



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)**

**CASE NO: 866/2023**

In the matter between

**COMPREGEN (PTY) LTD**

APPLICANT

AND

**LEZMIN 2021 (PTY) LTD**

1<sup>st</sup> RESPONDENT

**GEORGE LOCAL MUNICIPALITY**

2<sup>nd</sup> RESPONDENT

**THE MINISTER OF MINERALS AND RESOURCES**

3<sup>rd</sup> RESPONDENT

**THE MINISTER OF FORESTRY, FISHERIES AND  
ENVIRONMENT**

4<sup>th</sup> RESPONDENT

**THE MINISTER OF WATER AND SANITATION**

5<sup>th</sup> RESPONDENT

**THE MINISTER OF LOCAL GOVERNMENT,  
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT  
PLANNING,**

6<sup>th</sup> RESPONDENT

**THE MEC, DEPARTMENT OF LOCAL GOVERNMENT,  
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT  
PLANNING, WESTERN CAPE**

7<sup>th</sup> RESPONDENT

Date of Hearing: 12 June 2024

Date of Judgment: 27 September 2024 (to be delivered via email to the respective counsel)

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## JUDGMENT

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### THULARE J

[1] This is an opposed application where the applicant sought to declare mining activities conducted by the first respondent (Lezmin) unlawful and to prohibit Lezmin from conducting the mining activities conducted on Portions 8 and 48 of the Farm Kraaibosch No. 195 (the properties) until the properties are specifically zoned for mining and until Lezmin obtained the necessary water use authorization to conduct mining activities on the properties. The applicant further sought that Lezmin be prohibited from commencing with expansion of its mining activities on the properties under phase 4 and 5 thereof or to continue with its mining operations on the properties until and unless authorization had been granted to it to do so in terms of Western Cape Land Use Planning Act No. 3 of 2014 (LUPA) and the Land Use Planning By-Law for the George Municipality (2015) (LUPB) and until and unless a lawful water use licence has been granted to it in terms of the National Water Act 36 of 1998 (NWA) and that pending the outcome of the appeal and review proceedings under reference number WC 30/5/1/2/2/10114 NR Lezmin may not commence or continue with the expansion of its mining activities under phases 4 and 5 of its mining operations on the properties.

[2] No relief was sought against the second to seventh respondents save in the event of opposition. They were cited as competent authorities in terms of statutory provisions which they regulated and controlled and in so far as they may have an interest in the alleged illegal conduct. At the hearing of the application, Lezmin sought leave to file a further affidavit and that certain passages from the applicant's

replying affidavit be struck out on the basis that they constituted impermissible new matter in reply. Lezmin also raised issue with applicant's impermissible reliance on hearsay evidence and applied to strike out all such matter from the founding affidavit. Lezmin raised two threshold defences to the application. First, the existence of material disputes of fact which rendered application proceedings inappropriate and precluded the applicant from obtaining the relief it sought. The disputes were in so far as Lezmin's use of the relevant properties where it conducted mining activities, and its water use on the properties. Secondly, the applicant's standing to seek the relief it did pursuant the alleged contraventions of the NWA and related legislation. Lezmin also applied to strike out numerous passages in the applicant's founding papers.

[3] Lezmin conducted open case mining activities at a granite quarry on the remainder of portion 8 of the farm Kraaibosch measuring 40,9457 hectares and portion 48 of the farm Sandkraal which was a portion of portion 13, measuring 105, 7317 of the farms Kraaibosch No 195 in George, Western Cape. The applicant's case was that during 1981 the initial mining right was lawfully obtained by way of a consent use granted by the then Divisional Council of the Municipality to mine on 0.8 hectares of the properties. Since then, the mining activities had been unlawfully extended to more than 20 hectares. No land use application to extend the mining area were submitted to the Municipality. The area currently being mined extended beyond the consent use which was granted. Lezmin's mining activities on the properties could not take place until the properties had been specifically zoned for mining and a zoning determination was done under Special Planning and Land Use Management Act 16 of 2013 (SPLUMA) read with LUPA and LUPB. As the properties were not properly zoned and/or the zoning had not been determined, Lezmin did not have the necessary water use authorization as envisaged in the NWA to conduct lawful mining activities on the properties. According to the applicant, Lezmin did not have (1) authorization to use water as envisaged in schedule 1 of the NWA, (2) the General Authorisation (the GA) to use water without a licence as envisaged in section 39 of the NWA, (3) an Existing Lawful Water Use (ELU) and a (4) Water Use Licence (WUL) as envisaged in section 22(1)(b) of the NWA. Without the necessary authorization to use water Lezmin;s mining activities on the properties was unlawful. Under the circumstances and due to its illegal conduct Lezmin must be prohibited

