IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 23635/2009

In the matter between:

Joint Owners of Remainder Erf 5216 Hartenbos	**Applicant**
and	
Minister for Local Government, Environmental Affairs and Development Planning Western Cape Province	**First Respondent**
Body Corporate of Pansy Cove Sectional Title Scheme	**Second Respondent**

JUDGMENT DELIVERED ON 2 SEPTEMBER 2010

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[1] The applicants sought 3 declaratory orders. I deal with the relief sought below.

[2] This application involves a confined question of statutory interpretation, more particularly whether the applicants can be said to have already commenced an activity listed or specified in terms of section 24(2)(a) or (b) as envisaged in section 24F(1) of the National Environmental Management Act 107 of 1998 (**NEMA**).

[3] It was common cause in these proceedings that the Minister had in terms of section 24(2)(a) of NEMA listed certain activities in Government Notice 386 of 21 April 2006. This subordinate legislation took effect on 3 July 2006 and any person who intended to undertake a listed activity thereafter had to obtain environmental authorisation. However, where any party had already commenced any activity in furtherance of a listed activity by 3 July 2006, that party was exempted from obtaining environmental authorisation.

[4] In these proceedings, it was common cause that the applicants intended to undertake various listed activities in a development on Erf 5216 Hartenbos **(the Property)** situated at Hartenbos in the Western Cape. The development was to include the following:

(a) A palisade to be erected along the high-water mark on the beach. All the land above palisade fence, which currently forms part of the beach, would be enclosed;

(b) Lawns to be planted on the property. The lowest part of the lawns would be 11 metres above the high-water mark;

(c) Buildings to be erected on the property. The lowest point of the buildings would be 25 metres above the high-water mark;

(d) The buildings and lawns would be erected on an existing dune and extended onto the existing beach.

[5] The applicants contended that by filling in and compacting a depression on the property they had commenced all the listed activities that they would undertake in their development. It follows that, on the applicants' version, they are exempted from obtaining environmental authorisation for the listed activities. I consider below whether the filling in and compacting of the depression was an act in furtherance of all or any of the listed activities the applicants intend to undertake as part of the development because if it did, it would follow that the applicants do not have to obtain NEMA authorisation to continue with its intended listed activities.

The relief sought

[6] The applicants sought the following relief: (I quote from the Notice of Motion)

"...(2) Declaring that the applicants are not required, pursuant to section 24F(1) of the National Environmental Management Act 107 of 1998 (NEMA), to apply for or be granted an environmental authorisation under NEMA for the development of Remainder of Erf 5216 Hartenbos, Mossel Bay ("the property") in accordance with the Site Layout Plan of Proposed Subdivision annexed ...

(3) Declaring that the earthworks conducted by the applicants on the property in April and May 2006 did not constitute the construction, erection or upgrading of a 'road' as envisaged in Item 1(d) in Schedule 1 of the Regulations under section 21 of the Environment Conservation Act 73 of 1989 ("the ECA") promulgated in GN R1182 dated 5 September 1997, as amended.

(4) Declaring, accordingly, that the applicants were not required to obtain a written authorisation in terms of section 22(1) of the ECA before being entitled to perform the said earthworks ..."

BACKGROUND

[7] The circumstances that gave rise to this application are largely common cause and appear from the record to be the following.

(a) The applicants are the joint owners of the property. The property forms part of the broader Diaz Beach development at Mossel Bay.

(b) The development consists of various erven that were purchased by Stocks & Stocks, the applicants' predecessor, from the municipality in 1997. The entire area was re-zoned and subdivisional rights were granted in September 1997.

(c) In December 1999, Stocks & Stocks was granted environmental authorisation in terms of the Environment Conservation Act 73 of 1998 (**the ECA**).That authorisation applied to 2 of the erven, being erven

4332 and 4333 and related to the construction of a sectional title caravan park.

(d) The property was developed for this purpose including the building of ablution and braai facilities. It was used as a caravan park for approximately 3 years.

(e) In 2003, Krisptrade Eleven (Pty) Ltd (**Krisptrade**) purchased Ervens 4332 and 4333. In 2004, these properties were consolidated and subdivided to form two new erven, which were designated as Erf 5217 (on which the Pansy Cove Sectional Title Scheme has since been developed) and remainder Erf 5216, the property.

(f) Pursuant to an agreement of sale between the applicants and Krisptrade, entered into on 20 September 2004, the applicants received transfer of the property on 14 October 2004.

