
ORDER

On appeal from: Western Cape High Court, Cape Town (Le Grange J sitting as court of first instance):

(a) The appeal is dismissed.

(b) The sixth appellant is ordered to pay the respondent's costs, including the costs of two counsel, jointly and severally with the first to fourth respondents and the fifth respondent.

JUDGMENT

PLASKET AJA (HARMS AP, CLOETE, SHONGWE and WALLIS JJA concurring)

[1] This appeal from the Western Cape High Court, Cape Town concerns a single issue. It is whether the grant of a mining right issued by the Minister of Mineral Resources in terms of s 23 of the Minerals and Petroleum Resources Development Act 28 of 2002 (the MPRDA) entitles the holder of that right to undertake mining operations without obtaining authorisation in terms of the Land Use Planning Ordinance 15 of 1985 (C) (LUPO). This ordinance, operative in the provinces that formerly comprised the province of the Cape of Good Hope, empowers municipalities to determine and enforce the use to which land in their areas of jurisdiction may be put. Le Grange J found that LUPO applied in these circumstances.¹ The appeal against that decision is with his leave.

[2] The material facts are not in dispute. The first to fourth appellants are the trustees of the Hugo Louw Trust which owns the farm Lange Kloof near Malmesbury within the area of jurisdiction of the respondent, the Swartland Municipality. The fifth appellant (Elsana) is the holder of a mining right issued in terms of s 23(1) of the MPRDA by the sixth respondent, the Minister of Mineral Resources, authorising it to mine granite on Lange Kloof.

¹*Swartland Municipality v Louw NO & others* 2010 (5) SA 314 (WCC).

[3] In terms of LUPO, Lange Kloof was and is zoned 'agricultural 1' which means that the land may be used for the cultivation of crops or plants, the breeding of animals or be left as natural veld.²

[4] On 30 May 2008, the Hugo Louw Trust gave its consent to Elsana to mine granite on Lange Kloof. On 3 June 2008 an application was made to the Swartland Municipality for the rezoning of the land from 'agricultural I' to 'industrial III' (which includes mining as a use)³ for the purpose of establishing a 'granite quarry subject to the issuing of a mining right' in terms of the MPRDA.

[5] The rezoning application was made on the assumption that a rezoning in terms of LUPO was necessary before mining operations could commence. Having been advised later by the Department of Mineral Resources that 'the granting of mining rights and the control over mining activities was the exclusive preserve of national government' as represented by the Department, Elsana withdrew the rezoning application before it was considered by the Swartland Municipality.

[6] On 17 February 2009 the Minister granted Elsana a mining right, authorising it to mine granite for 30 years on Lange Kloof. It commenced its preparations for its mining operations. In June 2009 the Municipal Manager of the Swartland Municipality wrote to the Hugo Louw Trust to say that it had come to the attention of the municipality that Lange Kloof was being prepared for mining. He said that this was not authorised as the land was zoned for agricultural use. The trust was requested to cease its unlawful activities and, instead, to apply to the municipality for a rezoning that would allow for the mining operations to proceed.

[7] The trust's attorneys wrote to the municipality to inform it that Elsana had been granted a mining right in terms of s 23(1) of the MPRDA, that its mining operations were being conducted on the strength of this mining right and that the demand that mining operations should cease had 'no basis in law'. On 9 July 2009, the municipality launched an urgent application against the trustees of the trust, Elsana and the Minister to interdict mining operations on Lange Kloof until it had been rezoned in terms of LUPO to permit mining.

[8] On 21 December 2009, Le Grange J made an order in the following terms:

²See Scheme Regulations made in terms of s 8 of LUPO s 1.0 (definition of 'agriculture').

³See Table B of the Scheme Regulations made in terms of s 8 of LUPO.

'(a) The first to fourth respondents, in their capacity as trustees of the Hugo Louw Familie Trust, and fifth respondent, 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.

(b) The first to sixth respondents to pay the costs of this application, jointly and severally, including the costs occasioned by the employment of two counsel.'

[9] Le Grange J found that the MPRDA and LUPO regulated different undertakings – mining, on the one hand, and land use planning, on the other – and that there was no conflict between the two that required resolution: once a person has been granted a mining right, he or she can only begin mining operations if mining is permitted as a land use in terms of LUPO.

[10] Shortly before this appeal was to be heard, the trustees of the trust and Elsana withdrew their appeal and tendered the costs of the Swartland Municipality. The Minister persisted with the appeal.

[11] This appeal was argued together with a similar matter, *Maccsand v City of Cape Town*.⁴ As that judgment determines the outcome of this appeal, I do not intend to set out the reasoning in any detail. Suffice it to say that for the reasons set out from paragraphs [10] to [35] of the *Maccsand* judgment this court concluded that the MPRDA does not concern itself with land use planning and the Minister, when she considers the grant of a mining permit, does not, and probably may not, take into account such matters as a municipality's integrated development plan or its scheme regulations. As a result, the MPRDA does not provide a surrogate municipal planning function in place of LUPO and does not purport to do so. Its concern is mining, not municipal planning.

[12] LUPO thus operates alongside the MPRDA with the result that once a person has been granted a mining right in terms of s 23 of the MPRDA he or she will not be able to commence mining operations in terms of that right unless LUPO allows for that use of the land in question.

⁴*Maccsand v City of Cape Town* (709/2010; 746/2010) [2011] ZASCA 141 (23 September 2011).

[13] The appeal in this matter must accordingly fail. As stated above, the first to fifth respondents withdrew their appeal and tendered costs. The Minister persisted with the appeal. There is no reason why costs should not follow the result.

[14] The following order is made:

(a) The appeal is dismissed.

(b) The sixth appellant is ordered to pay the respondent's costs, including the costs of two counsel, jointly and severally with the first to fourth respondents and the fifth respondent.

C. Plasket
Acting Judge of Appeal

APPEARANCES

Sixth appellant: MM Oosthuizen SC (with him K Warner)

Instructed by:

State Attorney, Cape Town

State Attorney, Bloemfontein

Respondent: J Newdigate SC (with him P Vivier)

Instructed by:

Terblanche Slabber Pieters, Cape Town

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