in the processes is admitted, it is stressed that the information required and the enquiry in terms of NEMA goes much further than that set out in the MPRDA and that, accordingly, the latter could not sufficiently replace the former.[116] The Environmental Minister accordingly concludes that the decision of the High Court with the regard to the environmental authorisations under NEMA should have been upheld.

4. THE ROAD NOT TAKEN

So aside from adopting an adversarial approach and seeking a resolution to the dispute via court proceedings, how else could the parties have dealt with the matter? The arguments put forward by the parties during the course of litigation appear quite convincing and particularly the Minister of Minerals appears to express a real concern that should LUPO apply unchallenged, national government's task of acting as custodian of the country's mineral wealth may be compromised. But upon closer examination, it appears that a number of contrary arguments remain unexplored and a number of

[114] Ibid Environmental Minister heads of argument at para [23].
[115] Ibid at para [37].
[116] Ibid at para [42].

alternative options to address the apparent impasse between the parties have not been considered.

4.1 THE CO-EXISTANCE OF LUPO AND THE MPRDA

The flip-side to the argument raised by the Minister of Minerals is that if it was decided that satisfying the requirements of the MPRDA exempted the holder of a mining right or mining permit from complying with the provisions of LUPO, the argument had to be made that the MPRDA was unconstitutional to that extent since it interfered with the Constitution's division of powers. Mining and prospecting entails the use of at least the surface of the land. As Nugent JA instructed:

> It is clear that the word "planning", when used in the context of municipal affairs, is commonly understood to refer to the control and regulation of land use, and I have no doubt that it was used in the Constitution with that common usage in mind. The prefix "municipal" does no more than to confine it to municipal affairs. That construction ... has the effect of leaving in the hands of national and provincial government the authority to legislated in the functional area of "urban ... development", but reserving to municipalities the authority to micro-manage the use of land for any such development.[117]

For an interpretation of the MPRDA to be constitutionally valid, it must be that both a mining authorisation and a land use authorisation are required. In terms of this interpretation there is no reason why spheres of control cannot co-exist. All parties concerned in the matter appear unprepared to even consider this alternative since it would inevitably require a fair measure of co-operation to which none of the parties appear eager to commit. Instead of embracing a co-operative solution which would result in parallel spheres of control operating at the same time with interaction between the spheres of government to facilitate optimum implementation, the parties chose to pursue the 'all or nothing' approach, ie if LUPO was valid then the MPRDA, to the extent that it purported to deal with land use, was not, and vice versa.

4.2 ACCEPTING THAT 'PLANNING' IS NOT AN EXCLUSIVE MUNICIPAL COMPETENCE

The explanation of Nugent JA also however draws attention to another factor which is not dealt with in the argument of the City. All three spheres of government are allocated planning competencies in terms of the Constitution. While it seems to be accepted, taking

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[117] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (2) BCLR 157 (SCA) at para [41].

the cue from the judgment of the court by Nugent JA in *City of Johannesburg v Gauteng Development Tribunal* that municipalities are responsible for the micro-management of land use, this does not mean that it is the only planning authority that may have to be considered. National government has concurrent competency with provincial government to legislate on regional planning and development. Furthermore, national government may also legislate on functional areas listed in Schedule 4 in terms of the provisions of section 44 of the Constitution and in terms of section 155(7) has a duty to ensure that municipalities perform their constitutional functions adequately. This at least gives national government the authority to put planning frameworks for a region in place. '[T]he powers in terms of section 155(7) of the Constitution do not extend to the "core" of Schedule 4B matters, but rather deal with the framework within which local government is to exercise these powers. In other words, the regulatory power enables national government ... to set essential standards, minimum requirements, monitoring procedures, etc.'[118] Since national government has 'the authority to ensure that municipalities perform these matters adequately, [t]his means that interference by national ... government in Schedule 4B... matters is not only constitutionally permitted but also mandated in terms of [its] oversight role.'[119]

In the light of these points, it is clear that the planning function and the allocation of competency in that regard is not the exclusive domain of municipalities. Most importantly, the Constitution provides for situations where national legislation may trump legislation formulated by other spheres relating to functional areas listed in Schedule 4. National legislation prevails in circumstances where other spheres cannot regulate a matter effectively; where uniformity is required across the nation; where equal opportunity is to be secured; and where national economic policy has to be implemented.[120] Despite this, national government must 'support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and perform their functions'[121] and 'may not compromise or impede the municipality's ability or right to exercise its powers or perform its functions'[122]. It appears therefore that the

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[118] N Steytler et al *Local Government Law of South Africa* at 5-21.
[119] J de Visser 'Powers of local government' in (2002) Vol 17 *SAPL* 223 at 225.
[120] The Constitution note 1 supra at section 46(2) and (3).
[121] Ibid at section 154(1).
[122] Ibid at section 151(4).

Constitution requires a fine balance to be struck between supervision and capacity building, while at the same time taking care not to venture into an ambit of authority assigned to another sphere by the Constitution. This requirement of a carefully nuanced approach is not argued strongly enough in the all-or-nothing arguments put forward by the Minister of Minerals and the City. Instead, the parties appear more concerned with arguing that their respective competencies are exclusive and trump the competencies of other spheres. This is not and advisable approach from the perspective of intergovernmental relations. The parties should in fact have realised that the only reasonable method to navigate a path between the overlapping planning competencies, the oversight and monitoring function and the respect for functional integrity is by the employment of co-operative governance principles and mechanisms.

