**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 82/18

In the matter between:

**SPILHAUS PROPERTY HOLDINGS (PTY) LIMITED AND 18 OTHERS** Applicants

and

**MOBILE TELEPHONE NETWORKS (PTY) LIMITED** First Respondent

**ALPHEN FARM ESTATE IN CONSTANTIA (PTY) LIMITED** Second Respondent

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| **Neutral citation:** | *Spilhaus Property Holdings (Pty) Limited and Others v MTN and Another* [2019] ZACC 16 |
| **Coram:** | Cameron J, Froneman J, Jafta J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J |
| **Judgment:** | Jafta J (unanimous) |
| **Heard on:** | 7 February 2019 |
| **Decided on:** | 24 April 2019 |
| **Summary:** | Sectional Titles Act 95 of 1986 — locus standi — body corporate<br><br>Individual owners — section 41 — common law right — enforcement of compliance with zoning scheme regulation |

## ORDER

On appeal from the High Court of South Africa Western Cape Division, Cape Town:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order issued by the Supreme Court of Appeal is set aside and is replaced with the following:
   "The appeal is dismissed with costs including costs of two counsel."
4. The order issued by the High Court is reinstated.
5. Mobile Telephone Networks (Pty) Limited and Alphen Farm Estate Constantia (Pty) Limited are ordered, jointly and severally to pay costs in this Court, including costs of two counsel.

## JUDGMENT

JAFTA J (Cameron J, Froneman J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ, and Theron J concurring):

*Introduction*

[1] Central to this application for leave to appeal is the question whether the Sectional Titles Act[1] (Act) deprives individual owners in a sectional title scheme of legal standing to enforce a zoning scheme applicable to the area where the sectional title

[1] 95 of 1986.

scheme is located, where the breach of the zoning scheme regulation (zoning scheme) occurs on the common property. The Supreme Court of Appeal[2] held that the individual owners have no standing but the High Court[3]concluded that they did.

[2] The resolution of this question depends on the wording of section 41 of the Act, read together with sections 36(6) and 37(1). But before considering these provisions, one must outline the background facts and determine whether leave to appeal should be granted.

*Background facts*

[3] The applicants are owners of units in a sectional title scheme situated on Erf 377 Constantia, Cape Town. The respondents are Mobile Telephone Networks (Pty) Limited (MTN) and Alphen Farm Estate in Constantia (Pty) Limited (Alphen). Before the registration of the sectional title scheme, the whole property belonged to Alphen. MTN and Alphen had concluded a lease agreement in terms of which MTN had installed a 2G cellular antenna on the rooftop of the Mill Range building on the same property.

[4] Subsequently, the property was subdivided into two areas described as the historical precinct and the residential precinct. The historical precinct consists of the Alphen Hotel, an upmarket hotel which has been declared a heritage site, as well as commercial office buildings. The residential precinct comprises residential units owned by the applicants.

[5] Upon the registration of the sectional title scheme, management rules were adopted and a body corporate was established. The body corporate had four members, two of whom were elected by Alphen as the owner of units in the historical precinct and

[2] *Mobile Telephone Networks (Pty) Ltd v Spilhaus Property Holdings (Pty) Limited* [2018] ZASCA 16; 2018 (3) SA 396 (SCA) Per Ponnan JA, Saldulker JA, Swain JA, Plasket AJA and Makgoka AJA.

[3] *Spilhaus Property Holdings (Pty) Ltd v MTN Mobile Telephone Networks (Pty) Ltd* [2016] ZAWCHC 215 (High Court judgment).

the other two were elected by the owners of the units in the residential precinct. In the papers these members are described as trustees, and in terms of the applicable rules, in the event of a deadlock between the trustees of the two precincts, the matter would be referred to a referee for resolution.

