IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Coram: LE GRANGE, J

CASE NO: 13703/09
-REPORTABLE-

In the matter between:

SWARTLAND MUNICIPALITY	**Applicant**
And	
HUGO WIEHAHN LOUW N.O	**First Respondent**
CORNELIA JOHANNA ELIZABETH LOUW N.O	**Second Respondent**
IGNATIUS VILJOEN N.O	**Third Respondent**
IZAK BARTHOLOMEAS VAN DER VYFER N.O	**Fourth Respondent**
ELSANA QUARRY (PTY) LIMITED	**Fifth Respondent**
MINISTER OF MINERALS AND ENERGY	**Sixth Respondent**
MINISTER OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING	**Seventh Respondent**

JUDGMENT DELIVERED: 21 DECEMBER 2009

Le Grange, J:-

Introduction:

[1] This matter relates to the validity or enforceability of provincial legislation, namely the Land Use Planning Ordinance, No. 15 of 1985 (Cape) and the Scheme

Regulations promulgated in terms thereof, ("LUPO"), which regulates the manner in which local authorities deal with (re)zoning issues. The First to Sixth Respondents contends that LUPO, or part thereof, is invalid or unenforceable by virtue of the provisions of the Mineral and Petroleum Resources Development Act, Act 28 of 2002 ("the MPRDA") and the Constitution.

[2] The Applicant in this matter seeks an interdict preventing the Fifth Respondent "Elsana" from conducting the mining activities it commenced on a farm that has not properly been rezoned by it from Agricultural I to Industrial III, which permits mining.

[3] Mr. J A Newdigate SC, with Mr. P de B Vivier appeared for the Applicant. Mr. S P Rosenburg SC, with Mr. E de Villiers-Jansen appeared for First to Fifth Respondents and Mr. G Grobler SC, with Mr. K Warner appeared on behalf of the Sixth Respondent.

The Parties:

[4] The Applicant is a municipality ("the Municipality") as contemplated in the Municipal Structures Act, No. 117 of 1998, and the Municipal Systems Act, No. 32 of 2000, read together with sections 155 and 156 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

[5] The First to Fourth Respondents are the trustees of the Hugo Louw Trust, ("the Trust"), who are the owners of a farm known as Lange Kloof ("the farm"). The First Respondent, Mr. Hugo Louw, is also one of the directors of Elsana. The mining right relates to the mining of granite by Elsana on the farm.

[6] The Fifth Respondent, Elsana Quarry (Pty) Ltd ("Elsana"), is the holder of the mining right, effective for 30 years ending 16 February 2039, granted to it in terms of the Mineral and Petroleum Resources Development Act, No. 28 of 2002 ("the MPRDA") by the Sixth Respondent ("the Minister"). The Seventh Respondent does not oppose the relief sought by the Applicant and abides by the decision of this Court.

The Background:

[7] The material facts, which underpin the issues requiring adjudication, are not in dispute. Briefly stated, the facts are the following: The Trust is the owner of the farm which is some 598.7328 hectares in extent and falls within Ward 5 of the Municipality. It is located some 13 kilometers north west of Malmesbury, and just north of the R315 road going to Darling. It is surrounded by other farming areas with the nearest homestead approximately 1,5 kilometers away. Elsana has obtained a mining right on the farm and the mining area comprises 71.25 hectares of the property which has previously been used for cattle and sheep grazing. A quarry site

has been established on the mining area, comprising a granite dome. The mining involves, *inter alia*, drilling, blasting with dynamite and the transportation of granite with certain heavy vehicles. The Wilhelm Durr Familietrust, who owns the adjacent farm, Preekstoel, lodged a complaint with the Applicant with regard to the mining activities of Elsana. It also alleges the dynamite blasting has adverse effects on the milk production of their cows which Elsana denies. Nothing, however, turns on this in the present dispute. It is common cause, that Elsana conducted an environmental impact assessment and submitted an environmental management programme ("EMP") to the Department of Minerals and Energy ("DME") with its application, which was successfully approved. According to the EMP the mining project will result in nothing more than a nuisance impact or affect on surrounding land users and the actual land use- (paragraph 4.9.4 of the EMP). With regard to noise, the following is recorded at paragraph 4.13. 3:-