4.3 BRINGING LUPO INTO THE CONSTITUTIONAL ERA

It is further interesting to note that the Minister of Mineral's argument indicates that less regard may need to be paid to the provisions of LUPO since it is 'old order' legislation, having been promulgated before the constitutional era. This suggests that constitutional principles and functional competencies were not taken into account when LUPO was drafted and hence the legislation is somewhat deficient to be applied without question in the new constitutional dispensation. But what this argument misses is that, despite the fact that LUPO is pre-constitutional, it is only a tool to implement what is in fact a functional competency allocated by the Constitution itself, ie 'municipal planning'. The allocation of this functional competency to local government has been recognised by the Constitutional Court, which has also indicated the importance of respecting such allocation by stating that 'each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise'.[123]

Despite the tool therefore being from a pre-constitutional era, the competency which it is used to regulate is certainly constitutionally recognised and in no way of lesser value, from a constitutional perspective, than the competency claimed by national government. In any event, the fact that the planning authority has a level of discretion in deciding planning applications makes it possible for LUPO to transcend its pre-constitutional roots. When considering issues of need and desirability before approving

[123] *City of Johannesburg v Gauteng Development Tribunal* note 87 supra at para [56].

an application, as it is required to do in terms of section 36 of LUPO, the decision-maker exercises a level of discretion which is no doubt influenced by the circumstances and the law of the day, including prevailing constitutional principles. The desirability and legitimacy of the tool to implement the planning competency in these circumstances therefore cannot be judged deficient purely on the basis that its promulgation preceded that of the constitutional dispensation. If the co-operative mechanisms provided for in the legislation were optimally used, the decision-maker at local government level would in addition be aware of, or at least able to access, relevant national policies and objectives which could only serve to enhance the ability to decide upon 'desirability' by taking these into account. It is accordingly co-operative governance which could provide the thrust needed to transform a pre-constitutional local piece of legislation into a tool which optimally implements not only constitutional competencies but constitutional values and goals as well.

4.4 THE VALUE OF A DIFFERENT PERSPECTIVE

One aspect which forms the basis of the Minister of Mineral's argument in the legal proceedings, and seems to be the impetus for driving the matter all the way to the Constitutional Court, is the contention that there is a direct conflict between the provisions of the MPRDA and LUPO and the activities they authorise. In the appeal to the Constitutional Court, the Minister of Minerals has specifically asked the Court to pronounce on this issue and, in the event that a conflict is found, that the Court determine which legislation should prevail. The Minister of Minerals persists in this argument, despite the fact that the City has for some time been arguing otherwise, an argument which found favour with the court a quo. The City argued before the Supreme Court of Appeal that, since the MPRDA dealt with mining and not land use, there was no conflict between the MPRDA and LUPO. This argument is a bit simplistic, but in agreeing with the City on this aspect, the Supreme Court of Appeal expanded upon the reasoning. The Court found that LUPO had to operate alongside the MPRDA and its main reason for doing so was the finding that in the process of deliberation regarding whether or not to issue a mining right or a mining permit, the MPRDA does not require the Minister of Minerals to include any consideration of any planning aspect.[124] The Minister of Minerals

[124] *Maccsand v City of Cape Town* note 23 supra at para [33].

therefore could not have had regard to circumstances which may have been vital to the grant or not of the mining permit or mining right, simply because she was not required to consider them by the applicable legislation.

It is important to note that the Constitutional Court has expressed an opinion on what should happen in these and similar circumstances in the judgment in the *Fuel Retailers* matter.[125] In this matter, the Constitutional Court found that the environmental authority had not considered the 'need and desirability' of a particular development, since it had assumed that such 'need and desirability' had already been considered by the relevant local authority when giving planning approval. The Court found that this assumption was flawed since the context of the term 'need and desirability' and what would constitute it was very different from a planning perspective as opposed to an environmental perspective, indicating that in considering whether a development was required and desirable, the planning and environmental authorities would take very different considerations into account. The Court stated that

> [t]he local authority considers need and desirability from the perspective of town-planning and an environmental authority considers whether a town-planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town-planning perspective and yet fail from an environmental perspective. The local authority is not required to consider the social, economic and environmental impact of a proposed development as the environmental authorities are required to do by the provisions of NEMA. Nor is it required to identify the actual and potential impact of a proposed development on socio-economic conditions as NEMA requires the environmental authorities to do.'[126]

The one deliberation could therefore not suffice in the decision-making process of the other.

Applying this statement of the Court to the circumstances at hand, it is clear that the Supreme Court of Appeal was correct in finding the Minister of Mineral's consideration of the aspects which may have an impact on planning insufficient, if not non-existent. Added to the fact that the Minister of Minerals was not required by the

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[125] *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC).

[126] Ibid at para [85].

MPRDA to take any planning aspects into consideration in making a decision, she could also not realistically be expected to be aware of all the considerations which may influence a mining decision from a land use planning perspective in all districts of the country. Only municipalities would have such detailed local knowledge and only by employing meaningful consultation on matters of common interest through intergovernmental channels would such detailed knowledge have been made available to the Minister of Minerals. In the circumstances of the *Maccsand* matter, the land on which the mining was to take place was in close proximity to a residential area, one of the sites being located between two schools. As such, mining in the area would have required some particular safety and security measures which would not have been apparent to the Minister of Minerals and, if known, may have had an impact on the particulars of the grant of a mining right or a mining permit. Furthermore, the Minister of Minerals would not have been aware of any future development or spatial planning planned for the area by the municipality which may have made mining on the sites completely undesirable.

There is also a unique history to the area where the proposed mining sites are located which the Minister of Minerals could not have been expected to know. The residential area of Mitchell's Plain, which is in close proximity to the proposed mining sites, is an area in which people forcibly removed in terms of the provisions of apartheid planning legislation like the Group Areas Act were settled. There is accordingly a very distinct culture and historical perspective to the area and it is inhabited by citizens who have had a very difficult experience with the former government of South Africa. Any action taken by the government which would negatively affect these citizens' rights and well-being could therefore be expected to illicit opposition. There is no doubt that locating a mining site near the residential area and in proximity to schools in the area would lead to grave unhappiness and opposition on the part of the surrounding community.

