THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 845/2015

In the matter between:

SERENGETI RISE INDUSTRIES (PTY) LTD	**FIRST APPELLANT**
eTHEKWINI MUNICIPALITY	**SECOND APPELLANT**

and

TAYOB NAZEER ABOOBAKER NO	**FIRST RESPONDENT**
FAREEDA ABOOBAKER NO	**SECOND RESPONDENT**
CADOGAN GARDEN SHARE BLOCK (PTY) LTD	**THIRD RESPONDENT**
39TH STREET INVESTMENTS 86 SHAREBLOCK (PTY) LTD	**FOURTH RESPONDENT**
311 BODY CORPORATE	**FIFTH RESPONDENT**
SURREY MANSIONS BODY CORPORATE	**SIXTH RESPONDENT**

Neutral Citation:	*Serengeti Rise Industries (Pty) Ltd & another v Aboobaker NO & others* (845/2015) [2017] ZASCA 79 (2 June 2017).
Coram:	Shongwe ADP and Ponnan and Dambuza JJA and Coppin and Schippers AJJA
Heard:	**10 May 2017**
Delivered:	**2 June 2017**

Summary: Administrative law: validity of a demolition order granted as just and equitable remedy: order granted pursuant to a finding that Municipality decisions approving rezoning of property and approving building plans were unlawful: order vitiated by failure to set the approval decisions aside, failure to specify portion(s) of the building to be demolished, and failure to exercise discretion in determining just and equitable remedy: court order found to lack clarity and certainty.

ORDER

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

1 The appeal is upheld with costs including the costs of two counsel;

2 The order of the high court is set aside and is replaced with the following:

'The application is dismissed with costs including the costs of two counsel where so employed.'

JUDGMENT

Dambuza JA (Shongwe ADP and Ponnan JA and Coppin and Schippers AJJA concurring):

[1] The issue in this appeal is the validity of a demolition order granted by the KwaZulu-Natal Division of the high court, Durban (per Steyn J) (high court). The appeal is with the leave of this court.

[2] The judgment of the high court was made pursuant to an application, brought by the six respondents, seeking that three decisions made by the second appellant, the eThekwini Metropolitan Municipality (Municipality), be reviewed and set aside and that a 'just and equitable remedy' be granted in their favour. The impugned decisions related to the rezoning, by the Municipality, of the first appellant's immovable property situated at 317 Currie Road, Berea, Durban (the property),and its approval of two sets of building plans for a building to be erected on that property.

[3] The six respondents own and/or represent owners of immovable properties located within close proximity to the property. The first and second respondents, being husband and wife, are Trustees of the Fareeda Aboobaker Family Trust, which owns an abutting neighbouring property located at 311 Currie Road. The first respondent is also the chairman of the 311 Currie Road Body Corporate (the fourth respondent). The third, fifth and sixth respondents are Cadogan Gardens Share

Block (Pty) Ltd, 39th Street Investments, 86 Shareblock (Pty) Ltd, and the Surrey Mansion Body Corporate.

[4] The first appellant, Serengeti Rise Industries (Pty) Ltd (Serengeti) acquired the property in 2009. In August 2010 the Municipality approved the first building plans in terms of which Serengeti was to build a four storey residential apartment development on the property. At that time the property was zoned General Residential 1 (GR1) in terms of the Durban Town Planning Scheme Regulations (the scheme). On 12 December 2011, whilst construction under the 2010 building plans was underway, the Municipality approved an application by Serengeti for rezoning of the property from the GR1 to a General Residential 5 (GR5) zone. The rezoning was approved despite written objections from the third, fifth and sixth respondents.

[5] Thereafter, on 6 March 2014, the Municipality approved further building plans (deviation plans) for the development of a nine storey building, comprising 12 residential apartments. Over the ensuing period of approximately seven months a six storey building, with a bulk of 9 786 square metres (compared to the maximum of 1 800 square metres and four storeys allowed under a GR 1 zoning) emerged on the property. The rezoning approval together with approval of the deviation plans by the Municipality form the subject of this dispute.

[6] The respondents launched the challenge to the Municipality's aforementioned decisions on 16 October 2014. By that time the building had reached six storeys in height. Construction only ceased when the shell of the building was seven storeys high and the concrete slab of what would have been the eighth floor had already been cast. The respondents contended that the approval of the rezoning application and deviation plans were made in conflict with the Municipality's policy which provided that only buildings that conformed to GR1 and GR2 zoning would be allowed in the Berea-Musgrave area of the Municipality. They asserted that the process which preceded the approvals had been unfair as they had not been given proper notification thereof.

[7] In opposing the application, Serengeti and the Municipality (the appellants) contended, as a starting point, that the challenge to the rezoning decision, having

been brought only in October 2014, fell foul of the provisions of s 7(1) of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA).[1] They took issue with the fact that the respondents had made no substantive court application, under s 9(b) of PAJA, for an extension of time within which to launch their review application.[2] They insisted that the decisions had been properly made, in compliance with the applicable laws and procedures.

