THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Magaliesburg Protection Association v MEC of Agriculture & others

(563/2012) [2013] ZASCA 80 (30 May 2013)

The Supreme Court of Appeal (SCA) today dismissed an appeal against a judgment of the North West High Court, Mafikeng, which had refused with costs an application by the appellant, the Magaliesberg Protection Association (MPA), to review and set aside a decision of the first respondent, the North West MEC of Agriculture, Conservation, Environment and Rural Development. The decision in question was one dismissing an internal appeal against an earlier decision by the second respondent, the Chief Director: Environmental Compliance of that same Department, to grant ex post facto environmental authorisation to the third respondent, Kgaswane Country Lodge (Pty) Ltd, to construct a hotel and conference centre. Among other relief, the MPA sought the demolition of that development and the rehabilitation of the affected environment. The core dispute is therefore one which squares the preservation of the environment against development, and the effects thereof.

Kgaswane had begun construction of a 47-room Country Lodge within what is a protected natural environment in terms of the National Environmental Management Protected Areas Act 57 of 2003, which development is now complete. The area in question is the well-known Magaliesburg mountain range. At the time it began the construction, Kgaswane had not sought environmental authorisation, as required by, inter alia, the National Environmental Management Act 107 of 1998 (the NEMA).

Upon discovering the development in 2008, the MPA, a voluntary association aimed at encouraging environmental conservation and protection throughout the Magaliesburg mountain range, and which has worked closely with government in its conservation efforts over the years, contacted the provincial department to express its concerns. Among fears for the impact of the development on the ecologically sensitive environment, the MPA was also

distressed that its construction, absent the necessary environmental authorisation, would lead to a spate of similar such developments.

Kgaswane subsequently applied for ex post facto environmental authorisation for its development pursuant to s 24G of the NEMA, which was granted by the Chief Director in March 2009. The MPA then took that decision on appeal to the MEC, which appeal was dismissed in February 2010.

Aggrieved, the MPA then brought an application to the High Court seeking a review of both the initial decision of the Chief Director, as well as that of the MEC on appeal. The grounds of review included that the public participation process accompanying the Chief Director's decision had been flawed; that the environmental report submitted alongside Kgaswane's application for authorisation had been inaccurate and inadequate; and that both administrators had failed to have regard to a relevant departmental policy document, namely the Environmental Management Framework (EMF), which had been finalised over a year prior to the Chief Director's decision and which seeks to assists administrators in taking decisions which implicate ecologically sensitive areas.

The High Court refused the MPA's concomitant application for an interdict to prevent further construction work being done to the development pending the outcome of its review application. In later refusing the application for review, the Court held, inter alia, that neither administrator had erred in failing to consider the EMF as it had only been published subsequent to the Chief Director's decision and was thus not in force at that time. Further, although the EMF had come into existence by the time the MEC heard the internal appeal, it was not incumbent on the MEC to consider it because it was not the law at the time that the primary decision was made. The Court made a costs order against the MPA on the basis of its persistence with the application despite the court's refusal to grant the interdict sought, and despite an acknowledgement of the difficulties inherent in its application for demolition of the development.

The SCA, in noting the significance of the constitutional right to a protected environment and the principle of sustainable development inherent therein, recognised that the evidence tendered nevertheless indicated that the development posed no immediate further threat to flora, fauna or the general ecology of the surrounding environment that could be classified for conservation priority.

Regarding the issue of the administrator's failure to take the EMF into account, the SCA acknowledged that an applicant must be apprised of any policy considerations which a decision-maker will consider in adjudicating their application, but nonetheless held that the effect of that document on the administrators' decision had not been sufficiently proved. In particular, the MPA had not shown that the EMF – or, for that matter, any other policy documents which were alleged to be relevant to the decision to grant environmental authorisation – added any further factors for consideration over and above those outlined in the applicable legislative framework, which framework the administrators had been shown to have considered. Consequently, the EMF and similar documents were inconsequential and thus this ground for review was dismissed.

Moreover, with regard to the particular relief sought by the MPA – that of the demolition of the development – the SCA held that the MPA had failed to meet the onus resting upon it to prove the grounds therefor. Essentially, as the Court held,

‘The MPA failed to show, at the most basic level, that it was entitled the relief sought.’

Furthermore, no evidence had been tendered on the effect of such demolition on the environment. Absent such evidence this Court is not well-placed to determine whether the remedy sought effectively achieves the aim of sustainable development and environmental preservation. The speculated probabilities were such that the environment might well be further damaged.

In concluding that the MPA had failed to establish any grounds on which the decision of either administrator fell to be reviewed, the SCA sought to amend the costs order of the High Court. In particular, this court acknowledged the laudable goals of parties such as the MPA, and therefore invoked s32(2) of the NEMA, which

‘[G]ives the court a discretion not to award costs against a person or group of persons which fail to secure the relief sought in respect of any breach or threatened breach of any of the provisions of NEMA or of any provisions of a specific environmental act, or any other statutory provision concerned with the protection of the environment, if the court is of the opinion that a person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and it made due efforts to use other means reasonably available for obtaining the relief sought.’

Consequently, the parties were directed to bear their own costs. The High Court’s order was consequentially also amended. While acknowledging that Kgaswane might be aggrieved at having to bear its own costs, the SCA concluded that

‘[I]t should not be forgotten that the malfeasance that led to all the trouble and the subsequent costly litigation was of its own making.’