However, these dynamics could not have been known to the Minister of Minerals as she made the decisions regarding the mining right and the mining permit and it is arguable that, had she known the distinct history of the area from a planning perspective, this knowledge would probably have impacted upon her decision. Decision-makers need to have all the relevant facts and circumstances impacting upon a matter at their disposal

when making a decision and cannot afford to make decisions as important as the allocation of mining rights in a vacuum. It appears therefore that the Supreme Court of Appeal was quite correct in finding that the MPRDA did not replace LUPO and that the two had operate alongside each other, since LUPO would result in crucial planning elements and local knowledge being brought to bear on a process in a manner that was not required by the MPRDA. As such LUPO was not in conflict with the MPRDA but in fact complimentary thereto.

4.5 CO-OPERATIVE GOVERNANCE MECHANISMS THAT SHOULD HAVE BEEN IMPLEMENTED

Accordingly, the parties could have heeded the constitutional imperative to employ co-operative governance mechanisms to resolve the dispute.

> It is very important for the principles of co-operative government, as contained in the Constitution, to be respected and observed by all spheres of government. It is highly undesirable for different spheres of government to take each other to court. The Intergovernmental Relations [Framework] Act has been set up to facilitate co-operation and avoid legal proceedings between different spheres of government.[127]

Chapter 3 of the Constitution obliges organs of state, which includes the Minister and the City, to 'make every reasonable effort to settle the dispute' and 'exhaust all other remedies' before referring a dispute to the courts for determination.[128] In doing so, the parties to the matter could have been mindful not to 'encroach on the geographical, functional and institutional integrity'[129] of each other and 'co-operate with each other in mutual trust and good faith by ... consulting one another on matters of common interest [and] co-ordinating their actions ... with one another'.[130] The issue of consultation is very important and it must be stressed that the consultation must be meaningful. It is the practice of the National Department of Minerals to seek comment from other spheres of government when considering mining applications. The fact of the matter is that even where comprehensive comments, and even objections, are forwarded in response to the invitation to comment, there is little evidence that these comments and objections are

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[127] Understanding Government 'Intergovernmental relations and planning in government' available at http://www.etu.org.za/toolbox (last accessed on 08 December 2011).
[128] The Constitution note 1 supra at section 41(3).
[129] Ibid at section 41(1)(g).
[130] Ibid at section 41(10(h)(iii) and (iv).

seriously considered and taken into account in deciding the mining applications. This process pays lip service to the principles of co-operative governance and the mechanisms of intergovernmental relations without any meaningful engagement between spheres of government operating on equal footing. This defeats the objective of co-operative governance and leads only to frustration and poor governance.

The parties to the matter who are part of government could have used the forums and dispute resolution mechanisms set out in the Intergovernmental Relations Act[131] to find a workable solution to the apparent impasse, which would have been to the benefit of all parties and paved the way for a future collaborative relationship that could only have been beneficial to governance in the area of land use relating to mining activities. Employing this method may have resulted in the parties agreeing that there is no conflict between the legislative provisions at all and that special requirements only need to be put in place for the implementation of the legislation in order to avoid conflict. As De Visser points out: '[T]he question as to whether or not there is a conflict should be answered from the point of view of implementation and enforcement. There is no conflict if it is possible to implement and enforce both regulations with regard to the same matrix without difficulty.'[132]

In employing co-operative governance mechanisms, the parties could have arrived at some agreement or protocol on how to implement the relevant legislation so as not to compromise any sphere's constitutional competency. The Intergovernmental Relations Act makes provision for the conclusion of implementation protocols which may be co-ordinated by an appropriate intergovernmental forum.[133] Section 35(1) of the Intergovernmental Relations Act provides, as far as is relevant, that

> where the ... exercise of a statutory power [or] the performance of a statutory function ... depends on the participation of organs of state in different governments, those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol.

As to the content of the protocol, the Act provides that it

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[131] Intergovernmental Relations Act note 22 supra. Chapter 4 provides mechanisms for the declaration and resolution of intergovernmental disputes, including the appointment of a facilitator to assist the parties to reach the appropriate settlement.

[132] De Visser note119 supra at 226.

[133] Intergovernmental Relations Act note 22 supra at section 35.

> must identify any challenges facing ... the performance of the statutory function ... and state how these challenges are to be addressed; describe the roles and responsibilities of each organ of state in ... exercising the statutory power ...; give an outline of the priorities, aims and desired outcomes; ... provide for dispute-settlement procedures and mechanisms should disputes arise in the implementation of the protocol; ...and include any other matters on which the parties may agree.[134]

There are a number of examples that may be considered for evidence of the success that may be achieved through the implementation of co-operative governance principles and the conclusion of intergovernmental protocols. The Provincial Government of the Western Cape via its Department of Local Government has concluded a protocol with the City of Cape Town for the implementation of a community development programme scheduled to run in 2011 and 2012.[135] The legal basis for the conclusion of the protocol was stated to be the provisions of s 35 of the Intergovernmental Relations Act in the interests of co-ordinating functions for optimal service delivery. In terms of the protocol, community development workers are employed by the provincial government but deployed in the area of the local authority to implement agreed community development programmes for the benefit of the citizens in the area. This protocol further supports the community development programme of national government by creating more valuable engagements between government and communities. Through this protocol, the fulfilment of the development role of national and provincial government is aided by implementation at local government level, where it can be experienced and have the greatest impact upon the citizens. This remedied the situation which existed in the past where national and provincial government had the mandate and funds for community development but local government was forced to implement unfunded programmes to realise community development initiatives which it identified to be critical in its area of operation.

Another example of a successful co-operative governance initiative resulting in an intergovernmental relations protocol was the December 2011 conclusion of a protocol between the City of Cape Town's Directorate of Social and Early Childhood Development

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[134] Ibid at section 35(3).

