THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 873/2017

In the matter between:

UMFOLOZI SUGAR PLANTERS LIMITED	**FIRST APPELLANT**
PAUL VAN ROOYEN	**SECOND APPELLANT**
PETROS MAPHUMULO	**THIRD APPELLANT**

and

ISIMANGALISO WETLAND PARK AUTHORITY	**FIRST RESPONDENT**
MINISTER OF WATER AND SANITATION	**SECOND RESPONDENT**
MINISTER OF ENVIRONMENTAL AFFAIRS	**THIRD RESPONDENT**
MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	**FOURTH RESPONDENT**
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**FIFTH RESPONDENT**

Neutral citation: *Umfolozi Sugar Planters Limited v Isimangaliso Wetland Park Authority* (873/2017) [2018] ZASCA 144 (1 October 2018)

Bench: Ponnan, Mbha, Dambuza and Makgoka JJA and Mokgohloa AJA

Heard: 6 September 2018

Delivered: 1 October 2018

Summary: Environmental law – publication of management plan – rendering relief sought moot.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Moodley J sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel where so employed.

JUDGMENT

Ponnan JA (Mbha, Dambuza and Makgoka JJA and Mokgohloa AJA concurring):

[1] The first respondent, iSimangaliso Wetland Park Authority (iSimangaliso), is an organ of state in the national sphere of government. It was established as a World Heritage Authority in terms of s 9 of the World Heritage Convention Act 49 of 1999. Under s 92(2) of the National Environment Management: Protected Areas Act 57 of 2003, iSimangaliso is the management authority for the iSimangaliso Wetland Park which, in

1999, was recognised as a World Heritage Site. It reports to the third respondent, the Minister of Environmental Affairs (the Minister) who, in turn, reports to the United Nations Environmental and Social Council (UNESCO) in compliance with South Africa's obligations as a signatory to the World Heritage Convention.

[2] The St Lucia Estuary forms the core of the iSimangaliso Wetland Park. The estuary is by nature dynamic. It is driven, at any given point in time, by five rivers and sea water inflows through an estuarine mouth. Of the rivers, the Umfolozi is the largest. The Wetland Park supports a range of plant, bird, fish and animal species. Historically, the St Lucia Estuary operated as one estuarine system, which closed during low and drought periods, with breaching occurring naturally during the rainy season. On occasion, the closure of the mouth caused back flooding into the floodplain.

[3] Prior to 1915, when farming first commenced, the Umfolozi River meandered through the floodplain. However, the river was canalised and diverted by farms on the floodplain. Those drainage canals, which were intended to assist farmers to drain their fields in the floodplain, changed the natural course of the river. From 1956 a separate mouth was opened and since then the separation of the Umfolozi and St Lucia estuary mouths was actively maintained. However, the benefits of freshwater from the Umfolozi River were lost to the St Lucia system. During dry periods, seawater flowed unimpeded into the lake, resulting in increased salinity levels, which adversely impacted the lake ecosystem.

[4] During July 2010 iSimangaliso published what it described as a Background Information Document (BID) entitled 'Lake St Lucia: understanding the problem and finding the solution'. Included in the BID was a management strategy for 2011/12, which focused on restoring the ecological functioning of the St Lucia system by allowing: (i) fresh water to continue to flow from the Umfolozi River; (ii) the Umfolozi and St Lucia mouths to combine and (iii) the system to operate naturally. The management strategy, which was based on scientific research, recognised that back flooding of some of the low lying sugar cane farms might occur as a consequence of not artificially breaching the mouth, but that this was unavoidable as those farms were situated within the estuarine functional

area. The scientific research confirmed that the policy of keeping the estuarine mouth open permanently or artificially breaching the river mouth was having devastating effects on the bio-diversity of the Lake St Lucia system and the iSimangaliso Wetland Park as a whole.

