THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 647/06
REPORTABLE

In the matter between:

QUALIDENTAL LABORATORIES (PTY) LTD APPELLANT

and

HERITAGE WESTERN CAPE FIRST RESPONDENT
THE HERITAGE INSPECTOR SECOND RESPONDENT

Coram: Howie P, Navsa, Van Heerden, Mlambo JJA et Malan AJA

Heard: 16 November 2007

Delivered: 30 November 2007

Summary: National Heritage Resources Act – demolition permit with condition – whether provincial heritage resources authority has the power to impose conditions when granting demolition permit in respect of structure enjoying no formal protection in terms of the Act – condition not in conflict with principle of legality.

Neutral citation: **This judgment may be referred to as *Qualidental Laboratories v Heritage Western Cape* [2007] SCA 170 (RSA).**

JUDGMENT

MLAMBO JA

[1] This appeal concerns the powers of a provincial heritage resources

authority established in terms of the National Heritage Resources Act 25 of 1999 (the Act).

[2] The appellant sought, on an urgent basis, the review and correction of a demolition permit issued by the first respondent, a provincial heritage resources authority; the review and setting aside of a stop works order issued by the second respondent, a senior heritage inspector; and certain ancillary relief. In turn the first respondent, in a counter application, sought to interdict the appellant from continuing with certain building work pending inter alia the finalisation of the application. The matter came before Davis J sitting in the Cape High Court who dismissed the application but granted the appellant leave to appeal to this court. The judgment of the court *a quo* has been reported: see *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and another* 2007 (4) SA 26 (C).

[3] The facts giving rise to the litigation are largely common cause. The appellant is the owner of immovable property situated at erf 4953 (also known as 6 Marsh Street), Mossel Bay, Western Cape (the property). On the property was built a cottage (called an annex by the parties) and a villa both of which the appellant wanted demolished to make way for an apartment block development on the property. It applied to the first respondent for a permit for the total demolition of the villa and the annex as these buildings were older than 60 years and in terms of the Act could not be demolished without a permit.

[4] Upon receipt of the application and after consideration the first respondent requested the appellant to file a heritage statement from a heritage practitioner containing information in terms of which the proposed demolition could be considered. That statement having been filed by the appellant's heritage consultant, Mr Christopher Snelling, the first respondent issued a

permit approving the demolition of the annex but not the villa and attached a condition to the demolition. The condition is to the effect that the plans for the intended development on the property were to be submitted to it for final approval. The full record of decision reads as follows:

‘• The committee decided not to approve the application for total demolition, but has approved the demolition of the annex building.
- The committee feels that the building has intrinsic quality and contextual value and sites it in a Grade 3 area.
- Plans for any new development on the property must be submitted to HWC [the first respondent] for approval.
- The new development must be subsidiary to the main building in terms of massing, scale, sighting and location.
- The building will be put on the Heritage Register.’

[5] The record of decision also mentioned that the decision was subject to a general appeal period of 14 working days and could be suspended, should an appeal against the decision be received by the first respondent within 14 days from the date the record of decision was issued. It is the imposition of the condition that plans for any new development on the property be submitted to the first appellant for final approval that is at the centre of the litigation. I return to this aspect later.

[6] After receiving the permit the appellant submitted its building plans for the proposed development to the Mossel Bay Municipality which approved them subject to the proviso that the appellant comply with any condition imposed by the first respondent. The building plans were thereafter submitted to the first respondent by the Mossel Bay Municipality for approval but were found inappropriate and were as a result not approved. The first respondent’s reasons for not approving the building plans were essentially that (a) as the

envisaged apartment blocks were to be constructed in the vicinity of the villa, part of the development would obscure the most important aspect and view of the villa from Marsh Street; and (b) that the proposed development was intrusive and out of keeping with the context created by the villa and other buildings in the surrounding area, such as the St Blaize Terraces. It was felt that the development would, in fact, make a mockery of the villa's landmark status.