[6] On 10 October 2012, the historic precinct's trustees sought and obtained the consent of the residential precinct trustees for the upgrade of the 2G antenna on the Mill Range building to a 3G antenna. This building had become the common property on registration of the sectional title scheme. However, this upgrade was effected a year later, in November 2013. MTN installed a fake chimney with a height of five meters and the base station equipment was also improved.

[7] It turned out that these improvements were effected without the authorisation of the relevant local authority, the City of Cape Town (City). Having noticed the illegal structure the City issued notification that called upon Alphen to apply for approval of the erected structure within sixty days, failing which Alphen would face prosecution as its conduct in allowing an illegal structure to be erected constituted a criminal offence.

[8] But before Alphen and MTN could lodge the application for consent use with the City, the residential precinct trustees had withdrawn their consent to the upgrade. The application was eventually submitted to the City in April 2014. The City responded by pointing out that Alphen and MTN should obtain a power of attorney signed by all the unit owners. But this could not be achieved because by then, no fewer than nine owners had objected to the upgrade installed by MTN.

[9] Following this deadlock, the applicants approached the High Court for relief. They sought an order directing MTN to remove the installation and that Alphen be ordered to cooperate with that removal. Both Alphen and MTN opposed the relief sought. Firstly, they contended that in view of the existence of the sectional title scheme and the body corporate, the applicants lacked standing to institute the proceedings.

They submitted that it was only the body corporate that had the necessary standing. Secondly, they argued that the requirements of an interdict were not met.

[10] With reference to its earlier decisions,[4] the High Court concluded that the applicants had standing and that they had satisfied the requirements of the mandatory interdict sought. Consequently, MTN was ordered to remove the installation and Alphen was directed to cooperate with MTN during the removal.

[11] Dissatisfied with this outcome MTN and Alphen appealed to the Supreme Court of Appeal. That Court confined its judgment to the issue of standing. Invoking its previous decisions,[5] the Court held that section 41 of the Act applies to the present matter and consequently the applicants had no standing to institute proceedings for the relief they sought. The Supreme Court of Appeal reasoned that under section 41 the only remedy available to owners of units in a sectional title scheme is the appointment of a curator *ad litem*, provided the conditions imposed by the section are met. That Court stated:

> "The relief available to an owner in the position of the respondents is to approach a court for the appointment of a *curator ad litem* to the body corporate, so that the curator may investigate the events complained of and, if so advised, take action aimed at somehow remedying the position. Section 41 is an important component of the overall structural scheme. On the one hand it filters out unmeritorious claims by overzealous individuals. On the other it ensures that individuals complaining should have the advantage of the information and the funds of their corporation in pursuing legitimate claims."[6]

[4] *BEF (Pty) Ltd v Cape Town Municipality* 1983 (2) SA 387 (C) (*BEF*) and *Chapman's Peak Hotel (Pty) Limited v JAB and Annalene Restaurant CC t/a O'Hagan* [2001] 4 ALL SA 415 (C) (*Chapman's Peak Hotel*).

[5] *Cassim v Voyager Property Management (Pty) Ltd; Cassim v St Moritz Body Corporate (Pty) Ltd* [2011] ZASCA 143; 2011 (6) SA 544 (SCA); *Oribel Properties 13 (Pty) Limited v Blue Dot Properties 271 (Pty) Limited* [2010] ZASCA 78; [2010] 4 All SA 282 (SCA) (*Oribel Properties*) and *Wimbledon Lodge (Pty) Limited v Gore NO* [2003] ZASCA 33; 2003 (5) SA 315 (SCA) (*Wimbledon)*.

[6] Supreme Court of Appeal judgment id above 2 at para 19.

[12] Having concluded that the applicants lacked standing the Supreme Court of Appeal overturned the order granted by the High Court and replaced it with an order dismissing the application with costs. In this Court the applicants seek leave to appeal against the order of the Supreme Court of Appeal.