[5] By September 2012, the combined estuary mouth opened and breached into the sea naturally. It remained open thereafter for 27 months. As at 3 October 2012, about 16.4 billion litres of freshwater entered the St Lucia Estuary through the link with the Umfolozi River and was not wasted to sea. Three months after the natural opening of the mouth, increased freshwater inflows to the St Lucia system led to marked positive plant and animal responses to the recovered, naturally functioning estuary. Poor rains and low river flows during the latter part of 2014 contributed to a decrease in water levels in the system. Those conditions, in turn, led to a closing of the Umfolozi River mouth on 16 January 2015. Rainfall in late March and early April 2015 caused a rise once again in the levels of the Umfolozi River, resulting in back flooding of the farms of the second appellant, Mr Paul Van Rooyen and the third appellant, Mr Petros Maphumulo, who are shareholders of the first appellant, the Umfolozi Sugar Planters Limited.[1]

[6] On 1 May 2015 and in response to representations from the first appellant, the mouth was breached by iSimangaliso. However, a week later the mouth closed again naturally. When further attempts by the first appellant to persuade iSimangaliso to once again breach the mouth had come to nought, the appellants approached the Kwazulu-Natal Division of the High Court, Durban on 6 August 2015 with the first of three urgent applications. The following relief was sought:

'**Part A: Urgent interdictory relief**

. . .

2. That, pending the outcome of the relief sought in Part B of the Notice of Motion, the First Respondent is directed to open or to allow the First Applicant to open the Mfolozi estuary to drain down current flooding levels and to prevent further back flooding of the farmland of the Second and Third applicants and other shareholders of the First Applicant.

[1] The Umfolozi Sugar Planters Limited has 48 shareholders, who farm on land adjacent to the Umfolozi River. It was originally founded in 1923 as a co-operative of sugar cane farmers. The co-operative was converted to a company and registered as such on 13 May 2008.

Part B: Application

. . .

1. Declaring that the First Respondent has failed to develop and implement the statutory policies, protocols, procedures, rules and plans, including the Global Environment Facility (GEF) Project in terms of the regulatory framework under which it holds authority specific to the management of the Mfolozi River mouth;

2. Directing that the First Respondent comply with its statutory obligations and develop the necessary policies, protocols, procedures and plans, including the GEF Project specific to the management of the Mfolozi River mouth

. . .'

[7] Although the application was launched on an urgent basis the matter was adjourned by consent to 15 October 2015. On that date the high court (per Moodley J) issued the following consent order in respect of Part A of the relief sought:

'1. Pending the outcome of the relief sought in Part B of the notice of motion, the parties have agreed that the first respondent will breach the Umfolozi River Mouth to the sea to drain down backflooding on the applicants' farmland whenever the cotcane level reaches 1.2m.s.l. and shall establish the breach within 24 hours of being notified of the level by the first applicant.

2. The first applicant is directed to assist the first respondent to breach the Umfolozi River Mouth by making the long-boom excavator available for the 24 hour period.

3. The first applicant shall send the cotcane levels to the first respondent on a weekly basis and shall send the levels daily when the level exceeds 0.95m.s.l.'

[8] Despite the ostensible agreement between the parties, the appellants brought two further urgent applications in December 2015 and March 2016 alleging that iSimangaliso was in contempt of the order granted on 15 October 2015. In the event those applications, which were opposed by iSimangaliso, were held over for determination with Part B of the relief sought. By the time the matter came to be argued before Moodley J during May 2016, the appellants no longer persisted in the original relief sought in their notice of motion. Instead, in heads of argument filed on behalf of the appellants, it was intimated that the following amended relief would be sought:

'1. That the process of developing the estuarine management plan proceeds according to the timetable set out by iSimangaliso in its affidavit of 6 May 2016;

2. That, in developing the estuarine management plan and in taking environmental decisions, iSimangaliso is directed to take account of its obligation to prevent and drain down backflooding on the applicants' farmland;

3. That, pending the finalisation of the estuarine management plan the interim order of 15 October 2015 remains in place;

4. That it is declared that iSimangaliso is in contempt of the court order dated 15 October 2015 in that it failed in respect of both the 16 December 2015 and 13 March 2016 trigger events to "breach the Mfolozi River Mouth to the sea to drain down backflooding on the applicants' farmland whenever the cotca[n]e level reaches 1.2.m.s.l" and failed to establish the breach within 24 hours of being notified of the level by the first applicant.

5. That iSimangaliso is directed to pay the applicants' costs in respect of Part A, Part B and the two urgent contempt applications, such costs to include the costs of two counsel.'

