IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN
REPORTABLE

Case no: 6580/2012
(and Case no: 840/2012)

In the matter between:

ARTHUR EDWIN CAPENDALE	First Applicant
THE FIONA TRUST	Second Applicant
and	
MUNICIPALITY OF SALDANHA BAY	First Respondent
12 MAIN STREET, LANGEBAAN (PTY) LTD	Second Respondent
ABSA BANK LIMITED	Third Respondent

and

Case no: 840/2012

In the application of:

ARTHUR EDWIN CAPENDALE	First Applicant
MEL RICHTER	Second Applicant
and	
12 MAIN ST, LANGEBAAN (PTY) LTD	First Respondent
MUNICIPALITY OF SALDANHA BAY	Second Respondent
ABSA BANK LIMITED	Third Respondent

JUDGMENT : APPLICATION FOR LEAVE TO APPEAL
WEDNESDAY 29 JANUARY 2014

GAMBLE, J:

[1] On 30 October 2013 this Court granted the relief ultimately sought by the Applicants ("Capendale") against the Municipality of Saldanha arising out of the building works being conducted on the premises of 12 Main Street Langebaan (Pty) Ltd ("Van der Merwe").

[2] On 20 November 2013 Van der Merwe lodged an application for leave to appeal to the Supreme Court of Appeal against the order in a document containing some 34 paragraphs and running to 13 pages.

[3] The application for leave to appeal was heard on 12 December 2013, the day before the end of the last term of 2013. At the hearing Van der Merwe's counsel indicated that he was not familiar with the provisions of sec 17 of the Superior Courts Act 10 of 2013 ("the Act") and when questioned by the Court in regard to the import thereof, requested an opportunity to file a written note in response to the Court's query. Judgment on the application for leave to appeal was accordingly reserved.

[4] On 13 December 2013 counsel for Van der Merwe filed a note regarding the said section and counsel for Capendale replied thereto on 18 December 2013.

The Court is indebted to counsel for these additional submissions.

[5] As both counsel point out in their respective notes, the provisions of sec 17, contained as they are in a statute which came into operation fairly recently (23 August 2013), have not yet been dealt with in any reported cases.

[6] Section 17(1) of the Act reads as follows:

> 17. **Leave to Appeal**
>
> *"(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 sec 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 real issues between the parties."

[7] Section 16 of the Act deals with "A*ppeals Generally*" and sec 16(2)(a) is to the following effect:

"16(2)(a)(i) When at the hearing of an appeal the issues are of such a nature that the appeal 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."

[8] It is common cause that sections 17(1)(a)(i) and (ii) are to be read disjunctively in light of the word *"or"* at the end of sub-para (i) and after the semi-colon therein. The effect of this is that, even where there are not reasonable prospects of success on appeal, leave may be granted in circumstances where there is another "*compelling reason*" (such as conflicting judgments) on the point in issue.

[9] Save for the aforementioned disjuncture, in my view, sec 17(1) is to be interpreted conjunctively and in an incremental fashion with the relevant factors to be

considered one after the other.

[10] Accordingly, reasonable prospects of success alone are not sufficient to warrant the referral of the matter to an appellate court. The trial court must then turn to sec 16(2)(a) of the Act and enquire whether the outcome of the proposed appeal falls within the ambit of that section. If it does not, the trial court must then turn to sec 17(1)(c).

[11] A case falling within the ambit of sec 16(2)(a) will have the result that, even though there may be reasonable prospects of success, an appeal will be denied if the issue is moot: the decision sought on appeal having "*no practical effect or result".* In coming to this decision the trial court will only have regard to the question of costs in exceptional circumstances in evaluating the question of mootness.

[12] If the outcome of the order sought on appeal is, however, still a live issue, the trial court is enjoined by sec 17(1)(c) to then consider whether the proposed appeal will dispose of all the issues in the case. If it is found that this result will not ensue, the trial court may nevertheless grant leave if a positive decision on appeal would otherwise result in "*a just and prompt resolution of the real issues*".

[13] Applying the Natal Pension Fund case [1], a court will apply a purposive approach to the interpretation of this section. Adopting such an approach, one is therefore driven to conclude that the Legislature intended that the function of courts

[1] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

of appeal was to be "*results-driven*" and that the trial court was required to carefully consider whether a hearing on appeal would ultimately lead to a disposal of the real issues between the parties.

[14] It will be seen, too, that the Legislature intended that the function of the Supreme Court of Appeal was to be limited to cases genuinely warranting the attention of that Court, and then only in circumstances in which the decision sought to be appealed against "*involves a question of law of importance*", either because it involved a question of law of general importance, or because there are differences of opinion which require to be resolved, or the administration of justice requires a decision by that Court (See sec 17(6)(a)).

[15] The filtering process of careful evaluation as to whether the matter should enjoy Supreme Court of Appeal consideration is emphasised, for example, in sec 16(2)(b) of the Act which empowers that court to intervene *mero motu* in circumstances where leave has been granted by the trial court, and where the Judges of the Supreme Court of Appeal consider that the matter is effectively moot, and that the appeal should be dismissed without more.

