THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 22 September 2017

Status: Immediate

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.

DRIFT SUPERSAND (PTY) LIMITED
v
MOGALE CITY LOCAL MUNICIPALITY & ANOTHER

The appellant is the owner of certain rural property situated within the municipal area of the Mogale City Local Municipality. A wholly owned subsidiary of the appellant has a mining right over the appellant's property. That right has been exercised by the appellant, which operates an open cast mine, quarrying sand and gravel on its property. The appellant alleges that it does this pursuant to an agreement it has with its subsidiary.

The second respondent is the owner of a piece of immovable property extremely close to the appellant's property. It applied to the first respondent, the Mogale City Local Municipality, to establish a township on its property. After a period of some six years this application was eventually approved by the Municipality. This was done without the appellant's knowledge, although years previously it had filed an objection to the proposed township

development.

On hearing of the approval of the application, the appellant applied to the Gauteng Local Division, Johannesburg for an order reviewing and setting aside the Municipality's decision to approve the township. Its application was dismissed but leave was granted to appeal to the Supreme Court of Appeal.

The first issue on appeal was whether the appellant had standing to bring review proceedings. The respondent alleged it lacked such standing for various reasons. Firstly, it was contended that as it was not the appellant but its subsidiary who held the mining right under which the quarry was being operated, the subsidiary ought to have brought the review. They also argued that despite the proximity of the appellant's land to the proposed township, it was not an interested party under either the Municipality's policy relating to township applications or the provisions of s 69 of the Town Planning and Townships Ordinance 15 of 1986.

The Supreme Court of Appeal rejected these contentions. It held that the appellant, as owner, had the right to safeguard the amenity of its immediate neighborhood and that the question of interest in the application had to be determined not only in relation to the policy and the Ordinance but in the light of PAJA. It found that it was spurious for the Municipality to allege that because the situation of the appellant's land did not precisely fit that of an 'interested party' as defined in the policy, the appellant was not an interested party directly affected by the application when clearly the contrary was the case. It drew attention to s 195 of the Constitution which encouraged the public to participate in policy taking, as well as various other authorities, the effect of which was to oblige local government to act in a respectful and fair manner when fulfilling its functions. It stressed that, in matters of local government, the right to object to a township forms part of a legislative scheme which both entitles and encourages individual members of society to actively participate in the decision taking process. The court concluded that the appellant clearly was a party interested in the application.

Turning to the merits of the review, the senior municipal official who had

received the objection by the appellant had given an undertaking that a hearing would be held to which the appellant would be invited. However the final decision on the township application was taken without any such hearing. In the light of all the circumstances the court concluded that the Municipality had breached a reasonable expectation it had engendered in the appellant that such a hearing would be held and that, for this reason alone, the decision to approve the township application had to be set aside.

The court went on to deal further with the manner in which the approval had been granted. It found that although the Municipality alleged in its founding papers that it had taken the appellant's objection into account, it was clear that it had not. This, too, justified the decision being set aside.

Moreover, as the appellant had been excluded from the administrative decision-taking process, the appellant had not in the circumstances of this case been obliged to exhaust its so-called domestic remedies before seeking to review the Municipality's decision.

For these reasons the appeal succeeded and the order of the court below dismissing the application for review was set aside and substituted by an order reviewing and setting aside the Municipality's decision to approve the second respondent's application to establish a township.

In regard to a cross-appeal filed by the second respondent relating to certain matters which it contended the court below ought to have struck out of the appellant's replying affidavits, the Supreme Court of Appeal held that it could not succeed. The cross-appeal was dismissed.