[9] The appellants failed before Moodley J, who issued the following order on 21 April 2017:

'1. The interim relief as set out in the order taken by consent on 15 October 2015 is discharged;

2. The main application is dismissed.

The following order do issue:

1. Costs in the main application: Part A and B

The applicants are ordered, jointly and severally, the one paying the others to be absolved, to pay the costs of the first respondent, the iSimangaliso Wetland Park Authority, such costs to include all reserved costs and the costs of senior counsel.

2. The two Contempt Applications: 16 December 2015 and 13 March 2016

2.1 The applications are dismissed.

2.2 Each party is directed to bear its own costs.'

The appellants appeal with the leave of the learned judge. In heads of argument filed with this court, it was intimated on behalf of the appellants that the 'urgent interim applications and contempt applications are not pursued on appeal'. This meant that prayers 1 to 3 and 5 of the amended relief sought remained for consideration.

[10] The appellants adopted a scatter gun approach to the litigation in the court below. They initially claimed that iSimangaliso was acting arbitrarily and without any lawful basis. That wide ranging attack was met with a detailed analysis of the applicable laws guiding

the actions of iSimangaliso, which were extensively described in the answering affidavits. The court a quo concluded that iSimangaliso's actions were grounded in and sanctioned by law, including the World Heritage Convention, which was incorporated into law in the World Heritage Convention Act. This has not been challenged on appeal.

[11] The facts demonstrate that at all stages in the research, formulation and implementation of the management strategy for the St Lucia Estuary from 2008 to the present the appellants were consulted, their views were heard and they raised no objection. The appellants did not challenge the strategy plan published in July 2011, which was 'to restore the ecological functioning of the Lake St Lucia System' or any other administrative action taken by iSimangaliso in respect of the restoration of the St Lucia Estuary. Further, there was no response from the appellants to the affidavits from the experts expressing support for the environmental and scientific soundness of the measures taken for the restoration of the St Lucia Estuary. Nor were there any administrative law challenges to any of the measures adopted by iSimangaliso. The unchallenged findings of the court a quo was that iSimangaliso was not the cause of the back flooding. In that regard, the high court was willing to accept that back flooding on a floodplain is a natural process.[2] Indeed, on 26 September 2011, the first appellant's engineer, Mr AM Knox, recommended in a report to the former: 'it is probably pertinent to consider some sort of forced drainage from this area or consider abandoning these cane areas in favour of some better placed lands.' This observation ties in with the fact that the appellants' properties are: (a) in a floodplain; (b) within a estuarine functional zone and (c) slumping. In fact, in 2002, a specialist engaged by the first appellant, Mr Van Heerden, recorded that the appellants' farms had slumped approximately 1 metre in 26 years. The appellants did not deal with these two reports, which had been commissioned by them.

[12] In motion proceedings, the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom.[3] The discipline of the law requires an assessment of established facts,

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[2] *Abbott v Overstrand Municipality and Others* (16599/2013) [2014] ZAWCHC 184 (1 October 2014) para 7; *Abbott v Overstrand Municipality and Others* (99/2015) [2016] ZASCA 68 (20 May 2006).
[3] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA); [2005] 3 All SA 425 para 28.

through which legal issues are crystallised, for a proper assessment of claims. As the court below noted, large portions of the iSimangaliso's answering affidavits remained undisputed by the appellants. It is well settled that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[4] Here, it could not be said that iSimangaliso's allegations were such as to justify their rejection on the papers. It follows that such disputes, as there were, had to be resolved in favour of iSimangaliso. This is precisely how the court a quo approached the matter. In that, it cannot be faulted.

[13] It must also weigh against the appellants that the amended relief sought in the court below was not foreshadowed in the affidavits. Rather, it came to be raised for the first time in heads of argument, after the filing of all of the affidavits. The failure by the appellants to properly put up a case in support of the amended relief meant that iSimangaliso was denied the opportunity to deal issuably with those matters. Prayer 1 of the amended relief sought an order: '[t]hat the process of developing the estuarine management plan proceeds according to the timetable set out by iSimangaliso in its affidavit of 6 May 2016'. It is to be noted that the 'estuarine management plan' relied upon by the appellants as the basis for the relief, had been overtaken by the approval and publication of a new plan. At the hearing of the application for leave to appeal, the approval of a new management plan was known. On 20 January 2017 iSimangaliso had submitted to the Minister a final Integrated Management Plan (IMP) for the iSimangaliso Wetland Park for the period 2017 – 2021. The IMP, which includes the Estuarine Management Plan (EMP) for the St. Lucia Estuary, was approved by the Minister on 21 May 2017 (after judgment by the court below but prior to the hearing of the application for leave to appeal on 28 July 2017) in accordance with s 25(1) of the World Heritage Convention Act. The IMP was gazetted on 22 September 2017.[5]

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[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C; *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (2) All SA 512 (SCA); 2008 (3) SA 371 (SCA) para 12.