from continuing with its mining operations until and unless authorization had been granted for such properties to be used for mining and a water use authorization had been granted in terms of the NWA for the conducting of mining activities on the properties.

## APPLICATION TO STRIKE OUT

[4] Lezmin brought two applications to strike out. The first related to numerous passages in the applicant's founding affidavit and the basis for the strike out is hearsay evidence. The second related to numerous passages in the applicant's replying affidavit and the basis is impermissible new facts raised in reply. As regards the first, it is common cause that the application was premised on a report obtained from the Municipality which related to Lezmin's application to expand its mining activities. The report was compiled by the Deputy Director: Town Planning and Environmental Management in the Human Settlements, Planning and Development of the Municipality, Ms D Power (Power) in response to Lezmin's application for expansion of mining licence on the remainder of Portion 8 and Portion 48 of the Farm Kraaibosch 195. The report was annexed as FA2 to the applicant's founding affidavit deposed to by the applicant's Head of Development (HD). HD relied on the report to advance applicant's case. The case was that the consent use granted for the mining right on the property in 1981 was 0.8 ha and that the mining activities had been unlawfully extended to more than 20 ha. The area currently being mined extends beyond the 0.8 ha and therefore it constituted unlawful use and Lezmin does not have the water use authorization as envisaged in section 2 of the NWA to conduct mining activities. At the time when the 1981 consent use was granted no zoning or town planning scheme existed in the municipal area where the properties were situated. On application of LUPO council did not determine the entire property to have mining rights, except the permitted area of 0.8 ha. During 1986 the remainder of the properties were zoned agriculture zone 1 due to the farming activities conducted on the property and no zoning determination was carried out at the time. Only 0.08 ha was zoned in accordance with the utilization thereof. Lezmin's mining activities extended to more than 20 ha over the properties and therefore well outside the mining right granted. No land use application was submitted since the implementation of LUPO on 1 July 1986 to expand the mining area. Any mining

activity conducted over 0,8 ha constituted unlawful land use and Lezmin should be prohibited from continuing and/or extending its mining operations on the properties until and unless it had obtained the necessary authorization in terms of the relevant statutory provisions to use the properties for mining. Applications to rezone the properties were approved but the rezoning lapsed due to the zoning not utilized and/or implemented in accordance with the relevant approval. In 2022 Lezmin successfully applied to extend its mining activities on the properties. The applicant lodged an appeal which was opposed. The appeal suspended the proposed extension and the parties were awaiting the outcome of the appeal. If the appeal was not successful in respect of the 0.8 ha any further mining activities on the properties was in any event unlawful.

[5] The applicant also relied on email correspondence between Ms Erasmus (Erasmus), an environmental consultant appointed by the applicant to assist it with its development on the properties and Ms Sibonelo Ndlovu (Ndlovu), a water use officer in the employ of the Breede-Gouritz Catchment Management Agency (BGCMA). Erasmus enquired from inter alia Ndlovu whether any lawful water uses or authorized water uses such as a General Authorisation to use water (GA) or an Existing Lawful Water Use (ELU) on the properties. Ndlovu's response was that there was no GA or ELU or Water Use Licence (WUL) for the properties. Ndlovu said there was a water use registration in respect of the remainder of Portion 8 of the farm Kraaibosch no. 195. Ndlovu attached some documents confirming that a water use had been registered but not authorized. Ndlovu also indicated that a registration certificate merely confirmed that a water use was registered and not that there was an application for water use and/or an approval to lawfully use water. The email correspondence was attached as FA4 to applicant's affidavit. The properties were situated in a medium, long-term urban growth area and by implication the mining operations conflicted with and did not support the Municipality's long-term spatial vision for the George, Kraaibosch and Victory Bay areas. The area to the East and Sout East of the current mining footprint was denoted as 'critical biodiversity areas and green corridors and updated data from the Western Cape Provincial Government confirmed the existence of critically of critically endangered species in the area and that a significant amount of biodiversity had already been compromised. The Municipality also recognized that the blasting taking place on the