> *"Although included in the table above the impact assessment relating to blasting activities will be dealt with separately under 4.14, the cumulative resultant noise impact on the nearest surrounding farmsteads will be that of lower margin of moderate levels. It can be expected that under ideal atmosphere conditions if noise levels rise to 50 – 55 dBA sporadic complaints will be raised. However, achieving 45 – 50dBA levels at farmsteads in normal working hours should be attainable. Despite this nuisance, noise can be very aggravating and give rise to complaints. The applicant will have to diligently monitor and manage the situation to prevent bad neighbourliness and complaints with specific reference to the Preekstoel Farmstead."*

[8] Elsana, in June 2000, submitted in terms of LUPO a rezoning application of the farm to the Applicant. The notice of the rezoning application was given to interested and affected parties and governmental departments, as required in the case of a LUPO rezoning application. The Respondents were however subsequently advised by the DME that the granting of mining rights and the control over mining activities was the exclusive preserve of National Government as represented by DME. Having been so advised, the LUPO rezoning application was withdrawn in September 2008. Elsana contends that it is entitled by virtue of the mining right being issued to it, to continue its mining activities on the property. The Municipality has a different view and contends that until the property is zoned Industrial III, Elsana is not permitted to conduct mining activities on the property. The Director General of the newly formed Department of Mineral Resources ("DMR") which emerged after the DME was split in two Departments being DMR and the Department of Energy also filed an affidavit on behalf of the Minister. The following is recorded in the affidavit:-

> *"2.3 The Applicant's stance that the said property ought first to be rezoned from Agriculture 1 to Industrial III zoning, or such other zoning as may allow mining activities, before the fifth respondent may exercise its said mining right on the said property is, with respect, incorrect.*
>
> *2.4 The correct view is, with respect, that the application of the Cape Land Use Planning Ordinance, 1985, read with the said zoning regulations, in order to regulate mining as a "land use" on the said property, is constitutionally impermissible and whatever the position may have been prior to the new constitutional era, such an interpretation and application of the Ordinance and the scheme regulations are excluded by the Constitution."*

The Relevant Legislation:

[9] The dispute relates largely to the parties' different stands on the interpretation of provisions of the MPRDA, its effect on LUPO as a subordinate legislation and the constitutionality of LUPO, or parts thereof. The relevant statutory provisions and the applicable legislative framework in this matter are common cause.

[10] The MPRDA, which came into affect on 1 May 2004, introduced a number of fundamental changes to the statutory regulation of the mineral resources of the Republic of South Africa. It regulates specifically the mining industry and ensures that the mineral resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development and thus giving effect to section 24 of the Constitution. See also: Meepo v Kotze & Others 2008 (1) SA 104 (NC), 110F – J.

[11] The MPRDA essentially gives effect to the principle of the State's custodianship of the Nation's mineral and petroleum resources developed in the Republic, and providing security of tenure in respect of prospecting, exploration, mining and production operations. It also stipulates how the provisions should be interpreted.

[12] Section 4 of the MPRDA provides as follows:-

> *"(1) When interpreting a provision of this Act, <u>any reasonable interpretation which is consistent with the objects of this Act must be preferred</u> over any other interpretation which is inconsistent with such objects.*
>
> *(2) In so far as the common law is inconsistent with this Act, this Act prevails."*

[13] The long title of the MPRDA is informative when interpreting the reasonable functional boundaries of the Act, in issuing mining rights. The long title of the MPRDA declares that it aims *"to make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources; and to provide for matters connected therewith."*

[14] Reference was also made to sections 23 and 25 of the MPRDA. Section 23(6) of the MPRDA provides as follows:-

> *"(6) A mining right is subject to this Act, any relevant law, the terms and conditions stated in the right and the prescribed terms and conditions and is valid for the period specified in the right, which period may not exceed 30 years."*

A similar provision is contained in section 25(2)(d), which provides as follows:-

> *"(2) The holder of a mining right must –*
>
> *(d) comply with the relevant provisions of this Act, any other <u>relevant law</u> and the terms and conditions of the mining right."*

[15] Counsel on behalf of the Applicant argued that LUPO is relevant law as section 23(6) of the MPRDA provides for it to be applied. Moreover, LUPO is not

inconsistent with any provisions of the MPRDA or the Constitution, and the First to Sixth Respondents ("the Respondents") failed to appreciate that LUPO constitutes relevant and binding law which plays a central role in the efforts of local authorities to achieve the co-ordinate and harmonious use of the land, for the benefit of all of their inhabitants. Furthermore, the activities of Elsana, with the knowledge and consent of the Trust, constitute a clear breach of the provisions of LUPO and the scheme regulations.

