

SOUTH AFRICA / JUDGMENT

Maccsand CC v Macassar Land Claims Committee and Another (LCC 37/03) [2007] ZALCC 19 (14 August 2007)

[2007] ZALCC 19

COURT

Land Claims Court

BEFORE

Gildenhuis, Pienaar

CASE / FILE NUMBER

LCC 37/03

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IN THE LAND CLAIMS COURT OF SOUTH AFRICA

CASE NUMBER: LCC

37/03

Held at CAPE TOWN

on 14 June 2007

Before Gildenhuis J and Pienaar AJ

Decided on 14 August 2007

In the matter between:

MACCSAND CC Applicant

And

MACASSAR LAND CLAIMS COMMITTEE First

Respondent

DEPARTMENT OF MINERAL AND ENERGY AFFAIRS Second

Respondent

JUDGMENT

PIENAAR AJ

- [1] This is an application on an urgent basis by Maccsand CC, the holder of mining rights in relation to Erf 1197, for the discharge,

in the alternative a variation, of an Order made by the Supreme Court of Appeal on November 2004. The First Respondent, the Macassar Land Claims Committee, lodged a restitution claim in relation to various properties, including Erf 1197 and opposes the application. The Second Respondent, the Department of Mineral and Energy Affairs (DME), supports the present application.

- [2] The Court was also faced with an application to intervene by the Land Claims Commission under section 29(2) of the Restitution of Land Rights Act 22 of 1994 (“Restitution Act”) and Rule 13(2) of the Rules of the Land Claims Court.

Application to intervene

- [3] The Commission on the Restitution of Land Rights had been involved with the Macassar land claim and the Macassar Land Claims

Committee for a number of years: the Western Cape regional office investigated the claim when it was lodged in 1997 and was closely

involved in the application for interim relief which resulted in the Appeal Court Order that forms the object of this application. It was, however, not a party to the present proceedings; hence the application for intervention.

- [4] The application to intervene, as argued by the Commission, was necessary due to the Claimant’s (Macassar Land Claims Committee – the First Respondent in the main application) intention to
- (a) amend its Particulars of Claim relating to the restitution case to be heard at a later stage so as to include the expropriation of Macassar’s right to mine on the property; and (b) possibly mine the property themselves. The Commission sought intervention since it opined that continued mining operations would defeat the achievement of the objects of the Restitution Act. For this purpose the Commission relied on Section 29(2) of the Restitution Act and Rule 13(2) of the Rules of the Land Claims Court.
- [5] These provisions respectively provide the following:

Section 29(2):

“(2) The State shall have the right to intervene as a party to all proceedings before the Court”. (Own emphasis)

Rule 13(1) and (2):

“(1) Any person whose rights may be affected by the relief claimed in a case who is not a party in the case may, within a reasonable time after he or she became aware of the case, apply to the Court for leave to intervene in the case.

- (2) The Court may grant an application under subrule

- (1) on conditions which the Court considers appropriate, including conditions as to –
 - (a) the payment of costs; and
 - (b) the further procedure in the case.”
- [6] Maccsand filed papers opposing the application for intervention on the following bases: (a) the Commission was not “the State” as intended in said provisions; and (b) the Commission refrained from setting out exactly how the objectives of the Restitution Act would be defeated if this Court allowed the variation order.
- [7] It is necessary to determine whether the Commission constitutes “the State” for purposes of intervention. “State”

has different meanings, each representing particular or different features or elements of the State.¹ Although “State” is used in the Final Constitution,² no definition is provided. Baxter³ indicates that “State” appears to be used as a collective noun for:

“(a) the collective wealth (“estate”) and liabilities of the sovereign territory known as the “Republic of South Africa” which are not owned or owed by private individuals or corporations; and

- (b) the conglomeration of organs, instruments and institutions which have as their common purpose the “Management” of the public affairs, in the public interest, of the residents of the Republic of South Africa as well as those of her citizens abroad in their relations with the South African “Government”.”
- [8] Baxter further points out that, although the expression “State” is extensively employed in legislation, it is not used with consistency.⁴ The precise meaning depends on the context within which it is used.⁵ In light of the reference to “organs of State” by Baxter above, it is further necessary to refer to Section 239 of the Final Constitution. Here “organs of State” is defined as meaning:

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

- (b) any 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 a judicial officer”

