

SOUTH AFRICA / JUDGMENT

Vermaak and Others v Minister of Environmental Affairs of the Republic of South Africa and Others (224/2013) [2013] ZAECPHC 36 (19 March 2013)

[2013] ZAECPHC 36**COURT**

Eastern Cape High Court, Port Elizabeth

BEFORE

Goosen

CASE / FILE NUMBER

224/2013

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NUMBER: 224/2013

Date heard: 7 & 8 March 2013

Date delivered: 19 March 2013

In the matter between

PETRUS JOHANNES VERMAAKFirst Applicant

ROBERT C.A. BELLSecond Applicant

JENNIFER BELLThird Applicant

GEORGE CHAMBERLAINFourth Applicant

GERHARD SAAYMANFifth Applicant

CAREL SCHEEPERSSixth Applicant

LERISCHIA SCHEEPERSSeventh Applicant

SHIRLEY WAGNER-WELSHEight Applicant

JOHAN C WAGNERNinth Applicant

DEON P GOUWSTenth 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
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

JUDGMENT

GOOSEN, J.

This is an urgent application brought by residents of Blue Horizon Bay , a coastal suburb on the western outskirts of Nelson Mandela Bay, in which they seek an interdict restraining the continued construction of a wind energy facility (hereinafter the Wind Farm) on agricultural land situated immediately inland of the suburb. The application was brought on a semi-urgent basis and was set down for hearing on the same day as an application to review and set aside a decision by the first respondent not to grant the applicants an extension of time within which to prosecute appeals in terms of the National Environmental Management Act, Act 107 of 1998 (NEMA) against the environmental authorisation granted in respect of the wind farm.

In this application, the interdict is sought pending the finalisation of the review application (hereinafter the main application) and any appeals that may flow from the granting of such relief. The interdict is also sought pending the finalisation of appeals lodged by the applicants, in terms of section 44 of the Land Use Planning Ordinance, 15 of 1985 (LUPO), against a decision taken by the second respondent to grant special consent for the use of the property upon which the wind farm is being developed.

As indicated, the two applications were enrolled for hearing on the same day at the instance of the applicants and for considerations of convenience.

At the commencement of the matter it was submitted by Mr Buchanan, on behalf of the second respondent, supported by Mr Ford, for the third and fourth respondents, that the interdict application be argued separately and that in respect thereof an in limine objection relating to the failure by the applicants to join the MEC for Local Government and Traditional Affairs, Eastern Cape (hereinafter the MEC) be argued first. After hearing submissions by the parties I ruled that the in limine point in respect of the non-joinder be argued first. After hearing full argument on the issue and after considering the

submissions

in respect of the further progress of the application, I reserved judgement on the question.

On 28 March 2011 the department of Environmental Affairs approved an environmental authorisation for the construction and operation of a wind farm on the farm Rietfontein, Van Stadens (hereinafter “the property”). The authorisation permitted the erection of 10 wind turbines with a generating capacity of 20 MW. On 13 October 2011 an amended authorisation was approved permitting the erection of 9 turbines with a generating capacity of 27MW.¹ In November 2011 the applicants lodged notices of intention to appeal against the environmental authorisation and, in December 2011, the appeals were lodged. In these appeals condonation² for the late filing of the notices of intention to appeal was sought pursuant to regulation 60 of the Environmental Impact Assessment Regulations promulgated in terms of NEMA. ³

On 28 July 2011 the owner of the subject property made application to the second respondent for Special Consent to utilise the property, which is zoned for agricultural use, for the purpose of operating a wind farm. Notice of this application was given to the residents of Blue Horizon Bay on or about 15 September 2011. Objections to the application for special consent were lodged with the second respondent. On 28 May 2012 the Executive Mayor of the municipality resolved to approve the special consent usage. Thereafter, on 25 June 2012, the applicants lodged appeals with the MEC in terms of section 44 of LUPO. It is on the strength of the fact that these appeals are pending before the MEC that the applicants seek interdictory relief.

