THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 865/2016

In the matter between:

LONG BEACH HOME OWNERS ASSOCIATION **APPELLANT**

and

DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES (SOUTH AFRICA) **FIRST RESPONDENT**

MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES (SOUTH AFRICA) **SECOND RESPONDENT**

Neutral citation: *Long Beach Home Owners Association v Department of Agriculture, Forestry and Fisheries (South Africa) & another* (865/2016) [2017] ZASCA 122 (22 September 2017)

Coram: Shongwe AP, Saldulker, Swain and Mathopo JJA and Schippers AJA

Heard: 25 August 2017

Delivered: 22 September 2017

Summary: National Forests Act 84 of 1998 – ss 3(3)*(a)*, 7(1)*(a)* and 7(4) – licence to carry out prohibited activities in a natural forest – meaning of 'natural forests must not be destroyed save in exceptional circumstances' – nature of discretion – rigid adherence to policy – improper exercise of discretion – refusal of licence – review of decision.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kollapen J sitting as court of first instance):

1 The appeal is upheld.

2 The first and second respondents are ordered to pay the appellant's costs.

3 The order of the court a quo dismissing the appellant's application, with no order as to costs, is set aside and replaced with the following order:

'(a) The decision taken by the sixth respondent, the Department of Agriculture, Forestry and Fisheries (South Africa) on 17 March 2014, to refuse the application by the applicant in terms of s 7(4) of the National Forests Act 84 of 1998 (the Act), for a licence to carry out one or more of the activities specified in s 7(1)*(a)* of the Act, is reviewed and set aside.

(b) The application is referred back to the sixth respondent for reconsideration and decision.

(c) The sixth and seventh respondents are ordered to pay the applicant's costs.'

JUDGMENT

Swain JA (Shongwe AP, Saldulker and Mathopo JJA and Schippers AJA concurring):

[1] The subject matter of the dispute between the parties to this appeal is a natural forest, which was declared as such in terms of ss 7(2) and (3) of the National Forests Act 84 of 1998 (the Act) and is described as Eastern Cape Dune Forest. The forest comprises a sensitive dune forest ecosystem and is a critical biodiversity area.

[2] The source of the dispute is that the owners of seven properties located within the forest, represented by the appellant, the Long Beach Home Owners Association, wish to construct homes on their properties. Before doing so, a licence has to be obtained in terms of s 7(4) of the Act from the first respondent, the Department of Agriculture, Forestry and Fisheries, the executive head of which is the second respondent, the Minister of Agriculture, Forestry and Fisheries. The application by the appellant for the requisite licence was, however, refused by the first respondent, by way of a letter dated 17 March 2014.

[3] The reasons furnished by the first respondent for the refusal of the licence were as follows:

'1 . . . Section 3(3)*(a)* of the National Forests Act of 1998 (Act 84 of 1998) determines that: "natural forests must not be destroyed save in exceptional circumstances where, in the opinion of the Minister, a proposed new land use is preferable in terms of its economic, social and environmental benefits". This principle not only applies to trees, but to the natural forest ecosystem as a whole, including undergrowth and wildlife, and even to disturbed forest ecosystems, as determined by legal precedent.

2. Residential development in natural forests is not considered an exceptional circumstance.

This confirms the Departmental position on the licence application originally stated in a letter to you, dated 10 October 2012, upon which an extensive investigation was done of all relevant issues raised, and also involving communication with affected parties or their representatives.'

[4] Aggrieved by the decision of the first respondent, the appellant launched an application before the Gauteng Division of the High Court, Pretoria (Kollapen J). An order was sought reviewing and setting aside the first respondent's decision and substituting for that decision the grant of the requisite licence to the appellant. In the alternative, an order was sought referring the matter back to the first respondent for reconsideration. The court a quo, however, dismissed the application, made no order as to costs and then granted leave to appeal to this court.

[5] Central to a resolution of the appeal is the interpretation of the provisions of s 3(3)*(a)*, read together with s 7(1)*(a)* of the Act:

The heading to s 3 reads as follows:

'Principles to guide decisions affecting forests'

Section 3(1)*(a)* provides that:

'(1) The principles set out in subsection (3) must be considered and applied in a balanced way –

(a) in the exercise of any power or the performance of any duty in terms of this Act.'

Section 3(3)*(a)* provides that:

'(3) The principles are that –

(a) natural forests must not be destroyed save in exceptional circumstances where, in the opinion of the Minister, a proposed new land use is preferable in terms of its economic, social or environmental benefits.'

