



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable
Case No: 974/2015

In the matter between:

PETER GEES

APPELLANT

and

**THE PROVINCIAL MINISTER OF CULTURAL
AFFAIRS AND SPORT, WESTERN CAPE** **FIRST RESPONDENT**

**THE CHAIRPERSON, INDEPENDENT
APPEAL TRIBUNAL** **SECOND RESPONDENT**

HERITAGE WESTERN CAPE **THIRD RESPONDENT**

THE CITY OF CAPE TOWN **FOURTH RESPONDENT**

**CITY BOWL RATEPAYERS' AND
RESIDENTS' ASSOCIATION** **FIFTH RESPONDENT**

Neutral citation: *Gees v The Provincial Minister of Cultural Affairs and Sport*
(974/2015) [2015] ZASCA 136 (29 September 2016)

Coram: Maya DP, Bosielo and Seriti JJA and Fourie and Dlodlo AJJA

Heard: 15 September 2016

Delivered: 29 September 2016

Summary: Provincial heritage resources authority granting a permit in terms of s 34 of the National Heritage Resources Act 25 of 1999 for the demolition of a structure older than 60 years situated on a property with no formal heritage status: in so doing conditions were imposed controlling future development on the property: held that such conditions were lawfully imposed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town
(Weinkove AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Fourie AJA (Maya DP, Bosielo and Seriti JJA and Dlodlo AJA concurring)

[1] The issue in this appeal is whether the National Heritage Resources Act 25 of 1999 (the Act) authorises a provincial heritage resources authority, when granting a permit for the demolition of an entire structure which is older than 60 years, situated on a property with no formal heritage status, may lawfully impose conditions controlling future development on the property.

[2] The appellant is the registered owner of all the sections in a sectional title scheme comprising the land and a small block of flats (the structure) on Erf 1444, Vredehoek, Cape Town (Erf 1444), situated at 24 Davenport Road, Vredehoek. The appellant intends to redevelop Erf 1444 and this requires the demolition of the structure. As the structure is more than 60 years old, s 34(1) of the Act prohibits its demolition without a permit issued by the third respondent, Heritage Western Cape (HWC).

[3] The appellant's application for a demolition permit was considered by HWC's Built Environmental and Landscape Permit Committee at a meeting on 24 July 2013, and was refused. The appellant appealed to HWC's appeals committee, which refused the appeal on 18 September 2013.

[4] The appellant then lodged an appeal with the first respondent, the Provincial Minister of Cultural Affairs and Sport, Western Cape (the MEC). On 21 January 2015, the appeal tribunal appointed by the MEC in terms of s 49(2) of the Act, upheld the appeal and granted the demolition permit, subject to the following conditions:

- '(a) that the new development on the site shall not exceed the town-planning envelope of the existing building;
- (b) that the materials used for the façade of the new building are in keeping with the existing building;
- (c) that building plans for the new structure are submitted to Heritage Western Cape for its approval prior to any work commencing on site.'

[5] Aggrieved by the imposition of these conditions by the appeal tribunal, the appellant launched an application in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000, in the Western Cape Division of the High Court, Cape Town for the review of the appeal tribunal's decision and the setting aside of the conditions attaching thereto, alternatively for an order directing the MEC to reconsider the appellant's appeal. The application was opposed by the MEC while the City of Cape Town abided the decision of the court, but filed an affidavit providing the parties and the court with relevant information, particularly with regard to the proposed designation of a heritage protection overlay zone for the area including Vredehoek.

[6] In the event, the matter was heard by Weinkove AJ who dismissed the application with costs, but granted the appellant leave to appeal to this court. The MEC opposes the appeal. The remainder of the parties abide the decision of the court.

[7] The essence of the appellant's case is that the imposition of the conditions in the demolition permit by the appeal tribunal was not authorised by s 48(2) of the Act and thus ultra vires HWC's powers (via the tribunal's ruling). It is common cause that an entity such as HWC exercising public power is confined to exercising only such powers as are lawfully conferred upon it — this is the principle of legality. See *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 56; *Pharmaceutical Manufacturers Association of SA & another: In re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) para 50; *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape & another* 2008 (3) SA 160 (SCA) para 9 and *Vorster & another v Department of Economic Development, Environment and Tourism, Limpopo Province & others* 2006 (5) SA 291 (T) paras 17 and 18.