(g) Even before taking transfer of the property, the applicants had entered into a Participation Agreement and had begun planning for the property's development as a group housing scheme. The intention was always to establish 22 dwelling units on the property connected by an access road running from the main road along the (pan/handle) strip on the Northern side, turning South and then running along the border with Erf 5217 to the southern end of the property.

(h) More particularly, the applicants' intention was always to subdivide the property into 22 individual erven, each to be owned by an individual applicant.

(i) It was further their intention to hold an erven as common property between the individual owners. The common property would include the access road land subject to a right-of-way servitude running between Pansy Cove and the beach and the land subject to a public servitude lying between the proposed individual erven and the beach.

(j) A right-of-way servitude was registered over the property to give direct access to the beach and height restrictions were placed on any development on the property.

(k) In October 2004, shortly after transfer of the property to them, the applicants appointed Asritekion & Associates as architects for the development of the property. The principal architect was J C Watson (**Watson**). The architect's tasks included drawing up a site development plan and design for the houses. The work began immediately and the first progress payment was made in November 2004.

(l) On 27 January 2005, the municipality issued a certificate confirming the zoning of the property as a general residential area. The permitted uses under the zoning included blocks of flats and houses. In April 2005, the applicants represented by David Jacobus Horn (**Horn**) applied to the municipality for the re-zoning of the property to "group housing" with zoning building lines, and for the subdivision of the property as set out above. On 17 May 2005, the municipality approved the application.

(m) In the course of 2004, development began of the sectional title units on Erf 5217 (Pansy Cove), the property's neighbour. Pansy Cove appointed Brison CC, trading as Quickslab (**Quickslab**), as consulting civil and structural engineers. The professional engineer responsible for that development was A H Brandt (**Brandt**).

(n) Due to the proximity of Pansy Cove to the property, the applicants always intended to appoint Quickslab as the engineer to their proposed project because there were various civil and structural engineering issues that affected both properties, such as sewage and storm water disposal. During 2005, Quickslab began planning for the roads and services, including the retaining wall that was envisaged to run next to the road on the Pansy Cove side of the property. There were various communications between the applicants' architects and Quickslab and in November 2005, the applicants formally appointed Quickslab as their consulting civil and structural engineer.

(o) In November 2005, WKL surveyors surveyed the proposed 22 erven and prepared a surveyor's diagram to effect the subdivision. Subsequently, however, the municipality indicated that it was not

prepared to grant written authorisation for the transfer of any of the proposed 22 erven until all infrastructure services had been fully installed.

Filling in the depression

[8] When the applicants acquired the property, there was a large depression in its north-western corner that encroached upon the neighbouring Erf 5217. The depression was situated directly in the path of the planned access road across the property. Given the size of the property and the location of the proposed erven, there was no way the road could be deviated around the depression.

[9] According to Jan Frederick Ellis (**Ellis**), one of the applicants in these proceedings, the access road to be constructed across the property required substantial earthworks to be carried out to eliminate the depression and level the surface. The Pansy Cove developers also required these works to enable them to erect a palisade boundary fence. According to Ellis, the vast majority of infilling and earthworks to remove the depression had to be undertaken on the property.

[10] In April 2006, Pansy Cove wanted to erect the palisade fence. Brandt was of the view that this task required the applicants' permission and co-operation. Pursuant to Brandt's advice, the applicants and Pansy Cove reached the following agreement. (I quote from Ellis's affidavit).

"(37) The latter advised Horn that this was work that needed to be done as part of the applicants' own development. He recommended that these earthworks be conducted subject to the following conditions.

(37.1) All such work would have to be of such quality that the applicants' access road would be built on it without having to re-excavate and for the depression, including the compaction of the material to engineering standards,

(37.2) Quickslab would supervise the construction work to ensure that it complied with the necessary requirements."

[11] The parties also agreed that the applicants could use 1 363m³ of material that belonged to the Pansy Cove developers to fill in the depression. Ellis said the following about the filling in process.

"(39) The contractor... commenced with the earth works on 26 April 2006 with excavations of 238m³ of in situ material of which 70m³ was found by the set contractor to be unsuitable for the purpose of filling the depression to engineering road standards. ... The earthworks were completed on 3 May 2006. Brandt has confirmed that a maximum of 200m³ of fill was used on Erf 5217. In other words, the vast majority of earthworks and incidental construction work relating to the depression took place on the property."

[12] The compaction met the standard that Brandt had in mind.

[13] I accept that the work done constituted partial construction of the access road. It is so that the work done on the property could only be done with the applicants' permission. I accept that the applicants granted permission because of the advantage of having the depression filled in so that they would later be able to construct the access road over it. The applicants alleged that the filling in of the depression was an essential part of the entire development on the property without which the road to access the individual erven could not be built.