[5] Government Gazette No. 41129 dated 22 September 2017.

[14] iSimangaliso submitted that the publication of the IMP has rendered the appeal moot because, so the submission goes, absent any legally appropriate challenge to that plan, no practical relief can follow for the appellants from this appeal.[6] Indeed, when the application for leave to appeal was argued before Moodley J on 28 July 2017, counsel for iSimangoliso asserted:

'The first is the obvious point, is what relief would an appeal court now be asked to give and the relief as we know from the amended relief in part B was for the timetable for the estuary management plan to continue and for interim relief to follow. Now, we know that the estuary management plan was in fact passed on 21 May. So the question of mootness arises and the question becomes what practical relief will follow if M'Lady grants leave to appeal, and it is out submission, none.'

[15] In response, counsel for the appellants submitted:

'Moodley J: Mr Kemp, can I just stop you there? Basically – let us just go back to the relief that was sought, the amended relief that was sought.

Mr Kemp: Yes.

Moodley J: The first one was the process of developing the estuary management plan proceeds according to the timetable, now that basically has fallen away because this plan is now passed, it is now law.

Mr Kemp: Yes.

. . .

And M'Lady is quite right, paragraph 1 does not matter anymore but paragraph 2 matters and paragraph 3 also matters because if that estuarine plan does not meet the requirements and does not recognise those rights of protection of land, then they would be a request for interim relief.

M'Lady refused interim relief and I understand why M'Lady refused interim relief. Once you came to the conclusion that we did not have the rights that we contended to, it followed that we could not get any interim relief because you held that we did not have these rights and that is the issue that we want to take to court and that is the issue that is a very important and alive one.

It is whether we do not have any of those rights or whether we do and that is a very live issue. We do not want the relief in full.'

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[6] *Minister of Water and Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177; 2016 (1) All SA 676 para 23.

[16] The effect of the concession that 'paragraph 1 does not matter anymore', as was rightly accepted from the bar in this court, is that the appellants cannot, on appeal, seek to advance a case that was specifically abandoned before the court below.[7] That leaves prayers 2 and 3 of the amended relief. As originally framed, both were inextricably linked to and dependent upon the grant of prayer 1, because all three took as their starting point the development of an estuarine management plan. But, that has since been overtaken by the IMP. Prayer 1 having fallen away, prayer 2 stood logically to suffer the same fate. However, insofar as prayer 2 is concerned, so it was contended in this court, the appellants were at the very least entitled to an order in these terms: 'That in taking environmental decisions, iSimangaliso is directed to take account of its obligations to prevent and drain down back flooding on appellants' farmland.'

[17] In my view, there are several obstacles in the path of the appellants to the grant of such an order. First, even if this court is of the view that the judgment in the court below was wrong, the immediate difficulty is that it would not as a matter of course issue the declarator the appellant seeks.[8] Generally speaking, this court does not act in an advisory capacity by pronouncing upon hypothetical, abstract or academic issues. Second, absent properly brought challenges to set aside either the contents of the IMP or the EMP or any administrative actions based on these plans, it is not clear what is contemplated by the expression 'in taking environmental decisions'. What is equally unclear is whether the taking of those decisions pertains only to the St Lucia Estuary. This is because the EMP for the St Lucia Estuary is a separate but subsidiary plan to the IMP for the period 2017-2021. In this appeal, the appellants leave intact all of the measures undertaken by iSimangaliso for the St Lucia Estuary up to now. They base their relief on an alleged historic obligation on the part of iSimangaliso to drain down back flooding of the farms. And, they want that obligation incorporated into the already complete EMP and in the taking of environmental decisions. The legal bases for their asserted claim to the relief was said to lie in custom, the law of neighbours and a water use certificate. They say that

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[7] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA 5; 2013 (2) All SA 251 (SCA) para 17.
[8] *Rumdel Cape v SA National Roads Agency* (234/2015) [2016] ZASCA 23 (18 March 2016) (unreported case) para 15.

iSimangaliso must give effect to those rights. But, those have been overtaken by the passage of time and subsequent administrative decisions.

