

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 1103/2016

In the matter between:

**PIKETBERG LOCAL HERITAGE COMMITTEE** First Applicant

**JACOBUS PETRUS WILSON** Second Applicant

and

**LIEBCO VLEISHANDELAARS (EDMS) BEPERK** First Respondent

**HERITAGE WESTERN CAPE** Second Respondent

**BERGRIVIER MUNICIPALITY** Third Respondent

**JAN TRUTER TRADING AS 'SOUTH CONSULTING'** Fourth Respondent

Date of hearing: 19 April 2016

Date of judgment: 18 May 2016

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**JUDGMENT**

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[1] In this matter the first applicant, the Piketberg Local Heritage

Committee ('PLHC'), and its chairperson, Mr Jacobus Petrus Wilson, the second applicant, on 28 January 2016 obtained an interim order on an urgent *ex parte* basis interdicting *inter alia* the demolition of a building older than 60 years on Erf 207 Piketberg situated at 69 Long Street in Piketberg ('the property') pending the review of a decision taken on 30 September 2015 by the Built Environment and Landscapes Committee ('Belcom') of the second respondent, Heritage Western Cape ('HWC'). This decision (referred to hereafter as a decision of HWC) authorised the total demolition of the building on the property. Following the decision made by HWC, a demolition permit was granted on 7 October 2015 to the fourth respondent, a town and regional planner acting for the owner of the property, the first respondent, Liebco Vleishandelaars (Edms) Bpk ('Liebco').

[2] The rule *nisi* granted on 28 January 2016 was subsequently extended until 19 April 2016 on which date two applications were before this Court for determination. The first is the return day of the rule *nisi* which seeks confirmation on an interim basis of the rule made pending the applicants' review of the HWC decision. This application is opposed by Liebco on the basis that its counter-application seeks the review and setting aside of the same decision, with ancillary relief, and obviates the need for the applicants' application. The applicants do not persist in their opposition to the substantive relief sought in the counter-application and now abide the decision of this Court with regards to such application.

[3] HWC does not oppose the grant of the interim interdictory relief sought by the applicants pending final determination of the applicants' review application, but opposes Liebco's counter-application on the basis that HWC's decision is not liable to be reviewed and set aside. HWC states that Liebco was, in respect of the application made to it on behalf of Liebco, only obliged to notify for possible comment those conservation bodies which are registered with it in terms of s 25(1)(b)

of the National Heritage Resources Act 25 of 1999 ('the NHRA')<sup>1</sup> and its regulations; and that the PLHC was not notified given that it was not registered with HWC in the manner required. HWC submits that its notice requirements do not fall foul of the provisions of s 3(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') which requires that a fair administrative procedure depends on the circumstances of each case. Thus the notice requirements in place are not only fair but also accord with the provisions of PAJA, including ss 3(4) and 4 (4), in circumstances in which heritage applications are often specialised in nature. Furthermore, HWC contends that the applicants have not shown their rights or legitimate expectations to have been materially and adversely affected by HWC's decision.

[4] Liebco takes issue with HWC's process as neither fair nor compliant with ss 3 and 4 of PAJA given that the decision to permit demolition was taken without notice to a body such as the PLHC, or a person like the second applicant, and without following a general public notice procedure when the decision may, or will, materially and adversely affect the rights or legitimate expectations of such a body or person and/or the rights of the public.

[5] As the provisions of PAJA apply to HWC when taking administrative action and it follows that where such action materially and adversely affects the rights or legitimate expectations of any person, or where the rights of the public may be affected it must be procedurally fair.<sup>2</sup> An administrator is required, subject to the circumstances, to give adequate notice of any administrative action, provide a reasonable opportunity to make representations, provide adequate notice of any right of review or internal appeal, where applicable, and of the right to request reasons.<sup>3</sup>

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<sup>1</sup> Section 25(1)(b) of the NHRA reads *inter alia* as follows:

"(1) A heritage resources authority must –

(b) maintain a list of conservation bodies which have, in accordance with regulations by the heritage resources authority concerned, registered their interest in –

(i) a geographical area; or

(ii) a category of heritage resources;..."