[16] Considering these provisions of the Act in their general context, it seems to me that it is no longer "*business as usual*" (to adopt a phrase employed by the Supreme Court of Appeal in a completely different context [2]) when it comes to the intended prosecution of an appeal. A matter must meet the strict criteria laid down by

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[2] S v Malgas 2001 (1) SACR 469 (SCA) at 476g

the Legislature before it will be referred to the Supreme Court of Appeal, one of the most important considerations undoubtedly being the practice of pursuing an appeal for essentially dilatory purposes. The Act is a bold step by the Legislature to limit unnecessarily protracted litigation, a state of affairs which would tend to bring the administration of justice into disrepute in the eyes of the general public.

[17] Turning then to the facts of the present case, I am not persuaded that Van der Merwe has reasonable prospects of success in persuading the Supreme Court of Appeal (being the Court to which he wishes his appeal should be referred) that the orders made reviewing the Municipality's decisions in paras 2 and 3 of this Court's order of 30 October 2013 were wrong. I accordingly stand by the reasons given in support of that judgment.

[18] But, even if it were to be assumed that Van der Merwe in fact had reasonable prospects in that regard, in my view a decision on appeal overruling either (or both) of paras 2 and 3 of this Court's order, is not likely to bring an end to the litigation between these neighbours which has been on-going since 2010: It will not be "*the end of the affair*", as it were.

[19] Success on appeal for Van der Merwe will not *per se* permit him to resume the building operations which were halted in terms of the interim interdict granted by Davis, J in January 2012. Having subsequently agreed to the setting aside of the November 2011 building plans, Van der Merwe must now instruct his architect to go back to the drawing board and prepare new plans which must comply

with the requirements of the National Building Regulations and Building Standards Act, 103 of 1977 ("the NBRA").

[20] The provisions of the NBRA, in turn, will have to be considered in the context of the current Zoning Scheme Regulations applicable to Langebaan i.e. those amended in 2000. That zoning scheme currently requires a land surveyor's certificate which attests to the "*highest point of natural ground level*", from which the proposed height of the new structure is to be measured. The Pinker certificate which Van der Merwe evidently hoped could be relied upon if he was successful in persuading the Court of Appeal to overrule para 3 of this Court's order was issued in 1998 and relies upon "*die hoogste punt van die oorspronklike grondlyn op of binne die boulyne"* : the document was issued before the commencement of the current zoning scheme with its differing provisions relating to the measurement of the height of buildings in Langebaan and, further, refers to the original ground level rather than the natural ground level.

[21] I agree with counsel for Capendale that the only way in which the matter could have been resolved permitting the Municipality to accept the Pinker certificate in its evaluation of the new set of plans, was if Van der Merwe had successfully sought mandatory relief by way of a counter-application to determine the permissible height restriction pertaining to the property, or, to direct the Municipality to consider the Redelinghuys affidavit and the Pinker height certificate in any future planning related decisions.

[22] At the commencement of the hearing Van der Merwe's counsel belatedly indicated his client's intention to bring a counter-application for declaratory relief seeking an order determining the permissible height restriction on the property. However, this counter-application never saw the light of day.

[23] In the absence of any such interdictory relief which effectively compels the Municipality to accept the previous height determination, the Municipality will henceforth have to consider all plans submitted to it in terms of the current zoning scheme, the NBRA and its regulations.

[24] In the additional note submitted by counsel for Van der Merwe it is conceded that without being able to rely on the Pinker certificate and the Redelinghuys affidavit "*there is no real prospect of plans that provide for a third storey to be added onto the existing structure being approved, no matter how small the footprint".* That concession by counsel demonstrates really what is at the heart of this case: can Van der Merwe muster sufficient evidence to persuade the Municipality that the ground level which is visible on site is not the "*natural ground level".?*

[25] As the various affidavits filed in support of each party's case demonstrate, there is a plethora of expert evidence either way to justify each party's view. The expert evidence which supports the existence of a dune on the property before Van der Merwe acquired it together with the evidence which will enable Van der Merwe's experts to advance a case for a higher natural ground level, is still available to him and can be placed before the Municipality when the time therefor

arises.

[26] In my view therefore a decision on appeal setting aside the order made in terms of para 3 will not dispose of all the issues in the case and will not lead to a just and prompt resolution of the real issues between the parties.

[27] Similarly, success on appeal in relation to paragraph 2 of the Court's order would only permit reconstruction of the storeroom/sunroom which was erected in terms of the 2000 plans. That structure was voluntarily demolished by Van der Merwe in 2010 at his own risk. He manifestly does not wish to erect a similar structure on the property and so success on appeal in relation to that part of the order will similarly not meet the requirements of sec 17(1)(c) of the Act.

[28] In the circumstances the application for leave to appeal is dismissed with costs.

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GAMBLE, J