Section 7 provides that:

'7 **Prohibition on destruction of trees in natural forests**

(1) No person may –

(a) cut, disturb, damage or destroy any indigenous tree in a natural forest; . . .

except in terms of –

(i) a licence issued under subsection (4) . . .

(4) The Minister may licence one or more of the activities referred to in paragraph *(a)* or *(b)* of subsection (1).'

[6] The following definitions contained in s 2 of the Act are relevant in interpreting these sections:

'**"ecosystem"** means a system made up of a group of living organisms, the relationship between them and their physical environment;

"forest" includes –

(a) a natural forest, a woodland and a plantation;

(b) the forest produce in it; and

(c) the ecosystems which it makes up;

"natural forest" means a group of indigenous trees –

(a) whose crowns are largely contiguous; or

(b) which have been declared by the Minister to be a natural forest under section 7(2);

“tree” includes any tree seedling, sapling, transplant or coppice shoot of any age and any root, branch or other part of it.’

[7] The grounds advanced by the appellant before the court a quo for the review of the decision of the first respondent, were as follows:

7.1 Section 3(3)*(a)* of the Act was not applicable to the appellant's application for a licence, as this only applied where the applicant for a licence seeks to ‘destroy’ the natural forest. The appellant averred that it did not intend ‘destroying’ the natural forest. At the worst it may have to ‘disturb’ some indigenous trees.

7.2 As a result, the first respondent did not have to consider the issue of ‘exceptional circumstances’, in terms of s 3(3)*(a)* of the Act, which only applied where the applicant for a licence intended to destroy a natural forest. The first respondent in deciding that ‘residential development in natural forests is not considered an exceptional circumstance’ had therefore taken into account an ‘irrelevant consideration’ in refusing the application. In addition, the first respondent had failed to take into account the expert evidence tendered by the appellant that the development would not cause ‘significant disturbance’ and that there would not be ‘destruction’ of the natural forest as a whole. The decision accordingly fell to be reviewed and set aside in terms of s 6(2)*(e)*(iii) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). This section provides that a court has the power to judicially review an administrative action if ‘the action was taken, because irrelevant considerations were taken into account or relevant considerations were not considered’.

7.3 In terms of s 6(2)*(d)* of the PAJA a court has the power to judicially review an administrative action if ‘the action was materially influenced by an error of law’. The appellant submitted that the decision of the first respondent was ‘materially influenced by an error of law’ in the interpretation it had placed upon the provisions of s 3(3)*(a)* of the Act. From the answering affidavit of the first and second respondents, it is clear that the first respondent interpreted the sentence ‘. . . natural forests must not be destroyed . . .’ to mean ‘*any* part of a forest however small, and not a forest in its entirety’. In addition, according to the first respondent, if smaller trees had to be cut and/or removed, such cutting ‘amounts to the destruction of trees in a natural forest, and that would lead to the destruction of forest’.

7.4 The adoption by the first respondent of the policy entitled ‘Policy Principles and Guidelines for Control of Development Affecting Natural Forests’ (the Policy) which provided that ‘[r]esidential development is not considered to be exceptional circumstances’ resulted in the first respondent applying this principle invariably, as a hard and fast rule in every case. The use of this principle as a decisive factor and not simply as a guide, when considering the appellant's application, resulted in a failure by the first respondent to properly exercise its discretion.

[8] In summary, the appellant's argument was that if the respondent had properly exercised its discretion in terms of s 7(4) of the Act, it would have concluded that the natural forest was not going to be destroyed, which meant that s 3(3)*(a)* was not applicable, and even if it was, exceptional circumstances were present justifying the grant of the licence to the appellant.

[9] The court a quo did not decide the application on the basis that the first respondent had failed to properly exercise its discretion, but on the basis that there was insufficient evidence to determine whether the natural forest would be ‘destroyed’ by the development, for the purposes of s 3(3)*(a)* of the Act. It held that in the absence of such a factual finding the provisions of the section were not activated, ‘applicable’ or ‘triggered’.

9.1 In this approach the reasoning of the court a quo was fundamentally flawed. Before it could be determined on the evidence whether natural forest would be ‘destroyed’, the section had to be interpreted to ascertain the proper meaning of this term. In the absence of this exercise, no yardstick existed in terms of the section, against which the evidence could be measured. The crucial enquiry therefore was whether the first respondent’s interpretation of the section was correct, namely that natural forest is destroyed for the purposes of the Act, if ‘*any* part of a forest however small, and not a forest in its entirety’ is destroyed.