[7] The appellant thereafter proceeded to demolish the annex and, despite the lack of final approval for its building plans by the first respondent, commenced the construction of the apartment blocks on the property. News of the construction soon reached the first respondent and Mr Bewin September, a senior heritage inspector and the second respondent herein, accompanied by another heritage officer, decided to investigate. On arrival at the property they observed that the annex had been demolished and that an excavation had taken place, that concrete footings and a slab had already been laid with the principal external walls already up to ground level including what appeared to be a basement. Steel reinforcements for concrete columns were already in place. The second respondent entered into discussions with the appellant's contractor and officials from the Mossel Bay Municipality's Planning Department in an attempt to resolve the situation. As construction continued unabated without final approval of the building plans, the second respondent issued and served a stop works order on Mr Roy Freedman, a director of the appellant, stating that it had come to the first respondent's attention that he was 'responsible or is partly responsible for alleged illegal alteration to a structure older than 60 years, without fulfilment of Permit conditions (Permit no 2005/03/015) dated 2005/03/07 in terms of s 48(2)(c) as per the National Heritage Resources Act' and that he was therewith 'formally ordered' in terms of the Act to immediately cease all works until further notification and that failure to comply with the order could result in the criminal prosecution of Mr Freedman and/or the owner

of the property.

[8] It was the threat of a criminal prosecution rather than the stop works order that appears to have had the desired effect and to have been the catalyst that galvanised the appellant into launching its ill-fated application before Davis J in the court *a quo*. Central to the matter is the competence of the first respondent to impose the condition regarding the submission of building plans to it for final approval.

[9] Any entity like the first respondent exercising public power is confined to exercising only such powers as are lawfully conferred upon it – this is the principle of legality. See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at 399 para 56 and *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at 699 para 50.

[10] It is prudent at this stage to consider the statutory framework. In broad outline the scheme of the Act encompasses general principles underpinning the management of heritage resources; the establishment of heritage resources authorities and their functions, responsibilities and powers; the protection and management of heritage resources including formal and general protection as well as general provisions incorporating the competence of provincial heritage resources authorities to grant or refuse permits. An overview of the Act shows that its overarching objective is the identification, protection, preservation and management of heritage resources for posterity.[1] This objective also finds resonance in clause 24(b) of the Constitution.

[1]In this regard the preamble to the Act is of relevance. It reads:
'This legislation aims to promote good management of the national estate, and to enable and encourage communities to nurture and conserve their legacy so that it may be bequeathed to future generations. Our heritage is unique and precious and it cannot be renewed. It helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation. It has the potential to affirm our diverse cultures, and in so doing shape our national character. . . .'

[11] The first respondent was established in accordance with s 23 of the Act in terms of Provincial Notice 336 dated 22 October 2002, published in the Provincial Gazette, by the Member of the Executive Council responsible for cultural affairs in the Western Cape. In terms of s 8 the first respondent, as a provincial heritage resources authority, is responsible for the identification and management of heritage resources in the Western Cape that have special qualities making them significant within a provincial context. A heritage resource is defined in s 1 as a place or object of cultural significance. In terms of s 5 heritage resources management should recognise that heritage resources have lasting value and are finite, non-renewable and irreplaceable. In view of this, heritage resources have to be carefully managed to ensure their survival to be preserved for succeeding generations.

[12] Section 34(1) is the section in terms of which the appellant was obliged to apply for a permit for the authority to demolish the villa and annex. This section reads:

‘34. Structures (1) No person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority.’

It is evident that s 34(1) contains a general protection against the alteration or demolition of any structure or part thereof which is older than 60 years without a permit issued by the relevant provincial heritage resources authority. In turn s 34(2) provides that in the event of the refusal of a provincial heritage resources authority to issue a permit regarding the demolition or alteration of a generally protected structure it must consider bringing the structure concerned within any of the formal protections set out in the Act.

[13] It is common cause that neither the property nor the villa is a declared national or provincial heritage site as contemplated in s 27. They also do not enjoy provisional protection in terms of s 29, nor are situated within a designated protected area within the meaning of s 28. They are, furthermore, not listed in a heritage register in terms of s 30, nor designated as a heritage area in terms of s 31, nor declared heritage objects as contemplated in s 32. The property does, however, fall within an area proposed by the Municipality's consultants as being worthy of consideration as an urban conservation area in terms of the local zoning scheme.

[14] The granting or refusal of demolition permits is regulated by s 48. Section 48(2) is relevant for present purposes and reads:

'(2) On application by any person in the manner prescribed under subsection (1), a heritage resources authority may in its discretion issue to such person a permit to perform such actions at such time and subject to such terms, conditions and restrictions or directions as may be specified in the permit, including a condition–

(a) that the applicant give security in such form and such amount determined by the heritage resources authority concerned, having regard to the nature and extent of the work referred to in the permit, to ensure the satisfactory completion of such work or the curation of objects and material recovered during the course of the work; or

(b) providing for the recycling or deposit in a materials bank of historical building materials; or

(c) stipulating that design proposals be revised; or

(d) regarding the qualifications and expertise required to perform the actions for which the permit is issued.'