[135] Copy of protocol available at https://www.capetown.gov.za/en/ExternalRelations2/Documents/Intergovernmental%20Agreements/Implementation%20Protocol%20between%20CoCT%20and%20Provincial%20Government.pdf (last accessed on 09 February 2012).

and the Western Cape Provincial Department of Social Development.[136] The City acknowledged in the protocol that the developmental agenda it had in terms of the Constitution was not always supported by the functions assigned to local government in the Schedules to the Constitution. Therefore instead of pursuing programmes outside of its mandates which were essentially unfunded, as it had in the past, the City engaged with the relevant provincial department to find ways to complement and support the programmes and initiatives undertaken by the Province. The result of this engagement was the protocol mentioned above which secured the co-ordination of efforts and services in the arena of social development in the area of operation of the City. The City is now partnering with the Provincial Department of Social Development to roll out programmes aimed at, inter alia, substance abuse, poverty alleviation and youth development, which are not strictly part of its allocated constitutional functional areas. The interventions are however desperately needed in the communities comprising the City of Cape Town and it was therefore necessary to, through a co-operative process, utilise the best mechanisms which would guarantee development and assistance to the community.

Although the examples of protocols above all involve the vertical application of intergovernmental relations, it is arguable that the same or similar protocols may be concluded for horizontal application as well, for example, between competent authorities for environmental authorisations.

Since both mining and land use planning may also have environmental impact, the parties may in addition have considered utilising an instrument akin to an environmental management co-operation agreement as provided for in section 35 of NEMA. However, there are no specific guidelines for the use of this mechanism as a tool for co-operative governance[137] and therefore it does not present a viable alternative in the circumstances of the matter. Nevertheless, the use of a written agreement as provided for in terms of section 24K of NEMA would be advisable to set procedural requirements for integrated environmental authorisations, thus avoiding duplication. The Minister of Minerals and the

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[136] 'City and Provincial Government renew Social and Early Childhood Development Protocol Agreement' available at http://www.capetown.gov.za/en/Pages/CityandProvincialGovSocEarlyChildDevProAgr.aspx (last accessed on 09 February 2012).

[137] Bosman et al at note 93 supra at 414 and 421.

Environmental Minister could accordingly, through their respective departments, agree on the procedures to be followed from both a mining and environmental perspective to qualify for an integrated environmental authorisation which satisfies both the requirements of the MPRDA and NEMA. Admittedly the mechanisms discussed above are mostly aimed at co-operation and alternative actions for spheres of government or organs of state. In the *Maccsand* matter, the main affected party is a private entity that does not have access to these mechanisms to relieve the prejudice it is encountering through the inability to exercise its mining right. It is therefore conceivable that the only option open to this entity would be to seek the intervention of the courts in order to effectively implement the rights and permits granted. However, if the proper co-operative engagement had taken place between the relevant government entities in this matter, sufficient integration of processes may have been in place which could have prevented the dispute from arising in the first place when the private entity attempted to act on the rights granted to it.

Even if the parties had been hesitant to engage in co-operative governance mechanisms and intergovernmental relations to address the dispute, on the assumption that they have the option to bypass these mechanisms, or in the event that the parties could not reach agreement in the co-operative governance process, it was still not advisable to engage in adversarial litigation such as is being conducted in the *Maccsand* matter at present. The parties could have approached the Court for a declarator and agreed to be bound by the Court's decision. In a declaratory order, the Court could have made declarations as to the constitutionality of the legislation under consideration and how the apparently conflicting authorities should be interpreted. Since leave to appeal to the Constitutional Court on precisely these issues has now been granted, the parties could have saved lots of time and money by exploring this alternative at the outset without engaging in fully fledged litigation proceedings in both the High Court and Supreme Court of Appeal. The Constitutional Court could also have been approached for an advisory opinion on the issues in dispute to guide negotiations between the parties in fashioning an intergovernmental protocol. The possibility of seeking this opinion is referred to by De Villiers in his discussion of the important role the Constitutional Court could play in intergovernmental relations. He states that

> [t]he Constitutional Court could be one of the most influential institutions managing the relationship between governments. The Court could give advisory opinions on the constitutionality of legislation and it could also in the final instance adjudicate disputes concerning the allocation of powers and responsibilities. The Court could ... become an indispensable institution for giving new content to the Constitution and for interpreting the allocation of powers to the respective levels of government.[138]

Although De Villiers was writing at the start of the implementation of the constitutional dispensation, his opinion of the role the Constitutional Court would play was indeed prophetic in relation to its interpretation of constitutional competencies and the pivotal role the Court is being called upon to play in resolving the dispute in the *Maccsand* matter.

5. GUIDANCE FROM THE COURTS

As indicated above, the *Maccsand* matter has now been referred to the Constitutional Court for final determination. Considering the legislative framework that applies to the facts of the matter, the judgments of the courts a quo and the arguments before the Constitutional Court, it may be beneficial to explore the guidance given in previous constitutional judgments on disputes around the elements germane to the *Maccsand* matter and the arguments put forward by the parties.

5.1 THE STATUS OF LOCAL GOVERNMENT

The Constitutional Court in *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) acknowledged the status of municipalities. The Court held that municipalities were allocated original powers by the Constitution and that their status under the new constitutional regime was 'materially different from what it was when Parliament was supreme'.[139] 'Local government [was] no longer a public body exercising delegated powers. Its Council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself.'[140] This judgment accordingly recognised the role that local government had to play in South Africa, indicating that local governments were 'no longer [to be] regarded as a mere functionary

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[138] De Villiers note 3 supra at 275.
[139] Bekink Note 18 supra at 215 referring to *Fedsure* judgment at paras [35 – 39].
[140] Loc cit.

or agent of national and provincial government'[141] but a sphere of government in its own right with powers, competencies and obligations. It is partly as a result of this status given to local government and recognised by the Constitutional Court that the dispute in the *Maccsand* matter has reached the level it has. National government could no longer expect the municipality just to accept its supreme authority and the municipality was aware of and prepared to assert its original constitutional competencies. However, instead of this giving rise to an intergovernmental interaction between equals and an agreement to co-operate on issues of mutual interest, the consequence was a battle for supremacy fuelled by an unwillingness to co-operate.