*Leave to appeal*

[13] The first issue that needs to be established is whether this Court has jurisdiction to adjudicate the matter. The applicants contend that section 41 implicates the right of access to court guaranteed by section 34 of the Constitution.[7] Therefore, when the Supreme Court of Appeal construed section 41 it was obliged to interpret it in a manner that promotes the spirit, purport and objects of the Bill of Rights.[8]

[14] It is now axiomatic that whenever a court interprets legislation that limits rights entrenched in the Bill of Rights, section 39(2) of the Constitution must be followed. The duty to do so arises even where none of the parties to a particular litigation requests the court to invoke this section.[9] The question for immediate consideration is whether the obligation in section 39(2) has been triggered in this matter.

[15] It cannot be gainsaid that legal standing is necessary for the exercise of the right of access to court. Without it, a litigant may not have its dispute resolved by a court. Legal standing is key to accessing every court for purposes of resolving disputes. Therefore, an interpretation of a statute that denies a litigant standing implicates the

[7] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[8] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[9] *Phumelela Gaming and Leisure Ltd v Gründlingh* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) at para 27.

right of access to court. Consequently, section 39(2) was triggered. This Court has jurisdiction to entertain the matter as it raises constitutional issues.

[16] What remains for determination under the rubric of leave is whether it is in the interests of justice to grant leave. This part of the enquiry requires the balancing of relevant factors before a value judgment is made on where the interests of justice lie. The relevant factors include the fact that representatives of the applicants in the body corporate had initially consented to the offending installation; the breach of the zoning scheme appears to be minor; half of the trustees support the installation whose object was to improve the service rendered by MTN; the breach occurred on the common property in the historical precinct of which the objecting trustees and owners are themselves owners; and the City had itself taken steps to enforce the zoning scheme. The aggregate of these factors suggests that leave should be refused.

[17] But we are also required to consider factors which support the granting of leave and weigh them up against those that do not. The decision to grant or refuse leave may be made only at the conclusion of the balancing exercise. On the opposite side of the scale, we must bear in mind that there was a breach of the zoning scheme that was passed in the interest of the property owners at large within the relevant area. The breach gave rise to a claim that could be pursued by those owners, outside Alphen, in the High Court. The fact that the City took steps to have the breach corrected did not detract from the applicant owners' right to approach the High Court. In doing so the applicants were seeking to uphold the rule of law on which our constitutional order is founded.

[18] A significant factor is that the judgment of the Supreme Court of Appeal has the effect of stripping thousands of sectional title owners of standing in all matters where section 41 applies. This appears to be in contrast to the position taken by the Supreme Court of Appeal in *Oribel Properties* where standing of a unit owner was recognised despite the fact that section 41 applied. The claim in *Oribel Properties* was

based on a right whose object was the common property and regulated by a contract to which the body corporate was not a party.

[19] This together with the Supreme Court of Appeal's failure to invoke section 39(2) of the Constitution suggests that there are reasonable prospects of success. Indeed, this is a weighty factor which ordinarily tips the scale in favour of granting leave. Added to the weight of the prospects of success factor is the fact that the appeal is sought against the decision of the Supreme Court of Appeal. This means that this Court is the only forum in which an appeal may be pursued. The jurisprudence of this Court is that in these circumstances the prospects of success compel the granting of leave.

[20] In *Fleecytex Johannesburg* it was stated:

> "In dealing with applications for leave to appeal against a decision of the Supreme Court of Appeal this Court has held that the prospects of success are of fundamental importance. Such an appeal is the only remedy left to the applicant and if there are reasonable prospects that the appeal will succeed, there are compelling reasons for granting the leave that is necessary."[10]

[21] I conclude that here the factors warranting the refusal of leave are outweighed by those which support the granting of leave. The factors that favour refusal do not mitigate the effect of the judgment of the Supreme Court of Appeal on thousands of unit owners. Therefore, leave should be granted.

*Merits*

[22] Since the appeal lies against the decision of the Supreme Court of Appeal which confined itself to the question of standing, the singular issue that arises for determination is whether section 41 of the Act denies the applicants standing to seek the mandatory interdict and restricts them to a claim for the appointment of a curator.