[10] The erroneous approach of the court a quo is illustrated in the following extracts from the judgment. It defined the issue for decision in the following terms:

‘There is a dispute between the parties as to whether [s 3(3)*(a)*] has application, the stance of the applicant being that the proposed development will not lead to the destruction of the forest and therefore [s 3(3)*(a)*] is not applicable.’

The court a quo then pointed out that the view of the first and second respondents was that the development would of necessity require the removal of indigenous trees, a conservative approach was necessary and that the word ‘destroy’ should enjoy a wide meaning.

[11] The erroneous view of the court a quo that an interpretation of the provisions of s 3(3)*(a)* of the Act and more particularly, the sentence ‘natural forests must not be destroyed save in exceptional circumstances. . .’ was not necessary for the determination of the dispute between the parties, is illustrated by the following extract from the judgment:

‘*The word "destroy" is not defined in the Forests Act and while generally it denotes a state of destruction or the bringing to an end of the existence of something (see South African Concise Oxford Dictionary), there may be merit in the suggestion that in the context of a natural forest, it may require a different meaning relative to the context.* However, whatever the position may ultimately be, it does appear that in order to determine whether or not [s 3(3)*(a)*] is applicable, a factual enquiry with clear information with regard to both the proposed development and its impact on the natural forest which should include the number of trees that will be uprooted (and replanted if needs be), and the number of trees that will require pruning and cutting, will be necessary. In the absence of this information, it becomes speculative to make an assessment as to whether a proposed development will result in the destruction of a natural forest and whether this would then activate the principle as set out in [s 3(3)*(a)*] of the Forests Act.’ (Emphasis added.)

[12] The court a quo then referred to the fact that the original application by the appellant was sought in respect of all of the residential properties, including the boardwalks and garages that would form part of the development. The appellant had, however, in its supplementary replying affidavit restricted the application to one of the properties, namely Erf 1126, in which plans were available for the proposed home and some information had been furnished as to the effect of the construction upon the natural forest.

[13] The ratio for the decision of the court a quo appears in the following passages from the judgment:

‘All of the above only relates to Erf 1126 where there are building plans that have been developed. The situation insofar as it relates to the other erven in respect of which the Section 7(1) licence is applied for is unclear as there are no plans for such erven and accordingly it would be impossible to quantify the effect of any proposed development on the vegetation and indigenous trees.

It is this lack of detail, both in respect of Erf 1126 (in particular the garage site and the access route from the garage site to the residential erf) that prevents a proper quantification from taking place with regard to any possible forest destruction *and the related question as to whether Section 3(a) is triggered*.’ (Emphasis added.)

[14] In the result, the court a quo concluded that:

‘Under these circumstances where the nature of the relief sought has appeared to change and even in respect of the "amended" relief there appears to continue to be areas of uncertainty in respect of the damage to the natural forest, to conclude that the sixth and seventh respondents’ decision to refuse the licence applications in respect of all of the erven, would not be justified simply by reference to the effects to which reference has been made. . . .

In addition, and for the reasons given, the continuing uncertainty with regard to the number of trees that will be affected by the development in its entirety must all stand in the way of a proper assessment as to whether [s 3(3)(a)] is applicable as well as the scope of the licence sought in terms of Section 7(1).’ (Emphasis added.)

The fundamental flaw in the highlighted portion of the judgment is readily apparent. At the risk of repetition ‘whether section 3*(a)* is applicable’ can only be decided once the correct meaning of the sentence ‘natural forests must not be destroyed’ in the section is determined.

[15] I turn to the interpretation of s 3(3)*(a)*, read together with s 7(1)*(a)*, to determine the meaning of this sentence as well as the nature of the discretion possessed by the first respondent in terms of s 7(4), when considering whether to licence one or more of the activities set out in s 7(1)*(a)* of the Act.

15.1 The starting point must be a consideration of s 3(3)*(a)* in the context of the other relevant provisions in the Act. What is immediately apparent is that the provisions of this section are not peremptory, but directory. The heading to s 3 ‘Principles to guide decisions affecting forests’ as well as the introductory clause,

namely 'The principles set out in s (3) must be considered and applied in a balanced way –' clearly indicates that the principles are simply intended to serve as a guide to the decision-maker.

