

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

REPORTABLE

Case no: 20168/12

In the matter between:

HERSCHEL ZETLER N.O.

First Applicant

DENNIS LOUIS ZETLER N.O.

Second Applicant

JEFFREY MARK ZETLER N.O.

Third Applicant

JULIAN MARK GRUFT N.O.

Fourth Applicant

as trustees of the **SAMUEL ZETLER TRUST**

and

MINISTER OF TRANSPORT & PUBLIC WORKS,

PROVINCIAL GOVERNMENT OF THE

WESTERN CAPE

First Respondent

EXECUTIVE MANAGER: ROAD & TRANSPORT

MANAGEMENT, PROVINCIAL GOVERNMENT

OF THE WESTERN CAPE

Second Respondent

MUNICIPAL MANAGER: WINELANDS

Third Respondent

THE MINISTER OF LAW AND ORDER

Fourth Respondent

AND

Case no: 19622/12

In the matter between:

THE MINISTER OF TRANSPORT AND PUBLIC

WORKS, PROVINCIAL GOVERNMENT OF

THE WESTERN CAPE

Applicant

and

HERSCHEL ZETLER N.O.

First Respondent

DENNIS LOUIS ZETLER N.O.

Second Respondent

JEFFREY MARK ZETLER N.O.

Third Respondent

JULIAN MARK GRUFT N.O.

Fourth Respondent

Heard: 20 February 2013

JUDGMENT
DELIVERED: 8 MARCH 2013

SAVAGE AJ:

Introduction

[1] The Samuel Zetler Trust is the owner of the farm Mooiberge, situated adjacent to the R44 Main Road between Stellenbosch and Somerset West in the Western Cape. The Trust conducts farming operations and a farm stall with wine sales and a coffee shop from the farm. There exist two access points from Main Road 27 (known as the R44) to the farm stall and a third access point from Annandale Road, perpendicular to the R44. It is the left traffic only access point 125 metres from the intersection with Annandale Road from the direction of Stellenbosch that is the subject of dispute between the parties.

[2] On 8 April 2011 and 11 April 2011 officials of the respondents closed the disputed access point off the R44 and after the applicants launched an urgent spoliation application, access was restored. Correspondence ensued between the parties and on 11 June 2012 Mr Malcolm Watters, the Chief Engineer for Land Transport in the Western Cape Department of Transport and Public Works signed an order of closure ("the order") on behalf of the second respondent in terms of the provisions of section 18(1)(a) of the Roads Ordinance, 19 of 1976 ("the Ordinance") permanently closing the disputed access with immediate effect *'in the interests of road safety'*.

[3] The applicants appealed against the second respondent's order to the Premier of the Western Cape in terms of section 61(1)(a) of the Ordinance as a

result of their commercial interest in retaining this access to their farm stall. The Premier did not consider the appeal on the basis that it was not an appeal against an order made by a divisional or municipal council as provided for in section 61(1) of the Ordinance. The applicants do not take issue with this decision of the Premier.

[4] The applicants under case number 20168/12 seek the review and setting aside of the order of the second respondent. The respondents under case number 19622/12 seek enforcement of the same order. By agreement between the parties, the applications were heard together on the basis that if the applicants succeeded in their application to review and set aside the order in case number 20168/12, the relief sought by the first respondent (as applicant) in case number 19622/12 would consequently fail and *vice versa*.

[5] The applicants in their papers have raised a number of grounds of review, being the lack of authority, prescription, procedural unfairness, the unreasonableness of the decision and the existence of bias. I deal first with the lack of authority attack.

Lack of authority

[6] The order was made in terms of the provisions of section 18(1)(a) of the Roads Ordinance 19 of 1976 which provides that -

'Any road authority may by written order served on the owner of land abutting on any public road or public path of which such road authority is the road

authority and in respect of any existing access to or exit from such land by or for a vehicle from or to such public road or public path:

- (i) require such owner to deviate such access or exit, or*
- (ii) for any reason restrict, or in the interests of road safety, close such access or exit in such manner, to such extent and either permanently or for such period as may be specified in such notice.'*

[7] The applicants' take issue with the authority of the second respondent Mr Watters to issue the order in that the power to make the order had not been delegated to him in writing as required by section 65(1) of the Ordinance. This challenge to the second respondent's authority was raised in the applicants' supplementary affidavit in which it was stated that *'the source of his alleged authority to have issued the closure order'* had not been disclosed and such authority was placed in dispute.

[8] In his answering affidavit Mr Watters replied that *'the powers contained in section 18(1)(a) of the Roads Ordinance have been duly delegated by First Respondent to Second Respondent who has accordingly been duly authorised to deal with the closure of the illegal access as he did'*. A confirmatory affidavit signed by the first respondent, Mr Robin Carlisle, confirmed that –

'...in respect of the illegal access to the farm stall of the Applicants off R44, I have duly authorised the Second Respondent to exercise the powers in terms of section 18(1)(a)(ii) to close the access in the interests of road safety... I have in general been kept informed of the developments in the matter and copied in

on some of the correspondence with the Applicants and their attorneys. To the extent necessary, I have approved of the steps taken by the Second Respondent with regard to the matter and am satisfied that it was necessary to close the illegal access in the interests of road safety’.