[8] It is accordingly necessary to consider the imposition of the conditions in the demolition permit by the appeal tribunal against the background of the Act. As explained in *Qualidental Laboratories*, para 10, an overview of the Act shows that its overarching objective is the identification, protection, preservation and management of heritage resources for posterity. This objective also finds resonance in s 24(b) of the Constitution. A heritage resource is defined in s 1 of the Act as 'any place or object of cultural significance'. Cultural significance is defined as meaning 'aesthetic, architectural, historical,

scientific, social, spiritual, linguistic or technological value or significance'. A place is defined as including a site, area or region; a building or group of buildings and other structures or groups of structures; and open space, including a public square, street or park. In relation to the management of a place, a place is defined as including its immediate surroundings.

[9] In terms of s 6 of the Act, the South African Heritage Resources Agency (SAHRA) and the provincial heritage resources authorities are empowered to prescribe principles for the management of heritage resources and to publish for general information policy relating to heritage resources management. Section 7 provides for heritage assessment criteria and grading. A three-tier system for heritage resources management is prescribed. National level functions are the responsibility of SAHRA, while provincial level functions are the responsibility of provincial heritage authorities. Local level functions are the responsibility of local authorities. In s 25 of the Act the general powers and duties of heritage authorities are set out. These are wide-ranging powers and duties enabling and obliging heritage authorities to comply with their conservation mandate in terms of the Act.

[10] The formal protection provisions of the Act are to be found in part 1 of chapter II (ss 27-33). Section 27 deals with national and provincial heritage sites, while s 28 deals with protected areas. Section 29 provides for the provisional protection of protected areas and heritage resources by SAHRA and provincial heritage authorities, for a maximum period of two years, while local authorities are authorised to provisionally protect, for a maximum period of three months, any place which it considers to be conservation-worthy.

[11] Section 30 of the Act requires a provincial heritage authority to compile and maintain a heritage register listing the heritage resources in the province which it considers to be conservation-worthy. In terms of s 30(11)(a), the special consent of the local authority is required for any alteration to or development affecting a place listed in the heritage register. Section 31 allows for the designation by planning authorities (including municipalities) and in certain circumstances provincial heritage authorities, of heritage areas to protect any place of environmental or cultural interest.

[12] Part 2 of chapter II of the Act (ss 33-38) deals with general protection provisions, of which s 34(1) is of importance in the adjudication of this matter. It reads as follows:

‘No person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority.’

In terms of s 34(2), within three months of the refusal of the provincial heritage resources authority to issue a permit, consideration must be given to the protection of the place concerned in terms of the formal designations provided for in part 1 of chapter II.

[13] Finally, for purposes of this matter, reference must be made to s 48 of the Act, which falls within chapter III of the Act, headed ‘General Provisions’. Subsection (2) provides as follows:

‘On application by any person in the manner prescribed under subsection (1), a heritage resources authority may in its discretion issue to such a person a permit to perform such actions at such time and subject to such terms, conditions and restrictions or directions as may be specified in the permit, including a condition —

(a) that the applicant give security in such form and such amount determined by the heritage resources authority concerned, having regard to the nature and extent of the work referred to in the permit, to ensure the satisfactory completion of such work or the curation of objects and material recovered during the course of the work; or

- (b) providing for the recycling or deposit in a materials bank of historical building materials; or
- (c) stipulating that design proposals be revised; or
- (d) regarding the qualifications and expertise required to perform the actions for which the permit is issued.’

[14] As the structure on Erf 1444 is more than 60 years old, its demolition is not permitted unless a permit has been issued by HWC in terms of s 48(2) of the Act. This is the demolition permit which forms the subject matter of the appeal.