- [9] The Commission on the Restitution of Land Rights exercises a public function in implementing the constitutional imperative of land reform contained in both the Interim (Section 28 and Sections 121-123)⁶ and the Final Constitutions (Section 25(7))⁷. In this context I am satisfied that the Commission forms part of the “the conglomeration of organs, instruments and institutions

which have as their common purpose the ‘Management’ of the public affairs, in the public interest, of the residents of the Republic of South Africa”, particularly in relation to the land restitution programme. The application for intervention is thus granted.⁸

Background to the main application

- [10] A land claim in relation to various properties, including Erf 1197, was lodged on 3 March 1997 by the late Joseph Abraham de Wet on behalf of the “gemeenskap” in his capacity as chairperson of the Faure District Community Association – now known as the Macassar Land Claims Committee. The claim was accepted and published in General Notice 293 in GG 23177 of 1 March 2002 and revised in General Notice 932 in GG 23493 of 5 June 2002.
- [11] Erf 1197 contains vast deposits of sand which makes it suitable for sand mining. On 6 January 2000 Maccsand, the applicant in the main application, obtained a mining right from the Department of Mineral and Energy Affairs. It was originally issued in terms of section 9(1) read with section 9(3)(e) of the Minerals Act, No 50 of 1991 (“the 1991 Act”) and was valid until January 2005.
- [12] On or about 23 June 2003 the Macassar Land Claims Committee launched urgent proceedings under Chapter IIIA of the Restitution Act to have its land claim directly adjudicated by the Land Claims Court seeking inter alia the restitution of Erf 1197 and, pending the finalisation of the restitution issue, interim relief to prevent the Applicant in the present main application from mining the property. It was asserted that the mining on Erf 1197 was conducted illegally and that it caused irreparable harm to the property. An interim order was granted by Moloto J of this Court, which prevented Maccsand from continuing with its mining operations.
- [13] Maccsand appealed against the Land Claims Court Order to the Supreme Court of Appeal which made the following order on 30 November 2004:9

“3(a) Pending the finalisation of the claim for restitution of Erf 1197, Macassar, to the applicant, an interim interdict be issued against Maccsand:

3(a)(i) Interdicting Maccsand from continuing to mine sand on Erf 1197, Macassar, save for the area identified as Phase 1 demarcated as Strips B to C on the General Site Layout Plan dated March 1997, which Maccsand shall be entitled to mine, on condition:

3(a)(ii) that the sum of R120 000 is set aside in the trust fund established in terms of the Minerals Act, No 50 of 1991, for purposes of rehabilitating Strips B and C on completion of mining on each respective strip; and

3(a)(iii) that such rehabilitation is in compliance with the approved Environmental Management Programme and done to the satisfaction of the Department of Mineral and Energy Affairs.

3(a)(iv) Maccsand is given leave to approach the Land Claims Court for a further variation of this paragraph should the respondent, the Macassar Land Claims Committee not proceed with the trial for the restitution of Erf 1197 within one year from the grant of this order or as soon as the mining of Strips B and C and the rehabilitation thereof is complete, whichever event should occur first.” (Own emphasis)

[14] Since the Supreme Court of Appeal Order was handed down, a new mineral dispensation was introduced in South Africa when the Minerals and Petroleum Resources Development Act, No 28 of 2000 (“the MPRD Act”) commenced on 1 May 2004. In accordance with the MPRD Act Maccsand’s “old order mineral right” was converted into a “new order mining right” to entitle it to mine sand on Erf 1197 under Section 23(1) of MPRD Act with effect from 30 September 2005.

[15] In November 2006 the Macassar Land Claims Committee again approached the Land Claims Court for a “fresh interdict” preventing Maccsand from mining Erf 1197. This application, which will be referred to as the “second interim application” was unsuccessful.¹⁰ Accordingly mining on Erf 1197 was and still is conducted within the framework provided for in the Supreme Court of Appeal Order.