15.2 The correct approach in interpreting s 3(3)*(a)*, is as follows:

'. . . [T]he apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation . . . .'[1]

The purpose of the section is to give guidance to a decision-maker when exercising powers in terms of s 7 of chapter 3 of the Act and lays down the guiding principle that natural forests must not be destroyed save in exceptional circumstances. These exceptional circumstances are described as '. . . where, in the opinion of the Minister, a proposed new land use is preferable in terms of its economic, social or environmental benefits'. In other words, the guiding principle envisages the destruction of a natural forest and not individual indigenous trees making up a natural forest. This is because the 'exceptional circumstances' which may permit such destruction is a 'proposed new land use' which is 'preferable' to the existing use of the land as a forest because 'of its economic, social or environmental benefits'. Self-evidently, land will only become available for a new use if the natural forest, or at the very least a portion of it, is destroyed.

15.3 The provisions of s 7(1)*(a)* of the Act must be interpreted in this context. The prohibited activities are described as 'cut, disturb, damage or destroy any indigenous tree in a natural forest'. It is quite clear that to cut, disturb or damage an indigenous tree, does not qualify as destruction of the tree in terms of this section. This is because the prohibition that no person may 'destroy' an indigenous tree is included as a separate and distinct activity, in addition to the prohibition on cutting, disturbing or damaging an indigenous tree. This interpretation accords with the dictionary

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[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 26.

meaning of the word ‘destroy’, which the Concise Oxford English Dictionary (12th ed) defines as, ‘put an end to the existence of (something) by damaging or attacking it’.

15.4 Although a ‘natural forest’ is defined as ‘a group of indigenous trees whose crowns are largely contiguous’, it is quite clear from the definitions of a ‘forest’, ‘tree’ and an ‘ecosystem’ that it is not only comprised of indigenous trees, but includes tree seedlings, saplings, transplanted or coppice shoots of any age, and any root, branch or other part of a tree, as well as the ecosystem which makes up a forest. This however does not mean that the destruction of ‘*any* part of a forest however small, and not a forest in its entirety’ results in the destruction of natural forest for the purposes of s 3(3)*(a)*, as interpreted by the first respondent. It would be absurd if a licence to destroy a single seedling or sapling, or root, branch or other part of an indigenous tree in a natural forest, could only be granted if the land thereby made available as a result of its destruction, could be put to a proposed new use which is preferable ‘in terms of its economic, social or environmental benefits’, in order to establish the presence of exceptional circumstances. Such an interpretation would lead to ‘impractical’ or ‘oppressive’ consequences and ‘stultify the broader operation’ of the Act, as is clearly illustrated by the facts of this case.

15.5 The criterion is one of degree, to be determined on the individual facts of each case. If the evidence reveals that indigenous trees located in a natural forest will be destroyed, and not simply cut, disturbed or damaged, the number, nature, location, extent and distribution of the indigenous trees that will be destroyed, will have to be determined. Regard being had to the nature and extent of the natural forest in question, the first and second respondents will have to determine whether the prohibited activities for which a licence is sought, constitute the destruction of natural forest.

15.6 The guiding principle, which has to be considered and applied in a balanced way by the first and second respondents, is whether the nature and extent of the destruction will result in new land becoming available, with the potential of being put to a new use. If for example one indigenous tree in a natural forest of ten acres will be destroyed, to create new land for the erection of a beacon, this will obviously not constitute the destruction of natural forest, for the purposes of s 3(3)*(a)*. In such a case, it will not be necessary for the first and second respondents to be satisfied, that the proposed new land-use is ‘preferable in terms of its economic, social or

environmental benefits'. On the other hand, if one acre of indigenous trees in the same natural forest will be destroyed to create new land for the construction of a road, this will self-evidently constitute the destruction of natural forest for the purposes of the section. In the latter event, the guiding principle that natural forests must not be destroyed, save in exceptional circumstances, will have to be observed. Consequently, a licence for the prohibited activity may only be granted by the first and second respondents if satisfied that the proposed new use for the land is 'preferable in terms of its economic, social or environmental benefits'.

15.7 Obviously, where the prohibited activity does not involve the destruction of a natural forest in terms of s 3(3)*(a)*, the first and second respondents will nevertheless have to consider and apply in a balanced way, the remaining guiding principles set out in ss 3(3)*(b)* and *(c)* of the Act.

[16] It is therefore clear that the first respondent misconstrued the discretion it possessed in terms of s 7(4) of the Act and the decision of the first respondent was 'materially influenced by an error of law' in the interpretation it placed upon the provisions of s 3(3)*(a)* of the Act. In the result, the decision falls to be reviewed and set aside in terms of s 6(2)*(d)* of the PAJA.

