THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 133/07
Reportable

In the matter between :

KINGSLEY JACK WHITEAWAY SEALE	APPELLANT

and

BERNARD RENIER VAN ROOYEN NO	FIRST RESPONDENT
RHEINHOLD MATHIAS ANTWEILER NO	SECOND RESPONDENT
PROVINCIAL GOVERNMENT, NORTH WEST PROVINCE	THIRD RESPONDENT
THE REGISTRAR OF DEEDS, PRETORIA	FOURTH RESPONDENT

And in the matter between :

THE PROVINCIAL GOVERNMENT, NORTH WEST PROVINCE	APPELLANT

and

BERNARD RENIER VAN ROOYEN NO	FIRST RESPONDENT
RHEINHOLD MATHIAS ANTWEILER NO	SECOND RESPONDENT
KINGSLEY JACK WHITEAWAY SEALE	THIRD RESPONDENT
THE REGISTRAR OF DEEDS, PRETORIA	FOURTH RESPONDENT

CORAM : HOWIE P, NAVSA, CLOETE, HEHER *et* COMBRINCK JJA
HEARD : 5 MARCH 2008

DELIVERED : 27 MARCH 2008

Summary: Review : Administrative Actions : where an initial act is set aside on review subsequent acts, which depend on the initial act for their validity, are of no force or effect. The analysis of Forsyth as adopted in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) applies to the validity of acts consequent upon the initial act only for so long as the validity of the initial act has not been set aside on review; and the analysis does not deal with whether the initial act should be set aside.

Neutral citation: This judgment may be referred to as *Seale v Van Rooyen NO* (133/07) [2008] ZASCA 28 (27March 2008).

CLOETE JA/

CLOETE JA:

INTRODUCTION

[1] In *Bullock NO v Provincial Government, North West Province*[1] this court, at the suit of the Transvaal Yacht Club ('TYC'), set aside on review the decision of the Premier of the North West Province ('the Premier') to register a notarial deed of servitude in favour of Mr Seale. As the judgment records,[2] an official of the North West Province ('the Province') had on 18 April 2001 executed a power of attorney for the registration of the servitude and a notarial deed of servitude had been executed on 12 July 2001. Unbeknown to this court and the TYC the servitude had already been registered on 22 November 2002, the day on which the TYC's attorney of record informed the State Attorney acting on behalf of the Provincial Government of the Province ('the Provincial Government') that the TYC intended to appeal against the decision of the court *a quo* in *Bullock*.

[2] The State Attorney sought cancellation of the servitude in the Deeds Office, Pretoria, but he was advised by a colleague that the attitude of the Assistant Registrar was that the order of this court in *Bullock* 'should be regarded as null and void as it does not grant authorisation to the Registrar of Deeds to cancel' the servitude. The State Attorney approached Seale through his attorneys but Seale refused to consent to the servitude being cancelled. He undertook to provide his reasons for doing so in writing but before they were furnished, the TYC as the applicant brought motion proceedings in the Pretoria High Court against the Registrar of Deeds, Pretoria, the Provincial Government and Seale as respectively the first, second and third respondents. The relief ultimately sought was for an order (1) directing that the Registrar of Deeds, Pretoria, upon presentation to him of the order, forthwith cancel the registration of the servitude; alternatively (2) directing the Provincial Government and Seale to take all steps and to sign all documents

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[1] 2004 (5) SA 262 (SCA). The reference to a 'lease' in para 24 at p 273A, and in the headnote at p 264B-C, should be a reference to a 'servitude'.
[2] Ibid para 5.

necessary, within five days of the order, to cancel registration of the servitude in the office of the Registrar of Deeds, Pretoria and failing compliance, that the sheriff take all steps and sign all documents necessary to cancel the servitude. Costs were sought against the Provincial Government and Seale jointly and severally.

[3] Simultaneously with its answering affidavit the Provincial Government tendered, unconditionally and at its own cost, with the authority of the court, to cancel the registration of the servitude in the Pretoria Deeds Office and to pay the TYC's costs of the application on an unopposed basis. The State Attorney who had been handling the litigation explained in the answering affidavit that he had only found out 'afterwards' (when precisely was not disclosed) that the deed of servitude had been registered on 22 November 2002 and went on to say that:

'At all relevant times I was under the impression that if [the TYC] would be successful with the appeal, that such judgment would be sufficient to cancel the registration of the said servitude'

and

'I was astonished to hear that the judgment of the Court of Appeal was not sufficient for the cancellation of the said notarial deed of servitude and couldn't understand why [Seale] won't consent to the cancellation.'