The variation application

[16] The mining area covered by the mining license is divided into thirteen strips; designated as A to M. Maccsand has substantially completed mining Strips A and B. Only 1% of Strip C remains unmined. According to the papers submitted, it has also complied with the rehabilitation conditions provided for in the mining work programme and the Environmental Management Programme (“EMP”). It approached the court for an order on the following terms:

“That paragraph 2 of the SCA order be amended to read as follows:

“Pending the finalisation of the claim of restitution on Erf 1197, Macassar, to the Macassar Land Claims Committee, the mining of Erf 1197 be regulated in the following manner:

3(a)(1) Maccsand is permitted to mine Erf 1197, Macassar in terms of its mineral right in terms of section 23(1) of the Mineral and Petroleum

Resources Development Act, 28 of 2002 (“the MPRD Act) effective from 30 September 2005 in accordance with its Maccsand’s

Environmental Management Programme, and any approved addendums thereto and any further directives furnished by the Department of

Minerals and Energy from time to time;

3(a)(ii) Maccsand must make the prescribed financial provision for the rehabilitation or management of negative environmental impacts from time to time as required by the MPRDA or as requested by the department of Mineral and Energy Affairs in a manner as contemplated in section 41 of the MPRDA and in accordance with regulations 53 and 54 of the regulations published under Government Notice R527 in Government Gazette 26275 of 23 April 2004 (“the Mining Regulations”);

3(a)(iii) Maccsand rehabilitates those strips mined in accordance with section 38 of the MPRDA read together with section 55 of the Mining Regulations.”

[17] During the hearing the Applicant prayed in the alternative that the Supreme Court of Appeal Order be amended so as to allow further mining on Strips D, E and F. However, in the additional heads of arguments that were filed at a later stage, Applicant extended the required Strips to also include Strips G and H in light of an investigation relating to sand deposits on these portions. No detailed information relating to said investigation and the result thereof was, however, submitted.

[18] The application for the discharge or alternatively a variation of the current Order is principally premised on the following (a) that the legal dispensation in terms of which the mining right was awarded and regulated at the time the Supreme Court of Appeal Order was handed down, had changed drastically and had been replaced by a new dispensation of mineral rights; and (b) in accordance with the conditions of the current Order which provide for such an application in two instances, namely (i) when the Macassar Land Claims Committee refrained from proceeding with the trial for restitution of Erf 1197 within one year from the granting of the relevant Order; or (ii) as soon as the mining of Strips B and C had been completed.

[19] Concerning the mineral rights dispensation, when the Supreme Court of Appeal Order was handed down, there was still a possibility that, were the restitution claim successful once it had been dealt with by the Land Claims Court, the successful claimant could be restored Erf 1197 and connected therewith, also the mineral rights relating to that property. However, since the new dispensation relating to mineral rights had commenced on 1 May 2004 under the MPRD Act, land ownership and mineral rights had been divorced. Mineral and petroleum resources now belong to the nation with the State as the custodian thereof.¹¹ Accordingly, an order for restitution, even specific restoration, would not include mineral rights anymore.

Points raised in limine

[20] The First Respondent raised various points in limine. It argued that the application was not one of urgency, as claimed by the Applicant. I am, however, satisfied that the matter is urgent and proceed on that basis.

[21] Secondly, the First Respondent submitted that the law to be applied should be the law as it stood when the Supreme Court of Appeal Order was handed down. Consequently the new mineral rights dispensation would thus not be applicable in the present circumstances. In my view there is no merit in this submission. The previous mineral rights dispensation has been abolished by legislation and cannot survive through the operation of a Court Order.

[22] The third point in limine was that this Court did not have the necessary jurisdiction to entertain the present application since the current Order is that of the Supreme Court of Appeal. Courts generally have the power to vary interlocutory orders made by them where circumstances (including the law) have changed since the granting of interdicts or when fresh facts come to light.¹² The original Order was an order of the Land Claims Court of which certain provisions were amended by the Supreme Court of Appeal.

Furthermore, paragraph 3(a)(iv) of the current Order specifically grants the Land Claims Court the necessary jurisdiction to hear

variation applications when the conditions contained in paragraph 3(a)(iv) have been met. The mining of strips B and C, as well as the rehabilitation thereof have been completed. This Court is thus satisfied that it has the necessary jurisdiction to proceed with the matter.

[23] Fourthly, the First respondent pointed out that the Department of Environmental Affairs, as an interested party, should have been joined in the present proceedings, but had not. This alone, it was argued, ought to be reason enough to postpone the proceedings. The joinder or not of the Department of Environmental Affairs in light of the present circumstances where the Applicant is already in possession of a valid mining right and is in the process of conducting mining operations, is in my view not essential for purposes of the interim relief. The right of the Department of Environmental Affairs to be involved in the authorisation of mining operations raises complex legal and factual issues which are best decided after full argument in subsequent proceedings.

