



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

**MEDIA SUMMARY – JUDGMENT DELIVERED IN THE
SUPREME COURT OF APPEAL**

26 May 2010

STATUS: Immediate

Wilma van Rensburg NO & Another v Perapanjakam Naidoo NO & Others; Perapanjakam Naidoo NO & Others v Wilma van Rensburg NO & Another

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal today handed down judgment in two related appeals. First, it upheld an appeal against an order of Van der Byl AJ (Eastern Cape High Court), in terms of which he purported to declare parts of a judgment of Froneman J, in the same division of the high court, to be of no force and effect and made certain allied orders. Second, the SCA dismissed an appeal against an order of Dambuza J, in terms of which she reviewed and set aside a decision of the Member of the Executive Council of Local Government and Traditional Affairs, Eastern Cape Province (MEC) granting consent for the amendment of certain title conditions in respect of Erf 105, Summerstrand, Port Elizabeth, the property of the Shan Trust.

The opposing litigating parties are trustees of the Hobie Trust and the Shan Trust respectively. The Hobie Trust and Shan Trust are abutting neighbours in Summerstrand Township, Port Elizabeth. The Hobie Trust acquired erf 104 in 1989, whilst the Shan Trust acquired erf 105 in 1996. Both properties were subject to the restrictive conditions which in turn were subject to alteration and

amendment by the then Administrator of the Cape Province. The restrictive conditions were to the effect that the properties were to be used only for private residential purposes.

At the time of acquisition of Erf 105, the only improvements were a main building and a double garage. The Shan Trust thereafter started effecting a number of improvements and erecting additional buildings on the property in three phases in furtherance of its guest house business. The municipality had granted the Shan Trust special consent to operate a guest house – initially four rooms for hire – later 11 rooms, subject to certain conditions. The Shan Trust did not adhere to the conditions imposed and the municipality withdrew the special use consent in 2007. The improvements, referred to above, were more often than not effected without the necessary approvals of the municipality.

The Hobie Trust subsequently launched an application against the municipality and the Shan Trust for an order to demolish the offending buildings and for the Shan Trust to cease operating business unlawfully. The application was heard by Froneman J, who, on 30 March 2007, after considering restrictive conditions and repeated transgressions by the Shan Trust ordered it to demolish the offending structures within 60 days of the order. The Shan Trust applied for leave to appeal the decision. The application was dismissed by the SCA and the Constitutional Court. This rendered Froneman J's judgment final. The Shan Trust however failed to comply with the order.

On 27 June 2007 the Shan Trust applied to the Premier of the Eastern Cape Province, for the removal of the restrictive conditions. On 16 October 2007, the MEC purported to grant the said application.

The Shan Trust subsequently applied for an order to declare certain parts of Froneman J's orders to be of no force or effect and to suspend the remaining orders. In the meantime, the Hobie Trust instituted review proceedings to have the MEC's decision set aside.

Van der Byl AJ, who heard that application, sitting as a court of first instance, suspended and nullified the orders granted by Froneman J. The review application referred to above in terms of which the decision by the Administrator to remove the restrictive conditions was sought to be reviewed, was subsequently heard and the MEC's decision was set aside by Dambuza J. The decision was reviewed and set aside.

In regard to that decision, the SCA held that the decision by the MEC constituted administrative action as defined in the Promotion of Administrative

Justice Act 3 of 2000 (PAJA) and that the MEC was obliged to consider the objections of the Hobie Trust and other affected residents before making the decision in that regard — the MEC had made the decision without reference to the written objections of the Hobie Trust. This court held further that the MEC lacked the statutory authority to make the decision as there had been no proper delegation from the Premier of the Province, the successor to the Administrator. The SCA thus held that the MEC's decision was rightly reviewed and set aside. It dismissed the appeal by the Shan Trust.

In regard to the decision of Van der Byl AJ the SCA found that the learned judge had failed to appreciate the full import of Froneman J's judgment and re-engaged on issues already decided by the latter. It held that Van der Byl AJ did what he was not empowered to do when he declared an order of equal jurisdiction to be of no force and effect. The court held that although a court has inherent jurisdiction to order a stay of execution or to suspend an order, such discretion must be exercised judicially and that in this case Van der Byl AJ erred in suspending the order. The SCA thus upheld the appeal by the Hobie Trust and set aside the order by Van der Byl AJ.

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