[10] *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) (*Fleecytex Johannesburg*) at para 6.

[23] For a proper determination of this issue it is necessary to commence by outlining the nature of the right which the applicants sought to vindicate. This right can be traced back to *Patz* but was thus formulated in *Rooderpoort-Maraisburg*:

> "Where it appears either from a reading of the enactment itself or from that plus a regard to the surrounding circumstances that the Legislature has prohibited the doing of an act in the interest of any person or class of persons, the intervention of the Court can be sought by any such person to enforce the prohibition without proof of the special damages."[11]

[24] It is by now settled in our law that a zoning scheme is passed in the interests of the property owners who hold property in the area where the scheme applies.[12] The present applicants, being owners of units in a sectional title scheme to which the relevant zoning scheme applies, are entitled to institute proceedings to enforce the zoning scheme unless section 41 of the Act precludes them from doing so.

[25] As mentioned, section 39(2) of the Constitution obliges us to construe section 41 in a manner that promotes access to court. This means that if the section is capable of more than one meaning, we must prefer a meaning that advances access to court over the one that does not.[13]

*Meaning of section 41*

[26] Section 41 reads:

> "(1) When an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in section 36(6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the

[11] See *Rooderpoort-Maraisburg Town Council v Eastern Property (Pty) Ltd* 1933 AD 87 (*Rooderpoort-Maraisburg*) at 96. See also *Patz v Greene and Co*. 1907 TS 427.

[12] See *BEF* and *Chapman's Peak Hotel* above n 4.

[13] *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 89.

body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.

(2)

(a) Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the Court under paragraph (b) will be made.

(b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the Court for an order appointing a *curator ad litem* for the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.

(3) The court may on such application, if it is satisfied

(a) that the body corporate has not instituted such proceedings;

(b) that there are *prima facie* grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified, appoint a provisional *curator ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3), or confirm the appointment of the *curator ad litem* for the body corporate, and issue such directions as it may deem necessary as to the institution of proceedings in the name of the body corporate and the conduct of such proceedings on behalf of the body corporate by the *curator ad litem*."[14]

[27] What is noticeable from the language of this provision is primarily that it empowers individual owners of units in a sectional title scheme to institute proceedings not in their own interest but for and on behalf of the body corporate. That much is clear from the text read with the heading which states: "proceedings on behalf of bodies corporate". Seen in this context the conditions imposed on an owner who seeks to

[14] Section 41 of the Act has been repealed by the Sectional Title Schemes Management Act 8 of 2011 (STSM). The STSM came into effect on 7 October 2016 which is after the High Court proceedings had commenced. Section 9 of the STSM has a similar wording to section 41 of the Act. Section 36(6) of the Act has been repealed by the STSM. Section 2(7) of the STSM is identical to section 36(6) of the Act.

institute proceedings on behalf of the body corporate are understandable. The institution of proceedings has the risk of a costs order which may be issued against the body corporate, in the event of losing a case.

[28] Therefore, section 41(1) requires that the contemplated proceedings must be in respect of matters mentioned in section 36(6) of the Act. Those are matters in relation to which the body corporate has authority to institute legal proceedings. If the subject matter of the contemplated proceedings is a matter in respect of which a body corporate has no power to litigate, those proceedings cannot be brought in the name of or on behalf of the body corporate. This is because the body corporate would have no direct and substantial interest in those proceedings. For example, in *Oribel Properties*, the applicant sought to enforce a contractual right that it alone had over the common property.[15] In that case, the Supreme Court of Appeal observed that the body corporate could not institute proceedings because it was not a party to the contract the applicant sought to enforce.