Confirmation, rescission or amending of current Order

[24] The Applicant has requested the following relief: (a) upliftment of the current Supreme Court of Appeal Order; and in the alternative

(b) variation of the current Order in that permission be granted so that further Strips be mined.

[25] In essence the Supreme Court of Appeal was faced with a similar application in November 2004 when the Applicant appealed against the prohibitory interdict granted by the Land Claims Court. Although the interim relief that was granted in the Land Claims Court was essentially confirmed, the absolute prohibition on continued mining was amended so as to allow limited abstraction of sand deposits in that only three of the overall thirteen Strips could be mined. The Supreme Court of Appeal reached this decision with reference to the well-known requirements for an interim interdict. In order to be successful, the Applicant (Macassar Land Claims Committee) had to comply with the following requirements:

- (a) A prima facie right though open to doubt;
- (b) A well-grounded apprehension of irreparable harm if the relief was not granted;
- (c) That the balance of convenience favoured the granting of an interim interdict; and
- (d) That the applicant had no other satisfactory remedy available.

[26] The Supreme Court of Appeal found that the commonage right claimed by the Committee on which the restitution claim was primarily based, was prima facie established, though open to some doubt (para [17]). The doubt referred to related to the status, the antecedents and the claims of the Committee. The Court furthermore found that: "...it cannot be gainsaid on the papers that if the right to restitution of the commonage rights is established eventually the Committee will suffer irreparable harm unless the LCC grants the Committee a remedy other than restitution." (para [17]).

[27] It was the third requirement, namely the balance of convenience, that the Supreme Court of Appeal found problematic and in which it differed from the Land Claims Court a quo decision. With reference to *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (N) at 383F the Supreme Court of Appeal per Patel AJJA underlined that the balance of convenience related to the prejudice to the Applicant if the interdict is refused, weighed against the prejudice to the Respondent if it is granted. Accordingly it was found that the financial consequences for Maccsand, if the interdict in its original form were allowed to continue, would be dire. On the other hand, the prospect of the restitution claim, being successful, was uncertain. At that stage the Committee had also not proceeded with the restitution claim in the Land Claims Court. Furthermore:

*"Counsel for Maccsand properly submitted that Maccsand should be given leave to approach the LCC in the event the Committee should adopt a "we do nothing" position. Otherwise Maccsand would be prejudiced if after the mining of Strip B and C is complete, the Committee has not proceeded to trial with the restitution claim."*¹³

[28] The availability of another suitable alternative remedy was not ventilated in the Supreme Court of Appeal

judgement.

[29] The question now before this Court is whether the circumstances that have led to the Supreme Court of Appeal reaching its decision in November 2004 have changed to allow an upliftment or variation of the current Order on the one hand, or confirm the current limitations on mining, on the other. Since the November 2004 judgement setting out the extent of the current mining operations was handed down, the following had occurred:

a second application for a "fresh interdict" was lodged by the Respondent in the present application aimed at prohibiting

Maccsand's continued mining operations which was refused by this court in May 2007;

Maccsand has completed mining the allowed Strips A and B in accordance with the current Order;

only 1% of Strip C remains to be mined;

various Expert Reports were submitted during the second interim relief application referred to above relating to rehabilitation on the relevant portions which satisfied the Court that rehabilitation is in line with the current Order and the EMP incorporated into the mining license;

the Respondent in the present application has initiated restitution proceedings in this Court. There is an exception against the case put forward by the present First Respondent pending in this court. It has been set down for hearing on 13 – 14 September 2007; and

a new mineral rights dispensation commenced in South Africa in which mineral rights no longer vest in private individuals as land owners.

[30] Have these occurrences impacted on the requirements for interim relief in such a manner that it would necessitate a variation, rescission or confirmation of the current Order?