5.2 THE INTERPRETATION OF 'MUNICIPAL PLANNING'

The manner in which competencies relied on by the Minister and the City in *Maccsand* are phrased in the Constitution, and the fact that those competencies are not defined, does not assist in the resolution of the dispute. The 'municipal planning' competency relied on by the City appears in Schedule 4B to the Constitution. The competency to administer mining activities relied on by the Minister is not stated specifically in the Constitution but inferred from national government's residual powers and accepted as part of the role of national government as custodian of the country's mineral resources. An encroachment of national authority into a local government competency is no longer something which local government should just tolerate since the Constitutional Court pronounced that '[t]he powers of municipalities must ... be respected by the national and provincial governments which may not use their powers to compromise of impede a municipality's ability or right to exercise it powers or perform its functions'.[142] It is commendable that this firm stance has been taken but it is difficult to ensure that encroachment upon or overlap of functions does not occur when the competencies set out in the Constitution are not clearly defined. As Steytler et al express it, 'Schedules 4 and 5 of the Constitution have been drafted in a minimalist manner, leaving much scope for interpretation'.[143]

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[141] A du Plessis 'Local Environmental Governance and the role of local government in realising section 24 of the South African Constitution' in (2010) vol 21 *Stellenbosch Law Review* 265 at 265.
[142] *Western Cape Executive Council* note 13 supra at para [29].
[143] Steytler et al note 118 supra at 5-19.

The Constitutional Court has accordingly provided guidance on the manner in which the functional competencies must be interpreted. In *Ex parte Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another*[144] the Court held that '[i]n the interpretation of those schedules, there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the ... legislatures to exercise their respective legislative powers fully and effectively.'[145] The Court also commented on the allocation of the various competencies to particular spheres of government, holding that the allocation was linked to a 'functional vision of what was appropriate to each sphere'.[146]With regard to the interpretation to be given to the functional area of local government which is at the centre of the dispute in the *Maccsand* matter, viz municipal planning, there is no judgment more instructive than that of the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal.*[147]In that case, the Constitutional Court, and the courts a quo, were asked to decide on the constitutionality of the Development Facilitation Act 67 of 1995 in so far as that Act purported to assign the exercise of planning functions, constitutionally reserved for local government, to another entity. In doing so, the Court had to give content to the term 'municipal planning' in order to determine whether or not the constitutional competency was being encroached upon. The Court confirmed that the competencies must be interpreted purposively and 'that the purposive interpretation must be conducted in a manner that will allow the spheres of government to exercise their powers fully and effectively.'[148] With regard to the meaning of 'municipal planning' the Court held that

> the term is not defined in the Constitution. But "planning' in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land.... In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than

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[144] 2000 (4) BCLR 347 (CC).
[145] Ibid at para [17].
[146] *Ex parte President of the Republic of South Africa In re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) at para [51].
[147] *City of Johannesburg v Gauteng Development Tribunal* note 87 supra.
[148] Ibid at para [49].

> it common meaning which includes the control and regulation of the use of land.[149]

With regard to the prefix 'municipal' the Court held that '[t]he prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas allocated to the other spheres.'[150]

The courts a quo in *Maccsand* and the courts in other matters have applied this definition of 'municipal planning' articulated by the Constitutional Court. The matter of *Swartland Municipality v Louw NO and Others* in the High Court[151] and the appeal to the Supreme Court of Appeal[152] is on point with the *Maccsand* matter with regard to both facts and outcome. In the *Swartland Municipality* a mining permit had been granted for land which had not been properly rezoned by the land use authority to allow for mining. The municipality applied for and was granted an order to interdict the mining. The courts in the *Swartland Municipality* matters utilised the meaning given to 'municipal planning' by the court in *City of Johannesburg* to assist in the determination of the matter. In the matter of *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape*[153] the applicant sought to use the definition given to 'municipal planning' by the court in *City of Johannesburg* to oust the authority of the provincial minister to impose conditions to the amendment of a structure plan. The provincial minister had indicated that her approval of the structure plan was conditional upon 'the associated future zoning application in respect of the land concerned shall be subject to approval by the Provincial Government as the location and impact of the proposed development constitutes "Regional and Provincial Planning"'. [154] The applicant developer argued that, in terms of the definition assigned to 'municipal planning' by the court in *City of Johannesburg*, the provincial minister had no authority with regard to rezoning and subdivision applications since they were 'within the exclusive autonomous sphere of local government'.[155] The provincial minister's actions were accordingly contended to be unconstitutional. The court, very

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[149] Ibid at para [57].
[150] Ibid at para [55].
[151] 2010 (5) SA 314 (WCC).
[152] *Louw NO and Others v Swartland Municipality* [2011] JOL 27929 (SCA).
[153] [2011] JOL 27684 (WCC).
[154] Ibid at para [4].
[155] Ibid at para [9].

importantly, decided that while the definition of the term was sound, its application in the case under consideration had to be curtailed.

The court accepted that there was

> a category of planning decisions which will have an impact beyond the area of a single municipality and will have effects across a larger region. ...[F]or a variety of reasons, including its size and scale, the present development falls into this latter category. These "extra-municipal" ... exceed the bounds of municipal planning and fall within the ambit of "regional planning and development" (in Part A of Schedule 4 to the Constitution) and/or "provincial planning" (in Part A of Schedule 5 to the Constitution).[156]

The court further sought to distinguish the judgment in *City of Johannesburg* from the matter under consideration since the court in the *City of Johannesburg* matter had not called upon to consider the complex constitutional arrangements between spheres of government. The court felt that this was an important factor, since national and provincial government had constitutional obligations to monitor and support local government and ensure that municipalities effectively perform the functions allocated to them in terms of the Constitution. Both provincial and national government also have the power to intervene when a municipality does not perform its functions.[157] In assuming this stance, the court's expression is akin to that of the High Court in the *Cape Metro Council* matter, where it was held that 'the apparent autonomy and independence [of local government] is relative and limited by unequivocally expressed constitutional restraints. Its status is, to a large extent, that of a junior partner in the trilogy of spheres which make up the government of the country.'[158] Taking the cue from these judgments, in *Lagoon Bay Lifestyle Estate* therefore it is clear that while the definition of the term 'municipal planning' stated by the court in *City of Johannesburg* has distinct value, it is neither all-encompassing nor immune from impact from other factors, particularly in the context of the complex relationships between the different spheres of government.