It is common cause that the third and fourth respondents, having obtained the special consent usage and having obtained the second respondent’s approval of the site development plan and building plans, commenced construction of the facility on or about 18 November 2011. It is also common cause that the second respondent and the third and fourth respondents communicated to the applicants their view that the applicants enjoy no right of appeal in terms of LUPO. On the strength of this the 2nd respondent was not prepared to give any undertaking that it would seek to prevent the third and fourth respondents from proceeding

with the development pending the finalisation of the appeals purportedly lodged in terms of section 44 of LUPO. As a consequence,

the applicants commenced this application on substantially truncated time periods in January 2013 and enrolled the matter for hearing on the same day as the main review application.

In its answering affidavit the second respondent takes the point that no right of appeal exists in terms of section 44 of LUPO and that, in the light of the dispute as to the existence of the right, the failure to join the MEC constitutes a material non-joinder which is fatal to the application. This view is supported by the third and fourth respondents. In addition both parties challenge the urgency with which the application was commenced.

The applicants in turn contend that insofar as the right of appeal in terms of LUPO has been raised, it is only necessary for this court to come to the conclusion that a *prima facie* right has been made out, given that interim relief only is sought, and for this purpose it is not necessary that the MEC be joined as party to the proceedings. On behalf of the second, third and fourth respondents it was argued that in this instance it is necessary to resolve the question of the disputed right as a question of law. That being so, it was argued, the

determination

of the existence of the right of appeal cannot take place in the absence of the very appeal body, the MEC, to whom the applicants purport to appeal.

[10] Mr van der Linde, on behalf of the applicants, argued that the decision in respect of the non-joinder of the MEC would depend on whether it was necessary to resolve the dispute as to the existence of the right of appeal at this interlocutory stage. He argued that all that would be required to be determined is whether the applicants had a *prima facie* right even though it is open to doubt. For this purpose it was sufficient that the applicants had lodged appeals pursuant to LUPO

and that the appeals were being processed by official in the office of the MEC.

[11] Mr van der Linde was however constrained to concede, during argument, that the mere lodging of what purports to be an appeal in terms of section 44 does not confer a right of appeal. Nor does the fact that an official in the office of the MEC is “processing” the appeals.

He accepted that more is required. The applicants must establish that a right of appeal exists pursuant to section 44 of LUPO. In this sense therefore, argued Mr Buchanan, there cannot be a “*prima facie*” appeal. There is either a right of appeal or there is not. Whether there is, is purely a question of law. Since the appeal authority in the person of the MEC, necessarily has a direct and substantial interest in the question he is a necessary party who must be joined.

[12] Mr Buchanan further argued that in this instance there is, as a matter of fact, no further final determination of the legal issue at a subsequent trial or hearing. Unlike the circumstances in *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T), where it was held that “difficult questions of law” ought to be resolved at trial and not at the interlocutory stage, the circumstances of this matter required a resolution of the “question of law” as a necessary precondition to the granting of the relief sought by the applicants. In this regard he pointed to the terms of the order sought, which was to interdict certain activities on the property “pending the finalisation of the appeals” pending before the MEC. This court would

therefore need to determine whether there are, as a matter of law, “appeals” which are pending before the MEC. Mr Buchanan pointed to the judgment in *Geyser v Nedbank Ltd : In re Nedbank Ltd v Geyser* 2006 (5) SA 355 (W) where Van Oosten J expressed the view that disputed legal issues should only be decided at the interlocutory stage where it would result in the final disposal of the matter. The learned judge however, also held that if the disputed legal question could be decided at the interlocutory stage it would be sensible to do so.