[15] It is common cause that: neither the structure nor Erf 1444 is a declared national or provincial heritage site as contemplated in s 27 of the Act; neither of them enjoy provisional protection in terms of s 29; nor is either of them listed in a heritage register in terms of s 30 or declared as a heritage object in terms of s 32. Furthermore, Erf 1444 does not fall within a protected area as contemplated in s 28 of the Act, nor within a heritage area as contemplated in s 31. While certain areas in Vredehoek fall within a heritage protection overlay zone (HPOZ) in terms of the City’s zoning scheme regulations, Erf 1444 does not. However, as pointed out in the affidavit filed by the City of Cape Town, it is currently in the process of conducting a heritage survey of Vredehoek with the purpose of rendering the area in which Erf 1444 is situated subject to the HPOZ.

[16] The City has also graded Erf 1444 a proposed IIIC, as it is regarded as being of significance within its context of a well-preserved, coherent art deco streetscape spanning both sides of Davenport Road. In fact, the City has expressed the view that the large concentration of art deco buildings in the area is probably unique in the South African context and that Davenport Road is the

core of the art deco area of Vredehoek. I should add that the main concern of most parties who made submissions to the heritage authorities opposing the demolition of the structure, was that the character of Vredehoek and this particular street should be preserved.

[17] In considering the appellant's submission that the conditions imposed in the demolition permit are ultra vires the provisions of s 48(2) of the Act, it is immediately apparent that the submission flies in the face of the wide scope of application of s 48(2). As recorded earlier, the subsection confers a discretion upon a heritage authority to issue a permit 'subject to such terms, conditions and restrictions or directions as may be specified in the permit', including the conditions in paras (a) to (d) thereof. The word 'including' in the context used in s 48(2), is a word of enlargement, not of limitation. The conditions which may be imposed are thus not confined to those set out in paras (a) to (d) of s 48(2), but may include any appropriate condition. See *Dibowitz v Commissioner for Inland Revenue* 1952 (1) SA 55 (A) at 61B-D. Needless to say, any condition so imposed has to be a lawful condition, ie imposed by the relevant heritage resources authority exercising a power lawfully conferred upon it.

[18] What the appellant contends for is a construction of s 48(2) that limits its wide scope of application in the event of the granting of a permit for the demolition of a structure which enjoys no formal heritage protection. One may ask why, if this was the legislature's intention, it had not been conveyed by curtailing the wide ambit of s 48(2) in such circumstances. This could easily have been done and the failure of the legislature to do so necessarily points to a contrary intention. Therefore, on the plain wording of s 48(2) the appeal tribunal had a wide discretion to impose terms, conditions, restrictions or

directions in the permit. What remains, is to determine whether the appeal tribunal could lawfully have imposed the disputed conditions in the demolition permit. Put differently, were the conditions imposed by the appeal tribunal ultra vires the Act?

[19] As recorded earlier, it is common cause that, although the structure on Erf 1444 is not worthy of protection, the surrounding area is. The City of Cape Town regards the area as conservation-worthy and is in the process of formally protecting it by incorporation in the City's proposed HPOZ for the area of Vredehoek. The significance of Erf 1444 in the context of its surrounding area, was described as follows by the appeal tribunal:

‘Despite the building not falling within a Heritage Protection Overlay Zone, the art deco area of Vredehoek is accepted by the heritage fraternity as significant and worthy of being declared a conservation area. In broad terms and without referring to the boundaries of the art deco area, the significance of the area is sufficient to warrant protective measures.’

[20] It is important to note that the significance of Erf 1444 within its surrounding area was also acknowledged by Mr C Snelling, the heritage consultant who prepared the ‘Statement of Significance’ which accompanied the appellant’s application for the demolition permit. Mr Snelling referred to ‘. . . the richer art deco/modernist blocks of flats which are common in both the street on which the property is located and wider area’, and emphasised that:

‘. . . the structure does sit comfortably within its environment which is itself typical of the wider Vredehoek area which is noted for the art deco qualities of the various blocks of flats . . . and the eclectic mix of residential buildings which although invariably are of a simple box and hipped roof nature display variously art deco, Cape Dutch revival and arts and crafts qualities.’