site has been problematic and disrupts the occupiers of the next-door development and the wildlife in the area. Residents have complained to their infrastructure and buildings being damaged due to unlawful mining activities by Lezmin. Lezmin asked the court to strike these portions from the founding affidavit as its constituted impermissible and inadmissible hearsay.

[6] The applicant did not formally oppose Lezmin's application to strike out nor has it formally applied for any specific hearsay evidence to be allowed by the court. Nowhere in the founding affidavit did the applicant even attempt to make out a case for the hearsay evidence upon which it relied, to be admitted by the court. The applicant's cause of action in respect of the land use question was exclusively based upon written facts that depended upon the credibility of someone other than HD, the deponent to its affidavit. Power was an official of the Municipality. The evidence was not only hearsay, but related to matters spanning decades, in respect of which Power had no direct knowledge and importantly, related to what the land use was at the quarry on 1 July 1986, some 36 years ago. The applicant tendered no evidence whatsoever in its founding affidavit addressing the constituent factors of section 36(1)(c) of the Law of Evidence Amendment Act, No. 45 of 1988 (the Hearsay Act). The applicant did not apply, in which application it dealt with the factors that the court had to consider and as a result Lezmin did not have the opportunity nor was it called upon to answer to whatever factors the applicant wished to rely on to convince the court to exercise its discretion in favour of the applicant and admit the otherwise inadmissible evidence. The applicant did not file an opposing affidavit in response to the Lezmin's application to strike out. The applicant addressed the issue of hearsay raised by Lezmin in reply. Lezmin did not have the opportunity to respond to the allegations made in reply. The applicant could not compel Power to depose to an affidavit for purposes of this application. Faced with this difficulty, the applicant still pursued its relief by way of application and not action. The applicant had the option to pursue relief by action, in which case it would have been able to subpoena Power or any witness to testify at court alternatively to produce documents by way of subpoena *duces decum*. The applicant could not rely on another party it joined, the Municipality, to advance the applicant's own case to the question of the land use of the property. It is the applicant that must make out its own case.

*Hearsay evidence.*

[7] Section 3 and 4 of the Hearsay Act provides:

“3 Hearsay evidence

1. Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section-

**'hearsay evidence'** means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;"

In *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA) at para 27 and 28 it was said:

"[27] The purpose of the Act is to allow the admission of hearsay evidence in circumstances where justice dictates its reception. In *Metedad v National Employers' General Insurance Co Ltd* 1992 (1) SA 494 (W) it was stated as follows at 498I - 499G:

'It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater



injustice than any uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value. . . . There is no principle to be extracted from the Act that it is to be applied only sparingly. On the contrary, the Court is bound to apply it when so required by the interests of justice.'

In each case the factors set out in s 3(1)(c) are to be considered in the light of the facts of the case. The weight to be accorded to such evidence, once it is admitted, in the assessment of the totality of the evidence adduced, is a distinct question.

[28] The factors set out in s 3(1)(c)(i) - (vii) should not be considered in isolation. One should approach the application of s 3(1)(c) on the basis that these factors are interrelated and that they overlap. See *Hewan v Kourie NO and Another* 1993 (3) SA 233 (T) at 239B - C and Schmidt and Rademeyer's *Bewysreg* (*supra* at 481) where the learned authors state:

'Soos reeds uit die voorafgaande bespreking van die afsonderlike faktore sou blyk, behoort 'n hof nie die faktore onafhanklik, en sonder inagneming van die ander, in ag te neem nie. Die afsonderlike faktore hou tot 'n hoë mate op verskillende vlakke met mekaar verband, en elkeen kan gevolglik net effektief in aanmerking geneem word indien die hof, in die oorwegingsproses, die impak en invloed van die ander ook in die weegskaal plaas.'