It is evident that in terms of s 48(2) the first respondent has a discretion insofar as the granting or refusal of a permit is concerned. The first respondent also has a discretion regarding the imposition of any terms, conditions, restrictions or

directions when granting a permit.

[15] The appellant's stance in the court *a quo* and before us is that, properly construed s 34, providing as it does for general protection against alteration or demolition, does not clothe the first respondent with the power to impose the condition and particularly not in relation to the villa for which permission to demolish was refused. In the appellant's view the full extent of the first respondent's power in the circumstances of this case was only to authorise the demolition of the annex and impose conditions in that regard and nothing further.

[16] It was further submitted in relation to the villa that the only power which the Act confers upon the first respondent is to protect it from alteration or demolition but that the first respondent enjoys no power to regulate any other construction on the property. Counsel submitted that the imposition of the condition in the demolition permit was thus beyond the first respondent's powers. Counsel labelled the condition as one the objective of which was to control development which he submitted was not authorised by s 48 and was beyond the first respondent's power. It was further submitted that the powers contained in s 48(2) (in terms of which the condition was imposed) which entitle the first respondent to impose a condition that design proposals be revised, are exercisable only in the context of control by a heritage resources authority over the alteration or development of heritage resources which enjoy formal protection in terms of the Act through the provisions referred to in paragraph 13 above. In so far as the stop works order is concerned, it is sought to be set aside on the basis that its validity is predicated upon the effectiveness of the condition the validity of which is impugned.

[17] It is common cause that the appellant's application for a permit, though

specifying the villa and the annex, envisaged a single structure whose total demolition was sought. The sketch plan submitted with the application depicts a single structure even though in actual fact only the roof overlapped between the two buildings which were at least a metre apart. The annex was built directly adjacent to the villa with its flat roof effectively a continuation of the lean-to roof of the villa's kitchen and pantry. It is also apparent that the first respondent treated the application in the same light. It is clear from the stance adopted by the first respondent that when it approved the demolition of the annex and not of the villa it was in effect approving the partial demolition of a single structure.

[18] The first respondent clearly considered the villa, in respect of which permission to demolish was refused, to be a building of considerable cultural significance and worthy of preservation in its particular context. In this regard the aesthetic importance of the villa was emphasized in the appellant's heritage report compiled by its heritage consultant, Mr Snelling. The report inter alia records:

'The **aesthetic/contextual value** of the building is considered to be high in terms of its local content. It is however felt that this significance has been compromised by the annex addition. Given the urban feel of much of Mossel Bay, resultant from what Fransen describes as its restricted layout, 6 Marsh Street presents an interesting and elegant departure from the established building pattern that indicates the building had once enjoyed some considerable status. Indeed the building and site could be considered to be of landmark quality . . .. The Landmark quality is further enhanced by the placement of the main gables to the building, positioned to address the street and be visible from all approaches. This is a building that was designed in order to be noticed . . ..'

Therefore any new development that would detract from the villa and its surrounds would be contrary to the first respondent's obligation to protect and conserve the villa's landmark status.

[19] The condition imposed by the first respondent therefore accords with its conservation mandate in terms of the Act and is directly in line with the principles of heritage resources management set out in ss 5 and 6. The imposition of the condition is also within the parameters, not only of the Act but is consonant with the overall scheme of the Act. The first respondent's power to impose conditions in my view is not as narrowly circumscribed as contended for by the appellant.

[20] I may add that the purpose and effect of the condition is designed to enable the first respondent to exercise a power vested in it in terms of the Act and which, as pointed out, is consonant with the overall objective of the Act ie the conservation of a heritage resource. Therefore the condition, rather than being one aimed at controlling development, as contended by the appellant, was in actual fact a condition with a conservation objective. It must also follow that, the condition having been validly imposed, the stop works order is also unimpeachable.

[21] The court *a quo* was therefore correct in dismissing the application and this appeal must fail.

[22] Having come to this conclusion it becomes unnecessary to consider the other two issues raised by the first respondent regarding the failure of the appellant first to exhaust its internal remedies as set out in s 49 before launching its court application, as well as its failure to bring the application within the prescribed time limit, both as required by s 7 of the Promotion of Access to Justice Act 3 of 2000.

[23] In the circumstances the following order is made:

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

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D MLAMBO
JUDGE OF APPEAL

CONCUR:

HOWIE P
NAVSA JA
VAN HEERDEN JA
MALAN AJA