

Obligation to rezone land and its impact on mining and prospecting rights in SA

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The necessity to rezone land for mining or prospecting purposes has been confirmed by a series of recent judgements. If this obligation is ignored by holders of mining rights, mining permits or prospecting rights, it could have severe consequences for the holder, such as the forced legal closure of operations by municipal authorities or other affected persons, including local communities.

Holders of rights or permits who have not applied for the rezoning should do so now or, where necessary, negotiate with landowners to rezone the land as a matter of extreme urgency, or face the consequences.

In April 2012, the Constitutional Court (ConCourt) delivered judgement in *Maccsand (Pty) Ltd vs City of Cape Town and Others 2012 (7) BCLR 690 ("Maccsand Case")*. Maccsand is the holder of a mining right and mining permit issued to it by the South African Department of Mineral Resources (DMR) in terms of the Mineral and Petroleum Resources Development Act (MPRDA). The land over which the mining right and mining permit was granted is zoned as public open space. The City of Cape Town informed Maccsand that it would not be permitted to exercise the mining right or mining permit unless the land was rezoned for mining purposes in terms of the Land Use Planning Ordinance 15 of 1985 (Cape) (LUPO).

Maccsand and the DMR submitted that mining fell under the exclusive competence of the national sphere and that LUPO therefore does not apply as it only regulates a municipal functional area.

LUPO applies in three provinces: the Western Cape, parts of the Eastern Cape and parts of the North-West. There are similar provincial laws in the other provinces including the Orange Free State's Townships Ordinance 9 of 1969 and the Transvaal Province's Town Planning and Townships Ordinance 15 of 1986, applying in Gauteng, Limpopo and Mpumalanga (Ordinances).

Rights and how they can be exercised

The ordinances authorise the preparation of structure plans and zoning schemes or regulations. A zoning scheme or regulation is a legal document that records all land-use rights on properties in an area of jurisdiction. It includes regulations and restrictions on such rights and how they can be exercised. Under the different ordinances, every municipality has its own zoning scheme or multiple zoning schemes, each setting different rules and regulations.

The rules and regulations that would apply to each holder would depend on the location of mining or prospecting operations, the relevant ordinance as well as the relevant zoning scheme or regulation applicable to that area of jurisdiction.

Whereas mining is governed by the MPRDA, the land on which mining takes place is regulated by the various ordinances. There is, therefore, an overlap of the two functions.

No airtight compartments

In the Macssand Case, the ConCourt found that because the powers allocated by the Constitution to the three spheres of government (national, provincial and municipal), in accordance with the functional vision of what was appropriate to each sphere, were not contained in airtight compartments, the exercise of powers by two spheres may on occasion result in an overlap.

In the instance of the Macssand Case the ConCourt found that the overlap of the MPRDA and LUPO does not constitute an impermissible intrusion by one sphere into the area of another. Where overlapping occurs, the Constitution obliges these spheres of government to co-operate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another. The ConCourt held that mining cannot take place until the land in question is appropriately rezoned.

The ConCourt further noted that there is nothing in the MPRDA that suggests that LUPO (and therefore any Ordinance) will cease to apply to land upon the granting of a right or permit, the mere granting of a right or permit therefore does not cancel out the applicability of an ordinance.

Section 23(6) of the MPRDA states that: "A mining right is subject to this Act, any relevant law, the terms and conditions stated in the right ... " and section 17(6) similarly stipulates that: "A prospecting right is subject to this Act, any other relevant law and the terms and conditions stipulated in the right ... " (underlining our emphasis). The MPRDA does not define the phrase "relevant law" and the ConCourt therefore contends that, consequently, it must be accorded its ordinary wide meaning. There is, therefore, no justification whatsoever for limiting it to laws regulating mining only.

If land is intended to be used or is used for a purpose not permitted in terms of the zoning scheme or regulations, application must be made to the municipality for rezoning or for a use departure. If either is granted, the land must be used for the permitted purpose within a period of two years, failing which that rezoning lapses. It must be noted that the ordinances generally authorise a landowner to apply for the rezoning of land. However, land may also be rezoned at the instance of the provincial government or the municipality in whose jurisdiction it is located. This places a rights holder who is not also the landowner at a disadvantage.

It is clear from the above that mining cannot take place until the land in question is appropriately rezoned. If consent for rezoning is refused it does not mean that the first decision is vetoed, but it does result in the mining right holder being unable to exercise its rights to mine. Such conflicts of authority would be required to be resolved through co-operation between the two organs of state, failing which the refusal may be challenged on review.

The view that rezoning of land is required where the land in question is not zoned for mining purposes was further confirmed by the ConCourt in the Minister for Mineral Resources vs Swartland Municipality and Others 2012) (Swartland Case). The ConCourt stated that a party who is granted a mining right or permit in terms of the MPRDA may start mining operations only if the zoning of the land in terms of LUPO (or another ordinance) allows mining.

Both the Macssand and Swartland cases dealt only with mining rights. However, in a recent decision, the Western Cape High Court, on an application by the Berg River Municipality, granted an interdict against Bongani Minerals, preventing Bongani Minerals from prospecting for tungsten and molybdenum until the land has been rezoned for prospecting purposes. It must be noted that the prospecting activities of Bongani were not particularly intrusive (drilling) and had little impact on the land.

The judgment has not yet been reported, but it would now appear that rezoning will be required for both mining and prospecting purposes.

Extra ammunition to landowners

Holders of rights or permits must bear in mind that the Maccsand and Swartland cases have given extra ammunition to landowners in their negotiations with mining companies, as the landowner is the principal person able to apply for the rezoning of any property. The right to rezone is not extended to the holder of a right or permit.

The holder of a right or permit under the MPRDA may have commenced prospecting or mining operations and may in fact have been granted access to the land by the landowner, but, notwithstanding the grant and execution of a right or permit, until the area covered by the right or permit has been rezoned for mining or prospecting purposes in terms of the relevant land-use planning legislation, such mining or prospecting operations will in fact be carried out illegally.

Local government has the legal right to force mining or prospecting operations to close down if the land is not correctly zoned. Ceasing mining or prospecting operations because of rezoning can have far-reaching consequences on the right of permit holders as they will have to apply to the DMR for the suspension of mining or prospecting operations until such time as the land has been rezoned. If suspension is not applied for, the holders will not be mining or prospecting in accordance with their approved mining works programmes or prospecting work programmes, which could result in the DMR invoking the provisions of section 47 of the MPRDA and cancelling or terminating a right or permit by reason of non-compliance. The suspension of rights or permits may also have severe financial and/or contractual implications for the holders.

Most resource companies believed, and still believe, that a right or permit granted in terms of the MPRDA is sufficient regulatory authority for the conduct of their operations and that rezoning is not required. This is clearly not the case. We strongly advise that the holders of rights or permits who have not applied for the rezoning do so, or where necessary commence negotiations with landowners, to rezone the land as a matter of extreme urgency.

This article was reviewed by Allan Reid, director (sector head: mining), corporate and commercial of Cliffe Dekker Hofmeyr.

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