

SOUTH AFRICA / JUDGMENT

SA Heritage Resources Agency and Others v Mandela and Others (15867/2022) [2024] ZAGPPHC 278 (20 March 2024)

[2024] ZAGPPHC 278

COURT

North Gauteng High Court, Pretoria

BEFORE

Baqwa, Ngalwana, Ramawele

CASE / FILE NUMBER

15867/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 15867/2022

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

In the matter between:

S A HERITAGE RESOURCES AGENCY

First Applicant

ROBBEN ISLAND MUSEUM

Second Applicant

DEPT OF SPORTS, ARTS & CULTURE

Third Applicant

and

DR MAKAZIWE MANDELA

First Respondent

GUERNSEY'S AUCTION HOUSE

Second Respondent

ARLAN ETTINGER

Third Respondent

CHRISTO BRAND

Fourth Respondent

DAVID PARR

Fifth Respondent

JUDGMENT:

APPLICATION FOR LEAVE TO APPEAL

CORAM BAQWA J et NGALWANA AJ et RAMAWELE

[1] It is axiomatic that the applicable standard in applications for leave to appeal has in the past been whether there is a reasonable possibility that another Court may or could come to a different conclusion than that reached by the Court of first instance.

[2] Now the position is governed by the Superior Courts Act 10 of 2013 which says leave to appeal may be granted where:

2.1. the appeal would have a reasonable prospect of success[1] or there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;[2]

2.2. the decision sought will have a practical effect or result;[3] and

2.3. the appeal would lead to a just and prompt resolution of the real issues between the parties even where the decision sought to be appealed does not dispose of all the issues in the case[4].

[3] In my view the application before us meets none of these requirements. There are no prospects of success. Even though the main judgment characterises the question in issue as being “of wider significance and interest to the country as a whole”[5], that consideration on its own is not enough to found a compelling reason for burdening the Supreme Court of Appeal with an appeal that collapses in the pleadings filed in the court of first instance.[6] The merits of the case, anchored in the pleadings that served before us, are still decisive. This is so for several reasons:

3.1 First, the SCA will be bound by the record of pleadings that served before us. As explained in the main judgment, even the first applicant[7] conceded in its supplementary founding affidavit that the original founding papers “do not set out fully all the facts necessary to enable the Court to make its determination in this matter... [n]or do they fully set out how these objects form part of the rich heritage of this country and its fight for democracy”[8]. In other words, the applicants have conceded that their founding papers do not set out facts that are sufficient to meet the first requirement for the final interdict that the applicants seek (a clear right).

3.2 Second, even allowing for the admission of the supplementary founding affidavit some five months after the filing of replying papers, which was allowed in the interests of justice, there is no clear indication that the Mandela Objects fit the mould of heritage objects as envisaged in the Heritage Act. The applicants’ broad sweep of “list of types of heritage objects”, by dint of “strong association” with the former statesman, would result in absurdity that would render “heritage objects” of any and every object that is even vaguely “related to” President Mandela or any other “significant political figures and leaders in South Africa”, or objects which have “strong or special association with the life or work of a person ... of importance in the history of South Africa”. What a “strong or special association” is, as a measure adopted by the applicants to declare “types” of objects as heritage objects, is conjectural in the extreme. So, too, “a person of importance in the history of South Africa”. For example, what distinguishes President Mandela’s stationary exercise bicycle (not included in the list of types of heritage

objects) from a copy of the Constitution that he autographed and handed back to his former gaoler-turned-friend when the latter asked him to initial it (included in the list of types of heritage objects) when both seem to have “strong association with [him] a person of importance in the history of South Africa”? In fact, why should a copy of the fourth respondent’s constitution be declared a type of heritage object by sheer dint of

President Nelson Mandela autographing it, at the fourth respondent’s request, and including a personal message to the fourth

respondent?[9] The conjectural facts pleaded even in the supplementary founding affidavit simply do not satisfy the “clear right” requirement.

3.3 Third, the applicants did not dispute the fourth respondent’s averment that the key in question is “not an official Robben Island prison key”.[10] The first applicant simply dismissed the averment as “interesting [but] unfortunately irrelevant”.[11] This factual dispute goes to the heart of whether the object in question indeed falls within the list of types of heritage objects as claimed by the applicants. It is clearly not an irrelevant consideration. Again, the application fell at the first hurdle in

this regard in failing to establish a clear (or even prima facie) right to the interdict sought.