[8] The evidence of Power, Erasmus and Ndlovu is hearsay as defined in section 3(4). Lezmin did not agree to the admission of such evidence as envisaged in section 3(1)(a). Power, Erasmus and Ndlovu did not provide affidavits for the application to allow the admission of the hearsay evidence as envisaged in section 3(1)(b). The evidence can only be allowed if the court allowed it as envisaged in section 3(1)(c). A party in application proceedings should not be ambushed by the admission of hearsay evidence at the hearing of the matter. Where a party in application proceedings sought to rely on hearsay evidence, the other party must,

from the papers, learn clearly and timeously that the court will be asked to consider and rule on the admission of such hearsay as envisaged in section 3(1)(c) of the Hearsay Act. It is unfair for the other party, for one party to seek for the first time in argument to build up a case for admission of hearsay evidence in argument. In its founding papers, the party seeking to rely on hearsay evidence should clearly signal to the other its intention to invoke the provisions of the Hearsay Act to enable the other party to appreciate the full evidentiary ambit it is required to traverse in answering the case. In *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA) at para 24 it was said:

[24] "... Stated somewhat differently, in order to decide whether the plaintiff has made out a case to answer, a defendant is entitled to know the constituent elements of that case."

The other party must be called upon and must have the opportunity to answer whatever factors that the party seeking to rely on hearsay evidence puts forward in its founding papers. The other party must have sufficient particularity and opportunity to respond to the allegations and factors to properly answer so as to assist the court in consideration of its discretion on the admissibility of the hearsay evidence in respect of the hearsay evidence. It is insufficient, in application proceedings, only at argument, to rely on the bald reference to the court's discretion to admit hearsay evidence. The nature of the proceedings, under the circumstances, militates against admission. It is worth noting that the applicant elected to pursue relief by way of application, an election in which the applicant did not favour action proceedings which would have allowed the applicant to subpoena relevant witnesses including calling upon them to produce documents under subpoena.

[9] As regards the nature of the evidence (section 3(1)(c)(ii), what is required was said to be the characterization of the evidence sought to be introduced [*Makhathini's* at 523A; *Maize Board v Hart* 2005 (5) SA 480 (O) at 488 (B)]. Except for her office in the Municipality, nothing much is known about Power from the papers. It is even unknown whether she derives information from documents which were in her lawful custody. It seems that she was neither the author, signatory nor

attesting witness to the documents she relied upon. Most importantly, the applicant sought to rely on Power's opinions which seems to be based on some historical documents. Her opinions are challenged by Lezmin and that dispute was the very reason for the application. It has always been within the applicant's knowledge that Lezmin did not accept Power's opinion on the land use. The applicant knew that for it to succeed, Power's opinion was to be accepted by the court as a correct reflection of the position. Acceptance of the opinion of Power on land use would amount to an undeserved crucial and advantageous position for the applicant and an undue evidential disadvantage to Lezmin. Similarly, Erasmus and Ndlovu's opinions, where contested, must be fairly considered. A dispute needs to be properly resolved through deserved advantages and due disadvantages. The interests of justice do not permit admission on the evidence of this nature under the circumstances.

[10] In respect of the purpose for which the evidence is tendered, it was said in *Metedad v National Employers General Insurance Co Ltd* 1992 (1) SA 494 (W) at 498D:

"The fact that the Court is required to have regard, *inter alia*, to the purpose for which the evidence is tendered in deciding whether or not to exercise its discretion to allow hearsay evidence under s 3(1)(c)(iii) of the Act does not affect this decision. It means only that evidence tendered for a compelling reason would stand a better chance of admission than evidence tendered for a doubtful or illegitimate purpose."

In the circumstances of this case, and the issues dealt with, the applicant should have realized that a serious dispute of fact which was incapable of resolution on the papers was bound to develop [*Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 354 AD at 350A]. From 349H to 35A it was said:

"I may add that where the facts are in dispute a Court has a discretion as to the future course of the proceedings. It may dismiss the application with costs or order the parties to go to trial or order oral evidence in terms of any Rule of Court. The first course may be

adopted when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. See *Room Hire Co. (Pty.) Limited v Jeppe Street Mansions (Pty.) Limited*, 1949 (3) SA 1155 (T) at pp. 1162 and 1168.”