Events post filling in the depression

[14] The applicants continued with the detailed planning of the development. On 17 June 2006, the applicants entered into a revised and comprehensive partition agreement and constitution for the Homeowners Association. At the same time, they accepted the proposed site development plan, erf layout and building designs relating to the development.

[15] The architects continued to prepare plans for submission to the municipality, making their final submission in May 2007. Ellis alleged that at that stage, the applicants had already completed 70% of the architectural work.

[16] In 2007, the applicants put out to tender the construction of the services. Pursuant to that process, the applicants awarded the tender to Marracon on 14 June 2007.

Environmental authorisation required

[17] The municipality had in principle accepted that the building plans were ready for approval, although it had indicated that the applicants should obtain environmental authorisation from the Department of Environmental Affairs and Development Planning (**the Department**). That requirement has given rise to these proceedings.

[18] The applicants contended that they had commenced the first earthworks in April 2006. That work, on the applicants' version, was an activity undertaken in furtherance of the development and consequently in furtherance of all the listed activities they intended undertaking on the property. It followed, so the argument went, that the applicants were exempted from obtaining NEMA authorisation.

The statutory requirements

[19] I deal below first with the statutory provisions applicable to these proceedings.

[20] Section 24(F) of NEMA was inserted in that Act by way of section 3 of Act 8 of 2004 with effect from 7 January 2005. It was later amended by section 5 of Act 62 of 2008 with effect from 1 May 2009. Until its amendment in May 2009, section 24(F)(1) provided as follows:

"Notwithstanding the provisions of any other Act, no person may commence an activity listed in terms of s24(2)(a) or (b) unless the competent authority has granted an environmental authorization for the activity, and no person may continue an existing activity listed in terms of s24(2)(d) if an application for an environmental authorization is refused".

[21] The word "commence" was, until May 2009, defined in section 1 of NEMA as follows:

"Commence, when used in chapter 5, means the start of any physical activity on the site in furtherance of a listed activity".

[22] Following its amendment in 2009, section 24F(1) provided as follows,

"Notwithstanding any other Act, no person may –

(a) commence an activity listed or specified in terms of s24(2)(a) or (b) unless the competent authority or Minister of Minerals and Energy, as the case may be, has granted an environmental authorization for the activity: or

(b) commence and continue an activity listed in terms of s27(2)(d) unless it is done in terms of an applicable norm or standard".

[23] The definition of commence was also amended. It now reads as follows:

"Commence, when used in chapter 5, means the start of any physical activity, including site preparation and any activity on the site in furtherance of a listed activity or specified activity, but does not include any activity required for the purpose of an investigation or feasibility study as long as such investigation or feasibility study does not constitute a listed activity or specified activity".

[24] The applicants' counsel argued that this matter should be determined with reference to the current definition. I agree and proceed on that basis.

[25] Environment Conservation Act 73 of 1989 (**ECA**) is also relevant to these proceedings, in particular section 22(1) of that Act which provides as follows:

"No person shall undertake an activity identified in terms of s21(1) or cause such an activity to be undertaken except by virtue of a written authorisation issued by the Minister or by a competent authority or a local authority or an officer, which competent authority, local authority or officer shall be designated by the Minister by notice in the Gazette".

[26] Section 21(1) permitted the minister by notice in the Gazette to identify those activities that in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.

[27] The minister issued such a notice in the form of regulations on 5 September 1997, and amended it on 17 October 1997, 27 March 1998 and 10 May 2002. Relevant for purposes of this application is item 1(d) of the regulations. On 3 May 2002 item 1(d) was amended to refer to the

construction, erection or upgrading of ... roads, railways, airfields and associated structures.

[28] On 3 May 2002, the ECA adopted the following definition for road, namely:

"(a) any road determined to be a national road in terms of section 40 of the South African National Roads Agency Ltd and National Roads Act, 1998 (Act No. 7 of 1998).Including any part of such road;

(b) any road for which a fee is charged for the use thereof;

(c) any provincial road administered by a provincial authority;

(d) any arterial road or major collector street administered by a metropolitan or local authority;

(e) any road or track in an area protected by legislation for the conservation of biological diversity or archaeological, architectural or cultural sites or an area that has been zoned open space or an equivalent zoning;

(f) any road or track in an area regarded by the relevant authority as a sensitive area".

DID THE APPLICANTS COMMENCE THE LISTED ACTIVITIES?