[29] It is therefore true that under section 41, an owner's entitlement to institute proceedings on behalf of a body corporate is restricted to an application for the appointment of a curator. The purpose of that limitation is to protect the body corporate from unmeritorious proceedings initiated on its behalf. It is clear that before an owner may be permitted to act on behalf of the body corporate, she must show that the body corporate has failed to institute proceedings in a case where it has suffered damages or a loss or has been deprived of a benefit. Even then, the authority to initiate proceedings is not available to all owners but is restricted to only those owners who can show that they suffered a similar loss or damages.

[30] But before such owner may institute the proceedings, she must give written notice to the body corporate, calling upon it to institute the proceedings within a

[15] *Oribel Properties* above n 5 at para 24.

month.[16] If the body corporate does initiate proceedings the owner's entitlement to do so falls away. She cannot pursue the appointment of a curator. On the contrary if the body corporate fails to commence proceedings within a month, the owner concerned may seek the appointment of a curator. If satisfied of three things,[17] the court may appoint a provisional curator and direct him to investigate the matter and report to it on the return day of the provisional order. The three conditions for the appointment of a provisional curator are:

(a) The failure of the body corporate to institute proceedings;
(b) Prima facie grounds for the institution of proceedings; and
(c) Justification for an investigation into the prima facie grounds and the desirability of instituting proceedings.[18]

[31] On the return day, the court may discharge the provisional order or confirm the appointment of the curator and issue directions it deems necessary for the "institution of proceedings in the name of the body corporate". The curator conducts these proceedings on behalf of the body corporate.[19]

[32] It is quite plain from the reading of section 41 that its purpose is to protect the body corporate from unmeritorious legal proceedings by owners.[20] The section is not there for the protection or regulation of claims of individual owners. Instead, its focus is directed at the body corporate.

[33] Therefore, the object of the section is not to determine the legal standing of individual owners. A question that may arise in appropriate proceedings is whether the individual owners retain standing to institute proceedings in their own names in respect

[16] As provided for in section 41(2)(a) of the Act.

[17] *Wimbledon* above n 5 at para 13.

[18] This is required by section 41(3) of the Act.

[19] This is stipulated in section 41(4) of the Act.

[20] *Cassim* above n 5.

of matters mentioned in section 36(6) of the Act. It is not necessary to answer that question here because it does not arise.

[34] In this matter the claim pursued by the applicants does not arise from section 36(6) of the Act. They seek to enforce the zoning scheme that was passed in their interests as owners of property where this scheme applies. That they are entitled to do so is plain from established authority.[21] In *JDJ Properties*, Plasket AJA defined this entitlement in these terms:

> "In this matter, the nature of the interest involved is the right to enforcement of the Howick scheme. It is this interest that gives the appellants standing. They are part of the class of persons in whose interest the Howick scheme operates for three interlocking reasons: first, they are an owner and a lessee respectively of property within the area covered by the Howick scheme in a modestly sized town; secondly, their properties and business are within the same use zone as the development to which the building plans relate; and thirdly, their properties and business are in such close proximity to the second respondent's development, being across a road, that no question of them being too far removed from the second respondent's development can arise."[22]

[35] That section 36(6) read with section 37(1) of the Act empowers a body corporate to enforce laws and other rules does not alter the fact that the genesis of the applicants' claim is not the Act. The right they are seeking to enforce arises from the fact that they are part of the broader class in whose interest the relevant zoning scheme was passed. Their cause of action has nothing to do with section 36(6) and 37(1) of the Act. It is a self-standing claim.

[36] In these circumstances section 41 does not apply. It is impossible for it to find application. For example, if the applicants were to issue a notice calling upon the relevant body corporate to institute proceedings based on their cause of action, it would

[21] See *BEF* and *Chapman's Peak Hotel* above n 4.

[22] *JDJ Properties CC v Umngeni Local Municipality* [2012] ZASCA 186; 2013 (2) SA 395 (SCA) at para 34.

have no standing to do so. At best what it may do is to seek to act in terms of section 36(6) read with 37(1). But that would be a different cause of action.