The Provincial Government did not participate in the proceedings in the court *a quo* after it delivered its answering affidavit and tender on 21 September 2005. Seale on the other hand put in issue the TYC's *locus standi* to bring the application in its own name and the authority of those who did so, and opposed the application on the merits. The court *a quo* (Van Rooyen AJ), in interlocutory proceedings opposed by Seale, substituted the then trustees of the TYC as the applicants, and ultimately made an order directing the Registrar of Deeds to cancel the registration of the servitude. The learned judge further ordered the Provincial Government to pay the costs of the TYC and Seale. Seale has appealed against the substantive relief obtained by the TYC both on the merits and on the basis that those who sought the relief on behalf of the TYC were not authorised to do so. The Provincial Government has appealed against the costs orders. Both appeals are with the leave of this court.

LOCUS STANDI AND AUTHORITY

[4] The TYC was originally cited as the applicant. Mr van Rooyen, a trustee of the TYC, deposed to the founding affidavit. He said that the application was brought 'by the applicant as represented by me and Brian Macdonald Scott and Anthony Money as trustees of the applicant by virtue of the authority vested in us by paragraph 14 of the Constitution of the applicant'. A copy of the TYC's constitution was annexed to the founding affidavit. So were a resolution of the trustees authorising Van Rooyen to bring the application on behalf of the TYC and confirmatory affidavits by Scott and Money.

[5] It is necessary to quote paragraph 14 of the TYC's constitution in full. It reads:

'14 TRUSTEES

The role of Trustees shall be to hold in trust the Club's assets and to protect the legal and financial viability of the Club in pursuit of the Club's objectives. The tenure of trustees shall be for multiple years to enable them to provide continuity over the long-term affairs of the Club. The President of TYC shall de facto be a Trustee of the Club and there shall be up to three other Trustees.

Trustees shall be elected at an AGM according to the same procedures applying to the election of officers. They do not require to be re-elected at each AGM but shall hold their position until either they advise the Secretary in writing that they resign from that position, they cease to be a member of the Club or they are voted out of that position by a motion at an AGM or Special General Meeting. When Trustee positions fall vacant it shall be incumbent on the remaining Trustees to ensure nomination and replacements by the time of the next AGM, or SGM if an urgent need arises.

The Trustees shall represent the Club in any legal actions and shall involve themselves sufficiently in the Club's operational affairs to forestall or mitigate any legal actions they consider may harm the Club's position. They shall consult the committee of the day on any legal matters. A Trustee shall only act in a legal capacity for the Club if his actions have the agreement of the other available Trustees and such action follows the minuted direction of the Executive Committee. Any major expenditure or commitments that will require the Club to borrow or pledge funds in any form shall, unless approved at an AGM or SGM require the approval of the Trustees. They shall have the right to call for independent audits of the Club's financial affairs and to call special general meetings of the Club in any serious matters relating to their responsibilities.

The Trustees, for the time being shall be entitled to seats upon the Committee, to take part in its deliberations and shall possess equal voting rights with other members thereof. They do not lose their seats on the Committee through non-attendance, as do the other Members.

The following are provided as guidelines only regarding Trustees.

Trustees should ideally be long-standing members of the Club who have been flag officers and preferably past Commodores. They should bring legal, financial or business experience to their role

and be persons of recognised integrity and sound judgement. They should not hold operational responsibilities at the Club but can vote at Committee Meetings and provide guidance from their experience. The Trustees should meet from time to time to consider issues of strategic importance to the Club. They should act in consensus.'

Clause 9 of the constitution makes it clear in the following provision that the references in paragraph 14 to 'the Committee' are to the executive committee:

'NB: Where the word Committee is used without qualification in these Rules, the Executive Committee is signified.'

The function of the executive committee is set out in clause 9 as follows:

'The Executive Committee shall be appointed at the Annual General Meeting and shall manage, control and have entire conduct of the affairs of the Club save as shall be prescribed by the duties of the Trustees.'

[6] The argument of Seale's counsel was based on that part of clause 14 of the constitution which reads:

'A Trustee shall only act in a legal capacity for the Club if his actions have the agreement of the other available Trustees and such action follows the minuted direction of the Executive Committee.'

It is common cause that there was no minuted direction of the executive committee authorising the application. That, according to the argument advanced on behalf of Seale, is fatal.