[16] Counsel for the First to Fifth Respondents contended that the functional area of mining and minerals is an exclusive national legislative competence, and reference to any "relevant law" in the MPRDA does not include LUPO and the scheme regulations to the extent that such legislation purports to regulate and control the use of land for the purposes of mining and mineral exploitation. On a proper contextual interpretation of the MPRDA, the provisions of LUPO, which is a provincial pre-constitutional legislation, is inconsistent with the MPRDA and the Constitution and the MPRDA has impliedly repealed those provisions in LUPO.

[17] Central to the Applicant's case is that LUPO is "*relevant law"* as envisaged in terms of the provisions of section 23(6) of the MPRDA. This proposition, in my view, is not without merit.

[18] All municipalities are given their powers in terms of the Constitution which includes municipal planning. Moreover, a district municipality must seek to achieve the integrated, sustainable and equitable social and economic development of its area as a whole by ensuring integrated planning, promoting bulk infrastructural development and services, building capacity and promoting equitable distribution of resources and services. In this regard see section 83 of the Local Government: Municipal Structures Act no. 117 of 1988.

[19] In deciding the objective and relevancy of LUPO within the scope of application of the MDPRA the long title of LUPO is informative. LUPO is aimed at the regulation of land use planning. It can therefore be accepted that LUPO, in character, is to regulate land use planning and to provide for matters incidental thereto. One such incidental matter is (re)zoning.

[20] The legislature, in my view, at the time the MPRDA was enacted, must have been aware of the fact that provincial or local legislation regulating land planning and zoning may be in place and that these legislation may potentially have a bearing on the activities permitted by mining rights approved in terms of the MPRDA. The MPRDA is silent on the issue of rezoning of land and the only proper interpretation of the provisions of section 23(6) and 25(2)(d) of the MPRDA is that the meaning "*any other relevant law*" includes legislation like LUPO. To view it any differently, as submitted by the Respondents, cannot be correct as it may undermine the proper

functioning of municipalities who are under an obligation in terms of the Municipal Structures Act, to achieve the integrated, sustainable and equitable social and economic development of its area as a whole. LUPO is therefore relevant and binding law. A contravention of its provisions constitutes, in terms of section 39(2), a criminal offence and a local authority has therefore a statutory duty to ensure that its laws are complied with. In this regard see City of Tshwane v Ghani and Others 2009 (5) SA 563 (TPD) at 567 F-G.

[21] Mr. Grobler's main submissions are that section 26(3) of the MPRDA, if properly interpreted as section 4(1) of the Act, demands that in view of the objects of the Act, to exclude LUPO as relevant law. Moreover, in terms of section 146 of the Constitution, the MPRDA prevails over LUPO and the scheme regulations in respect to the use of land for mining which is subject to the mining right granted.

[22] As LUPO cannot be excluded as "relevant law" in view of what was said in paragraph [20] above, I turn to consider the issue of conflict as raised by Mr. Grobler, in terms of the provisions of section 146 of the Constitution.

[23] Section 146 of the Constitution applies to a conflict between national legislation and provincial legislation falling within a functional area listed in Schedule 4. It solves the conflict by providing that national legislation will prevail

over provincial legislation if certain conditions, set out in section 146 (2) or (3), apply.

[24] Conversely, section 146(5) provides that provincial legislation prevails over national legislation if sub-section (2) or (3) does not apply. An Act of Parliament can only prevail over a Provincial Act if the law has been approved by the National Council of Provinces. The prevailing principle of section 146 does not have invalidity of the relevant law as a consequence. The legislation simply becomes inoperative for as long as the conflict remains. Section 148 of the Constitution also provides that if a dispute cannot be resolved by a court, the national legislation prevails over the provincial legislation. A closer consideration of the relevant constitutional approach to legalisation, hierarchy and the schedules pertaining thereto is therefore needed.

Constitutional Considerations:

[25] The Constitution refers to the three spheres of government, being National, Provincial and Municipal or Local. Within this framework is the hierarchy of legislation which generally presupposes the existence of higher and lower legislatures and manifests the vertical distribution of power at the different levels. See: City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others [2009] ZASCA 106 (22 September 2009) at paragraphs [25]-[29].

