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Can the holder of a mining right be an 'applicant' for rezoning of property?

Yacoob J in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) stated that "there is probably not a single functional area in the Constitution that can be carried out without land." There is no sector in South Africa to which this could be more applicable than to the mining sector.

The Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA"), published in the Government Gazette on 5 August 2013 and commencing on 1 July 2015, is national framework legislation designed to provide a framework for and clear direction to provincial and local governments in their spatial planning and land use principles and policies. The bulk of the detail of this area of law is yet to be buttressed by way of provincial legislation of which only the Western Cape has enacted such legislation to date. Provincial legislation serves the purpose of bolstering SPLUMA and providing details of procedures, processes and time frames for each province in order to establish a uniform system of land use and development. Municipalities, under the oversight of provincial governance, are constitutionally afforded exclusive executive competence in respect of municipal planning.

Whereas mining *per se* is governed on a national level through the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA"), the corollary of recent case law is the confirmation that municipal planning matters are the responsibility of local government and that land used for mining purposes is not excluded from compliance with land use requirements at a local level.

In terms of section 24 of SPLUMA a municipality must, within 5 years of the commencement of SPLUMA, adopt and approve a single land use scheme which applies to the entire municipal area including areas not previously subject to a land use scheme. This would affect existing mining operations that in terms of certain provincial ordinances were not previously subject to land use schemes, such as the Transvaal Town Planning Ordinance 15 of 1986 that still pertains to the Gauteng, Mpumalanga, North West and Limpopo regions.

However, mining entities will find relief in section 26(3) of SLUMA which provides that, in the period before a land use scheme is approved, the previously unregulated land may continue to be used for the purposes listed in Schedule 2 to SPLUMA, which include mining operations lawfully conducted before the commencement of SPLUMA. It would be prudent for the owners of existing mining operations, in liaison with the local authorities, to ensure that the correct land use is accorded to their properties in any new land use scheme being prepared for approval.

In the instances where the rezoning of land for mining purposes is required, there is uncertainty whether the holder of a mining right can apply for the rezoning of the land where the land is owned by a third party. The question as to whether the holder of a mining right qualifies as an 'applicant' has vast implications since an 'applicant' as defined in SPLUMA is the only party who may apply to rezone land. If one unpacks the relevant definitions and provisions in SPLUMA, the following however transpires: An applicant is "a person who makes a land development application contemplated in section 45." Section 45(1)(a) lists four categories of applicants, the most pertinent for current purposes being "an owner, including the State, of the land concerned". An owner is in turn defined as "the person registered in a deeds registry as the owner of the land or who is the beneficial owner in land". It is important to note that land also includes real rights in land by means of land being defined as, "any erf, agricultural holding or farm portion, and includes any improvement or building on the land and any real right in land."

Under Section 5 of the MPRDA a mining right constitutes a limited real right in respect of the land to which the mining right relates. This mining right is duly registered in the Mining and Petroleum Titles Registration Office, being a duly constituted registration office in terms of the Mining Titles Registration Amendment Act 24 of 2003. However, does this establish the holder of the mining right as the owner of a real right registered in a deeds registry?

The Mining Titles Registration Act 16 of 1967 established the Mining and Petroleum Titles Registration Office as the office for all mineral and petroleum titles and related deeds. It is accordingly the deeds registry dealing with the registration of the rights and deeds pursuant to the MPRDA. If we look at the trajectory of other land legislation such as the Land Survey Act 8 of 1997 which expressly includes the Mining Titles Office as a deeds registry it is apparent that the Mining Titles Office qualifies as a 'deeds registry'. Consequently, it can be reasoned that the holder of a mining right may apply for rezoning as the "owner" of the land as stated in section 45(1)(a) by virtue of their 'ownership' of the real right as embodied in the mining right.

Another conceivable course of argument may possibly reside in Section 45(1)(c). This section lists "a person to whom the land concerned has been made available for development in writing by an organ of state or such person's duly authorised agent" as one of the categories of an applicant. Can it perhaps be argued that the granting of a mining right by the Minister of Mineral Resources to the holder of a mining right equates to making the right to mine available for development of the real rights embodied in the mining right? If so, the holder of a mining right qualifies as an applicant as provided for in section 45(1)(c).

The possible interpretations as set out above would allow the holder of a mining right to apply for the rezoning of the land where it intends to exercise its mining right.

There are however a number of other issues that will have to be addressed, such as the weight that will be accorded to the concerns of the landowner in the public participation process. It will also have to be established if the land use scheme that applies to the land, provides for multiple zonings (agricultural and mining) in respect of a single land parcel.

The current uncertainty regarding the *locus standi* of the holder of the mining right will probably remain until interpreted by the courts. Until such time, interpretation and development of the land use legislation as pertaining to the mining industry will indeed be a challenging endeavour.

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