[8] The high court accepted the first and second respondents' explanation that they had launched the proceedings as soon as they reasonably could, within four months of obtaining the information they had needed to challenge the lawfulness of the relevant decisions.[3] There was no explanation by the other respondents for their delay in challenging the approvals. Nevertheless, the high court, relying on the principle of legality, found that there had been no unreasonable delay on the part of the respondents in bringing the review application. The court also found that the rezoning approval was unlawful and invalid, mainly because the purported notification to the public did not meet the requirements of the KwaZulu-Natal Ordinance 27 of 1949 (the Ordinance), and further, that the Municipality had failed to comply with the provisions of s 7(1)*(b)* of the National Regulations and Building Standards Act 103 of 1977 (Building Standards Act).[4] Consequently, the approval of

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[1] The section provides that:
'(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without reasonable delay and not later than 180 days after the date –
(a) …
(b) On which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

[2] The section provides variation of time within which the period of 180 prescribed for institution of review proceedings may be extended. Such extension may be achieved by either agreement between the parties or by a court on application by the person or administrator concerned. The court may grant such an extension where the interests of justice require.

[3] It was the first and second respondent's case that they could not have challenged the approvals without having regard to the record of the Municipality's decision. Their delay resulted from the delay by the Municipality in furnishing them with that information.

[4] Section 7(1) states: '**Approval by local authorities in respect of erection of buildings.**—(1) If a local authority, having considered a recommendation referred to in section 6 (1) (*a*)—
(*a*) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;
(*b*) (i) is not so satisfied; or
(ii) is satisfied that the building to which the application in question relates—
(*aa*) is to be erected in such manner or will be of such nature or appearance that—
(*aaa*) the area in which it is to be erected will probably or in fact be disfigured thereby;
(*bbb*) it will probably or in fact be unsightly or objectionable;
(*ccc*) it will probably or in fact derogate from the value of adjoining or neighbouring properties;
(*bb*) will probably or in fact be dangerous to life or property,

the 2014 deviation plans, based on the unlawful rezoning, was also found to be unlawful and invalid. Accordingly, the portions of the building that did not accord with the original (2010) building plans were found to be illegal; hence the demolition order.

[9] In this appeal the third responded has elected to abide by the decision of this court. Extensive submissions were made on whether the rezoning approval fell to be reviewed under PAJA or whether it was an executive decision requiring only compliance with the legality principle as the high court found. The appellants insisted that both decisions were administrative decisions and that the review together with the alleged delay had to be considered under s 7(1) of PAJA. I may add that although the decision of the high court on this issue was founded on the principle of legality the learned judge also found that both the rezoning and the deviation plans approval were administrative decisions.[5]

[10] The second leg of the appeal was that the 'draconian' demolition order was not justified and that the high court's approach when considering the remedy was erroneous in that it failed to exercise its discretion as envisaged in s 172(1)*(b)* of the Constitution and s 8 of PAJA. The appellants contended that, in granting the demolition order, the high court disregarded the fact that the approved building plans conformed with the zoning for that property.

[11] In my view, the insurmountable problem for the respondents in this appeal lies with the order granted by the high court. In relevant part the order reads: 'The development on the property situated at 317 Currie Road that exceeds GR1 zoning be demolished'. This order is unsustainable for a number of reasons.

[12] Firstly, although in its reasons the high court found that the rezoning and deviation approvals were invalid and should be set aside, it made no order(s) to that effect. The court therefore granted a remedy of a consequential nature without

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such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal.

Although the high court also found that provisions of s 7 (1) of the Act had also not been satisfied the finding of inadequate notification to members of the public was the main reason for the order ultimately granted by the high court.

[5] Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay.

granting the primary relief sought. However, the consequential relief depended upon the rezoning and plan approval by the Municipality being reviewed and set aside. Until set aside, they remained valid and have legal effect.[6] The building thus complied with building and zoning approvals of the Municipality that remained extant. The demolition order was thus incompatible with those extant decisions. Moreover, the court's findings or reasons are not appealable. Apart from the trite legal principle that an appeal lies against an order of court and not the reasons, [7] the practical reality is that only the order granted would be recorded by the Registrar in the document that would be served or executed by the Sheriff and not any conclusions appearing in the reasoning of the court below.

[13] Secondly, the order lacks certainty and clarity. On a plain reading of the order only the portion of the building that 'exceeds GR1 zoning' will have to be demolished. There is no description of that portion. This is not surprising, as no evidence, expert or otherwise, was led in the high court in this regard. There was also no evidence on whether the structural integrity of the building could survive the execution of the partial demolition order.[8] In the end the demolition order lacked clarity and certainty. It would appear that the only way it could be executed would be the demolition of the entire building. And, the court below did not give any consideration to the constitutional proportionality of that remedy.