[26] The author, Du Plessis, in his works "Interpretation of Statutes and the Constitution" in *Bill of Rights Compendium* paragraph 2C5 suggests that it is not insignificant that the drafters of the Constitution chose to refer to "spheres" instead of the "tiers" although the two words are sometimes used as synonyms: Du Plessis at 2C5, *supra,* states:

> *"The terminological strategy of referring to 'spheres' rather than 'tiers' of government in the Constitution is of more than semantic significance. It connotes a shift away from a rigidly hierarchical division of governmental (including legislative) powers, and is premised on the assumption that each of the various spheres of government (and their legislatures) has equivalent status, is self-reliant and inviolable, and enjoys sufficient constitutional latitude to define and express its unique character."*

[27] The view expressed by Du Plessis *supra,* is not without substance as the Constitution reserves certain functions to the Municipalities. Section 156(1) provides that:-

> *"A municipality has executive authority in respect of, and has the right to administer-*
>
> *(a) the local government matters listed in Part B of schedule 4 and Part B of schedule 5; and*
>
> *(b) any other matter assigned to it by national or provincial legislation."*

[28] The functional area of mining and minerals are not included within the matters listed in Schedules 4 or 5 and the effect of section 156(1) of the Constitution is that

the Municipalities do not exercise any executive authority in respect of the functional area of mining and minerals.

[29] Schedule 4 of the Constitution grants provincial legislatures concurrent legislative authority along with the national legislature over the focus areas listed therein, while Schedule 5 of the Constitution makes provision for areas in which provincial legislation takes precedence over parliamentary legislation. In part B of both schedules allowance is made for the regulation of listed areas to be extended to the municipal authorities. Of specific relevance is the fact that Part A of Schedule 4 places "agriculture" as well as "regional planning and development" within the scope of the provincial concurrent authority, while reserving "municipal planning" for local regulation in Part B. In Part B of Schedule 5 "provincial planning" is specifically earmarked as an area for legislative regulation at provincial level which must ordinarily take precedence.

[30] In Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Others 2009 (1) SA 337 (CC) at 384 D, the Constitutional Court with reference to "provincial planning" as a Part A of Schedule 5 exclusive provincial functional area, held the following:-

> "*Planning entails land use and is inextricably connected to every functional area that concerns the use of land. There is probably not a single functional area in the Constitution that can be carried out without land. Land-use planning must be done at three levels at least: provincial planning, regional planning and municipal planning.*"

[31] The legislative scope of the local authority is therefore important to consider as "municipal planning" is also brought within the scope of Schedule 4 of the Constitution. All municipalities are given their powers in terms of the Constitution which includes municipal planning. According to the Local Government: Municipal Structures Act, a district municipality must seek to achieve the integrated, sustainable and equitable social and economic development of its area as a whole by ensuring integrated planning, promoting bulk infrastructural development and services, building capacity and promoting equitable distribution of resources and services.

[32] In considering the meaning of "planning" as it is linked to both provincial and municipal areas, the dictum of Nugent, JA in City of Johannesburg Metropolitan Municipality *supra,* at par 41, is apposite in this instance.

> *"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, which gives meaningful effect to the term, has the effect of leaving in the hands of national and provincial government the authority to legislate in the functional area of "urban . . . development", but reserving to municipalities the authority to micro-manage the use of land for any such development. On that construction the functional area of "urban development" retains considerable scope for national and provincial legislation."*

[33] LUPO provides a statutory framework which regulates land use, planning and matters incidental thereto. It directs every local authority to comply and enforce compliance with its provisions and the conditions imposed in terms of these provisions. See Wary Holdings (Pty), *supra* at 385 C-D. LUPO and the scheme regulations, on a proper interpretation, can therefore not be inconsistent with the Constituton.

[34] LUPO and the scheme regulations do also not unlawfully intrude into an area of exclusive national legislative competence in purporting to control and regulate the use of land for mining purposes. LUPO is not directed at the control of mining. Its main aim and objective as stated in its long title, is the regulation of land use planning which can be described as “regional planning and development”. LUPO and the scheme regulations do not attempt to regulate mining *per se*. There is no suggestion that a local authority would be involved in considering or granting applications for mining rights. The regulation of mineral and petroleum resources and the issuing of rights relevant thereto clearly fall outside the ambit of provincial legislative authority as it falls outside the ambit both Schedule 4 and 5. LUPO can therefore justifiably be placed within the legislative competency scope provided for in both Schedules 4 and 5 of the Constitution.