3.4 Fourth, even when the fourth respondent, in a supplementary answer to the first applicant's supplementary founding affidavit, again stated that the key in question was a "replica" of the real thing, none of the applicants put up an affidavit specifically dealing directly with this allegation. The bare denial

by the first applicant of the "contents" of four paragraphs, including the one containing this allegation, does not avail it.

3.5 Fifth, in their Notice of Application for Leave to Appeal the applicants seek to pedal a different canoe than the one they pedalled in the main application. This they do in order to navigate the less than placid waters in which their pleaded case places them. In the main application, counsel was at pains to emphasise that the applicants' case was not that each of the Mandela Objects was declared heritage objects. Their case was rather that all these Mandela Objects were, as a group, declared or deemed heritage objects under the broad sweep of "list of types of heritage objects" as envisaged in paragraphs 3.3, 3.5 and 3.6 of the government gazette of 18 April 2019. Indeed, this was the case pleaded in the

"supplementary replying and answering affidavit in the main application and the counter-application"[12]. It was also the basis on which the first respondent's counter-application for review was dismissed as she sought to review

a decision that was never made (namely, the declaration of each of the 29 Mandela Objects as a heritage object) as strongly argued by counsel for the applicants. Now, the applicants will have the SCA conclude that each of the 29 Mandela Objects falls within the ambit of lists of heritage objects (no longer all of them as a group) and faults this court for not having reached that conclusion.[13] But that is not the question this court was asked to determine. Again, the case falls at the first hurdle.

[4] Absent a clear right, the irreparable harm enquiry becomes otiose. As the applicants fell at the first hurdle of the final interdict requirements, the SCA will not be at large nevertheless to consider the other requirements because no court, including the SCA, has discretion to grant an interdict where any one of the requirements has not been met. It would thus be irresponsible of this court to burden the SCA needlessly with an appeal where the applicant itself concedes that its founding papers do not satisfy the first requirement for an interdict, where determinative factual averments are not disputed or meaningfully engaged with, and where the applicants seek to advance a new case on appeal that they had expressly disavowed before us.

[5] There are no compelling reasons for the appeal to be heard. The applicants are correct that the application before us turned on the proper interpretation of an Act of Parliament and regulations promulgated in pursuance of the objects of that legislation. We know from a long line of cases that a case that turns on the interpretation and application of legislation specifically mandated

by the Constitution thereby raises a constitutional matter.[14] This is so even if the legislative provisions in issue are not the subject of constitutional attack.[15] The high court cannot be the final arbiter on constitutional issues.

- [6] But this does not assist the applicants, and there are at least two reasons for that conclusion. First, no constitutional issue arises in this case. None was pleaded by the applicants.[16] The constitutional validity of the Act and regulations was not in issue. Second, in any event, the appellate jurisdiction of the appeal court where the interpretation of a legislative provision is in issue is triggered where the legislation in question is specifically mandated by the Constitution. Examples include the Labour Relations Act[17] (specifically mandated by section 23 of the Constitution); the Equality Act[18] (specifically mandated by section 9(2) of the Constitution); the Promotion of Administrative Justice Act[19] (specifically mandated by section 33 of the Constitution); the Promotion of Access to Information Act[20] (specifically mandated by section 32 of the Constitution). The Heritage Act[21] is nowhere mandated by the Constitution. It therefore does not fall among the category of pieces of legislation the interpretation of which, absent a constitutional challenge, triggers a constitutional matter.
- [7] While there is no denying that the case raises important issues about national heritage, as the main judgment itself expressly recognises, sight must not be lost that those issues are defined by and anchored in the pleadings in this case. As I have already indicated, the mere fact that a case concerns an important matter of national importance cannot, without more, and by dint only of that fact, entitle a losing party to an appeal.[22] That would open the floodgates for needless and unmeritorious appeals. There can in my view be no compelling reason for an appeal to be heard, even where the issues that arise in the case are of national importance, but the pleadings fail to define them. It is the pleadings a quo that define the issues to be decided on appeal; it is not the nature of the issues that determine the appealability of the judgment or order. In other words, while national heritage is an important issue for the country as a whole, the undisputed facts in this case (some of which are described above) render it unsuitable for the determination of that issue on its legal merits. In my judgment, the SCA will simply not be able to see past the poverty of the pleaded case in the applicants' papers as it seeks to find its way to the legal merits of the case.
- [8] The submission that this court ventured into law-making rather than confine itself to interpretation and application of the relevant provisions of the Heritage Act and regulations is not borne out by the content of the main judgment which dedicates a large portion to the interpretative exercise. It is not clear to me how paragraph 63 of the main judgment can in good faith be read as legislating. The paragraph plainly evinces an interpretative exercise. Paragraph 64 puts this beyond doubt.