[31] The Supreme Court of Appeal has found that the Macassar Land Claims Committee has a prima facie right though open to some doubt. None of the occurrences since November 2004 have impacted in such a manner that it has affected

this finding of the Supreme Court. In fact, since 2004 the claim has been investigated fully by the Regional Land Claims Commission which submitted a detailed report. The Macassar Land Claims Committee has also in the mean time proceeded with the claim in the Land Claims Court. In this regard it is essential to underline the following two considerations:

nowhere in Section 25 of the Final Constitution or in the whole of the Restitution Act is a claimant provided with a right to specific restoration, especially in relation to original land, as was recently confirmed in the Constitutional Court in *Concerned Land Claimants' Organisation (PE) v PELCRA and Others* 2007 (1) SA 531 (CC).¹⁴ The motivation for this approach is that the process of dispossession occurred over many decades and it would thus be impossible to guarantee specific restoration due to the many variables that play a role. Thus, even if the restitution claim is successful, it does not necessarily mean that Erf 1197 will be restored to the Macassar Land Claims Committee; and

The mineral rights dispensation has changed since the Supreme Court of Appeal Order was handed down. Even if the Court decides on specific restoration so that Erf 1197 is restored to the claimants, it would not include mineral rights in relation to the property since the Applicant had already been granted a license to conduct their present

activities. If the property is restored to the present respondent, it would similarly require a license from the relevant department

before it would be entitled to mine the property.

- [32] Concerning the second requirement for interim interdicts, namely a well-grounded apprehension of irreparable harm, it has to be clear that the continued mining on Erf 1197, as prayed for by the Applicant in the present proceedings, would cause irreparable harm. This requirement was canvassed in detail during the second interim application and need not be repeated here again.¹⁵ Suffice to say that the provisions of the existing rehabilitation programme and the enforcement thereof, as well as the possibility of damages that may be claimed if Erf 1197 is restored to the Respondent in this application, would address the issue of harm if and when it is caused.
- [33] By the balance of convenience is meant the prejudice to the party requesting the interdict if it is refused, weighed against the prejudice to the respondent party if it is granted. In this application for an upliftment or amendment of the standing Order, the balance of convenience is still relevant. The Land Claims Committee has an existing interim interdict in place that sets a limit to the mining that can take place at this stage. The major portion of the area allowed to be mined under the existing interim Court Order has already been mined, save the remaining 1%. The Applicant has invested a lot of capital, time and effort in its mining and rehabilitation endeavours. It has also argued that its financial survival is dependent on utilising its mining license. Not only would 22 persons be unemployed if mining cannot continue, but other contractual obligations may suffer as a result. The Respondent averred that the Applicant also has other mining licenses and would thus be able to continue receiving an income. During the hearing Ms Bawa for the Applicant drew the Court's attention to documents that set out Maccsand CC's mining licenses and concomitant mining operations. Although Maccsand CC has three mining licenses issued to it, the first mining license, which relates to Erf 4891, is exhausted since mining operations have been completed. Mining in relation to Erf 4889, which constitutes the second mining license, cannot be proceeded with due to other court proceedings. The only viable mining license is in relation to Erf 1197, of which only 1% remains to be mined. It would thus seem that the Applicant's financial survival depends on mining further strips on Erf 1197. On the other hand, the prospect of Erf 1197 being restored to the Applicant is at this stage still uncertain. The restitution claim might fail, or the Applicant might be granted relief not by way of restoration of the land, but through equitable redress. Accordingly I am satisfied that the recent occurrences referred to above have not managed to alter the balance of convenience, which was found to favour Maccsand by the Supreme Court of Appeal.
- [34] The last requirement, namely no other satisfactory remedy available, was similarly addressed in detail in the second interim application.¹⁶ It has already been found that the MPRD Act provides for various internal remedies. If Maccsand is allowed to mine further Strips,

any contravention of its mining licence may be reported to the authorities in the Department of Mineral and Energy Affairs. Depending on the circumstances, the result may be a suspension or cancellation of the mining license. Furthermore, depending on the outcome of the restitution claim, Section 35(2)(a) of the Restitution Act empowers this Court to determine conditions which must be fulfilled before a right in land is restored to a claimant. An order for the repair of damage, or an order for the payment of compensation

insofar as repair is not feasible, are thus further possible options.¹⁷ Finally, there is also the possibility of holding the members of the Applicant in this proceeding jointly and severally liable for any unacceptable negative impact on the environment, including damage, degradation or pollution advertently or inadvertently caused by its mining activities.¹⁸