[37] The notion of two claims arising from the common facts is well-known in our law. For example, the same set of facts may give rise to separate claims, one in contract and the other in delict.[23] But sometimes the common facts may sustain separate statutory claims. Facts on the termination of the contract of employment may result in a labour relations claim sourced from the Labour Relations Act[24] or an administrative law claim based on the Promotion of Administrative Justice Act[25]. In *Makhanya* the Supreme Court of Appeal said:

> "The claim in each case arose from the termination of the contract of employment. That fact had the potential to found a claim for relief for infringement of the LRA right. But it also had the potential to found, in addition, a claim for relief for infringement of the other right that was asserted."[26]

[38] The concept of separate claims arising from the common facts was also recognised by this Court in *Gcaba*.[27] It is up to a litigant to whom both claims are available to choose which one to pursue. Once a claim has been selected and advanced in pleadings before a competent court, that court is under a duty to adjudicate the claim. The court may not dismiss the pleaded claim on the ground that another claim arises from the same facts, which can only be pursued by a different party. In *Gcaba* this Court stated:

> "[The pleadings] contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the

[23] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* [1984] ZASCA 132; 1985 (1) SA 475 (A).

[24] 66 of 1995.

[25] 3 of 2000.

[26] *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) at para 37.

[27] *Gcaba v Minister of Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

> contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court."[28]

[39] But even if section 36(6) were to apply, it does follow as a matter of course that section 41 would be triggered. Section 41 lays down conditions which must be met before an owner may seek the appointment of a curator. One of those conditions is to show that both the applicant and the body corporate have suffered damages or loss. If the owner is able to show that only she has suffered damages, the invocation of section 41 will not be successful. That applicant would be left without a remedy for the damages or loss suffered unless she may rely on the common law for the recovery of damages. In any event, it is unclear in the present matter what damages or loss have been suffered by the body corporate and how section 41 would have been triggered.

[40] The interpretation adopted by the Supreme Court of Appeal here is not borne out by the language of the relevant section. But not only that, it may lead to untenable results. On that construction, the applicants' neighbours outside Alphen would be entitled to institute proceedings to enforce compliance with the very same zoning scheme while the applicants would not. Even those who are members of a neighbouring sectional title scheme would have no impediment against the exercise of the right to enforce compliance. This is because their body corporate would have no authority over a breach on the common property of a neighbouring sectional title scheme. And these neighbouring owners would have no right to issue a notice calling upon the correct body corporate to institute proceedings.

[41] The interpretation does not only lead to absurd results but it also creates an unequal "protection and benefit of the law". This is at odds with section 9(1) of the Constitution which confers on everyone the right to equal protection and benefit of the law.[29] An interpretation that leads to these consequences is at variance with the

[28] Id at para 75.

[29] Section 9(1) of the Constitution provides—

injunction in section 39(2) of the Constitution. It does not promote the objects of the Bill of Rights.

[42] In reaching the conclusion that section 41 was applicable to the current matter, the Supreme Court of Appeal relied on *Cassim*.[30] That Court reasoned that the body corporate there was competent to institute proceedings. As mentioned, the body corporate here could not initiate proceedings in pursuit of the cause of action advanced by the applicants. The body corporate had no authority to institute proceedings in relation to a cause of action based on the common law. This distinguishes *Cassim* from the present matter. In that case, by contrast, the claims arose from the provisions of the Act.

[43] Therefore, the Supreme Court of Appeal erred in construing section 41 and concluding that it deprives the present applicants of the legal standing to institute these proceedings. The High Court was correct in holding that the applicants have standing. This means that the appeal must succeed.

*Remedy*

[44] With regard to remedy, MTN suggested that in the event of this Court holding that the applicants have standing, the matter must be remitted to the Supreme Court of Appeal because that Court did not address the merits of the mandatory interdict. The Supreme Court of Appeal itself has said that it is desirable, where possible, for a lower court to decide all issues raised in a matter before it.[31] This applies equally to the Supreme Court of Appeal. This is more so where, as here, the final appeal court reverses its decision on the chosen limited point. This may impact on the fairness of an appeal hearing. Litigants are entitled to a decision on all issues

"Everyone is equal before the law and has the right to equal protection and benefit of the law."