[18] Third, it is not proper for a party in motion proceedings to base an argument on matter not canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts.[9] The position is worse where the arguments are advanced for the first time on appeal.[10] Fourth, the declarator sought is indeterminate, open ended and irredeemably vague.[11] Impermissibly vague provisions violate the rule of law, which is a founding principle of our Constitution.[12] An order or decision of a court binds all those to whom, and all organs of state to which, it applies.[13] Litigants who are required to comply with court orders, at the risk otherwise of being in contempt if they do not, must know with clarity what is required of them.[14] It goes without saying that in order to comply with that order, iSimangaliso has to know not just where its obligations start and end, but also what it is obliged by the order of court to do. It does seem to me that if such an order were to issue, it would be difficult in the extreme for iSimangaliso to know with any measure of confidence precisely what steps it would be required to take to comply therewith.

[19] Fifth, in considering whether to grant a declaratory order, a court exercises a discretion with due regard to the circumstances. And, whilst the absence of an existing dispute is not an absolute bar to the grant of a declaratory order,[15] as Navsa JA pointed out in *West Coast Rock Lobster Association v The Minister of Environmental Affairs and Tourism*[16] para 45:

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[9] *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others* 2008 (2) SA 184 (SCA) para 43.
[10] Id.
[11] *Minister of Water and Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177; 2016 (1) All SA 676 para 13; *Mazibuko NO v Sisulu NO and Another* [2013] ZACC 28; 2013 (6) SA 249 (CC).
[12] *National Credit Regulator v Opperman and Others* [2012] ZACC 29*;* 2013 (2) SA 1 (CC) at para 46.
[13] Section 165(5) of the Constitution.
[14] *Minister of Home Affairs v Scalabrini Centre, Cape Town & others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) para 77.
[15] *Ex Parte Nell* 1963 (1) SA 754 (A).
[16] *West Coast Rock Lobster Association v The Minister of Environmental Affairs and Tourism* [2010] ZASCA 114; 2011 (1) All SA 487 (SCA).

'The court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation. If the court is so satisfied it must consider whether or not the order should be granted. In exercising its discretion the court may decline to deal with the matter where there is no actual dispute. The court may decline to grant a declaratory order if it regards the question raised before it as hypothetical, abstract or academic.'

It follows, for these reasons that the appellants' quest for a declarator could not succeed.

[20] Turning to prayer 3: The appellants persist on appeal in their call that 'the interim order of 15 October 2015 remains in place'. The legal basis for the re-assertion of interim relief is not understood. As Nugent JA put it in *National Director of Public Prosecutions v Rautenbach and Others*[17] para 12:

'That is to misconstrue the true nature of the orders. As pointed out by Goldblatt J in *Chrome Circuit Audiotronics (Pty) Ltd v Recoton European Holdings Inc and Another* 2000 (2) SA 188 (W) E at 190B-E, orders of this kind are not independent of one another. An interim order that is made *ex parte* is by its nature provisional—it is "conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side" (per Harms JA in *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) in para [6]), which is why a litigant who secures such an order is not better positioned when the order is reconsidered on the return day (*Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) in para [45]). It follows that when an appeal is sought to be brought against the discharge of such an order there is nothing to revive for it is as if no order were made in the first place.'

In any event, the interim relief is not self-standing. It was dependent upon the grant of the declaratory order under prayer 2. The declaratory relief having failed, the interim order sought under prayer 3, likewise must fail.

[21] There remains the costs of the two contempt applications: Having elected not to appeal the decision of the court below to dismiss the two contempt applications, it is entirely unclear upon what basis the appellants claim the costs of those applications on appeal.

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[17] *National Director of Public Prosecutions v Rautenbach and Others* 2005 (4) SA 603 (SCA).

[22] In the result, the appeal is dismissed with costs, including those of two counsel where so employed.

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellants:	K J Kemp SC (with him SF Pudifin-Jones) Instructed by: Shepstone & Wylie Attorneys, Umhlanga Rocks Matsepes Inc., Bloemfontein
For First Respondent:	A A Gabriel SC Instructed by: D'Arcy-Herrman Raney Attorneys, Johannesburg Webbers, Bloemfontein