

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NUMBER: 224/2013
Date heard: 13 September 2013
Date delivered: 17 September 2013
OF INTEREST

In the matter between

PETRUS JOHANNES VERMAAK	First Applicant
ROBERT C.A. BELL	Second Applicant
JENNIFER BELL	Third Applicant
GEORGE CHAMBERLAIN	Fourth Applicant
GERHARD SAAYMAN	Fifth Applicant
CAREL SCHEEPERS	Sixth Applicant
LERISCHIA SCHEEPERS	Seventh Applicant
SHIRLEY WAGNER-WELSH	Eighth Applicant
JOHAN C WAGNER	Ninth Applicant
DEON P GOUWS	Tenth Applicant
DEAL MAKING INVESTMENTS (PTY) LTD	Eleventh Applicant
JAN BURGER PIENAAR	Twelfth Applicant
DAVID LISTER	Thirteenth Applicant
VIRGINIA LISTER	Fourteenth Applicant

and

THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
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NELSON MANDELA BAY MUNICIPALITY	Second Respondent
METROWIND (PTY) LTD	Third Respondent
RUBICEPT (PTY) LTD	Fourth Respondent
JACOBUS OLIVIER N.O.	Fifth Respondent
DEON OLIVIER N.O.	Sixth Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HOUSING AND TRADITIONAL AFFAIRS EASTERN CAPE PROVINCE	Seventh Respondent

JUDGMENT

GOOSEN, J.

- [1] The first, second, third, fifth, sixth, seventh, tenth, eleventh, twelfth and thirteenth applicants seek leave to appeal against two judgments delivered in this matter. The first judgment was delivered on 19 March 2013. It concerned a preliminary issue relating to the non-joinder of the seventh respondent. In respect of that judgment the applicants seek leave to appeal only against the costs order. The second judgment was delivered on 1 August 2013. It concerns the merits of the main application for an interim interdict.

- [2] The application for leave to appeal was launched on 23 August 2013. Although the application for leave to appeal was presented as a composite application in respect of the two judgments it comprised two applications brought as one. The application for leave to appeal against the judgment of 1 August (the main judgment) was, by my calculation, launched one day after the expiry of the period provided for in Rule 49. Nothing was made of this by the respondents and, to the extent necessary, the non-compliance is condoned. Insofar as leave to appeal against the judgment of 19 March (the preliminary judgment) is concerned, it was considerably out of time. No application for condonation was brought. When asked about this applicant's counsel suggested that the order only became appealable when the main judgment was delivered and that, in any event, the applicants seek to prosecute a single appeal.
- [3] There is, in my view, no basis to treat the application as some sort of "composite" application. The applicants require leave to appeal against each of the judgments. There is also no basis upon which the judgment of 19 March can be considered as only having become appealable on 1 August when the main judgment was delivered. Since the application in respect of the 19 March judgment is out of time condonation should have been sought. The respondents did not, however, take this point and, as I understood their position, they were prepared to address the merits of the

application and dispose of it on that basis. I shall therefore deal with the application on that basis.

[4] Before dealing with each of the applications for leave it is appropriate to record that the Superior Courts Act, 10 of 2013 was assented to on 12 August 2013 and came into operation on 23 August 2013.¹ This application was commenced on 23 August 2013. Accordingly the provisions of the Superior Courts Act appear to me to apply in respect of this application for leave to appeal.² For reasons which will become apparent hereunder, I do not consider that the provisions of the Superior Courts Act materially alter the principles to be applied in determining an application for leave. It is however appropriate to draw attention to the fact that the Superior Courts Act provides in section 17 for leave to appeal, *inter alia* , as follows:

- (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
 - (a) (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) The decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
 - (c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the issues between the parties.

¹ Proclamation Notice R36, 2013 (Government Gazette 36744, 22 August 2013).

² Section 52 of the Act provides for pending proceedings as follows:

- (1) Subject to section 27, proceedings pending in any court at the commencement of this Act, must be continued and concluded as if this Act had not been passed.
- (2) Proceedings must, for the purposes of this section, be deemed to be pending if, at the commencement of this Act, a summons had been issued but judgment had not been passed.

In this instance the proceedings under case number 224/2013 were finally concluded upon judgment having been delivered on 1 August 2013.