<sup>2</sup> Sections 3 and 4 of PAJA.

<sup>3</sup> Section 3(2)(b).

Where the rights of the public may be affected, such as in the current matter where the application was one to obtain approval for the demolition of a building, s 4(1) of PAJA provides that in giving effect to the right to procedurally fair administrative action an administrator may have regard to any different procedure which may apply and decide whether to hold a public inquiry, follow a notice and comment procedure or other appropriate procedure.<sup>4</sup>

[6] Faced with the fact that there was no conservation body for Piketberg registered with HWC in terms of s 25(1)(b) of the NHRA and its regulations, fairness required that HWC had regard to any such different procedure as may be appropriate to ensure that it adopted a procedure that was fair in the circumstances of this matter. In the nature of the application made by Liebco to HWC, the rights of the public quite clearly may be affected by the outcome which would permit in due course a demolition of a building of more than 60 years old. HWC should in the circumstances have had regard to the fact that its decision was one taken without notice to interested parties, especially in circumstances in which no conservation body had been cited and that the decision taken may materially and adversely affect the rights or legitimate expectations of the public.

[7] Having regard to the circumstances of the matter, fairness required that HWC apply its mind to what constituted a fair procedure in order for interested parties to be heard regarding the application prior to a decision being taken. This did not occur and the failure to do so had the result that the decision taken did not accord with the provisions of PAJA and exposed such decision taken to be reviewed and set aside.

[8] Both the applicants and Liebco contended that the review and setting aside of HWC's decision is just and equitable in terms of s 8(1) of PAJA and sought that the matter be referred back to HWC for re-consideration under s 8(1)(c)(i). This Court takes no issue with these submissions. I am unable to agree with HWC that in

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<sup>4</sup> Section 4.

the absence of a registered conservation body to which notice of Liebco's application could be given it was not obliged to ensure that notice of the application had been given to any party.<sup>5</sup> The approach of HWC to the application made by Liebco was unduly narrow with the result that the decision taken fell foul of the provisions of PAJA. It follows that the decision taken falls to be reviewed and set aside.

[9] Liebco seeks that this Court give directions, which it submits would be just and equitable, regarding the reconsideration of the matter by HWC to ensure that the following is given effect to: (a) the applicants' right to be heard, enshrined in s 3(1) and (2) of PAJA; (b) the right of any other interested and affected parties to a fair notice-and-comment procedure, enshrined in s 4(1) and (3) of PAJA and chapter 2 of the Regulations on Fair Administrative Procedures, 2002,<sup>6</sup> and (c) the first respondent's right to an administrative decision within a reasonable time, enshrined in s 6(2)(g) and (3)(a) of PAJA. The directions sought include an order that the application be provided to the applicants with time frames provided within which the applicants are entitled to lodge comments or objections; that notice of the application be made in the Piketberg local newspaper including making the application available for public scrutiny and comment; that the public be invited to submit comments within specified time frames; that the comments or objections received be provided to Liebco who are to reply within specified time frames; and requiring HWC to reconsider the application within a specified period. I see no reason as to why, in the circumstances of this case, such an order should not be made. With the HWC decision authorising the demolition of the building set aside, there is no reason as to why the rule *nisi* should not be discharged on the basis that without such decision Liebco is no longer

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<sup>5</sup> See *Joseph and Others v City of Johannesburg and Others* 2010 (3) BCLR 212 (CC) where the Constitutional Court held that procedural fairness is afforded not only to customers but to any person whose rights would be materially and adversely affected by the decision. The local authority was obliged to afford affected persons procedural fairness before taking a decision that will materially and adversely affect their rights. Notice to such persons would not undermine the ability to provide an efficient service. For the notice to be "adequate" it had to contain all relevant information, including the date and time of the proposed decision will take effect, the reason for the proposed decision, and the place at which the affected parties could challenge the basis of the proposed decision. It also has to afford sufficient time to make any necessary enquiries and investigations.

<sup>6</sup> GN R1022 in *Government Gazette* 23674 of 31 July 2002.