Given this complex relationship, it is all the more important that the spheres of

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[156] Ibid at para [10].

[157] National government has the power to intervene and pass legislation in terms of section 44 of the Constitution while provincial government has the power to pass legislation in terms of section 104(1) of the Constitution. Both national and provincial government have legislative and executive authority to see that municipalities effectively perform their constitutional functions in terms of section 155(7) of the Constitution.

[158] *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development and Others* 1999 (11) BCLR 1229 (C) at para [115].

government deal with disputes which may arise between them utilizing the co-operative governance and intergovernmental relations mechanisms provided for this purpose.

5.3 THE IMPORTANCE OF CO-OPERATIVE GOVERNANCE

So far, none of the courts a quo in the *Maccsand* matter have referred to the constitutional duty to adhere to the principles of co-operative governance and it would accordingly be interesting to ascertain what the Constitutional Court may hold on the matter. In past judgments, the Constitutional Court has been quite unequivocal on the matter. In *Independent Electoral Commission v Langeberg Municipality*[159] the Constitutional Court set the scene by sketching the landscape within which the principles of co-operative governance must operate. It stated that

> all the spheres are interdependent and interrelated in the sense that the functional areas allocated to [the various spheres] cannot be seen in isolation of each other. ...[T]hey must ensure that while they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole.[160]

This is an important point, since co-operative governance has to be founded on a spirit of mutual collaboration and will not be developed in a culture of competition and slavish adherence to party politics. Co-operative governance is good governance, and 'good governance is about democratic, open and accountable government and about a way of exercising state authority that will result in respect for human rights, transparency, certainty, predictability and a culture of justification of state action'.[161] The importance of parties engaging in the dispute resolution mechanisms set out in the co-operative governance chapter in the Constitution cannot be overstated. The Constitutional Court has on occasion denied access to the Court to determine a dispute where the obligations of Chapter 3 were not met.[162] The observance of co-operative governance and intergovernmental relations principles is clearly of significant importance to the Constitutional Court.

The avoidance of litigation between the spheres of government has also been identified as a paramount consideration. Even in the *Certification* judgment it was stated

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[159] 2001 (9) BCLR 883 (CC).
[160] ibid at para [26].
[161] Du Plessis note 141 supra at 294 – 295.
[162] See the judgment in *MEC for Health, KwaZulu-Natal v Premier of KwaZulu-Natal: in Re Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1028 (CC).

that 'disputes should where possible be resolved at political level rather than through adversarial litigation.'[163] This sentiment has been echoed by a number of judgments. In *National Gambling Board v Premier KwaZulu-Natal* the Constitutional Court cautioned government departments not to litigate against each other but should rather attempt to resolve disputes by fundamentally re-evaluating their positions and considering alternatives and compromises.[164] In *Uthukela District Municipality v President of the Republic of South Africa* the Constitutional Court against expressed its hesitation to interfere in intergovernmental disputes that should be resolved with political rather than judicial intervention and restated that every reasonable effort must be made to settle the dispute and that all existing co-operative governance and intergovernmental relations mechanisms must be exhausted before a dispute is referred to the court.[165]

More recently in the judgment in the *Beja* matter[166], the court slated the City of Cape Town for not utilising intergovernmental relations mechanisms in its opposition to an interpretation given to the Housing Code. The court stated that

> [i]nstead of approaching the National Department to resolve the issues it now complains of, the City decided to embark on litigation instead in disregard of the prescripts for co-operative governance under the Constitution. The City has not complied with the Intergovernmental Relations Framework Act 13 of 2005 or the constitutional prescripts of co-operative governance. The City has also not provided any proper explanation for its failure to have done so.[167]

The court felt particularly strongly about the fact that the City was seeking to challenge fundamental elements of the Housing Code for being unconstitutional in a process to which none of the other provinces or municipalities in which the Housing Code applied were a party and therefore unable to state their views. The court accordingly dismissed the City's application as 'premature and incompetent' on the basis that there had been non-compliance with co-operative governance and intergovernmental relations.[168] It is therefore clear that the courts are prepared to act decisively to ensure adherence to co-operative governance and intergovernmental relations principles and processes.

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[163] *In re Certification* note 20 supra at para [291].
[164] 2002 (2) BCLR 156 (CC) at para [36].
[165] 2003 (1) SA 678 (CC) at para [14] and para [19] – [24].
[166] *Beja v Premier of the Western Cape* 2011 (10) BCLR 1077 (WCC).
[167] Ibid at para [169] – [170].
[168] Ibid at para [171] – [172].

5.4 THE PROPER EXERCISE OF CONSTITUTIONAL COMPETENCIES

Aside from providing methods of dispute resolution and being a signature element of co-operative federalism, co-operative governance is also aimed at ensuring that the constitutional competencies are properly exercised by the sphere to which they are allocated and that local government is capacitated, supported and developed.

> [T]he ...Constitution seeks to realise ... a structure of local government that on the one had reveals a concern for the autonomy and integrity of local government and thereby prescribes a so-called "hands-off" relationship between local governments and other levels of government and on the other acknowledges the requirement that higher levels of government have a monitoring function and can intervene in instances when local government is not complying to its functions. This is regarded as a "hands-on" relationship.[169]

With reference to the co-operative governance principles stated in section 41 of the Constitution, the Court in the *Cape Metro Council* matter stated that the section

> places a limitation or constraint on the manner in which a sphere of government or an organ of State may exercise its powers or perform its functions. It may be interpreted to mean that no interference with, or encroachment upon, the inviolate sphere of activities of another organ of State is to be tolerated. This is consonant with the spirit of co-operation based on mutual trust and good faith, as envisaged in section 41(1)(h). ...[S]ection 41(1)(g) appears to be directed at preventing one sphere of government from undermining others, thereby preventing them from functioning effectively. Such conduct could, indeed, be regarded as an abuse of power.[170]

The Constitutional Court echoed these words in the judgment of *Premier of the Province of the Western Cape*.[171] It further confirmed in its judgment in the *City of Johannesburg* matter[172] that 'the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed.'[173] In one case, the view has been articulated even stronger to indicate that legislation that

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[169] Bekink note 18 supra at 97 referring to *Certification* judgment.

