



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 102/11
[2012] ZACC 8

In the matter between:

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| MINISTER FOR MINERAL RESOURCES | Applicant |
| and | |
| SWARTLAND MUNICIPALITY | First Respondent |
| HUGO WIEHAHN LOUW N.O. | Second Respondent |
| CORNELIA JOHANNA ELIZABETH LOUW N.O. | Third Respondent |
| IGNATIUS VILJOEN N.O. | Fourth Respondent |
| IZAK BARTHOLOMEAS VAN DER VYFER N.O. | Fifth Respondent |
| ELSANA QUARRY (PTY) LTD | Sixth Respondent |
| MEC FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE | Seventh Respondent |

Heard on : 16 February 2012

Decided on : 12 April 2012

JUDGMENT

JAFTA J (Mogoeng CJ, Yacoob ADCJ, Cameron J, Froneman J, Khampepe J, Maya AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo AJ concurring):

[1] The Minister for Mineral Resources has brought this application for leave to appeal against the judgment of the Supreme Court of Appeal in terms of which her appeal was dismissed with costs. The Minister had appealed against a judgment of the Western Cape High Court¹ in which the Hugo Louw Trust (Trust) and Elsana Quarry (Pty) Ltd (Elsana) were interdicted from conducting mining operations on Lange Kloof farm situated in the municipal area of Swartland Municipality (Municipality).

[2] The Minister was cited as a respondent in the High Court even though no relief was sought against her. Her interest in the matter arose from the fact that she had granted a mining right which Elsana claimed authorised it to undertake mining operations on the farm. The Minister holds the view that the exercise of the right granted by her in terms of the Mineral and Petroleum Resources Development Act² (MPRDA) is not subject to the requirements of the Land Use Planning Ordinance³ (LUPO).

[3] The facts are straightforward and are not in dispute. The Trust owns the farm which is 598.7328 hectares in extent and is surrounded by other farms. It granted Elsana permission to mine granite. The second to fifth respondents are its trustees. The second respondent is also a director of Elsana.

¹ *Swartland Municipality v Louw NO and Others* 2010 (5) SA 314 (WCC).

² Act 28 of 2002.

³ Ordinance 15 of 1985.

[4] In June 2008 Elsana applied to the Municipality to have the farm rezoned so as to allow for mining to be conducted on it. But it withdrew the application before it was determined by the Municipality. This was done on the strength of the advice received from the Department of Mineral Resources to the effect that rezoning was unnecessary.

[5] In February 2009 the Minister, acting in terms of section 23 of the MPRDA, granted Elsana a mining right to be effective for a period of 30 years, terminating on 16 February 2039. Mining was restricted to an area comprising 71.25 hectares on the farm. A quarry site was established where the mining was to be carried out. Soon upon the commencement of mining operations, the owner of the neighbouring farm lodged a complaint with the Municipality, alleging that the blasting of dynamite had an adverse effect on the production of milk from its cows.

[6] Responding to the complaint, the Municipality addressed a letter to the Trust pointing out that mining operations on the farm were not permitted in terms of LUPO. At that time, the farm was zoned Agricultural I, which meant that it could only be used for agricultural purposes like cultivation of crops or animal farming. In fact, before the mining started, the farm was used for grazing cattle and sheep. In its letter the Municipality advised that the Trust should apply for rezoning of the farm to Industrial III, which would authorise mining on the land. In reply, the Trust disputed that the mining operations were illegal and argued that these operations were

conducted on the strength of a mining right granted in terms of section 23 of the MPRDA.

[7] The Municipality launched an urgent application in the High Court against the Trust, Elsana and the Minister. It sought an interdict restraining the Trust and Elsana from pursuing mining operations on the farm until it had been rezoned in terms of LUPO to allow mining. In opposing this relief, the Minister asserted that the Municipality's understanding of the law was mistaken. She argued that LUPO did not apply to land used for mining which was regulated by the MPRDA. Meeting the requirements of the MPRDA was, on the Minister's argument, sufficient to authorise the mining operations on the farm.

[8] The Minister submitted to the High Court that it was "constitutionally impermissible" to hold that LUPO applied to land used for mining because the Constitution excluded its application. Relying on the decision of this Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another*,⁴ the High Court held that LUPO regulates land use and that it directs every local authority to comply and enforce compliance with its provisions. Properly construed, held the Court, LUPO is consistent with the Constitution.⁵ In conclusion the High Court rejected the contention that LUPO authorised an unlawful intrusion into an area of exclusive

⁴ [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC).

⁵ *Swartland Municipality* above n 1 at para 33.

national competence by purporting to regulate mining. It held that LUPO played no part in determining applications for mining rights.⁶

[9] Consequently the High Court granted an interdict in these terms:

“The First to Fourth Respondents, in their capacity as trustees of the Hugo Louw Familietrust, and [Elsana] are interdicted and restrained from conducting mining activities and/or permitting others to conduct mining activities on the immovable property described as the remainder of the Lange Kloof farm, No 701, Malmesbury Division, Western Cape Province, unless and until the said immovable property is rezoned from Agricultural I to Industrial III, or any such other rezoning which permits mining activities.”

[10] With leave of the High Court, the Minister appealed against this order to the Supreme Court of Appeal. The Trust and Elsana withdrew their appeal shortly before the hearing in the Supreme Court of Appeal. The Minister persisted.

[11] The Supreme Court of Appeal held that the MPRDA does not regulate land use planning whereas LUPO does. The MPRDA, the Court held further, governs mining. Accordingly, it concluded that LUPO operates alongside the MPRDA with the result that once a party is granted a mining right in terms of the MPRDA, it may not commence mining operations unless the land to which the right applies is appropriately zoned in terms of LUPO.⁷

⁶ Id at para 34.

⁷ *Louw NO and Others v Swartland Municipality* [2011] ZASCA 142 at paras 11-2.

[12] The application was heard in this Court together with *Maccsand v The City of Cape Town*,⁸ which is a matter similar to the present one. The reasons given for granting leave and dismissing the appeal in that matter apply equally to this case. As a result, I do not intend to repeat them here. Suffice it to say, I agree with the Supreme Court of Appeal 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 allows it. It follows that leave to appeal must be granted here but the appeal must fail.

[13] What remains is the issue of costs. The Municipality and the MEC for Local Government, Environmental Affairs and Development Planning, Western Cape have successfully opposed the appeal and I can think of no reason why they should be denied costs. The Minister for Mineral Resources must pay their costs. Elsana and the trustees did not take part in the present hearing.

Order

[14] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The Minister for Mineral Resources must pay the costs of Swartland Municipality and the MEC for Local Government, Environmental

⁸ *Maccsand v City of Cape Town and Others* [2012] ZACC 7 at paras 40-51.

Affairs and Development Planning, Western Cape, including costs of two counsel.

For the Applicant:

Advocate MM Oosthuizen and
Advocate K Warner, instructed by the
State Attorney.

For the First Respondent:

Advocate J Newdigate SC and
Advocate P de B Vivier, instructed by
Terblanche Slabber Pieters.

For the Seventh Respondent:

Advocate A Breitenbach SC and
Advocate R Paschke, instructed by
Werksmans Incorporated.