THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Astral Operations Ltd t/a Country Fair Foods and Others v The Minister for Local Government, Environmental Affairs and Development Planning (Western Cape) and Others (3509/2014) [2022] ZASCA 62 (29 April 2022)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing, with costs including the costs of two counsel, an appeal against the decision of the Western Cape Division of the High Court, Cape Town (the high court).

The appeal concerned a question that was reserved for separate determination by agreement between the parties, when a set of separate decisions relating to environmental authorisation for a proposed new landfill site for the City was reviewed and set aside. The question that was separated was the following: whether in dealing with the appeal against the decision of the Director, the appeal authority was entitled to authorise the activities at the Kalbaskraal location? The high court answered the question in the affirmative and granted the appellants leave to appeal to this Court. The issue was whether the high court was correct in its determination.

The facts of the matter were briefly the following: the first and second appellants were commercial enterprises with extensive broiler chicken farming interests close to the footprint of the proposed regional landfill for the City, near the Bottelfontein Farm in the Western Cape, for which environmental authorisation was granted by the MEC on 30 August 2013. The third appellant is an association of farmers who carried on mixed farming activities, primarily the cultivation of cereal crops, on farms around Bottelfontein. The first and second appellants' main practical concerns related to the impact the landfill would have on the groundwater used at the broiler houses, and vectors (namely flies, rodents and birds) transporting pathogens from the landfill to the broiler houses. The third appellant's main concerns were that the operation of the landfill would give rise to the contamination of the groundwater upon which the vast majority of its members depended on for their farming activities.

In 2000, the City appointed consultants to identify and assess potential sites for a new landfill to service it. In June 2002, four sites were short-listed and then selected for a more detailed site ranking process. These sites were Kalbaskraal, Atlantis, Vissershoek and Eendekuil. The final two sites that were chosen, were Atlantis and Kalbaskraal. On 23 January 2007 a Final Environmental Impact Assessment Report (the FEIR) relating to the Atlantis site and the Kalbaskraal site was submitted to the department. Mr Barnes, (the Director) acting under authority delegated by the MEC, granted the City an environmental authorisation in terms of s 22(3) for the establishment of the new regional landfill at the Atlantis site. Thereafter, appeals were lodged in terms of s 35(3) of the Environment Conservation Act 73 of 1989 (ECA) against the Director's decision. On 7 April 2009 the MEC upheld the appeals and granted environmental authorisation for the establishment of the new regional landfill at the Kalbaskraal site (the first decision). The first decision was taken on review by the appellants. It was reviewed and set aside pursuant to the court of 11 May 2010. The appeals were remitted to the MEC for reconsideration.

On 31 August 2013, the MEC acting in terms of s 35(3) and (4) of the ECA, again upheld the appeals against the Director's decision and granted the City an environmental authorisation in terms of s 22 of the ECA for the establishment of the new regional landfill at the Kalbaskraal site (the second decision). The MEC gave reasons why he preferred the Kalbaskraal site over the Atlantis site. However, the appellants were not satisfied with the MEC's decision and thus instituted proceedings for judicial review in the high court. The second decision was reviewed and set aside in terms of the court order which was taken by agreement between the parties and the issue forming the subject matter of this appeal was reserved for separate determination by the high court.

As already stated, the high court in a judgment delivered on 17 June 2020 determined the reserved question in favour of the MEC and the City and ordered the appellants to pay costs jointly and severally, including costs of two counsel. Hence the matter went on appeal to this Court.

The appellants raised two main issues concerning the interpretation of section 22 and 35 of the ECA. The first was whether the establishment of a new regional landfill proposed at different locations was an alternative proposed activity contemplated by ss 22(2) and (3)? The second was whether, when determining an appeal in terms of s 35(3) and (4), the MEC could step into the shoes of the first-instance decision-maker (in this case the Director) and take any decision which the Director could have taken or conversely, whether when the MEC upholds an appeal he or she must remit the matter to the Director for a fresh decision?

In relation to the first point (the section 22 point), the appellants submitted that establishing a regional landfill at the Atlantis site and establishing a regional landfill at the Kalbaskraal site were not alternative proposed activities as contemplated in s 22(2), and consequently the MEC was not entitled on appeal to authorise the Kalbaskraal site as an alternative proposed activity in terms of s 22(3). The SCA disagreed with the appellants' submissions. The Court held that the MEC was entitled on appeal to authorise the landfill activity to be carried out at Kalbaskraal as an alternative proposed site. The words 'alternative proposed activities' appearing in s 22(2) and s 22(3) must be interpreted contextually and purposively. The SCA agreed with the respondents' submission that, contextually, it was possible to read s 22(2) of the ECA as permitting the undertaking of comparative assessment of the proposed site and alternative proposed sites in circumstances where there were no available alternatives to the proposed activities by which the solid waste can be disposed of. In such circumstances it would have been permissible for the decision maker to consider reports concerning the impact on the environment of establishing the landfill on the proposed site and of doing so at one or more alternative proposed sites. This was exactly what the Director and the MEC did in this case. They each considered the impact on the environment of granting authorisation for landfill in Atlantis or Kalbaskraal or of not granting authorisation at all. It was clear that the sites were presented as alternatives and were equally subjected to environmental scrutiny as required by s 22(2).

As regards the second point, (the section 35 point) it was submitted by the appellants that the MEC's powers on appeal were limited to a consideration of the application and the decision in respect of Atlantis site. Those powers, it was contended, did not include the power to grant environmental authorisation for the activities at a different site, namely Kalbaskraal, because the subject matter of the appeal to the MEC was the Director's decision granting environmental authorisation for the listed activities at the Atlantis site, there having been no decision made and thus capable of appeal in respect of Kalbaskraal site. The appellants emphasised that s 35(3) confers an entitlement to appeal on a person who felt aggrieved at the decision of the employee or officer exercising the delegated power and that the powers conferred upon the appellate decision-maker by s 35(4) must be exercised after considering such an appeal. The appellants contended that, when determining an appeal in terms of ss 35(3) and (4), the appeal authority could not step into the shoes of the first-instance decision-maker and take any decision which the first-instance decision-maker could have taken. Building on this submission, the appellants submitted that if the appeal authority decided to set aside the decision under appeal (as opposed to merely varying it), he or she could not replace it with an entirely different decision which the first-instance decision-maker could have taken. Thus, where the decision appealed against was the granting of authorisation for a proposed activity, the appeal authority could not set aside the granting of that authorisation and replace it with the granting of an authorisation for an alternative proposed activity. Instead, the appellants contended, an appeal authority who sets aside a decision under appeal must have remitted the matter to the first-instance decision-maker for the taking of a fresh decision. This was so, it was argued, because the remedial powers conferred by s 35(4) to confirm, set aside or vary the decision did not also include the power to substitute.

The Court held in this case the Atlantis and Kalbaskraal sites were presented as alternatives. The decision-maker could have granted or refused authorisation in respect of either of the two sites or both. The appeal authority could, on appeal, also have granted or refused authorization in respect of either of the two sites or both sites. The Court further held that an appeal under ss 35(3) and (4) against a decision of an officer or employee exercising delegated authority on an application for an environmental authorisation under s 22, involved a complete rehearing and a fresh determination of the merits of the application with or without additional evidence or information; and further that the appeal authority was free to substitute his or her own decision for the decision under appeal.

In consequence, the appeal was dismissed, with costs, including the costs of two counsel.

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