- [9] There is no “uncertainty” created by the judgment as regards the future interpretation of “lists of types” of heritage objects. The judgment is self-evidently confined to the pleaded case and does not seek to venture (speculatively) into future interpretations on facts that are not before us.
- [10] Counsel for the applicants argued that because section 5(3) of the Heritage Act is not under challenge, it cannot be a basis for dismissing the application. Counsel seems to have misunderstood the basis for this court’s decision. The approach of this court is clear in the main judgment and specifically in paragraphs 43 to 64 on this score. Tempting as it is, we should not be drawn into rephrasing what we have already said in the main judgment, lest we be taken to have refashioned our reasoning. We do not.
- [11] For these reasons, and those already given in the main judgment, the appeal has no prospects of success.
- [12] There are also no compelling reasons for allowing the appeal. The foreign law, now advanced for the first time in heads of argument in this application, cannot avail the applicants. The foreign law should have been provided in evidence and properly debated before us in the main case. We would then have engaged with that evidence and taken it into account in rendering our judgment. It would not be fair on the respondents – and it would not be in the interests of justice –

at this late stage to require them to address the new foreign law de hors legislative context of the countries from which they spring. The content and effect of foreign law is a question of fact that must be proved in evidence. That the applicants have not done. They cannot at this late stage, and in heads of argument, raise this new foreign law for the first time. This issue has previously received judicial consideration in a line of cases, including the SCA (in its previous incarnation) and this division. It has been said:

“The content and effect of a foreign law is a question of fact and must be proved (Schlesinger v Commissioner for Inland Revenue 1964

- (3) SA 389 (A) at 396G). Proof is usually furnished by the evidence of properly qualified persons who have an expert knowledge of the law in question. Where the relevant foreign law is statutory in nature, then, in my opinion, it is the right and duty of the Court itself to examine the statute and to determine the meaning and effect thereof in the light of the expert testimony, especially where such testimony is of a conflicting nature. (Cf Cheshire and North Private International Law 10th ed at 129; Dicey and Morris The Conflict of Laws 10th ed at 1211 - 12; De Beêche v South American Stores Ltd and Chilian Stores Ltd 1935 AC 148 at 158 - 9.) It follows that the party relying on the foreign statute should, generally speaking, place that statute before the Court. Accordingly, the argument based on the alleged proper law of the contract cannot succeed.”[23]

(emphasis added)

- [13] The foreign law now advanced by the applicants in the heads of argument filed on their behalf at this late stage is not a factual matter about which this Court can take judicial notice as there is no expert evidence in relation to which such judicial notice could possibly be taken. This is because, where the relevant foreign law is statutory in nature, it is the right and duty of the Court itself to examine the statute and to determine the meaning and effect thereof in the light of the expert testimony.[24] But in the absence of expert testimony in relation to such foreign law, there is no room for taking judicial notice of it. That this foreign law is sought to be used as an interpretative guide does not take the matter any further. That is how we understood the purpose for introducing it.
- [14] Counsel for the applicants invokes section 233 of the Constitution in urging us to consider foreign law. There is no warrant for this. Section 233 says: “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” But nowhere do the applicants plead any inconsistency of the Heritage Act with international law. That is not the case advanced by their counsel in argument either. It is thus not entirely clear to what end recourse to international law can possibly aid this court in the proper interpretation of the Heritage Act. Recourse to international law, in light of what has been pleaded, will in my view be of no assistance to the SCA.
- [15] The applicants claim in their heads of argument that South Africa is party to at least two multilateral treaties for the protection and regulation of heritage objects, and that a regional policy document was accepted by the South African head of state in 2020. They then seek to invoke these treaties and policy documents with a view to moving us to granting leave to appeal. But these are factual allegations that should have been placed in evidence before us. They cannot simply be advanced for the first time, as if common cause, in heads of argument in an application for leave to appeal. In any event, there is no warrant for recourse to these instruments for reasons already given.
- [16] Finally, the applicants complain that we “overlooked or undervalued the qualifying effect of the term “significant” in each of the categories of the List of Types relied on by the applicants”. They say: “A proper interpretation of such categories would have confined itself to giving meaning to that term as a central element of the text, context and (broad) purpose of the List of Types and the empowering Heritage Act”.[25] But this ground of appeal is in sharp contrast to what the applicants urged us not to do at this interdict stage. In their heads of argument in the counter-application, their counsel urged that: “To conduct a significance assessment at this point would be to misapply section 32(19)”.[26] The applicants cannot pedal two canoes at once. They cannot fault this court for failing to perform the very exercise they urged us not to perform in the first place.
- [17] In the circumstances, I would dismiss the application with costs in relation to both the first and fourth respondents, including the costs consequent upon the employment of two Counsel.