[9] The second respondent, Mr Johannes Mouton, stated in his confirmatory affidavit that the order to close the access *‘had been duly issued on 11 June 2012 in terms of section 18(1)(a) of the Roads Ordinance in the interests of road safety pursuant to the authorisation of the First Respondent’.*

[10] In reply, the applicants persisted with their authority challenge stating that –

‘The Ordinance specifically provides for the written delegation of the Road Authority’s powers. The assignment of powers and functions relating to transport in general does not ... include a delegation of the Premier’s specific powers under the Ordinance. No such delegation has been proven. The applicants accordingly persist in their denial of the respondents’ authority to issue the closure order’.

[11] The ‘road authority’ for purposes of the Ordinance, previously the Administrator, is now the Premier of the Western Cape. On 8 May 2009, the Premier acting in accordance with section 132(2) of the Constitution and section 42(2) of the Constitution of the Western Cape Act 1 of 1998 appointed the first respondent as a member of the provincial cabinet and assigned him the powers and functions relating to the provincial portfolio of Transport and Public Works.

[12] The Constitution distinguishes between an assignment of powers and functions to an executive authority and the transfer of such powers and functions between Executive Council members. This is apparent from a sections 132(2) and section 137. Section 132(2) provides that *'(t)he Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them'*, while section 137 permits the Premier by proclamation to transfer powers between members of the Executive Council. Consequently, the assignment by the Premier of the powers and functions of the Transport and Public Works portfolio into which the first respondent had been appointed was lawfully effected and did not require proclamation. Given that the Roads Ordinance constitutes legislation relating to the portfolio of Transport and Public Works, it follows that the powers and functions of the Premier contained in such Ordinance have accordingly been lawfully assigned to the first respondent.

[13] An assignment or transfer of powers is distinct from a delegation of powers in that an assignment constitutes a full transfer of authority, the duty to exercise such authority and the responsibility for such exercise from one public authority to another. This is contrasted to a delegation of powers in terms of which one public authority authorises another to act in its stead. (De Ville, 2003 at 146). Section 65(1) of the Roads Ordinance provides that –

'A road authority may, either generally or specially, in writing and, in the case of a road authority which is a council, by special resolution, delegate any power or duty conferred or imposed on such road authority

by or under this ordinance to any employee, agent or contractor of such road authority'.

[14] Consequently, the first respondent having been assigned the powers of the Premier as road authority may delegate such powers in accordance with the provisions of section 65(1). Such delegation is also constitutionally permissible. Section 238 of the Constitution permits an executive organ of state in any sphere of government to -

'(a) delegate any power or function that is to be exercised and performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or

(b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.'

[15] An 'organ of state' is defined in section 239 of the Constitution as-

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) *exercising a public power or performing a public function in terms of any legislation,*

but does not include a court or a judicial officer...

[16] The starting point of any enquiry is therefore whether or not the exercise of delegated powers and functions is *ultra vires* the empowering statute. (Corbett CJ in *Catholic Bishops Publishing Co v State President and another* 1990 (1) SA 849 (A) at 861D-E). As much is confirmed by section 238 of the Constitution that a delegation must be consistent with the legislation in terms of which the power is exercised or the function is performed.

[17] Innes CJ stated in *Schierhout v Minister of Justice* 1926 AD 99 at 109 that '(i)t is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect'. For the actions of an administrator to be valid, such administrator must be properly appointed, properly qualified and properly constituted when taking the administrative action (De Ville at 137-9). Van Dijkhorst J in *Lucky Horseshoe (Pty) Ltd v Minister of Mineral and Energy Affairs* 1992 (3) SA 838 (A) at 848I – 849B put it this way –

'Like a dog on a leash its free and wilful movement is constrained by the dominant legislator by means of the enabling enactment. It can sniff only at trees which the length of the leash permits. The origin of his power lies in, and the limitations thereon are to be determined from, the words used in the empowering legislation.'

[18] Where words are clear and unambiguous their grammatical construction must be placed upon them and they must be given their ordinary effect (*Venter v R* 1907 TS 910 at 913). The use of the word 'may' in section 65(1) in relation to 'delegate' grants to the road authority a clear and unambiguous discretion to delegate any power or duty conferred or imposed by the Ordinance upon the road authority to any employee, agent or contractor of such road authority. Where the road authority elects to delegate any such power or duty, generally or specifically, the Ordinance clearly and unambiguously requires that such delegation be in writing. Where no such written delegation is made, there is no delegation of the power or duty and the consequence thereof is that the purported delegatee in performing any such power or duty acts *ultra vires* the statute and the action taken is unlawful and invalid. The factual enquiry as to whether there has been a delegation of a power or duty in terms of the Ordinance is accordingly central to a determination as to the legality and validity of the administrative act performed.

[19] In *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A) at 646 D-E Van Winsen AJA stated that:

"The enquiry, I suggest, is not so much whether there has been 'exact', 'adequate' or 'substantial' compliance with this injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that, even though the position as it is is not identical with what it

ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance.”