[7] Counsel for the TYC relied on that part of clause 14 which reads:

'The Trustees shall represent the Club in any legal actions . . . '.

The submission was that this provision authorised the trustees to decide whether legal proceedings should be instituted.

[8] The constitution is not a model of clarity. It is my view, however, that the argument on behalf of the TYC is correct. Clause 9 of the constitution vests the entire conduct of the affairs of the club in the executive committee 'save as shall be prescribed by the duties of the Trustees'. The duties of the trustees are, in terms of the third paragraph of clause 14 of the constitution, to 'consult' the executive committee on any legal matters. These provisions read together are inconsistent with an interpretation that requires the trustees to act only on the minuted direction of the

executive committee. There is nothing startling in this.[3] The trustees are the TYC's elder statesmen and –women who are given particular responsibility in regard to legal matters affecting the Club. That responsibility appears also from provisions of clause 14 other than those to which I have already specifically emphasised, namely:

'The role of Trustees shall be . . . to protect the legal . . . viability of the Club . . . The Trustees . . . shall involve themselves sufficiently in the Club's operational affairs to forestall or mitigate any legal actions they consider may harm the Club's position . . . They should bring legal, financial or business experience to their role . . .'.

One of the guidelines at the end of clause 14 is that the trustees should act in consensus. The provisions relied upon by Seale were inserted in my view to cater for the situation where a single trustee is to act alone. The resort to the singular, 'a trustee', is significant. In such a case the single trustee is not enjoined to act in consensus with the other trustees — those 'available' have to agree; and a further safeguard, inserted only because a single trustee will be acting, is that the action taken by that trustee has to follow the minuted direction of the executive committee.

[9] The argument on behalf of Seale that the trustees of the TYC required the authority of the executive committee to bring these proceedings must accordingly fail. The only other preliminary point taken in Seale's answering affidavit was that the TYC lacked standing to bring the application in its own name. That argument was abandoned on appeal. Counsel representing Seale sought, however, to mount two further challenges: the first relating to the alleged non-participation of the president of the TYC in the bringing of the application and the second, that it had not been shown that the trustees had been properly appointed as such.

[10] It was only in argument in the court *a quo* that the non-participation of the president was raised. The submission, repeated on appeal, was that the president, who is (in terms of the first paragraph of clause 14 of the constitution quoted above) a trustee, had not joined with the other trustees in bringing the application. There

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[3] Contrast *Kempff v Visse* 1958 (1) SA 379 (T) at 380B-C and *Nampak Products Ltd t/a Nampak Flexible Packaging v Sweetcor (Pty) Ltd* 1981 (4) SA 919 (T) at 921D-H which deal with the institution of an action by a company.

may be a perfectly good reason for this: the president may have died, or resigned and the vacancy may not yet have been filled. Or ─ for all this court knows ─ Van Rooyen, Scott or Money, or Mr Antweiler (who was a trustee sailing in the Mediterranean when the application was brought, and subsequently ratified the action of the other three trustees) could have been the president: such a supposition is not far-fetched because, in terms of the first paragraph of clause 14 of the constitution, the number of trustees is limited to the president and three others. But it is not necessary to speculate. The question was not raised in the affidavits delivered by Seale and the TYC had no opportunity of dealing with it. The argument advanced by counsel depends on a fact not canvassed in the papers and it cannot be entertained for this reason. [4]

[11] Although the constitution of the TYC was annexed to the founding affidavit, Seale did not suggest in his answering affidavit that the trustees who brought the application had not been properly elected as such. The point was raised in the interlocutory proceedings for the substitution of the then trustees as applicants. But Seale did not appeal against the order of the court *a quo* granting this application; and in any event, the position was clarified by Van Rooyen in a further affidavit. Counsel for Seale cavilled at the fact that resolutions of the annual general meeting at which the trustees were elected, were not annexed; but had Seale entertained any doubt on this point, he could have obtained those minutes by invoking rule 35(11) which applies to motion proceedings (*Pieters v Administrateur, Suidwes-Afrika*)[5] and reads (to the extent relevant):

'The court may, during the course of any proceeding, order the production by any party thereto under oath of such documents . . . in his power or control relating to any matter in question in such proceeding as the court may think meet, and the court may deal with such documents . . ., when produced, as it thinks meet.'

MERITS

[12] It was submitted on behalf of Seale (I quote from the heads of argument):

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[4] *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) para 43.
[5] 1972 (2) SA 220 (SWA) at 228B-D.