[21] The significance of the IIIC grading of Erf 1444 was recognised by Mr A C Lillie, the heritage consultant who deposed to the appellant's founding affidavit, as follows:

‘. . . grade IIIC heritage resources do not have intrinsic merit — their significance derives from their contribution to the character of significance of their surrounding areas.’

[22] It bears emphasising that a ‘place’ is defined in s 1 of the Act as including a street as well as the immediate surroundings of a place. Furthermore, in terms of s 3(1) of the Act those heritage resources of South Africa which are of cultural significance or other special value for the present community and future generations, must be considered part of the national estate and fall within the sphere of operations of heritage resources authorities. In terms of s 3(2) the national estate may include places, buildings, structures and equipment of cultural significance, as well as places which are associated with living heritage. Section 3(3) of the Act emphasises that a place is to be considered part of the national estate if it has cultural significance or other special value because of its importance in exhibiting particular aesthetic characteristics valued by a community or a cultural group.

[23] In terms of s 5(1) of the Act, all heritage resources authorities performing functions and exercising powers in terms of the Act for the management of heritage resources, must recognise, inter alia, that heritage resources have lasting value in their own right, and that they are valuable, finite, non-renewable and irreplaceable, and must be carefully managed to ensure their survival. In the present context, the relevant heritage resources are not confined to the structure or Erf 1444 itself, but extend, on the clear wording of the Act, to the surrounding area, including other buildings or structures in the immediate vicinity of Erf 1444. This would encompass the large concentration of art deco buildings spanning both sides of Davenport Road and its surrounding area,

which, on all the available evidence, forms part of the national estate and is worthy of protection. In fact, as recorded above, the City of Cape Town has recognised this and is in the process of rendering Erf 1444 and its surrounds a protected heritage area.

[24] Although the proposed designation of the area as a heritage area requires further refinement, as well as engagement between the owner and the public, the evidence shows that it is an ongoing process that would, in the foreseeable future, result in the formal protection of the area in which Erf 1444 is situated. In view thereof, I agree with the submission on behalf of the MEC, that it would not make sense to allow for the demolition, in the interim, of the very resources that are intended to form the subject of the HPOZ, without the necessary counter-balancing measures to preserve the fabric of the HPOZ, such as the conditions imposed in the demolition permit.

[25] The appellant's construction of s 48(2), limiting the imposition of conditions to formally declared conservation areas only, would effectively reduce heritage resources management to a small area of concern and exclude major instances of possible abuse from the power of protection by heritage resources authorities. The current is a prime example. Where a heritage resource, such as this art deco area of Vredehoek, is potentially affected by an application brought in terms of the Act, the relevant heritage authorities should be entitled to impose such conditions as the Act would permit for the conservation of the affected area. In fact, their failure to do so would constitute the shirking of their conservation mandate to protect heritage resources for posterity.

[26] Counsel for the appellant reiterated that the Act does not authorise heritage authorities to impose conditions controlling future development on a property when they grant a permit authorising demolition of the structure on a property with no formal heritage status. Therefore, the submission continued, it is impermissible to attach conditions to a demolition permit for the purpose of preserving neighbourhood characteristics unless those neighbourhood characteristics have been recognised as worthy of preserving by the designation of the area as a protected heritage area.

[27] In *Qualidental* this court also dealt with an appeal regarding the imposition of a condition as to future development in a demolition permit in respect of a structure in an unprotected heritage area. The same submission was made on behalf of the appellant, namely that, in those circumstances, the Act does not clothe the HWC with the power to impose the relevant conditions. In paragraph 20 this court made short shrift of this submission in the following terms:

‘I may add that the purpose and effect of the condition are designed to enable the first respondent [HWC] to exercise a power vested in it in terms of the Act and which, as pointed out, is consonant with the overall objective of the Act ie the conservation of a heritage resource. Therefore the condition, rather than being one aimed at controlling development, as contended by the appellant, was in actual fact a condition with a conservation objective.’

[28] While the facts in the present appeal differ somewhat from those in *Qualidental*, this does not detract from the principle enunciated therein, that, even in an unprotected heritage area, the relevant heritage conservation authority may, in appropriate circumstances, when approving a demolition, impose conditions controlling future development to protect a heritage resource and its surrounds.