[5] Section 16(2)(a) is framed in terms similar to section 21A of the now repealed Supreme Court Act, 1959. It provides that:

- (2) (a) (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
- (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

[6] As already stated the applicants seek leave to appeal only against the costs order made on 19 March. Subsequent to that judgment the applicants joined the seventh respondent and the main application proceeded on that basis. The challenge to the costs order is premised upon the contention that this court erred in several respects in determining that the seventh respondent was a necessary party who had a material interest in an issue to be decided in the main application.

[7] The principles governing an application for leave to appeal where the only issue to be determined on appeal is the question of costs are well established. They are: that such leave is not lightly granted for the reason that costs is a matter of judicial discretion and that it is in the interests of justice that where the merits of an issue have been determined finality should be regarded as having been reached; that the court will not grant leave in respect of 'dead' or moot issues unless there is a matter of principle involved, the costs involved are not insubstantial and there are reasonable prospects of success on appeal (see *Tsosane & Others v*

Minister of Prisons 1982 (3) SA 1075 (C) at 1076E- 1077B; see also *W v S and Others* (2) 1998 (1) SA 499 (N) at 502, where the court held that the application of these principles was not affected by the amendment of s 20 of the now repealed Supreme Court Act, 1959).

- [8] In *POPCRU v Minister of Correctional Services (No 2)* 2008 (3) SA 129 (E) Plasket J held that regard must be had to s21A of the Supreme Court Act at the stage of deciding whether or not to grant leave to appeal. The learned judge said (at 132):

I may add that it seems to me that it is consistent with the purpose of s21A, as explained by Olivier JA in the *Premier, Mpumalanga* case, and with the common law that it has replaced, that the Court of first instance may also refuse leave to appeal because the judgment or order on appeal will have no practical effect. It has, in any event been held in this Court, by Chetty J in *Give Ziyawa Construction CC v Ndlambe Municipality and Another* that although s21A refers to an appeal, a Court hearing an application for leave to appeal would be justified in refusing leave where the grant thereof would have no practical effect.

- [9] Section 17(1) of the Superior Courts Act puts the issue beyond doubt and requires that the court considering an application for leave to appeal will only grant leave if it is of the opinion that the matter does not fall within the ambit of s16(2)(a).

- [10] In respect of the preliminary judgment the appeal would, in my view, have no practical effect. The seventh respondent was in fact joined and no purpose whatsoever could be served by a finding overturning the basis upon which it was decided that the seventh respondent was a necessary

party, other than as a basis to overturn the costs order, which was granted pursuant to the postponement of the main application at that stage.

[11] It is of course so that the question whether a judgment or order on appeal may have a practical effect may, in exceptional circumstances, be decided with reference to considerations of costs (see s16(2)(a) of the Superior Courts Act; compare also *Oudebaaskraal Edms Bpk v Jansen van Vuuren* 2001 (2) SA 806 (SCA) and *Radio Pretoria v Chairperson, Independent Communication Authority of South Africa and Another* 2005 (1) SA 47 (SCA)).

[12] In the *Oudebaaskraal* matter the exceptional circumstances consisted of the fact that costs were a material factor, the trial having lasted nine days and involving senior counsel and numerous expert witnesses and that the relevant legislation had been repealed at a stage when the appeal was enrolled for hearing.

[13] In the *Radio Pretoria* matter the court set out the circumstances applicable in *Oudebaaskraal* and went on to state (at 56F-J) the following:

In the present matter the appeal is against a judgment in motion proceedings and the appeal record consists of eight volumes. The *Oudebaaskraal* case and the present appeal are not comparable at all.

In the *Grobeldarsdalse Stadsraad* case, *supra*, Olivier JA said the following at 1143A-C:

'Die bedoeling van art 21A van die Wet op die Hooggeregshof is klaarblyklik om die drukkende werkslas van Howe van appel te verlig. Appêlle behoort slegs vir beregting neergelê te word as daar 'n werklike, praktiese uitwerking of gevolg van 'n uitspraak van die Hof van appêl sal wees. Praktisyns behoort dus geurgaans die doel van art 21A voor oë

te hou; in die besonder by 'n aansoek om na 'n hoër Hof te appelleer en by die voortsetting, voorbereiding en beredenering van die appél.'

In the *Rotek* case, *supra*, at 63H-I the following appears (at para [26]):

'The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle spelt out in the *Grobelardalse Stadsraad* case, above, namely that Courts will not make determinations that will have no practical effect.'