'The decision by the State Attorney, to proceed with the registration of the Deed of Servitude, at a time when it was authorised to do so, should in itself have been the subject of judicial review, before the registration could be set aside. That never happened.'

The submission is without substance. There was no 'decision' by the State Attorney. The execution of the power of attorney by the official of the Province to enable the notarial deed of servitude to be registered, the conclusion of the notarial deed of servitude itself and the lodging of the documents with the Registrar of Deeds by the State Attorney were not 'decisions' but acts performed to give effect to the decision of the Premier to register a notarial deed of servitude in favour of Seale. This court held in *Bullock* that that decision amounted to administrative action based upon incorrect advice fundamental to its proper exercise and it was accordingly set aside.

[13] Counsel for both Seale and the TYC sought to rely in argument on passages in the decision of this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[6] which adopted[7] the analysis by Christopher Forsyth[8] of why an act which is invalid may nevertheless have valid consequences and concluded:[9]

'Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect *for so long as the initial act is not set aside by a competent court*.'

Applying that analysis to the present facts, the substantive validity of the decision of the Premier (the initial act by the first actor) was not a necessary precondition for the validity of the consequent act (the registration of the servitude by the Registrar of Deeds, the second actor); as long as the decision stood the validity of the registration was dependent on no more than the factual existence of the Premier's decision.[10] But all of this is irrelevant and the reliance by counsel on the decision in

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[6] 2004 (6) SA 222 (SCA).
[7] In para 29.
[8] '"The Metaphysic of Nullity": Invalidity, Conceptual Reasoning and the Rule of Law' in *Essays on Public Law in Honour of Sir William Wade QC* (Christopher Forsyth and Ivan Hare (eds), Clarendon Press) at 141; see also the subsequent article by the same learned author '*The Theory of the Second Actor Revisited*' 2006 AJ 209.
[9] In para 31; emphasis supplied.
[10] cf *Oudekraal* paras 39 and 40.

Oudekraal, misplaced. As appears from the italicised part of the judgment just quoted, the analysis was accepted by this court as being limited to a consideration of the validity of a second act performed consequent upon a first invalid act, pending a decision whether the first act is to be set aside or permitted to stand. This court did not in *Oudekraal* suggest that the analysis was relevant to that latter decision. The judgment emphasised[11] that:

'[A] court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.'

I think it is clear from *Oudekraal*, and it must in my view follow, that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent. It is precisely because of this consequence that a court asked to review the first act and set it aside has, and must have, a discretion whether or not to do so.[12] Some of the factors relevant to the exercise of that discretion were discussed in *Oudekraal*;[13] they include the lapse of time, the need for finality, the consequences for the public at large and the extent to which persons may have acted in reliance on the decision which it is sought to set aside. But the question whether or not the decision by the Premier in this matter should be set aside, has already been answered by this court in *Bullock*. The result is that all acts done consequent upon that decision (including the registration of the servitude), and all acts to give effect to it (including those to which I have referred in the previous paragraph of this judgment), are of no force or effect.

[14] It was submitted on behalf of the TYC, following upon views expressed from the bench during the hearing of the appeal, that the decision of this court in *Bullock* was retrospective in that it must be substituted for the order of the court of first instance in *Bullock*, and it accordingly operated from the date upon which the latter court gave its order; and that because that date preceded the date of registration of

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[11] Para 36 at p 246C-D.
[12] cf *Oudekraal* para 38.
[13] Para 46.

the servitude, the registration of the servitude was invalid for that reason. That is so (although an order to this effect would have been required before the Registrar could cancel the registration of the servitude) but the result would have been the same even if the registration of the servitude had preceded the date on which the court of first instance gave its order in *Bullock*. The reason is that acts performed subsequent to a decision which is set aside and which can no longer depend upon the mere existence of that decision for their own validity, are invalid once the decision is set aside, irrespective of whether those acts were performed before or after the court order invalidating the decision.

COSTS

[15] As I have already said, the court *a quo* ordered the Province to pay the costs of both Seale and the TYC. Seale abandoned the order in his favour. But he only did so in the heads of argument for this court delivered on 17 September 2007. It was pointed out by his counsel that he did not oppose the Province's applications for leave to the appeal made to the court *a quo* and to this court; but the fact remains that until he abandoned the order, the Province was obliged to bring those proceedings and to proceed to appeal. The Province is accordingly entitled to its costs up until 17 September 2007 and its counsel sought nothing more.