The use of the land at the quarry for mining was ongoing for many decades. The applicant has itself no direct knowledge of what Lezmin’s water use was at the quarry. The applicant relied on these material issues on persons who did not depose to affidavits. There is an important date of 1 July 1986, a date on which the Land Use Planning Ordinance Cape, 15 of 1985 (LUPO) commenced. Amongst others, the issue between the parties was the interpretation of section 14(1) of LUPO which provides:

“With effect from the date of commencement of this ordinance all land referred to in section 8 shall be deemed to be zoned in accordance with the utilization thereof, as determined by the council concerned.”

The Municipality took no action to what the applicant alleged to be unlawful use of the land since 1986, 38 years before the applicant issues its process. A hearsay untested opinion that Lezmin utilized the land without appropriate zoning does not merit admission in the circumstances. Furthermore, where the applicant acknowledged that no water use for Lezmin have been determined and that the authorization process for Lezmin’s water use has yet to be confirmed, hearsay untested opinions cannot be admitted with the purpose of constituting a proper cause of action. The evidence may still be found useful if it is properly placed before the court, but I am reluctant to admit untested hearsay opinions to be used against a party who puts such opinions in contest. In *Makhathini* at para 32 it was said in respect of the probative value of the evidence:

“[32] Section 3(1)(c)(iv) requires that the probative value of the evidence be considered. Evidence sought to be introduced in terms of s 3(1)(c) may be such that its probative value, even at first blush, is minimal and in those circumstances the enquiry will end there. Questions of relevance and reliability

arise in the application of this subsection: see *S v Ramavhale* (*supra* at 649e - 650a)."

An untested opinion based on resources not placed before the court, where the facts upon which the opinions are based are contested and not settled, and the qualification of the person giving the opinion remained unclear, have minimal probative value. Dealing with prejudice as envisaged in section 3(1)(c)(v) at para 32 in *Giesecke* it was said that:

[32] ... The respondent's prejudice lies in the fact that he will be deprived of the opportunity to test this evidence through cross-examination, which is undoubtedly a real disadvantage."

[11] I am unable to find any other factor on which to exercise my discretion to admit the hearsay evidence of Power, Erasmus and Ndlovu. The applicant should have addressed the constituent factors of section 36(1)(c) upon which it sought to rely in its founding affidavit, or by way of a distinct application supported by a founding affidavit dealing therewith. In this way, Lenmin would have had an opportunity to fully deal with the factors as relied upon by the applicant in its answer. This is what fairness and justice demands for a court to arrive at an informed decision on the question of the admission of hearsay evidence. The applicant's case in its founding affidavit is exclusively premised on hearsay evidence in respect of which no case is made out for its admission. I am persuaded that the application to strike out hearsay evidence should be granted.

*Impermissible new matter in reply.*

[12] The respondent also asked the court to strike out impermissible new matter from applicant's replying affidavit wherein the applicant made various allegations. The applicant therein alleged that contrary to Lezmin's Basic Assessment Report (BAR) (RA2 in the papers), Lezmin admitted that it did not have a WUL to use water for its mining operations. The further allegations related to the rainfall which ran down the stockpile and ultimately accumulated in the mining pit, which water was then being used for dust suppression on haul roads, on the plant and in the washing plant which

triggered certain provisions of the NWA inter alia storage water (section 21(b), discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit (section 21(f), disposing of waste in a manner which may detrimentally impact on a water resource (section 21(g) and disposing in any manner of water which contained waste from, or which has been heated in, any industrial or power generation process (section 21(h)). The BAR and Environmental Management Plan Report described and depicted the dam wall, settling pond system, still water cut-off drains, silt catchment pod and processing plants, water body, surface water and its use. The case was that the excavated mining pit in the BAR report accumulated and/or retained water which would otherwise have flown from the property, which on all the available evidence was situated on a topographically higher elevation than the remaining properties and that this water would otherwise have flown from the property to the lower lying areas and was now accumulating in the pit. The topography of the land was changed by the excavation and impacted on the normal flow of water. Lezmin had created an off-stream dam and the excavated area enabled Lezmin to collect water which would have otherwise either been absorbed into the soil to supplement underground resources or would have reached one of the multiple streams in the region and would have reached one of the surrounding rivers.