[170] *Cape Metropolitan Council* note 158 supra at para [122].

[171] *Premier of the Province of the Western Cape v President of the Republic of South Africa* 1999 (4) BCLR 382 (CC) at para [58].

[172] *City of Johannesburg v Gauteng Development Tribunal* note 87 supra at para [58] where the Court referred to section 41(1)(e)-(g) of the Constitution and commented that 'it specifically requires the spheres of government to respect the functions of other spheres, not to assume any functions or powers not conferred on them by the Constitution and not to encroach upon the functional integrity of other spheres'.

[173] Ibid at para [44].

compromises or impedes a municipality's ability to exercise its powers or perform its functions is simply invalid. The Constitutional Court held in the *Executive Council of the Western Cape* matter that

> the Constitution therefore protects the role of local government, and places certain constraints upon the powers of Parliament to interfere with local government decisions. It is neither necessary nor desirable to attempt to define these constraints in any detail. It is sufficient to say that the constraints exist, and if an Act of Parliament is inconsistent with such constraints it would to that extent be invalid.[174]

Another factor which has received the attention of the courts which is relevant in *Maccsand* is that of concurrent exercise of competencies. Both the High Court and the Supreme Court of Appeal in *Maccsand* approved the dictum in the matter of *Wary Holdings*[175] which states, in relation to the subdivision of agricultural land, that

> [t]here is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of subdivision of "agricultural land", the one may in effect veto the decision of the other. It should be borne in mind that the one sphere of control operates from a municipal perspective and the other from a national perspective, each having its own constitutional and policy considerations.[176]

This indicates that the Constitutional Court is, like the City but unlike the Minister of Minerals, willing to consider that two competencies may need to run concurrently, even if they overlap, because they operate from different perspectives. The Constitutional Court confirmed how vital it was for all relevant perspectives to be considered in the making of decisions in line with allocated competencies in its judgment in the *Fuel Retailers Association* matter.[177] This approach is particularly important in the *Maccsand* matter since, as discussed above, a proper decision in the circumstances may be impacted upon by local factors which only the municipal authority may be aware of. The Court in *Fuel Retailers Association* gives the following advice to authorities who shy away from the concept of concurrently applying seemingly conflicting competencies: 'Our Constitution does not sanction a state of normative anarchy which may arise where potentially conflicting principles are juxtaposed. It requires those who enforce and

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[174] *Executive Council of the Western Cape* note 13 supra at para [29].
[175] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2008 (11) BCLR 1123 (CC).
[176] Ibid at para [80].
[177] *Fuel Retailers* note 125 supra.

implement the Constitution to find a balance between potentially conflicting principles. It is founded on the notion of proportionality which enables this balance to be achieved.'[178]

5.5 THE CONSOLIDATED JUDICIAL DIRECTIVES

From the constitutional judgments discussed above it may be understood that the status of municipalities as a fully-fledged sphere of government is unassailable. Local government should therefore engage on equal footing with national and provincial government when it comes to the ability to deliver on its constitutional mandates and encroachment upon the areas of competence is not sanctioned. In the area of 'municipal planning' an attempt has been made to define the ambit of the functional area, both to give guidance to local government on when it should be acting and to provide caution to the other spheres of government regarding where they should not tread. As was stated by the court in *City of Johannesburg:* '[No purpose is] served by reserving power to local government merely to assist or participate in the exercise of powers by another [sphere] of government'.[179] Coupled with this, however, is also an obligation on national and provincial government to provide oversight for the performance of local government functions, which naturally presupposes a measure of intervention. This delicate balance to be achieved between autonomy and interdependence, between detachment and oversight results in complex constitutional arrangements between the spheres of government that can only be effectively navigated by the implementation of solid intergovernmental relations.

The vital role of good co-operative governance and intergovernmental relations processes is clear, as is the appreciation of the value that can be brought to a decision-making or implementation process when the different perspectives of the different spheres of government are taken into account. There is an obligation to employ the dispute resolution mechanisms referred to in section 41(3) of the Constitution and sections 41 to 43 of the Intergovernmental Relations Act, more so where there are political agendas which may be clouding the issues and where the best solutions to issues can be achieved through political intervention rather than resorting to court action. The court should not be used as a tool in an ill-advised battle for supremacy between spheres

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[178] Ibid at para [93].
[179] *City of Johannesburg v Gauteng Development Tribunal* note 117 supra at para [38].

of government when the most beneficial solution for the citizens of the country could actually be achieved by compromise and co-operation.

It is arguable that the best solution to the *Maccsand* matter would be the concurrent exercise of competencies. In the *Fuel Retailers Association* matter, the Constitutional Court sent a very strong message regarding the appropriateness of each decision-making exercise by each authority to whom power has been given to make a decision. The Court was entirely correct in holding that different decision makers viewed a set of circumstances from different angle and with different priorities in mind and that for this reason, the decision of one authority could not be supplanted for the decision of another. The competencies asserted by the respective parties in the *Maccsand* matter are of the nature that one cannot be allowed to trump the other. This is so particularly in the light of the fact that national government is not required to consider any land use elements in awarding a mining right or mining permit and cannot be expected to be aware of relevant land use aspects in the area of the mining site, such as zoning, unique characteristics or future development plans. In addition, local government is not the custodian of the country's mineral resources or authorised to allocate mining rights or mining permits and, in deciding on land use applications, is not required to take aspects into consideration such as the optimum exploitation of the country's mineral wealth, affording equal opportunity to access mining-related activities and security economic benefit for the country. But in the arena of land use for mining purposes, the one authority cannot properly function without the other and hence the only alternative is that the competencies have to function in parallel to each other.