[16] Counsel for the TYC submitted that the order of the court *a quo* was justifiable on the basis that had the State Attorney informed this court of the registration of the servitude timeously, the point would have been argued and decided in its favour in *Bullock* and these proceedings would then have been unnecessary. With hindsight, that is so (provided the Registrar of Deeds had been joined as a party to the previous appeal). But the difficulty with the submission is that the State Attorney dealing with this appeal was entitled to assume that the decision in *Bullock* would invalidate also the registration of the servitude (as this court has now held) or, at worst, would require an order to enable the Registrar to cancel it; and in view of that decision, the State Attorney would reasonably have been entitled to assume that such an application would be unopposed. It is Seale who should have been ordered

to pay the costs of the proceedings in the court *a quo* ─ but there is no cross-appeal by the TYC for such an order. This, however, cannot redound to the disadvantage of the Province.

[17] Counsel for the TYC further submitted that the costs order of the court *a quo* could be justified on the basis that the Province failed to bring an application to compel Seale to co-operate in the cancellation of the servitude. But even assuming any such obligation, the Province was in the process of ascertaining the reasons for Seale's refusal to consent to the cancellation of the servitude when the application was brought by the TYC against *inter alios* it and Seale; and once that happened, the Province could not have been expected to do anything more than tender the relief which it did. The costs occasioned by Seale's opposition were not of its making and I fail to see any basis upon which it should be ordered to pay such costs.

[18] Finally, counsel on behalf of the TYC attempted a damage control exercise by arguing that the Province had unnecessarily embarked on a costly appeal when a relatively cheaper application in terms of rule 42(1)(a) was available to it. The rule reads:

'(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

Proceedings against Seale under the rule were competent in as much as he had not asked for a costs order against the Province and that order was therefore erroneously granted within the meaning of the rule. But such proceedings would not have been competent against the TYC, because the TYC did ask for the costs order made by the court *a quo* in its favour. The granting of this latter order amounted to a mis-exercise of the court *a quo*'s discretion because it unjustifiably disregarded the tender made by the Province,[14] but that renders the order appealable; the order was not 'erroneously sought' or 'erroneously granted' within the meaning of the rule. The

[14] *Naylor v Jansen* 2007 (1) SA 16 (SCA) para 14 at 23E-F.

submission by counsel representing the TYC that the rule should be interpreted, 'because of its plain and grammatical meaning', as covering orders wrongly granted, is inconsistent with the interpretation given to the rule in numerous cases, [15] has not a shred of authority to support it and requires no further consideration. Equally without merit is the submission that the court *a quo* could in terms of the rule have varied the order in favour of the TYC in proceedings brought by the Provincial Government against Seale, to provide that the Provincial Government and Seale would be jointly and severally liable for the TYC's costs. The basis for this latter submission was that only one costs order was made by the court *a quo*. In fact two costs orders were made ─ one in favour of Seale and one in favour of the TYC; and neither had anything to do with the other.

[19] The Province asked for the costs of two counsel. The questions raised by the Province's appeal were anything but complex and there is in my view no basis for such an order. On the other hand, it was in my judgement a wise and reasonable precaution for the TYC to have briefed two counsel to oppose the appeal brought by Seale, in view of the history of this matter, what was at stake in these proceedings and (I would say without wishing to fan the flames of litigation further) what may occur in the future.

[20] The following order is made:

(1) The appeal by Seale is dismissed with costs. Seale is ordered to pay the costs of appeal of the TYC, including the costs of two counsel.

(2) Seale is ordered to pay the costs of the appeal by the Province against the costs order in his favour up to 17 September 2007.

(3) (a) The appeal by the Province against the costs order in favour of the TYC succeeds, with costs.

(b) The order of the court *a quo* awarding costs to the TYC is set aside and the following order substituted:

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[15] See eg *Topol v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 648D-650A, *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) at 510D-511A and cases referred to in both decisions.

'The Province is ordered to pay the TYC's costs of the application up to and including 21 September 2005, being the date on which the answering affidavit and tender by the Province was served upon it. Such costs shall include the costs attendant upon that affidavit and the tender, shall exclude the costs occasioned by Seale's opposition to the application and all interlocutory applications, and shall be taxed on an unopposed basis.'

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T D CLOETE
JUDGE OF APPEAL

Concur: Howie P
Navsa JA
Heher JA
Combrinck JA