[20] In *Kasiyahuru v Minister of Home Affairs and others* 1999 (1) SA 643 (W) at 651D-E Hoffman AJ held that the fact of a valid delegation must clearly and satisfactorily be established and an express power of delegation must be interpreted restrictively. It follows that where there is a challenge to the authority of an administrator to perform any powers or functions, there rests upon the administrator the duty to make out a proper defence and to rebut the challenge through proving that the powers and functions had been lawfully delegated. When written delegation is required and no proof of written delegation is put up in such circumstances, the only inference to be drawn on the facts is that no written delegation of authority exists. For this reason, I do not agree with Mr Potgieter that, in the absence of a proper defence, the matter stands to be determined on the basis of the test set out in *Plascon-Evans v Van Riebeeck Paints* 1984(3) SA 623 (A) at 643E-635D. The test in *Plascon-Evans* is designed to resolve factual disputes. In the present case, the respondents have simply not alleged or proved the existence of a written delegation.

[21] Where there has been no written delegation, the position is akin to that of a functionary who has not been appointed in accordance with the provisions of a statute. In *Lupacchini v Minister of Safety and Security* 2010(6) SA 457 (SCA) at 468F-H Nugent JA held that proceedings instituted in the name of a trustee who had not been appointed by the Master as such in terms of s 6(1) of

the Trust Property Control Act 57 of 1988 were a nullity. Goldblatt J in *Simplex (Pty) Ltd v Van der Merwe and Others* NNO1996 (1) SA 111 (W) at 112 J-113C stated that –

‘S6(1) is not purely for the benefit of the beneficiaries of the trust but in the public interest to provide proper written proof to outsiders of incumbency of the office of trustee (Honore’s South African Law of Trust 4th ed 179). That whole scheme of the act is to provide a manner in which the master can supervise trustees in the proper administration of trust properly and s6(1) is essential to such purpose.’

[22] The respondents rely on Mr Watters’ statement that the powers had been *‘duly delegated’* by the first respondent to the second respondent *‘who has accordingly been duly authorised to deal with the closure of the illegal access’*. There is further reliance on the first respondent’s confirmation of this authorisation, his approval *‘of the steps taken by the Second Respondent’* and confirmation by the second respondent of this authorisation.

[23] Authorisation cannot be conflated with the requirement of written delegation. The legal distinction between the two lies in the fact that a delegated power is one required to be exercised by the delegee in accordance with the terms of the empowering statute. Where delegation is permissible under express terms, as are provided in section 65(1) of the Ordinance, the authorisation of an administrative act taken by a subordinate does not equate to a delegation of the function to such subordinate, nor does it validate the action taken in the absence of the written delegation. This is because the Ordinance,

and indeed the Constitution, require the delegation to be made in a manner consistent with the applicable legislation. Consequently, the purported authorisation by the first respondent of the order made by the second respondent does not amount to the required proof of written delegation by the first respondent of the power to the second respondent to issue the order, nor does any such authorisation cure the defect that is the absence of a written delegation.

[24] Administrative action in terms of section 33 of the Constitution must be lawful, reasonable and procedurally fair. The requirement of written delegation is not purely for the benefit of the functionaries concerned but it is in the public interest to provide proper written proof to outsiders and members of the public of the fact that powers and duties have been lawfully delegated, to whom and the extent and limits of such delegation. Had the statute intended that delegation could be undertaken in any manner chosen, it would have remained silent on the manner in which delegation was to be effected. Consequently, I find that written delegation was a requirement for the lawful exercise of the delegated powers and duties and that the Ordinance in this regard must be interpreted restrictively. The fact that Mr Watters stated that the powers were '*duly delegated*' to the second respondent takes the matter no further given that neither the first nor second respondent either attest to or provide any proof of the existence of the required written delegation.

[25] For the reasons stated above, I find that in the absence of proof of a written delegation of the power to issue the order of closure, the respondents have not proved that the action taken by the second respondent was lawful or

valid. Consequently, the review must succeed and it follows that the order made by the second respondent must be set aside. Given my conclusions with regards the unlawfulness of the order made, it is not necessary for me to determine the further review grounds raised by the applicants.

[26] I am satisfied that costs should follow the result and that, given the complexity of the issues raised, the costs of two counsel are justified.

Order

[27] In the result, I make the following order:

1. The application under case number 20168/12 to review and set aside the order of closure in terms of section 18(1)(a) of the Roads Ordinance 19 of 1976 of access to Farm 537/15, Mooiberge, off Main Road 27, Stellenbosch, issued by the second respondent on 11 June 2012, is granted and the order is set aside with costs, including the costs of two counsel.
2. The application under case number 19622/12 is dismissed with costs, including the costs of two counsel.

KM SAVAGE
ACTING JUDGE OF THE HIGH
COURT

Appearances:

For applicants: Advs A J Smit SC & S van Zyl instructed by Theron & Partners,
Stellenbosch

For respondents: Adv D Potgieter SC instructed by: The State Attorney, Cape
Town