Conclusion

[35] In light of the afore-said, I am satisfied that, although various important occurrences have taken place since the Supreme Court of Appeal Order was handed down in November 2004, none of these occurrences have impacted in such a manner so as to alter the essence of the current Supreme Court of Appeal Order. On the other hand, wholly uplifting the current Order could potentially prejudice

issues

that may be more appropriately dealt with in another forum or in other proceedings. The essence of the Supreme Court of Appeal Order is thus confirmed, namely (a) that the Macassar Land Claims Committee's prima facie right to restitution be protected as far as may be equitable, having regard to the interests of all parties in relation to Erf 1197; but

(b) that, in light of the balance of convenience, limited mining on Erf 1197 ought to be allowed. In the absence of supporting detailed information I am not, however, convinced that additional Strips for mining should be extended to also include Strips G and H.

[36] The prosecution of the restitution claim, is indicative of the fact that the First Respondent did not adopt a "we do nothing" position as envisaged by the Applicant in the appeal proceedings. However, the new mineral dispensation inevitably impacts on land ownership and mineral rights in general and restoration awards resulting from restitution claims in particular. Even if the restitution claim is successful, there are no guarantees that Erf 1197 would be awarded to the First Respondent. What is clear, however, is that since May 2004 specific restoration of land would no longer automatically include mineral rights. Macassand, as holder of a valid mining license would still be able to conduct mining operations on Erf 1197, irrespective of who or what the registered owner is.

The following order is made:

1. Paragraph 3(a) of the current Order is amended to read as follows:

“3(a) Pending the finalisation of the claim for restitution of Erf 1197, Macassar, to the applicant, an interim interdict be issued against Maccsand:

3(a)(i) Interdicting Maccsand from continuing to mine sand on Erf 1197, Macassar, save for the area demarcated as Strips C to F on the General Site Layout Plan dated March 1997, which Maccsand shall be entitled to mine, on condition:

3(a)(ii) that the sum of R120 000 is set aside in the trust fund established in terms of the Minerals Act, No 50 of 1991, for purposes

of rehabilitating Strips C to F on completion of mining on each respective strip; and

3(a)(iii) that such rehabilitation is in compliance with the approved Environmental Management Programme and done to the satisfaction of the Department of Mineral and Energy Affairs.

3(a)(iv) Maccsand is given leave to approach this Court for a further variation of this paragraph as soon as the mining of Strips C to F and the rehabilitation thereof is complete.”

2. No order as to costs.

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I agree.

GILDENHUYS J

1 IM Rautenbach and EFJ Malherbe Constitutional Law Third Edition Butterworths (1999) p-2, HJ de Waal “Executive Authority” in LAWSA vol 10 First Reissue (1998) para 2.

2 Constitution of the Republic of South Africa Act 103 of 1996.

3 LG Baxter “‘The State’ and other basic terms in public law” 1982 SALJ 212-236 225.

4 Baxter 1982 SALJ 226.

5 Baxter Administrative Law (1984) p95, GE Devenish, K Govender and D Hulme Administrative Law and Justice in South Africa

(2001) p10. See also Greater Johannesburg Transitional Metropolitan Council v Eskom 2000 (1) SA 866 (SCA) paras [12]-[16].

6 The Constitution of the Republic of South Africa 200 of 1993.

7 The Constitution of the Republic of South Africa 103 of 1996.

8 See also Ex Parte Beukes and Bekker [1998] 1 ALL SA 34 (LCC) paras [19]-[37].

9 Maccsand CC v Macassar Land Claims Committee and Others (Case no 594/03 delivered on 30 November 2004 (SCA) para [28.2]

10 LCC 37/03 before Gildenhuis J and Pienaar AJ.

11 Long title of the MPRD Act.

12 CTD Ltd v Argus Holdings Ltd

[1995] ZASCA 32; 1995 (4) SA 774 (A) 783C-D, 789E-F.

13 Para [19].

14 Also followed in Haakdoornbult Boerdery CC and others v Mphela and 217 others and Minister of Agriculture and Land Affairs (Case no: 553/05, heard 8 May 2007 and delivered on 30 May 2007) para [8].

15 See in particular paras [21]-[32].

16 See paras [35]-[37].

17 Richtersveld Community v Alexkor Ltd and Another 2004 (8) BCLR 871 (LCC) at para [37].

18 S 38(2) of MPRD.

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