Undermining local planning?

HIGH COURT CONFIRMS THAT MINING COMPANIES REQUIRE LAND USE APPROVAL

Elsana Quarry, a mining company, was granted mining rights on a farm situated within the jurisdiction of the Swartland Municipality. The municipality requested the Court to prohibit Elsana from conducting the mining activities because the farm had not been rezoned by the municipality in terms of its zoning scheme. The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) requires those who obtain mining rights to comply with any 'relevant law'. The Swartland Municipality argued that this meant that Elsana should have applied for rezoning under both the Western Cape Land Use Planning Ordinance 15 of 1985 (LUPO) and the municipality's zoning scheme.

In *Swartland Municipality vs Elsana Quarry (Pty) Limited* Case no: 13703 / 09 (Western Cape High Court (unreported)), the key question was whether a municipality has the competence to regulate land use for mining purposes. Elsana Quarry argued that only the national government has decision-making power with regard to mining and minerals: mining and minerals are not mentioned in any of the Schedules to the Constitution and therefore belong to the national government. Elsana Quarry argued that compliance with any relevant law, as required by the MPRDA, did not include LUPO or municipal zoning schemes.

The Swartland Municipality argued that LUPO constituted relevant and binding law which plays a central role in the efforts of local authorities to achieve the coordinated and harmonious use of land for the benefit of all of their inhabitants.

Defining municipal planning

The High Court held that, although municipalities do not have powers to regulate mining, 'municipal planning' is a local government power, granted by the Constitution. The term 'planning', as used in this case, refers to the control and regulation of land use. If the municipal power to regulate municipal planning affects mining activities, that does not mean that the municipality is encroaching on the national power by dealing with mining. It is rather an affirmation of a municipality's original powers to regulate municipal land use. In practice, it amounts to another 'hurdle' that the mining company would have to overcome before it can commence its activities.

In this case an interdict restraining the company from conducting mining activities was granted until the property was rezoned from agricultural to industrial land.

Comment

This judgment is the latest in a series of significant events and processes that may finally deliver some movement on the question of who is responsible for (what parts of) land use planning and development management.

In 2008, a Land Use Management Bill was finally submitted to Parliament, but withdrawn after the public hearings were conducted. The Bill was widely criticised for not making a serious attempt to define the responsibilities of national, provincial and


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local government. The national government is currently redrafting the Bill. However, municipalities, provinces and the courts can no longer wait for a national Land Use Management Act to deliver the country from the embarrassing reality that in 2010, land use planning in South Africa is still done in terms of apartheid legislation.

In October of 2009, the Supreme Court of Appeal handed down an important judgment (see *LGB* 11(5), p 27). The dispute dealt with the Gauteng Development Tribunal, which was making land use management decisions and bypassing municipal land use planning processes. It performed this task in terms of the Development Facilitation Act. The City of Johannesburg argued that this infringed its constitutional right to administer 'municipal planning', a competency listed in Schedule 4B of the Constitution. The Court concluded that the provision in the Constitution giving municipalities authority over 'municipal planning' included land use planning and management, and that the 'municipal planning' competency was not limited to forward planning (as argued by the Gauteng Development Tribunal). As a result, certain sections of the Development Facilitation Act were declared unconstitutional.

In the case involving the Swartland Municipality, the Western Cape High Court relied on the Supreme Court judgment for parts of its reasoning. The matter is currently before the Constitutional Court because a declaration of invalidity of parts of the Development Facilitation Act needs to be confirmed by the Constitutional Court.

In the meantime, provincial governments are also stepping into the fray. In her State of the Province Address, Western Cape Premier Helen Zille announced that her provincial government was revising the Land Use Planning Ordinance and that the new version would create more clarity around who did what when it came to land use planning and development management.

The Constitutional Court's judgment regarding the meaning and scope of 'municipal planning' is eagerly awaited. The judgment is likely to overtake a debate that the national government has been too slow to resolve through appropriate framework legislation.

Local government's role in land use planning and development management may very well receive some recognition from the Constitutional Court, but there is a more difficult question that needs to be answered. How does the municipality's authority regarding 'municipal planning' compare to that of the national government and / or provincial government? The Constitution allocates authority to national and provincial governments with regard to, for example, 'the environment', 'agriculture' and 'urban and rural development'. Moreover, provincial governments have the exclusive authority to see to 'provincial planning'. How do all these relate to 'municipal planning'?

The successful modernisation of South Africa's old land use planning framework depends to a very large extent on adequate answers to these questions.

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