These statements by this Court continue to be ignored.

- [14] These remarks are apposite in the present matter. So too is the approach set out in *Logistic Technologies (Pty) Ltd v Coetzee and Others* [1998] 1 All SA 377 (W) where Cloete J said that:

'The result of the amendment to s21A, in my view, is that unless an applicant applying for leave to appeal against a costs order only can satisfy the court *a quo* that an appeal court may reasonably find that exceptional circumstances exist, leave to appeal should be refused; and in determining this question, the approach laid down by the Appellate Division in such matters remains relevant in that a failure to exercise a judicial discretion would (at least usually) constitute an exceptional circumstance – but conversely, - the mere fact that an appeal court might, or even probably would, give a different order, would not.'

- [15] The circumstances of this matter do not present as being exceptional. Certainly no grounds are advanced in the application for leave which suggest that the matter is indeed exceptional and that on such basis section 16(2)(a) would not find application.

- [16] I am not persuaded, in any event, that the grounds upon which leave to appeal the costs order of 19 March 2013 are sought establish a reasonable prospect that another court may come to a different conclusion or that there is any prospect that the discretionary costs order is likely to

be altered on appeal. It follows therefore that leave to appeal against the order of 19 March 2013, in respect of costs, must be refused.

[17] I turn now to the application for leave to appeal against the judgment of 1 August 2013. There are two aspects to be considered, namely the findings in respect of s44 of the Land Use Planning Ordinance, 1985 (hereafter LUPO) and the findings concerning the interdict pending the main review application.

[18] The grounds upon which leave is sought in respect of s44 of LUPO comprise essentially two categories. On the one hand it is submitted that this court erred in interpreting s44 of LUPO to exclude a right of appeal against the granting of a consent use application. On the other it is submitted that the court erred in finding that a consent use does not constitute a departure as defined by LUPO.

[19] In respect of the latter set of grounds there is, in my view, no reasonable prospect that another court will come to a different conclusion. It was submitted that the court erred in failing to find that the 'administrative action' of the Mayor or second respondent remains valid until set aside. It is indeed so that the judgment does not address this aspect. That is so because it is irrelevant to the basis upon which the applicants sought an interdict. It was not the applicants' case that the notification either

established a right of appeal or precluded the second respondent from denying the existence of such right. The judgment records at paragraph 7 that it was conceded that the fact that the second respondent had notified the applicants of a right of appeal did not accord them such right. No issue was taken with this aspect of the judgment. It is difficult to conceive on what basis it is therefore suggested that this can establish some reasonable prospect of success on appeal.

- [20] Insofar as the interpretation of what constitutes a departure is concerned, the judgment sets out the provisions of LUPO in some detail. I need not repeat those here. It suffices to say that the findings in the judgment are based upon the clear and unequivocal language of LUPO and I do not consider that another court will come to a different exposition of those provisions. I may mention that some of the grounds advanced in this regard appear to be based on a wholly incorrect understanding of the terms of the judgment and the provisions of LUPO set out therein. It is for example contended that I erred in finding that a departure as defined concerns land uses for which no provision is made in the scheme regulations. Quite what the error may be is unclear when regard is had to s15(1)(a)(ii) of LUPO which provides for the utilisation of land “..for a purpose for which no provision has been made in the said regulations in a particular zone”.

[21] The primary basis upon which leave is sought is founded upon this court's interpretation of s44 of LUPO. It is of course so that the nature and extent of the appeal for which s44 makes provision has not, as far as I am aware, enjoyed consideration other than in this matter. That, of course, does not mean that it is a matter which warrants being considered on appeal. It must be established that there are reasonable prospects of success on appeal.

[22] In advancing the argument there are indeed such prospects, Mr van der Linde referred to a recent judgement by Davis J in *Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others; City of Cape Town v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others* (6227/2013; 23016/2013) [2013] ZAWCHC 112 (14 August 2013). In that matter Davis J was concerned with a challenge to the constitutionality of s44 of LUPO. The applicants sought an order declaring s44 to be invalid 'insofar as it allowed [the Minister] to finally determine municipal planning applications falling within the functional competence of [the City] as a local government'. Mr van der Linde conceded that the issue before Davis J had no bearing upon the matters considered in the judgment in this matter. He pointed out that his reliance on the *Habitat* judgment was

confined to a passage which appears to recognise that an appeal against the refusal of a special consent application does lie in terms of s44 of LUPO.