- [13] This, Mr Buchanan argued, was one such instance. The disputed legal question not only could be decided at this “interlocutory” stage but it was, given the nature of the issue and its critical importance to the matter at hand, one that ought to be decided since it would result in the final disposal of the matter. The legal issue however, could not be decided in the absence of the joinder of the MEC as the appeal authority whose jurisdiction the applicants sought to invoke as a basis for the interdict sought by them. The question was posed as to what would happen if this court was persuaded that, *prima facie*, a right of appeal exists and were persuaded to grant an interdict “pending the final determination of the appeals” and the MEC, as the appeal authority, were to adopt the view that no such appeal lies to him? These considerations highlight the problem posed by the failure to join the MEC in these circumstances.
- [14] I agree with the submissions made by Mr Buchanan, who was supported by Mr Ford. The nature of the relief sought requires that the applicants must establish not merely that they have invoked the provisions of Section 44 of LUPO by submitting to the MEC what purports to be an appeal but that, as a matter of law they are vested with such a right of appeal. The existence of that right is in dispute. In this instance the resolution of that legal dispute is a necessary condition for the granting of an interdict. It was argued by Mr van der Linde that the issue is one that could be resolved by way of interpretation of the relevant provisions of LUPO and that there is no basis to join the MEC who is the political head of the department. Whilst the interpretation of LUPO and related regulations no doubt will be central to the resolution of the legal issue, the argument loses sight of the fact that the MEC is the appeal authority, before whom, on the applicants’ case, appeals are pending. The resolution of the legal issue in dispute will necessarily determine whether appeals are indeed pending; not in the sense of whether an appeal process is underway but in the sense of whether what is before the MEC

constitutes an appeal. In my view the MEC, as the appeal authority to whom the applicants appeal, clearly has a direct and substantial interest in the determination of this dispute.

- [15] In *Amalgamated Engineering Union v Minister of Labour* 1949(3) SA 637 (A), at 659, the following was said in regard to the approach to be adopted in instances where it appears that a third party may have a direct and substantial interest in the issue before court:

“The two cases last mentioned are both instances in which the question of non-joinder of a third party who was found to have “a direct and substantial interest” in the decision of a point before the Court was taken by the Court mero motu. In Collin v Toffie the third party’s interest only became apparent

from a legal contention put forward by counsel for defendant in arguing in support of the exception to the declaration as disclosing no cause of action. In the Home Sites case it was only facts disclosed in the plea, taken in conjunction with a legal argument based on them by counsel for the Plaintiff, who here was the excipient, that showed a third party to have an interest. In both cases, too, it was the Court of Appeal that first raised the question of non-joinder. Yet in both cases, when once the Court realised that a third party might be affected, it set aside the lower Court's order and referred the case back to that Court to be dealt with afresh after the third party had been joined, and it ordered the plaintiff to join him.

Indeed it seems clear to me that the Court had consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect the party's interests.

- [16] It follows therefore that a failure to join the MEC is material and that the point taken by the second, third and fourth respondents that this matter cannot be determined in the absence of the MEC must be upheld.
- [17] When asked as to what should follow from such a finding, the applicants' counsel, after taking appropriate instructions, took the view that the application as a whole must be postponed in order to enable the applicants to join the MEC. In that event, it was submitted, the costs occasioned by the postponement should be reserved for determination by the court hearing the interdict application in due course.
- [18] Mr Buchanan, on behalf of the second respondent, correctly did not oppose the postponement request but argued that the costs of such postponement should be paid by the applicants in the light of the fact that the dispute as to the right of appeal was pertinently raised even before the application was launched.
- [19] Mr Ford, however, took a different view. He argued that there was no basis for the postponement of the application since such postponement would be destructive of the alleged urgency with which the application was initiated and would necessarily occasion prejudice to the respondents who are proceeding with the construction of the wind farm. He argued that the application, when once the MEC is joined, would as a matter of fact have to be considered upon wholly different considerations, not only of urgency but also in respect of the progress of the development which would by then have occurred. For these reasons the postponement should not be granted and the application should be dismissed with costs.
- [20] Mr Ford also argued that a postponement of the application, which was set down as a matter of convenience on the same day as the main application, may give rise to wholly unsatisfactory consequences, inasmuch as another court may be called upon to determine, in respect of the second leg of the application based on the pending review application, whether that application enjoys prospects of success in circumstances where this court will be seized with determining the review application. This too, it was suggested, is a factor which should weigh against the exercise of the court's discretion in favour of granting a

postponement.

