# *THE SUPREME COURT OF APPEAL OF SOUTH AFRICA*

*NOT REPORTABLE*

Case number : 159/2007

In the matter between :

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| **ANTOY INVESTMENTS (PTY) LTD** | **APPELLANT** |
| **and** | |
| **RAND WATER** | **FIRST RESPONDENT** |
| **EMFULENI MUNICIPALITY** | **SECOND RESPONDENT** |
| **SHERIFF, VANDERBIJLPARK** | **THIRD RESPONDENT** |

**CORAM :** **SCOTT, MTHIYANE *et* COMBRINCK JJA**

**DATE :** **25 FEBRUARY 2008**
**DELIVERED :** **20 MARCH 2008**

Summary: Review – when matter to be remitted in successful review – decision made by CEO instead of decision making body.

Neutral citation: *Antoy Investments v Rand Water Board* (159/2007) [2008] ZASCA10 (20 March 2008)

# *JUDGMENT*

**COMBRINCK JA/**

COMBRINCK JA:

[1] The development of the Vaal River Barrage Area was regulated by a Guide Plan issued under the Physical Planning Act 88 of 1967. In the Plan a so-called 1975 control flood line of the Vaal River was proclaimed. Development below this line was prohibited save with the consent of the Rand Water Board. The body is now known as Rand Water by virtue of the provisions of the Water Services Act 108 of 1997. It has been referred to throughout the papers as 'the Board' and for convenience shall in this judgment be referred to as such. Since 1990 the present appellant has unsuccessfully through the courts sought to obtain permission to build a dwelling house below the control flood line. This appeal, strangely enough, arises from the one decision where the appellant was substantially successful in that the purported decision of the Board refusing permission was set aside on review by Ledwaba J in the Pretoria High Court. The appeal, with leave of the court *a quo,* is confined to the order referring the matter back to the Board for reconsideration and the costs order. Appellant contends that the court *a quo* should not have remitted the matter but have determined the merits itself. In addition it maintains that it was entitled to its costs.

[2] The history of the matter is fully set out in the judgment *a quo* and I will merely give a short summary as the necessary background to the issues debated in this court. In 1990 the Board applied for an order restraining the appellant from continuing with the construction of a dwelling below the 1975 fifty year control flood line. A consent order was taken affording the Board the relief sought which was an interdict coupled with a demolition order in respect of that portion of the dwelling situated below the flood line. Subsequently the Board granted permission for the dwelling to encroach five metres below the flood line only later to discover that the appellant had proceeded with the construction 35 metres below the flood line. The Board then applied for and was granted an interdict restraining appellant from building below the agreed flood line. This order, in 1993, was also coupled with a demolition order. By 1998 effect had still not been given to the order and the Board filed an application to compel the appellant to carry out the order. The appellant brought a counter-application for review of the refusal by the Board in 1996 to allow relaxation of the prohibition against building below the flood line. The matter was heard in August 2000 and the Board's application was successful and the appellant's counter-application was dismissed. Undaunted by this

setback appellant launched a further application this time asking the court to order the Board to re-determine the control flood line due to changed circumstances, alternatively to declare the 1975 flood line to be no longer operative. In addition and pending this determination, an interdict was sought restraining the Board from executing on the August 2000 court order. In March 2002 the application was dismissed with costs. In the course of his judgment the learned judge remarked that it was always open to the appellant to apply to the Board in terms of the Guide Plan for relaxation of the building restrictions. This precipitated a voluminous application to the Board for consent as envisaged in para 2.2 of Annexure C to the Guide Plan to permit the dwelling to be retained insofar as it had been constructed below the flood control line. By letter dated 26 April 2002 the Chief Executive Officer ('CEO') advised the appellant that the Board declined the consent sought. The appellant, (then in voluntary liquidation – the liquidation was set aside in terms of s 354 of the Companies Act 61 of 1973 prior to the hearing of this appeal and the company substituted as appellant for the joint liquidators) then launched the present review proceedings in which it sought the following order:

'1. Reviewing and setting aside the decision of the first respondent ('the Board') or the one or the other of its officers taken upon or about 25 April 2002 to refuse application lodged by Antoy Investments (Pty) Ltd for its consent, as envisaged in paragraph 2.2 of Annexure C to the Guide Plan approved by the then Minister of Internal Affairs in terms of s 6A of the Physical Planning Act, 1967 (Act No 88 of 1967) so as in effect to permit the dwelling erected on Portion 1 Northdene 5891Q Vanderbijlpark to be retained insofar as it had been constructed below the flood control line;

2. Granting the applicant the consent required in terms of paragraph 2.2 or 2.10 of the said Annexure C, alternatively directing the Board to request the Minister of Water Affairs to amend the Guide Plan in terms of paragraph 5.12 thereof, read with paragraph 4 of the court order granted in case number 20632/903 . . .'

[3] It transpired from the Board's answering affidavit that the decision, ostensibly taken by the Board, was in fact taken by the CEO without reference to the other members of the Board. After considering the relevant sections of the Water Services Act relating to the activities, powers and duties of a Water Board, the judge *a quo* concluded that the CEO was not empowered to make the decision and that such decision had to be made by the Board. The review therefore succeeded. The following order issued:

'1. The application served on Rand Water in April 2000, which may be supplemented and/or amended is hereby referred back for consideration by the Water Board within five (5) months from date of this order;

2. The outcome of the application to be served on the applicant within thirty (30) days after the decision;

3. Should the application be unsuccessful the Rand Water Board may not execute the court order dealing with the demolition of the house for a period of thirty (30) days for applicant to have an opportunity to file a review application if the applicant deems it necessary.

4. Each party to pay its own costs.'

[4] The present appeal is directed against paragraphs 1 and 4 of the aforesaid order. There was no cross appeal and in heads of argument filed in this court the Board conceded the correctness of the decision that the CEO was not empowered to determine the matter on behalf of the Board.

[5] The following were the contentions put forward by the appellant:

a) The court *a quo* did not in terms set aside the ostensible decision of the Board and the appellant had to appeal to this court to rectify this omission;

b) (i) The facts of the matter were such that the court *a quo* should have come to its own conclusion on the merits instead of referring the matter back; and

(ii) there had been an agreement between the parties that if the review was successful the court would determine the merits without reference back to the Board;

c) It was common cause between the parties that the appellant's dwelling does not constitute a risk of pollution. The consent of the Board for relaxation of the building restriction below the flood line is, in terms of Annexure C to the Guide Plan, only required if there is a risk of pollution. There being no such risk the Board had no jurisdiction to grant or refuse the application;

d) The appellant having been substantially successful should have been granted a costs order in its favour.

[6] The first point can be disposed of swiftly. It is trite that a judgment like any other document must be read as a whole in order to ascertain its intention. (*Firestone South Africa (Pty) Ltd v Genticuro* 1977 (4) SA 298 (A) at 304D; *Administrator, Cape v Ntshwaqela* 1990 (1) 705 (A) at 715F.) Read as a whole it is abundantly clear that the intention of the judge was to set aside the decision of the Board. Why else one asks, rhetorically, would the court order a reference back to the Board for decision?

[7] Turning next to issues 2(i) and (ii). The Board's CEO made it clear that he, and he alone, had taken the decision. He sets out in his answering affidavit what steps he took to reach an informed decision. He consulted certain experts, he took a boat trip up the river to view the site and he studied the documents filed in the various court applications. He then concludes:

'I on behalf of Rand Water accordingly decided to reject the application.'

Later he records the following:

'In this regard it must be borne in mind that the decision in question had been taken by an individual, myself, and there was no "record" of any "proceedings" . . . '

When questioned as to why the court *a quo* should have substituted its decision for that of the Board where as a fact the Board had never considered the matter and consequently not made a decision, counsel contended that the Board subsequently adopted and/or ratified the CEO's decision. This he said was to be inferred from the fact that the decision was conveyed to the appellant on the Board's letterhead and the fact that the Board had stoutly defended the 'decision' in the review proceedings. Nowhere in the papers filed by the Board was it contended that there was such adoption or ratification. The point was not advanced before the judge *a quo,* it does not appear in the application for leave to appeal nor in the notice of appeal. The letter relied upon was written and signed by the very person who admitted that he had taken the decision on behalf of the Board. In short, there is no substance in this argument. Clearly the judge was correct in refusing to determine the issues when the Board had not had an opportunity of applying its mind and coming to a decision. The so-called agreement also does not assist the appellant. It was never proved in evidence. A letter said to record the agreement was handed up from the Bar during the course of argument in the court below. Counsel for the Board disputed that any such agreement had been reached. The judge correctly found that no such agreement had been proved and that in any event even if there was such an agreement, he was not bound by it. His attitude in this regard was, in my view, entirely correct. It is furthermore in accordance with the general principle reaffirmed in *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council* 1999 (1) SA 104 (SCA) at 109F that a matter (in a successful review) will be sent back unless there are special circumstances giving reason not to do so.

[8] The next issue is whether the Board had any authority (or as it was stated, jurisdiction) to decide whether to grant permission or not, absent any proof of pollution. The argument advanced by the appellant rested in the main on the preamble to Annexure C of the Guide Plan referred to herein before. Annexure C contains the 'Requirements for development in the Vaal Dam and the Vaal River Barrage Area'. The preamble reads as follows:

'With a view to combating pollution in the catchment areas of the Vaal Dam and the Vaal River Barrage Area, all future developments must, apart from complying with any other relevant legislation, satisfy the following requirements . . . '

In terms of paragraph 2.2, no habitable buildings or structures, toilets, french drains, conservancy or septic tanks, sewerage pumping installations or sewerage works are permitted below the flood control line, except with the written consent of the Board. In terms of s 29(3) of the Development Facilitation Act, 67 of 1995, the Guide Plan with the exception of Annexure C was withdrawn as a statutory document with effect from 25 December 1996. The argument advanced was that, with the withdrawal of the major part of the Guide Plan, the provisions of Annexure C were only applicable once there was proof of possible pollution caused by the activity envisaged in the regulated area. This was said to be a jurisdictional fact which had to be established before consent is required. It was argued that it was common cause that the building erected by the appellant constituted no danger of pollution. Accordingly the Board had no power to refuse to grant written consent. I have some difficulty in understanding why, if Annexure C only applied once it had been established that there was a danger of pollution, the appellant nevertheless applied to the Board under the provisions of the Annexure for consent. Surely all it needed to do was apply for a declaratory order to the effect that no consent was required because there was no danger of pollution. I am also far from being persuaded that on the proper reading of Annexure C the preamble restricted the inquiry by the Board to the question as to whether the structures and activities proposed in the regulated area would constitute a danger of pollution. In any event it is for the Board to consider and decide whether there is a danger of pollution. It must decide whether the jurisdictional fact exists, assuming the correctness of appellant's argument. The Board has neither considered nor made a decision on this issue and must be given an opportunity of doing so. It was not common cause as suggested by appellant that there was no danger of pollution should appellant's dwelling remain where it is. In answer to the appellant's contention in the founding affidavit that it was common cause

that the dwelling created no danger of pollution, the deponent to the Board's answering affidavit said the following:

'Ad Paragraph 3.9:

28.1 The dwelling *per se* should not cause pollution;

28.2 However, if the dwelling is flooded, which is the very risk created by its erection under the flood control line, it could, and in all likelihood will, cause extensive pollution apart from other damage to person and property and the resources of Rand Water.'

[9] I turn finally to the issue of costs. The appellant was successful in that the review application succeeded and the 'decision' of the Board was set aside. There was, counsel submitted, no reason to depart from the usual rule that costs follow the result. Unfortunately the judge *a quo* gave no reasons for deciding that each party should pay its own costs. One does therefore not know what factors he took into account when exercising his discretion. The appellant was substantially successful and was obliged to bring the review proceedings and have the purported decision of the Board set aside to prevent the dwelling from being demolished. The Board defended 'its decision' right up to the stage of the filing of heads of argument in this court. In these circumstances I cannot see why the appellant should bear its own costs. The appellant also contended that the court *a quo* should have ordered that the costs reserved in a number of preliminary applications preceding the review application be paid by the Board. We are not in possession of any of the judgments in those matters and the record contains no information as to the facts and circumstances which motivated those courts in reserving costs. We are unable therefore to consider this issue. Appellant's remedy is to apply by way of substantive application in the court below for those costs.

[10] In the result the following order is made:

1. Save to the extent set out in para 2 of this order, the appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel;
2. Paragraph 4 of the order of the court *a quo* is set aside and there is substituted the following:

   'The first respondent is ordered to pay the applicant's costs.'

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P C COMBRINCK
JUDGE OF APPEAL

Concur:

SCOTT JA
MTHIYANE JA