[18] Since the first respondent's cross-application is contingent upon the granting of leave to the applicants, it is not necessary to deal with it.

Order

In the result, I propose that the following order be made:

1. The application for leave to appeal is dismissed.
2. The applicants are, jointly and severally, to pay the costs of the first and fourth respondents, including the costs consequent upon the employment of two counsel in each instance.

V NGALWANA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree.

R RAMAWELE

I agree and it is so ordered

SELBY BAQWA

JUDGE OF THE HIGH COURT

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 March 2024.

Date of hearing: 13 March 2024

Date of judgment: 20 March 2024

Appearances:

Attorneys for the First Applicant: Bowman Gilfillan Inc Counsel for the Applicant: R Pearce SC (083 650 5022) Y S Ntloko (082 044 8108) Attorneys for First Respondent: Wesley R Hayes Attorneys Counsel for First Respondent: R Buchanan SC (082 652 5410) D A Smith (064 068 9797) Attorneys for Fourth Respondent: ZS Inc Counsel for Fourth Respondent: R MacWilliam SC (079 290 3695) R Van Wyk (072 193 4426)

[1] Section 17(1)(a)(i)

[2] Section 17(1)(a)(ii)

[3] The effect of section 17(1)(b) read together with section 16(2)(a)(i) is that where the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

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- [4] Section 17(1)(c)
- [5] Judgment, para 24
- [6] Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others 2016
- (3) SA 317 (SCA), at para 24.
- [7] The application for leave to appeal appears to be launched on behalf of all three applicants. For that reason, reference is made to “the applicants” rather than just “first applicant” even though the pleadings referred to are under the hand of the latter.
- [8] Caselines 002-179, para 12
- [9] The applicants do not dispute that the copy autographed by President Mandela was the fourth respondent’s own personal copy. see Caselines 002-107/62 & 002-138/49
- [10] Caselines 002-102/40
- [11] Caselines 002-137/45
- [12] Caselines 002-436, paras 22-24 et seq
- [13] Caselines 012-7, paras 10 & 11
- [14] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others
- [2004] ZACC 15; 2004 (4) SA 490 (CC) at para 25; National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another [2002] ZACC 30; 2003
- (3) SA 513 (CC) at para 15; National Education Health and Allied Workers Union v University of Cape Town and Others 2003
- (3) SA 1 (CC) at paras 14 – 15; Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC) at paras 50 – 51; Normandien Farms (Pty) Ltd v SA Agency for Promotion of Petroleum Exploration and Exploitation Soc Ltd and Another 2020 (4) SA 409 (CC) at para 38
- [15] National Education Health and Allied Workers Union v University of Cape Town and Others 2003
- (3) SA 1 (CC) at para 15
- [16] The “deprivation of property” argument advanced by the first respondent has not been considered as it was unnecessary to do so.
- [17] 66 of 1995
- [18] Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000
- [19] 3 of 2000

[20] 2 of 2000

[21] National Heritage Resources Act, 25 of 1999

[22] Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others 2016

(3) SA 317 (SCA), at para 24.

[23] Standard Bank of SA Ltd and Another v Ocean Commodities Inc and Others 1983 (1) SA 276 (A), at 294G-295A. See also Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting 2002 (3) SA 765 (T), at 793G et seq. Laurens NO v Von Höhne 1993 (2) SA 104 (W), at 116B-D.

[24] Laurens NO v Von Höhne 1993 (2) SA 104 (W), at 116C-D

[25] Caselines 012-6, para 9

[26] Caselines 003-233, para 48

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