[30] *Cassim* above n 520.

[31] *Theron N.O. v Loubser N.O.: In Re Theron N.O. v Loubser* [2013] ZASCA 195; 2014 (3) SA 323 (SCA) at paras 21, 24 and 26; *Democratic Alliance v Acting National Director of Public Prosecutions* [2012] ZASCA 15; 2012 (3) SA 486 (SCA) at para 49; *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA 921 (A) at 928. See also *Heyman v Yorkshire Insurance Co Ltd* 1964 (1) SA 487 (A) at 491.

raised, especially where they have an option of appealing further. The court to which an appeal lies also benefits from the reasoning on all issues.[32]

[45] The practice of choosing one point in disposing of an appeal in the Supreme Court of Appeal pre-dates the Constitution and arose at the time when that Court was the apex court. It may have been proper in the pre-constitutional era. That is no longer the case because appeals against decisions of the Supreme Court of Appeal lie to this Court which is now the apex court. As was observed in *Mphahlele*, such practices should be carefully scrutinised to ensure that they are compatible with the current constitutional scheme. This is because not all practices which were established under the apartheid era are constitutionally objectionable, some are not in line with the present order.

[46] That said I am not persuaded that remittal of the matter to the Supreme Court of Appeal is necessary in this case. It appears that a remittal here would be a waste of scarce judicial resources and would also be inconsistent with the principle that there must be finality in litigation. Before reaching this Court, the present matter has gone through two courts already. The High Court adequately addressed the issues left out by the Supreme Court of Appeal.

[47] Since the reversal of the decision of the Supreme Court of Appeal means that the High Court's order is revived, recourse may be had to reasons furnished by that Court in support of its order. This Court will not be deciding those issues as a court of first and last instance.

[48] However, MTN submitted that a determination of those issues by this Court would prejudice the respondents because they have not addressed them in argument in this Court. There is no merit in this contention. Directions in terms of which this matter was set down for hearing alerted the parties to submit written argument on the merits of

[32] *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12.

the appeal. Indeed, written submissions filed by the parties cover the question whether a proper case for a mandatory interdict was made in the papers. The respondents disputed that the applicants have established a clear right and that they had suffered loss as a result of the non-compliance with the zoning scheme. These are the issues on which the Supreme Court of Appeal did not express a view.

[49] Here it is common cause that the relevant zoning scheme was not followed. The applicants in whose interest the zoning scheme was passed have the right to enforce it. It is this right which underpins the relief sought. In matters like the present, it is not necessary for the applicants to show that they have suffered special damages. Their standing flows from the fact that the conduct complained of is prohibited in the interests of the applicants.[33]

[50] In matters such as this where there has been non-compliance with the zoning scheme, interdictory relief sought is usually granted.[34] Consequently the High Court here cannot be faulted for granting the orders it issued.

*Order*

[51] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order issued by the Supreme Court of Appeal is set aside and is replaced with the following:
   "The appeal is dismissed with costs including costs of two counsel."
4. The order issued by the High Court is reinstated.
5. Mobile Telephone Networks (Pty) Limited and Alphen Farm Estate Constantia (Pty) Limited are ordered, jointly and severally to pay costs in this Court, including costs of two counsel.

[33] See *Rooderpoort-Maraisburg* above n 11.

[34] See *BEF* and *Chapman's Peak Hotel* above n 4.

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| For the Applicants: | BJ Manca SC and K Reynolds instructed by Shepstone & Wylie Attorneys |
| For the First Respondent: | M Basslian SC and T K Manyage instructed by Mashiane Moodley & Monama Inc |
| For the Second Respondent: | R W F Macwilliam SC instructed by Lawrence Whittaker Attorneys |