[13] The well-established rule was that an applicant must stand or fall by its founding papers [*Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635-636 *in fine*.] The relief sought must be found in the evidence supported by the facts set out in the founding affidavit [*Kleynhaans v van der Westhuizen* NO 1970 (1) SA 565 (O) at 568E.] There are exceptions to the rule [*Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others* 2003 (5) SA 1 (C)] and the court had a discretion to admit new evidence [*Body Corporate* at 6D-F; *Mostert v First Rand Bank* 2018 (4) SA 443 at para 13]]. In exercising the discretion, the Court would ordinarily strike out new issues raised in a replying affidavit if the applicant knew or ought to have known of the existence of such issues but failed for whatever reason to raise them in the founding affidavit [*Bayat and Others v Hansa and Another* 1955 (3) SA 547 (N); *Dawood V Mahomed* 1979 (2) SA 361 (D); *Faber v Nazerian* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) at para 24]. New matter introduced by the applicant's replying affidavit is what applicant knew or ought to

have known at the time that it deposed to the founding affidavit, and were thus known to the applicant before the applicant received the respondent's answering papers. The applicant knew that whether the Lezmin's water use fell within the ambit of the NWA was still an open question. Allowing the new evidence would be prejudicial to Lezmin as it did not have the opportunity to deal with it, unless the matter was postponed affording it such opportunity. In the circumstances, there is no basis upon which the court should exercise its discretion in favour of allowing the new evidence introduced by the applicant in the replying affidavit [*Faber* at para 26]. In my view the applicant has not made the hurdle of a cause of action. The applicant's reliance on inadmissible hearsay evidence and impermissible new matter in reply is not allowed.

#### APPLICANT'S *LOCUS STANDI*

[14] The applicant alleged that it has *locus standi* as it was the owner of the properties where Lezmin conducted mining activities. It relied on a title deed of transferring ownership to the applicant dated 11 January 2023. According to the applicant the transfer was not subject to any conditions which entitled Lezmin to mine on the properties. The applicant also relied on being an interested and affected party that was directly affected by the mining activities. The applicant acknowledged that the facts upon which its application was premised were obtained from a report from the Municipality which related to Lezmin's application to expand its mining activities and to Lezmin's alleged illegal activities. Lezmin did not dispute applicant's ownership of the properties with full knowledge of the existence of the ongoing mining activities. Lezmin's position was that it had the right to mine in terms of a renewal of its mining right dated 9 November 2021, granted in terms of section 24(3) of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) and that Lezmin's right to mine the properties in terms of such renewal was in respect of an area of 30, 0530 hectares on the properties where the quarry was situated and it endured for a period of 30 years commencing on 1 October 2021. There was no attack on the validity of Lezmin's mining right.

[15] Lezmin submitted that in relation to the complaint regarding the alleged contravention of the NWA, the applicant had no standing. Its argument was that

water was a national resource which belonged to all people and that the purpose of the NWA was to ensure that water resources were protected, used, developed, conserved, managed and controlled in ways that took account amongst others factors meeting the basic human needs of present and future generations and that it was manifestly legislation intended for the benefit of all South Africa's people. The NWA was not enacted for the protection of a particular class of persons. In *Makhanya NO v Goede Wellington Boerdery (Pty) Ltd* 2012 JDR 2323 (SCA); [2013] 1 All SA 526 (SCA) at para 38 it was said:

“[38] The preamble to the Act makes it clear that water is a natural resource that belongs to all people and that the discriminatory laws of the past have prevented equal access to water and the use of water resources. It makes it equally clear that water in South Arica is scarce. The preamble recognises that the ultimate aim of water resource management is to achieve the sustainable use of water for the benefit of all users. It states that the 'protection of the quality of water resources is necessary to ensure sustainability of the nation's water resources in the interests of all water users'.”

