THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1250/2016

In the matter between:

PATMAR EXPLORATIONS (PTY) LTD **FIRST APPELLANT**

PATMAR ENERGY (PTY) LTD **SECOND APPELLANT**

PATMAR MANUFACTURING (PTY) LTD **THIRD APPELLANT**

HUILBOS BELEGGINGS (PTY) LTD **FOURTH APPELLANT**

AVANT VERSPREIDERS (PTY) LTD **FIFTH APPELLANT**

and

THE LIMPOPO DEVELOPMENT TRIBUNAL **FIRST RESPONDENT**

MEC FOR CO-OPERATIVE GOVERNMENT, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS, LIMPOPO **SECOND RESPONDENT**

THE PREMIER, LIMPOPO PROVINCE **THIRD RESPONDENT**

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM **FOURTH RESPONDENT**

GABRIEL STEPHANUS LABUSCHAGNE N.O. **FIFTH RESPONDENT**

CATHARINA LEFINA LABUSCHAGNE N.O.

SIXTH RESPONDENT

ABEL HERMANUS GERHARDUS NELL N.O.

SEVENTH RESPONDENT

LOSKOP MOTORS (PTY) LTD T/A TM AUTO (CALTEX)

EIGHTH RESPONDENT

J H JARDIN T/A LOSKOP VALLEI FILLING STATION (BP)

NINTH RESPONDENT

JKG PETROL SALES CC **TENTH RESPONDENT**

E T PAPADOPOULOS **ELEVENTH RESPONDENT**

A PAPADOPOULOS **TWELFTH RESPONDENT**

Neutral citation: *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* (1250/2016) [2018] ZACC 19 (16 March 2018)

Coram: NAVSA, WALLIS and MATHOPO JJA and DAVIS and HUGHES AJJA

Heard: 23 February 2018

Delivered: 16 March 2018

Summary: *Stare decisis* – SCA does not depart from its own previous judgments unless satisfied clearly wrong – High Court – judges in same division bound by judgments of that division unless satisfied clearly wrong – costs

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (N F Kgomo J, sitting as court of first instance) it is ordered that:

1 The appeal is upheld with costs, such costs to be paid by the First to Third Respondents jointly and severally, the one paying the other to be absolved..

2 The order of the High Court is set aside and replaced by the following:

‘1 The decision of the First Respondent on 14 November 2012 approving the application by the Gawie Labuschagne Trust for development rights in respect of erven 756 and 757 Groblersdal Extension 11 is set aside as null and void.

‘2 The First to Third Respondents are ordered to pay the costs of the application, jointly and severally the one paying the other to be absolved.’

JUDGMENT

Wallis JA (Navsa and Mathopo JJA and Davis and Hughes AJJA concurring)

[1] Chapters V and VI of the Development Facilitation Act (DFA) established development tribunals in the various provinces of South Africa and empowered them to approve land developments. However,

those provisions were declared to be unconstitutional by this Court[1] and the Constitutional Court confirmed that order.[2] It suspended its order of invalidity for two years to enable the legislature to remedy the constitutional defect. The order of suspension expired on 17 June 2012. On that date the first respondent, the Limpopo Development Tribunal (the Tribunal), had before it a land development application for the construction of a service station brought by the fifth to seventh respondents.[3] The appellants, among others, opposed the application. They submitted to the Tribunal that, in consequence of the expiry of the suspension order, the relevant provisions were now unconstitutional and their power to determine the application had ceased to exist. The Tribunal rejected this contention and proceeded to deal with and uphold the application on 8 November 2012. This prompted the appellants to bring proceedings in the Gauteng Division, Pretoria of the High Court for an order reviewing and setting aside its decision. The application was dismissed by N F Kgomo J and this appeal is with his leave.

[2] On 26 September 2016, three days before leave to appeal was granted, this Court delivered its judgment in *Shelton*,[4] holding that the effect of the Constitutional Court's period of suspension of its order of invalidity expiring was to deprive the Eastern Cape Development Tribunal of the power to determine applications lodged with it, but not disposed of, prior to the 17th June 2012. As a matter of law that judgment meant that the decision by the Tribunal in the present case in relation to

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[1] *Johannesburg Municipality v Gauteng Development Tribunal and Others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA).
[2] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC).
[3] The latter have played no part in this appeal and, in the High Court, withdrew their opposition and tendered costs when the time came to deliver heads of argument.
[4] *Shelton and another v Eastern Cape Development Tribunal and others* [2016] ZASCA 125. There was no attempt to appeal that decision to the Constitutional Court.

the application by the fifth to seventh respondents was invalid, because it was made at a time when the Tribunal no longer had the power to make such decisions. The outcome of this appeal thus became inevitable, subject only to the plea by the Tribunal that the decision in *Shelton* 'should be reconsidered in that the court[5] correctly found that the Constitutional Court judgment is silent on the position of applications lodged during the period of suspension but not finalised at midnight on 17 June 2012'.

[3] It is surprising in the light of this submission that we were not referred to any of the cases dealing with the circumstances in which this Court will depart from its previous decisions on a matter of law. The basic principle is *stare decisis*, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous. The cases in support of these propositions are legion.[6] The need for palpable error is illustrated by cases in which the court has overruled its earlier decisions.[7] Mere disagreement with the earlier decision on the basis of a differing view of the law by a court differently constituted is not a ground for overruling it.