Similarly, as has been pointed out, the environmental assessment process under NEMA for securing environmental authorisations is much more detailed than those required by the MPRDA and if the intention is not to exploit the country's mineral wealth at the expense of the environment, it may be more beneficial to employ as comprehensive an environmental assessment as possible before mining rights and mining permits are issued. However, to avoid unnecessary duplication of processes and prejudice to the applicants for mining rights and permits, there is a need for an integrated process of environmental assessment and authorisation.

The concurrent exercise of competencies and the implementation of integrated processes can only be achieved by co-operation, not by enforcing a court order.

6. CONCLUSION

Adherence to the principles of co-operative governance is a constitutional imperative as well as a requirement for the success of the system of governance operating in the country. The very nature of the three spheres of government, ie 'distinctive, interdependent and interrelated', and the manner in which the functional competencies are assigned to the spheres requires that co-operative governance is observed to successfully navigate the governance challenges that will arise in order to deliver effectively on mandates and serve the electorate. The very fact that co-operative federalism was chosen as the governance mechanism for the new constitutional democracy with a decentralised power base predetermined that the success of the governance system was directly related to the amount of co-operation practiced by the spheres of government. Despite the fact that co-operative governance is at the very foundation of the system of government, it is not uniformly observed by the spheres of government and in some cases, simply avoided. The reason behind this may be tied to the fact that the vestiges of the hierarchical governance system of the past remains in operation in relation to the mindset of those tasked with the administration and enforcement of the law in the various spheres of government or it may be impacted upon by the very particular political history and party politics that constitute the South African governance landscape.

An example of a situation where the spheres of government have, some may say purposefully, missed the opportunity to employ co-operative governance mechanism is documented in the court proceedings in the matter of *City of Cape Town v Maccsand*. Given the nature of the particular competencies at the heart of the dispute between the parties, however, it appears that the only reasonable solution would be that the exercise of such competencies have to run parallel to each other, making it imperative for the parties to adhere to the principles and mechanisms of co-operative governance. This will ensure that each party is enabled to fully discharge its function without seizing any authority not allocated to them by the Constitution. Despite calls for a more clearly defined expression

of the functional competencies in the Constitution, it appears that the overlap, and sometimes conflict, in competencies is here to stay. In this context,

> effective intergovernmental relations and structures ... remain the most important way through which the effective co-ordination of common competencies can be achieved. There will inevitably be a tension between local government and the other levels of government with regard to competencies. This is part of a healthy competition that leads to experimentation and innovation, one of the underlying purposes of a decentralised system of government.[180]

In considering the value of co-operative governance, regard should be had to the fact that the 'establishment of a political culture of co-operation, mutual respect and trust is a prerequisite for effective government relations. [T]his is far more important than legal structures, procedures or technicalities provided by a Constitution or legislation.'[181] To quote De Villiers: 'The importance of intergovernmental [relations] in the new constitutional dispensation dare not be overlooked. ...It would be a pity if it took South Africans years to realise that no level of government can function in isolation from others, and that co-operation actually means strength, not weakness.'[182]

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[180] N Steytler 'The powers of local government in decentralised systems of government: managing the "curse" of common competencies' in (2005) vol 38 *CILSA* 271 at 284.
[181] Du Plessis note 91 supra at 107.
[182] De Villiers note 3 supra at 271.

ANNEXURE A

Schedule 4
FUNCTIONAL AREAS OF CONCURRENT NATIONAL AND PROVINCIAL LEGISLATIVE COMPETENCE
PART A
Administration of indigenous forests
Agriculture
Airports other than international and national airports
Animal control and diseases
Casinos, racing, gambling and wagering, excluding lotteries and sports pools
Consumer protection
Cultural matters
Disaster management
Education at all levels, excluding tertiary education
Environment
Health services
Housing
Indigenous law and customary law, subject to Chapter 12 of the Constitution
Industrial promotion
Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
Media services directly controlled or provided by the provincial government, subject to section 192
Nature conservation, excluding national parks, national botanical gardens and marine resources
Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
Pollution control
Population development
Property transfer fees
Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
Public transport
Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
Regional planning and development
Road traffic regulation
Soil conservation
Tourism
Trade
Traditional leadership, subject to Chapter 12 of the Constitution
Urban and rural development
Vehicle licensing
Welfare services
PART B
The following local government matters to the extent set out in section 155 (6) (*a*) and (7):
Air pollution
Building regulations
Child care facilities
Electricity and gas reticulation
Fire-fighting services
Local tourism
Municipal airports
Municipal planning
Municipal health services
Municipal public transport

Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto
Stormwater management systems in built-up areas
Trading regulations
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

Schedule 5
FUNCTIONAL AREAS OF EXCLUSIVE PROVINCIAL LEGISLATIVE COMPETENCE
PART A
Abattoirs
Ambulance services
Archives other than national archives
Libraries other than national libraries
Liquor licences
Museums other than national museums
Provincial planning
Provincial cultural matters
Provincial recreation and amenities
Provincial sport
Provincial roads and traffic
Veterinary services, excluding regulation of the profession
PART B
The following local government matters to the extent set out for provinces in section 155 (6) (*a*) and (7):
Beaches and amusement facilities
Billboards and the display of advertisements in public places
Cemeteries, funeral parlours and crematoria
Cleansing
Control of public nuisances
Control of undertakings that sell liquor to the public
Facilities for the accommodation, care and burial of animals
Fencing and fences
Licensing of dogs
Licensing and control of undertakings that sell food to the public
Local amenities
Local sport facilities
Markets
Municipal abattoirs
Municipal parks and recreation
Municipal roads
Noise pollution
Pounds
Public places
Refuse removal, refuse dumps and solid waste disposal
Street trading
Street lighting
Traffic and parking

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