Zoning Issue:

[35] The First to Fifth Respondents, from the papers filed, also recognised these principles until it withdrew its application for rezoning. The papers filed of record demonstrated this. In February 2008 the DME addressed a letter to Elsana and in annexure ("HVN6") the following is recorded:-

> *"21. The Applicant must note that this application does not exempt him/her to acquire authorizations from any other organ of State and/or local authority".*

[36] Elsana, in turn, accepted that its application for a mining right was subject to a successful application to the Municipality for the rezoning of the property. In the EMP prepared on its behalf, Elsana states in ("HVN6"), the following:-

> *"The existing situation is that the property is zoned Agriculture Zone 1…An application for a change in land use is in the process of being submitted to the West Coast District Municipality concurrent with the application for a Mining right."*

[37] A similar statement is made in the notification on behalf of Elsana in terms of the National Heritage Resources Act, No. 25 of 1999, which also forms part of annexure "HVN6". In part 4 of the standard form the question posed is – "*Does the development require any departures or consent use in terms of the Zoning Scheme*?" The answer given is – "*Rezoning only*". The next question is – "*Has an application been submitted to the planning authority*?" The answer given is – "*An application will be submitted on 30 May, 2008."*

[38] In my view, rezoning can therefore not be regarded as a matter connected to the issuing of mineral rights to such an extent that it is also regulated thereby and in fact renders provincial and municipal planning legislation as provided for constitutionally, superfluous. The MPRDA is silent on the issue of rezoning. The MPRDA can therefore not be read as impliedly having repealed legislation with LUPO's character and aim.

[39] The application of LUPO and the scheme regulations may have an effect on whether mining activities would ultimately be undertaken on land falling within the area of a local authority's jurisdiction. But this is a consequence of land use planning provided for in LUPO and recognised in the MPRDA that a mining right is "*subject to any relevant law*" - and a holder of a mining right must comply with "t*he relevant provisions of this Act, any other relevant law and the terms and conditions of the mining right."* (See: section 23(6) and section 25(2)(d) *supra*.) The exercise of the powers of the Municipality, in this context, is reasonably necessary for, or incidental to, the exercise of its powers in respect of land use planning as contemplated in LUPO. Having regard to the provisions of section 104(4) of the Constitution, there can be no question of LUPO or the scheme regulations being invalid as submitted by the Respondents.

[40] Given the fact that the object and focus of the MPRDA and LUPO are not the same, as well as the fact that provincial and local spheres of government are given

considerable constitutional latitude to regulate areas of interests, the impact of which can only be locally determined, the MPRDA cannot be regarded as water-tight to the exclusion of relevant zoning legislation. See further Wary Holdings, *supra,* at 385 A and the reference therein to the *Liquor Bill* case: Ex parte President of the Republic of South Africa: In *re* Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC).

[41] The zoning of land is essentially a planning function in terms of Schedule 4 and 5 of the Constitution. The legislator could not have intended to grant the Minister the power to make decisions outside the scope, aims and objectives of the MPRDA. Such an exercise of power has the potential to stand in conflict with the spirit and purport of the Constitution. In my view such a wide ministerial power will negate the municipal planning function conferred upon all Municipalities and it may well trespass into the sphere of the exclusive provincial competence of provincial planning. I am satisfied that there is no conflict between LUPO and the MPRDA as contemplated in section 146 of the Constitution, as LUPO and the MPRDA can be read as mutually supportive.

Consideration of the Intergovernmental Relations Framework Act:

[42] The Trust and Elsana also relied upon the provisions of section 45 of the Intergovernmental Relations Framework Act, No. 13 of 2005 (“the Framework Act”), alleging that it is not competent for the Municipality to approach this Court.

[43] Section 45(1) of the Framework Act provides as follows:-

> *"(1) No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this chapter were unsuccessful."*

[44] Section 45(1) is, in my view, not applicable in this instance as the Applicant launched these proceedings against the First to Fifth Respondents to comply with the provisions of LUPO and the scheme regulations thereto. The application was not brought in order to settle an intergovernmental dispute. In any event, I did not understand the Minister to rely upon the Framework Act in order to prevent the matter being decided.

Conclusion:

[45] In the circumstances and for the reasons stated, I am satisfied that the Applicant is entitled to the relief sought.

[46] In the result the following order is made:-

a) The First to Fourth Respondents, in their capacity as trustees of the Hugo Louw Familietrust, 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.

LE GRANGE, J