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[5] That is this Court in *Shelton*.
[6] *Bloemfontein Town Council v Richter* 1938 AD 195 at 232; *R v Nxumalo* 1939 AD 580; *CIR v Estate Crewe and Another* 1943 AD 656; *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) at 24H.
[7] *Coface South Africa Insurance Co Limited v East London Own Haven t/a Own Haven Housing Association* [2013] ZASCA 202; 2014 (2) SA 382 (SCA) overruling *Dormell Properties 282 CC v Renasa Insurance Co Limited and Others NNO*[2010] ZASCA 137; 2011 (1) SA 70 (SCA).

[4] The doctrine of *stare decisis* is one that is fundamental to the rule of law. The object of the doctrine is to avoid uncertainty and confusion,[8] to protect vested rights and legitimate expectations as well as to uphold the dignity of the court.[9] It serves to lend certainty to the law. In those circumstances the bar that the Tribunal set itself to clear in this case was high. It made no attempt to clear it. In fact, in response to a question from the Bench, counsel responded: "We are not necessarily saying *Shelton* is wrong.' That renders it unnecessary to engage in any detailed examination of the judgment in that case. It suffices to say that I see no reason to depart from the conclusion this court reached in *Shelton*.

[5] The appeal must therefore succeed. However, it is necessary to address two other issues, the one relating to the approach of the High Court to the issue of *stare decisis* and the other to the question of costs.

[6] This was not the only case after 17 June 2012 in which the Tribunal approved land development applications that were pending prior to that date. Running virtually in parallel with it, in the same court, was another involving the Mogalakwena Municipality.[10] In a judgment delivered on 6 May 2013, Mothle J held that the Tribunal had been divested of its powers to grant development applications with effect from 17 June 2012 in consequence of the expiry of the period of suspension of the Constitutional Court's order of constitutional invalidity in relation to

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[8] *CIR v Estate Crewe* 1943 AD 656 at 680; Kahn 1955 *SALJ* 652.
[9] *Ex parte Minister of Safety & Security*: *In re S v Walters* [2002] ZACC 6; 2002 (4) SA 613 (CC) 646; 2002 7 BCLR 663 (CC) paras 53-61; *Afrox Healthcare Bpk v Strydom* [2002] ZASCA 73; 2002 (6) SA 21 (SCA) 38F–40F; [2002] 4 All SA 125 (SCA); *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) para 28.
[10] *Mogalakwena Local Municipality v Semmogo Property Development (Pty) Ltd and others* (Case No 18585/2013, unreported)

the relevant provisions of the DFA. He interdicted the Tribunal from performing any functions under the DFA in respect of the land development application in that case. There was no appeal against his decision.[11]

[7] Accordingly, when the present case came to be argued in the High Court on 24 November 2014, there existed a judgment of the same court on the very point in issue. The principles of *stare decisis* required the judge to follow that decision unless satisfied that it was clearly wrong.[12] The High Court disregarded that principle. It said in regard to the submission that the replacement legislation[13] and its transitional provisions would have been unnecessary if invalidity had not taken effect from 17 June 2012 that: 'The jury is still out on this submission.' The jury was not out because a judgment had already been delivered on the point. Mothle J's judgment was rejected on the basis that 'it is not correct as it is inconsistent with the Constitutional Court's judgment'. This approach was entirely incorrect.

[8] The judge was only entitled to depart from the earlier judgment if satisfied that it was clearly incorrect. The proper approach was to ask whether Mothle J's judgment was a tenable interpretation of the Constitutional Court's decision and order. There could be only one answer to that question, namely, that it was, as the lengthy discussion of

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[11] There was also some indirect support for Mothle J's views in *Nabuvax (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality and Others* [2013] ZAGPPHC 18; [2013] 3 All SA 528 (GNP) para 48-50.

[12] *Klaassen v Benjamin* 1941 TPD 80 at 90; *Shabalala v Attorney-General, Transvaal; Gumede v Attorney-General, Transvaal* 1995 (1) SA 608 (T) at 618D-H. Whatever revisions may be required to the rules governing *stare decisis* in the light of recent structural changes to the courts effected by the Superior Courts Act 10 of 2013, there is no reason to believe that they should affect this principle. If anything the principle must operate more extensively.

[13] Spatial Planning and Land Use Management Act 16 of 2013.

that very issue in the High Court's judgment amply demonstrated. And once that conclusion was reached nothing more needed to be said. Kgomo J was obliged to follow his colleague's decision and should have done so. The test for departing from a judgment from one's own court is set high so that it is only done in few cases and then only after anxious consideration.

[9] Turning to costs the appellants are entitled to their costs and entitled to recover them from the Tribunal and the MEC, who supported the Tribunal in pursuing the proceedings to this court. Whilst it is deplorable that as a result of decisions by unnamed officials these costs, as well as the costs of resisting this appeal, have been incurred unnecessarily and are a burden on the public purse, it is beyond our remit to address and solve this problem. The appellants were brought to this Court by the first to third respondents and it is legitimate for them to insist that the respondents pay their costs and not the officials responsible for this situation, who may in any event not have the means to pay them.

[10] The following order is made:

1 The appeal is upheld with costs, such costs to be paid by the First to Third Respondents jointly and severally, the one paying the other to be absolved.

2 The order of the High Court is set aside and replaced by the following:

> '1 The decision of the First Respondent on 8 November 2012 approving the application by the Gawie Labuschagne Trust for development rights in respect of erven 756 and 757 Groblersdal Extension 11 is set aside as null and void.

‘2 The First to Third Respondents are ordered to pay the costs of the application, jointly and severally the one paying the other to be absolved.’

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant: A Liversage

Instructed by: Adriaan Venter Attorney & Associates; Pretoria

Rossouws Attorneys, Bloemfontein

For 1st to 3rd respondents: M S Phaswane

Instructed by: The State Attorney, Pretoria

Ivan Pauw & Partners, Bloemfontein.