[17] Although not strictly necessary for the determination of this appeal, I should say something concerning the Policy, referred to above, which has been adopted by the first and second respondents. As stated in *Computer Investors Group Inc & another v Minister of Finance* 1979 (1) SA 879 (T) at 898C-E: (affirmed in MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another 2006 (5) SA 483 (SCA)):

'Where a discretion has been conferred upon a public body by a statutory provision, such a body may lay down a general principle for its general guidance, but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public body for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter, but will have prejudged the case, without having regard to its merits. The public body will not have applied the provisions of the statutory enactment.'

[18] The Policy provides as follows:

‘Land uses which transform natural habitat and which are not of national or provincial strategic importance (including residential development and agriculture), do not constitute exceptional circumstances.’

In the answering affidavit of the first and second respondents this policy is dealt with as follows:

‘Residential development is not considered to be exceptional circumstances.’

Later, the following is added:

‘The term "exceptional circumstances" indicates situations that are unusual or rare. These exceptional circumstances are confined to strategic public projects such as national roads, dams and bulk service infrastructure*, but exclude ordinary urban or residential development*.’ (Emphasis added.)

[19] That the first respondent applies this Policy rigorously, is clear from the following passage in the affidavit:

‘. . . the principle is very clear and unambiguous, and that DAFF [first respondent] policy determines that *only the development of strategic significance such as dams and power lines, qualify as exceptional circumstances* and that *a high income residential development, as proposed at Long Beach, cannot be construed to constitute exceptional circumstances*.’ (Emphasis added.)

[20] In this regard, the court a quo however stated that:

‘. . . for the reasons already given, I am not satisfied that it could be said that sixth and seventh respondents erred in relying exclusively on the policy position that a residential development could never constitute exceptional circumstances. The engagement between the parties and the dispute that developed around the scope and nature of the impact of the development suggests compellingly that regard was indeed given to the merits of the application.’

I disagree with this conclusion. It is clear from the passages in the answering affidavit of the first and second respondents, that they do not regard the Policy simply as a guide, but as a decisive factor in deciding an application where the proposed new land use is residential development. The result is that in slavishly following this Policy the first and second respondents did not properly consider the

merits of the appellant's application. In doing so, the first respondent failed to properly apply the provisions of s 7(4), read with s 7(1)*(a)* and s 3(3)*(a)* of the Act.

[21] In the result, the appellant's application for a licence under s 7 (4) of the Act must be referred back to the first respondent for reconsideration, in the light of the principles laid down in this judgment. It is unnecessary to comment on the correctness of the conclusion reached by the court a quo, that the number of trees that will be affected by the development in its entirety and not simply those trees that will be affected by the development on Erf 1126, will have to be ascertained before a decision can be made as to whether the natural forest will be 'destroyed' for the purposes of the Act. In my view, this issue must be determined by the application of environmental considerations, when the s 7(4) application of the applicant is reconsidered.

[22] The court a quo in refusing the application made no adverse costs order against the appellant, on the basis that 'the applicant was ultimately seeking to protect a right enshrined in the Constitution and that its stance in advancing the application was well-intentioned'. However, when regard is had to the unreasonably narrow meaning that the first and second respondents placed upon their discretion they possessed in terms of the Act, as well as their slavish adherence to a rigid policy when considering the appellant's application, there can be no reason why they should not be ordered to pay the appellant's costs incurred before the court a quo, as well as those incurred in this appeal.

[23] In the result the following order is granted:

1 The appeal is upheld.

2 The first and second respondents are ordered to pay the appellant's costs.

3 The order of the court a quo dismissing the appellant's application, with no order as to costs, is set aside and replaced with the following order:

'(a) The decision taken by the sixth respondent, the Department of Agriculture, Forestry and Fisheries (South Africa) on 17 March 2014, to refuse the application by

the applicant in terms of s 7(4) of the National Forests Act 84 of 1998 (the Act), for a licence to carry out one or more of the activities specified in s 7(1)*(a)* of the Act, is reviewed and set aside.

(b) The application is referred back to the sixth respondent for reconsideration and decision.

(c) The sixth and seventh respondents are ordered to pay the applicant's costs.'

K G B Swain
Judge of Appeal

Appearances:

For the Appellant:	K Hopkins
	Instructed by:
	BKM Attorneys, Johannesburg
	Claude Reid Attorneys, Bloemfontein
For the Respondent:	G Bofilatos SC (with R Oosthuizen)
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein