

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

2843/2007

DATE:

21 APRIL 2008

5 In the matter between:

THE NOORDHOEK ENVIRONMENTAL ACTION

GROUP

Applicant

and

JEREMY JONATHAN F WILEY

1ST Respondent

10 THE DEPARTMENT OF ENVIRONMENTAL

AFFAIRS

2ND Respondent

THE CITY OF CAPE TOWN

3RD Respondent

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JUDGMENT

(Application for Leave to Appeal)

DAVIS, J

20 This is an application for leave to appeal against the whole of the judgment of this Court which was delivered on Tuesday 19 February 2008. I do not intend to traverse the essential facts of the case which was set out in that judgment. However it is necessary to commence with two preliminary points.

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Firstly, in paragraph 3 of the order which was granted, reference is made to the prohibition from the using of erf 453 or any portion thereof “as a permanent parking area for vehicles”. When the notice of application for leave is examined, objection is taken to the order prohibiting all forms of parking without the qualification “permanent”. That is an error for which I am must take the blame. When this judgment was read into the record, I mistakenly read from the incorrect copy of the notice of motion in my file and therefore omitted to read my handwritten qualification to the order to applicant’s prayer in its notice of motion which appeared to me, for reasons which I shall dwell on presently, to be too wide; that is it sought the prohibition of all parking on erf 453, even of a temporary nature. Hence the correction in the typed judgment and the explanation in respect of the reference in the notice of application for leave to appeal. I might add that this correction was accepted by both parties and I shall say no more, save for an implication of that finding.

Secondly, the argument for leave to appeal contained submissions by Mr Bridgman, who appeared on behalf of the applicant in this application, regarding the meaning of paragraph 1 of the order. Mr Bridgman appeared to suggest that, even if permission was sought and granted for the construction of a permanent structure on erf 453, first respondents would, as a result of this order, be prevented in perpetuity from implementing

the contents of that permission. That submission leads me to deal with the merits of this application for leave to appeal.

In my view, the judgment which was delivered, pursuant to which the order was granted, rests on two foundational findings: firstly that erf 453 was reserved in terms of Section 2(3) of the Scheme Regulations “as open space for public use” and accordingly, in terms of the finding of this Court, this could not include the employment of such space as a permanent tarred parking site for vehicles. That finding turned on the interpretation of the conditions which were attached to erf 453, as a result of the rezoning of erf 270.

Further, the Court found that there had been no permission granted to first respondent to construct a permanent parking facility on the site. Pursuant to those two central findings, I am of the view, that Mr Bridgman’s construction of the order is incorrect. It must surely be the case that, in the event of duly authorised permission being granted to first respondent to construct a permanent parking on erf 453, the order which was granted in this case would have no application to such permission, Central to the judgment of this Court, was a finding that, given the nature of the conditions and given the absence of permission, first respondent was not entitled to proceed with the

construction of permanent parking. The converse must apply: if permission is granted, the foundation for the order falls away.

That leads to an examination of the essential merits, as to whether there is a reasonable prospect of success on appeal, as that term has been developed in our *jurisprudence*. As Mr van der Merwe, who appeared on behalf of respondent in this application observed, there was nothing in the notice of application for leave to appeal to suggest that there was now a dispute regarding the finding of this Court that the existing parking lot was a permanent structure. Therefore, on the basis of the notice of application for leave to appeal, which has been placed before this Court, the evaluation of the merits of applicant's case must be predicated on the finding that, at present, there is a permanent structure on erf 453.

Hence the case on appeal, and indeed a central plank of the case as argued in the principal matter, was whether legal permission had been granted to construct a permanent parking lot on erf 453. In short, once it is accepted that there is a permanent structure, namely that the present parking on erf 453, together with the other construction on the site, constitutes a permanent structure, there can be no possible success in an argument that the zoning condition have not been breached.

The only prospect of success then turns on whether, on the papers, it could not be contended that permission was granted to so construct a permanent parking lot, or, as Mr Bridgman submitted, that there was a sufficient dispute on the papers so as to prevent a Court from concluding that no permission had been granted for the parking lot as presently constructed.

I should again point out that the far more expeditious avenue for first respondent, as was debated in argument before this Court, is that legal permission should be sought and granted, and if that was the case this dispute would no longer be live. That is not an issue before this Court at present.

Mr Bridgman again pressed the point that the letter from the provincial engineer of 21 November 2003 constituted permission to construct the present parking lot on erf 453. An examination of that letter, read as a whole, together with the diagram attached to the letter, does not appear to apply to erf 453. It may well apply to the balance of erf 270 from which erf 453 emerged, but there is no basis for the conclusion that erf 453 was covered by that letter. The only parking layout plan that clearly deals with erf 453 was the plan supported by the City Engineer in terms of a letter of 14 September 2006, I might add that this letter may constitute a rather compelling indication that permission had not been granted earlier as contended for by first respondent. One

may ask rhetorically as to why the need for permission as late as 2006, if permission had already been granted in 2003, as contended for by Mr Bridgeman, and as set out in the application for leave to appeal.

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In summary;

1. The present construction which was the subject of the dispute is a permanent structure. That is now an uncontested finding on which another Court would have to work;
2. The provincial authorities' consent, which was expressly required as a condition in respect of rezoning and subdivision, had not been shown to have been procured insofar as erf 453 was concerned;
3. An examination of an affidavit deposed to by first respondent's attorney, Miss Fleischer, which emerged extremely late in the proverbial litigation day, is itself indicative of first respondent's problem. Having trawled through various forms of documentation from the relevant authorities, all that she could conclude is that various forms of applications and development plans were submitted, but no specific permission for the construction of the permanent

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parking site can be definitively shown to have been granted.

The best Ms Fleischer can do is to aver that there is a factual dispute regarding permission. But if permission was granted to construct the permanent structure it should exist.

5 In my view, on the law as it presently exists, there is no dispute on the papers with regard to this matter, because no official permission has been shown to exist. Until such permission is granted, the construction continues to be illegal.

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I mentioned earlier that the prohibition is against permanent parking. The reason for that finding is clear: on the papers a Court cannot be certain that, from time to time informal parking did not take place on the open space. Since a finding about temporary parking will not alter the nature of the open space, occasional parking of such a nature may well be possible. That is not an issue which is relevant to the determination as to whether a permanent structure was constructed on what was intended to be open space, save where permission was granted to alter that condition.

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Mr Bridgman submitted that, once it is accepted that some form of informal parking may well have taken place on erf 453, that is fatal to applicant's case. The compelling counter argument is that, on the evidence which is available on the papers, it is clear,

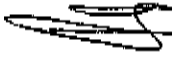
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particularly from the photographs which were placed before this Court, that there never was permanent parking on erf 453.

For all of these reasons, on the evidence placed before this Court, together with the findings which are no longer are
5 contested, there is no prospect that another Court would come to a conclusion different to this Court. Accordingly the

APPLICATION FOR LEAVE TO APPEAL IS DISMISSED WITH
COSTS.

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DAVIS, J