In the interest of all water users the NWA moved water law from the domain of private law to public law. In *Witzenberg Properties (Pty) Ltd v Bokveldskloof Boerdery (Pty) Ltd and Another* 2018 (6) SA 307 (WCC) at para 24 it was said:

“[24] Given that Witzenberg seeks interdictory relief in pursuit of its own interests, the issue of legal standing is approached in accordance with the principles set out in *Patz v Green & Co* read with *Roodepoort-Maraiburg Town Council v Eastern Properties (Pty) Ltd*, which were encapsulated E in *Laskey and Another v Showzone CC and Others*. In essence these principles are:

[24.1] When it appears that a statute was enacted in the interest of a particular person or any class of persons, a party who shows that he or she is one of such class of persons, and seeks judicial F intervention



by way of interdictory relief premised on the statute, is not required to show harm as a result of a contravention of the statute, such harm being presumed.

[24.2] However, when a statutory duty was imposed, not in the interest of a particular person or a particular class, but in the public interest generally, the applicant must show that he or she has sustained or apprehends actual harm to obtain interdictory relief on the ground of breach of the statute.

[25] As Cameron J put it in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*:

'[33] The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.

[34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if the right remedy is sought by the right person in the right proceedings. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and

determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.

[35] *Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.* [Emphasis supplied.]

[26] The preamble to the NWA expressly recognises that (a) water belongs 'to all people'; and (b) national government has overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use.

[27] Witzenberg cited the Minister as second respondent purely because she has 'a substantial and direct interest in the subject matter of these proceedings and is accordingly a necessary party hereto'. Section 3 of the NWA stipulates that national government, acting through the Minister, is the public trustee of the nation's water resources. It is clearly for this reason that the Minister is empowered, under part 3 (ss 32 – 35) of the NWA to determine, where necessary, an 'existing lawful water use'.

In *Tavakoli and Another v Bantry Hills (Pty) Ltd* 2019 (3) SA 163 (SCA) at para 26 it was said:

“[26] The appellants were required to establish their locus standi in their founding papers. The only founding allegations concerning standing are in para 21, where their deponent, Mr Tavakoli, said that they had standing because they were entitled to enforce the DMS against the respondent and because their constitutional rights to just administrative action had been infringed by the approval of the plans. The first of these grounds is a conclusion unsupported by facts. The second, as the *JDJ Properties* case shows, does not relieve the

appellants of the burden of establishing their standing along conventional lines. With reference to s 38 of the Constitution, the appellants have not alleged that they are acting in anyone's interests other than their own. The sufficiency of their own interest must be determined in accordance with the principle emanating from *Patz v Greene*. As Cameron JA stated in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (SCA) ([2012] ZASCA 28), an 'own-interest litigant' does not acquire standing from the invalidity of the challenged decision but from the effect it will have on his or her interests (para 33)."

In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2012 JDR 2298 (CC); 2013 (3) BCLR 251 (CC) at para 35 it was said:

"[35] Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown."

[16] To establish locus standi the applicant had to show that it suffered harm from a contravention of the NWA beyond that which it may be supposed all members of the public to. The applicant only had locus standi in respect of the alleged breach of the NWA if it showed that it had suffered actual or apprehended harm or loss. The applicant only relied on its ownership of the property and did not allege and prove that it had sustained or apprehended actual harm of the kind required. When the applicant acquired the properties Lezmin's mining activities were ongoing. The applicant had no standing to pursue its case in respect of Lezmin's alleged use of water in breach of the provisions of the NWA. No relief can accordingly be granted to it as it had no standing to be granted such relief.

## RELIEF

[17] From the facts before me, I am unable to declare Lezmin's mining activities conducted on portions 8 and 48 of the Farm Kraaibosch No. 195 unlawful. I am unable to prohibit Lezmin from commencing with the expansion of its mining

activities on the properties under phase 4 and 5 or to continue with its current mining operations on the properties.

ORDER

[18] **For these reasons, I make the following order:**

The application is dismissed with costs, such costs to include costs of Senior Counsel on the scale C.

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**DM THULARE**  
**JUDGE OF THE HIGH COURT**