[29] In my view, the purpose and effect of the conditions imposed in the present matter were clearly designed to enable HWC to fulfil its duty in terms of the Act, ie to conserve a heritage resource. Therefore the conditions, contrary to the appellant's submission, were not aimed at controlling development as such, but constituted conditions with a conservation objective. It follows that the conditions were lawfully imposed in terms of s 48(2) of the Act.

[30] Counsel for the appellant also had a second string to his bow. He submitted that an interpretation of the Act which authorises a heritage authority, when it grants a permit authorising demolition of the structure on a property not otherwise protected under the Act, to impose conditions controlling future building or development on the property, permits the arbitrary deprivation of property contrary to the provisions of s 25(1) of the Constitution. This line of attack was first raised in the appellant's heads of argument on appeal. It was not alluded to in the papers in the court below or in the judgment of Weinkove AJ. In the result the MEC did not have the opportunity to meet a case on this basis and to present evidence which might be relevant to it. However, there is no need to belabour this point, as I believe that there is, in any event, no merit in the appellant's underlying submission.

[31] Section 25(1) of the Constitution provides as follows:

‘No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.’

In terms of s 25(1), all deprivations of property must meet the requirements of the section, ie they must be authorised by a generally applicable law and may not permit arbitrary deprivation. If these requirements are not met, the infringement will be unconstitutional and invalid, unless it is justifiable under s 36(1) of the Constitution. See in general P J Badenhorst et al, Silberberg and Schoeman's *The Law of Property* 5ed (2006) at 545; *First National Bank of SA*

Limited t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) paras 57-60.

[32] It is true that the conditions imposed in the demolition permit amount to a curtailment of the appellant's entitlement to deal with his property as he sees fit, and may therefore to a certain extent be regarded as a deprivation of property. However, it is widely recognised that in our present constitutional democracy an increased emphasis has been placed upon the characteristic of ownership which requires that entitlements must be exercised in accordance with the social function of law in the interest of the community. A J van der Walt and G J Pienaar *Introduction to the Law of Property* 7ed (2016) at 50 put it as follows:

‘. . . the inherent responsibility of the owner towards the community in the exercise of his entitlements is emphasised. The balance between the protection of ownership and the exercise of entitlements of the owner regarding third parties, on the one hand, and the obligations of the owner to the community, on the other hand, must be maintained throughout. This might, in certain circumstances, even mean that an owner's entitlements could be limited or infringed upon in the interest of the community. In such cases the infringement must always be reasonable and equitable [not arbitrary].’

See also the comments of Davis J in *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape & another* 2007 (4) SA 26 (C) at 37C-E; *Corium (Pty) Ltd & others v Myburgh Park Langebaan (Pty) Ltd & others* 1993 (1) SA 853 (C) at 858E-F; *Diepsloot Residents' and Landowners' Association & another v Administrator, Transvaal* 1994 (3) SA 336 (A) at 349C-J and *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23.

[33] In the instant matter the partial deprivation of the appellant's property rights by means of the imposition of the conditions in the demolition permit, is authorised by the Act, in that it stems from the very purpose of the Act viz the

conservation of a heritage resource. The imposition of the conditions also accords with the conservation mandate of HWC in terms of the Act and is directly in line with the principles of heritage resources management set out in the Act.

[34] In these circumstances I find that there has been no arbitrary deprivation of the appellant's rights of ownership by HWC. On the contrary, the imposition of the conditions, in my view, was reasonable and equitable, having regard to the inherent responsibility of the appellant towards the community in the exercise of his entitlements as the owner of Erf 1444.

[35] I therefore conclude that the court below was correct in dismissing the application for review and accordingly the appeal has to fail.

[36] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

PB Fourie
Acting Judge of Appeal

Appearances:

For the Appellant: S P Rosenberg SC (with him K Reynolds)
Instructed by: Smith Tabata Buchanan Boyes, Cape Town
Webbers, Bloemfontein

For the Respondent: I Jamie SC (with him P S van Zyl)
Instructed by: The State Attorney, Cape Town
The State Attorney, Bloemfontein