[14] The submission, on behalf of the first and second respondents, that plans could be drawn up for the purpose of executing the demolition order, is untenable. Counsel for the fifth and sixth respondents explained that these respondents had envisaged that the matter would follow the two stage procedure envisaged in *AllPay v Chief Executive Officer*.[9] However, the high court was of the view that the 'piecemeal approach' would be undesirable and time consuming'.

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[6] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2010 (1) SA 333.
[7] *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 714J-715E; *Neotel (Pty) Ltd v Telkom SA SOC Ltd and others* (605/2016) 2017 ZASCA 47 (31 March 2017).
[8] *BSB International (Pty) Ltd v Readam South Africa* (Pty) Ltd [2016] ZASCA 58 at para 29.
[9] See *AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer of the South African Social Security Agency* 2014 (4) SA 179 (CC); *AllPay Consolidated v Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) 604 (CC).

[15] The final reason why the order of the high court cannot stand is the failure by the court a quo to exercise its discretion in considering the order to be made. As submitted on behalf of the appellants the court's power to grant constitutional remedies is broad and flexible. The court may grant an order that is just and equitable and the terms of the order are determined within the context of each case.[10]

[16] The learned judge reasoned that:

'. . . the relief should be in line with the findings. What remains valid is that part of the building that was built in terms of the GR1 zoning and the plan approved by the [Municipality] on 30 August 2010. There is an obligation on this court to uphold the law. This court by operation of the legality doctrine is bound to order that the part of the structure that is illegal be demolished.'

[17] Reliance was placed on *Lester v Ndlambe Municipality and Another.*[11] The court held that: 'I understand *Lester* to direct that once a court has made a finding that a structure is illegal, the jurisdictional basis for a demolition has been proved. Once a ground for review under PAJA has been established then this court has to deal with its consequence. In terms of section 172(1)(a) of the Constitution the administrative action by the Municipality has to be declared unlawful.'

[18] This reliance on *Lester* was misplaced. In *Lester*, the building in respect of which the high court had issued a demolition order had been constructed without any approved building plans. The demolition order was sought by the Municipality in terms of s 21 of the Building Standards Act, which empowers a magistrate, on application by a local authority or the Minister, to authorise such local authority or Minister to demolish a building, if the magistrate is satisfied that its construction does not comply with the provisions of that Act. In any event, *Lester* must now be read in the light of the subsequent judgment of this court in *BSB International (Pty) Ltd v Readam South Africa* (Pty) Ltd.[12]

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[10] Section 172 of the Constitution.
[11] *Lester v Ndlambe Municipality and Another* (514/12) [2013] ZASCA 95; [2014] 1 All SA 402 (SCA); 2015 (6) SA 283 (SCA).
[12] See fn 8 above.

[19] Remedies provided for under s 8 of PAJA and under common law must be construed as giving effect to and promoting constitutional rights. Sections 38 and 172 of the Constitution enjoin courts to grant case appropriate remedies. The principle is that:

'. . . invalidity under the Constitution, as was the case with voidness under the common law, is a relative concept. It is, firstly, subject (in the administrative-law context) to a determination by the court whether a ground of review is present. Secondly (in the event that a ground of review is present) a court has to determine what the consequences of such determination are. A finding that the action in question is invalid (because a ground of review is present) will not necessarily mean that the action is to be set aside or declared invalid with retrospective effect or even at all. Especially in the case of delegated legislation which authorises administrative action, a retrospective declaratory order of invalidity could have extremely disruptive effects (especially where a number of actions had already been taken in terms of such legislation).' [13]

The high court therefore erred in adopting an approach that it was compelled to issue the demolition order that it did.

[20] Regarding costs, the respondents were not public interest litigants.[14] The review was motivated by a desire to protect property rights and advance private interests. I can find no reason as to why the costs of appeal should not follow the result.

[21] Consequently the following order is granted:

1 The appeal is upheld with costs including the costs of two counsel;

2 The order of the high court is set aside and is replaced with the following:

'The application is dismissed with costs including the costs of two counsel where so employed.'

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N DAMBUZA
JUDGE OF APPEAL

[13] J R de Ville; *Judicial Review of Administrative Action on South Africa* (2003) at 331.
[14] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

APPEARANCES:

For the First Appellant:	C D A Loxton SC; C F van der Merwe SC Instructed by: Norton Rose Fulbright SA Inc c/o Webbers, Bloemfontein
For the Second Appellant:	G F Marcus SC; M du Plessis Instructed by: Livingston Leandy Inc , La Lucia Ridge c/o McIntyre & Van der Post, Bloemfontein
For the First, Second and Fourth Respondents:	N Cassim SC; G F Porteous Instructed by: Saley Laher Hoosen Inc, Johannesburg c/o Honey Attorneys, Bloemfontein
For the Fifth and Sixth Respondents	K J Kemp SC; H S Gani Instructed by: Theyagaraj Chetty Attorneys, Durban c/o Honey Attorneys, Bloemfontein