- [21] A postponement would no doubt substantially impact upon the determination of issues of urgency in the matter, an issue which remains alive. The postponement may also have the consequence that substantially more development would have occurred by the time the application is finally determined. These are, however, matters which the court hearing the interdict application will be best placed to consider. They are matters which no doubt will bear upon the exercise of that court's discretion, should it come to that, whether or not to grant the relief sought by the applicant.
- [22] As to the potentially unsatisfactory circumstance that another court may be called upon to consider whether a *prima facie* case has been made out in respect of the review, at a time when this court will be seized with deciding the review, the problem is more illusory than real. If the main review application has not by that stage been finalised that fact will no doubt be considered by the court hearing the interdict. The status of the review application will no doubt be a factor relevant to the decision on the interdict application. It is not unusual for one court to be called upon to consider whether some form of interlocutory relief should be granted pending finalisation of a matter pending before another court. In my view this is not a reason not to postpone the interdict application.
- [23] I am accordingly not persuaded that, in these circumstances, the application should be dismissed at this stage. The issues upon which the applicants seek to found their claim for interdictory relief remain alive. The question regarding the existence of a right of appeal in terms of section 44 of LUPA is one which the applicants are entitled to pursue. Accordingly the applicants ought to be afforded an opportunity to do so. Any prejudice which the respondents may suffer in my view can be addressed by way of an appropriate order as to costs. Whether relief is to be granted in due course is a matter for another court to decide.
- [24] Having come to this conclusion the only question that remains is that of costs. I am unable to agree with Mr van der Linde that the costs should be reserved. The dispute regarding the existence of the right to appeal was pertinently raised prior to the application being launched. It was also clearly set out in the answering affidavits. The applicants chose, at their own risk, to proceed with the application without taking the precaution of joining the MEC or taking other steps which would have obviated the

need for a postponement of the matter. The court that ultimately hears the interdict application will be in no better position to determine who should pay the costs occasioned by the postponement. No substantive reason has been advanced on behalf of the applicants why they should not be ordered to pay the costs occasioned by the postponement of the matter to effect a necessary joinder of the MEC.

- [25] I therefore make the following order:

The Second, Third and Fourth Respondent's in limine objection to the non-joinder of the MEC for Local Government and Traditional Affairs, Eastern Cape is upheld.

The application is postponed sine die to enable the Applicants to take such steps as may be necessary to join the MEC for Local Government and Traditional Affairs, Eastern Cape in this application.

The Applicants are ordered to pay the wasted costs of the Second, Third and Fourth Respondents occasioned by the postponement of the application jointly and severally, the one paying the other to be absolved, 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

FOR THE APPLICANTS: MR. H. VAN DER LINDE SC

INSTRUCTED BY WILKE WEISS INCORPORATED

FOR THE SECOND RESPONDENT: MR. R. G. BUCHANAN SC

INSTRUCTED BY GRAY MOODLIAR ATTORNEYS

FOR THIRD & FOURTH RESPONDENTS: MR. E. A. S FORD SC AND

MR. J.G RICHARDS

INSTRUCTED BY RUSHMERE NOACH INCORPORATED

1It is not necessary for present purposes to detail the terms and conditions of the environmental authorisations.

2It is important to note that the filing of the notices of intention to appeal and the appeals are issues which are hotly disputed in the main review application. The ambit and effect of this dispute need not be dealt with in this application, for reasons which will become apparent hereunder.

3The EIA Regulations were promulgated in GN R543 and came into operation on 18 June 2010

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