[23] This passage reads as follows:

‘At the meeting on the 13th of April 2011, SPELUM refused to grant the requested special consent. This decision triggered an appeal by the trust against this decision, in terms of section 44 of LUPO, to the Western Cape Provincial Government, represented, as it was, by the first respondent.’

[24] A reading of the judgment makes it clear that the court in that matter was not called upon to and did not consider the question whether s44 of LUPO confers upon an applicant for special consent a right of appeal. That was not in issue. It appears that the parties accepted that this is so.

[25] The passage upon which Mr van der Linde relied does not constitute a judicial pronouncement upon the right of appeal. It is even doubtful that it constitutes anything more than a recording of relevant facts as they pertain to that matter. Accordingly the judgment in the *Habitat* matter is not authority for the proposition that such right of appeal exists. It should be mentioned here that it is in any event apparent from the judgment that although LUPO also applies in the Western Cape, it is by no means certain that all of the provisions of LUPO are identical to those that find application in this province. That is so because, as Davis J records in the judgment, the Western Cape Parliament has amended section 44 of

LUPO most recently in terms of the Western Cape LUPO Second Amendment Act 3 of 2011. It is also apparent from the judgment that the particular 'special consent' dealt with in that matter is regulated by the scheme regulations applicable to the City of Cape Town. Whether those regulations provide for a right of appeal is unknown.

[26] In considering the several grounds upon which the applicants seek leave to appeal I am unable to conclude that there is any reasonable prospect of success on appeal. Accordingly in respect of this aspect of the judgment leave to appeal must be refused.

[27] I turn now to the grounds advanced in respect of the establishment of the requisites for an interdict pending the judicial review application.

[28] Here too the applicants appear to have misconstrued the judgment. The essential basis upon which the interdict was refused was that the applicants had failed to establish a balance of convenience in their favour. I need not reiterate the basis upon which that finding was made. It suffices to state that the evidence presented by the respondents at the stage when the interdict application was considered established an overwhelming balance against the granting of the interdict. In my opinion another court will not come to different conclusion. A great deal of the construction work had already been completed at the time that the application was heard. A

very considerable amount of money had already been expended in the development. These aspects were not addressed by the applicants in any significant manner, if at all. Nor was any substantive basis advanced in this application to suggest that the judgment was founded upon error or misdirection.

[29] There is of course the further aspect which concerns the practical effect of the order sought on appeal.

[30] The interdict was sought pending the final determination of the review application and, if successful, any appeals which may flow from the judgment. The review application was very recently fully argued before me and judgment in that matter was reserved. Mr van der Linde accepted that I cannot be expected to disabuse my mind of the prospects of success in the review application. To the contrary, as I understood it, it was suggested that I must indeed have regard to such prospects.

[31] Mr Ford argued that no basis is laid in the application for leave to appeal to justify granting such leave. He further submitted that the order sought on appeal could have no practical effect whatsoever since a judgment against the applicants in the review would render the appeal of mere academic significance. I agree. He further argued that in any event the facts in the main review application disclose that the wind farm facility will

be commercially operational by February 2014. Thus, even if leave were to be granted (and it was assumed in favour of the applicants that the review would be successful) it is doubtful that any appeal would be heard at a stage before the wind farm facility was fully operational. This would have the effect of rendering the entire appeal exercise moot. I agree.

[32] It follows from what is set out above that I do not consider that the applicants enjoy a reasonable prospect of success on appeal. I am also of the opinion that the matter, at least in respect of the costs order of 19 March and the refusal of the interdict pending the review on 1 August 2013, falls within the ambit of section 16 (2) (a) of the Superior Courts Act and that, on this basis too, leave to appeal must be refused.

[33] I make the following order:

The application for leave to appeal is refused with costs, such costs, in the case of the Third and Fourth Respondents, to include the costs of two counsel.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicants
Mr. H. J. van der Linde SC
Instructed by Wilke Weiss van Rooyen

For the Second Respondent
Mr. R. G. Buchanan SC
Instructed by Gray Moodliar Attorneys

For the Third and Fourth Respondents
Mr. E.A.S. Ford SC assisted by Mr. J. G. Richards
Instructed by Rushmere Noach Incorporated