[29] Below is a table of the listed activities the applicants intended undertaking at the property.

Activity number	**Activity description**
2.	Construction or earth moving activities in the sea or within 100 metres inland of the high-water mark of the sea, in respect of – (a) facilities for the storage of material and the maintenance of vessels; (b) fixed or floating jetties and slipways; (c) tidal pools; (d) embankments; (e) stabilising walls; (f) buildings; or (g) infrastructure.

Activity number	Activity description
3.	The prevention of the free movement of sand, including erosion and accretion, by means of planting vegetation, placing synthetic material on dunes and exposed sand surfaces within a distance of 100 metres inland of the high-water mark of the sea.
5.	The removal or damaging of indigenous vegetation of more than 10 square metres within a distance of 100 metres inland of the high-water mark of the sea.
6.	The excavation, moving, removal, depositing or compacting of soil, sand, rock or rubble covering an area exceeding 10 square metres in the sea or within a distance of 100 metres inland of the high-water mark of the sea.
16.	The transformation of undeveloped, vacant or derelict land to – (a) establish infill development covering an area of 5 hectares or more, but less than 20 hectares; or (b) residential, mixed, retail, commercial, industrial or institutional use where such development does not constitute infill and where the total area to be transformed is bigger than 1 hectare.

[30] In deciding whether the applicants had commenced all the activities by filling in the depression, I had regard firstly to the provisions of NEMA from which it appears that:

(a) the legislature intended to provide measures to protect the environment for this and future generations. The preamble provides that:

"...the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone ....

Everyone has the right to have the environment protected, for the benefit of present and future generation, through reasonable legislation ...."

(b) Section 24(2)(a) enables the national Minister to identify activities "which may not commence without environmental authorisation from the competent authority".

(c) In these proceedings, it was common cause that the relevant authority was the first respondent's predecessor.

(d) Section 24F(1)(a) prohibits any person from being allowed to "commence an activity listed in terms of section 24(2)(a) or (b) unless the competent authority ... has granted an environmental authorisation for the activity..." (my emphasis)

(e) "Commence" is used in the definition section in relation to the furtherance of a listed activity. "Commence, when used in Chapter 5, means the start of any activity, ...in furtherance of a listed activity."

[31] I have no doubt that the filling in of the depression qualified as "any activity". Innes CR in the matter of **R v Hugo** AD 1926 271 interpreted the word "any" as being of wide and unqualified generality. I can therefore not agree with the submission that because the filling in was "limited in the extreme" it does not qualify as "any activity". In any event, it appears from the record that the filling in involved substantial work even though it involved a relatively small area.

[32] Mr Budlender, the first respondent's counsel, argued that "in each instance one has to relate the activity in question to the listed activity". This must be correct because sections 24(F)(1)(a) and (b) prohibit the commencement of "an activity ...the Minister...has granted authorisation for the activity...".

[33] In addition section 24(E) provides that "every environmental authorisation must as a minimum ensure that adequate provision is made for the ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity." (my emphasis)

[34] Clearly, the objective is to manage comprehensively the impact of the activity on the environment. The applicants' counsel argued that the first respondent had a long-standing practice of granting environmental approvals "not ...on an 'activity-by-activity' basis, but with reference to the development as a whole." In support of the allegation, the applicants annexed a sample approval from which the following appears:

"DECISION

In terms of Section 22 ...I, Minister..., hereby grant authorisation with conditions...for the execution of the activity described above but excluding the Group Housing component...

In terms of Section 22 ...I... hereby refuse authorisation for the execution of the following..."

[35] The sample provided does not support the submission to the extent that it was suggested that a consideration of the impact of the individual activity is not the focus of the authorisation.

[36] The applicants have not attempted to show any link between the infill and compacting, and any of the listed activities they intended undertaking. Instead, they alleged that because the filling and compacting were essential for the development, it was carried out in furtherance of every listed activity that would be undertaken in the development. Ellis, who attested to the founding affidavit, said the following in his replying affidavit:

"...It was a substantial civil engineering exercise. In any event, the First Respondent's reliance upon the extent of the activity is misplaced, given the low statutory threshold ('any physical activity'). The extent of the potential environmental impacts is also not relevant: the whole purpose of the provision is to ensure that certain developments, which would have been lawful before NEMA EIA regulations were enacted, can continue without environmental approvals. Finally, there is a real and substantial connection between the commencement of the road and the development as a whole, since the road is essential to enable dwellings to be constructed. It is therefore clear physical activity in furtherance of listed activities (another low statutory threshold)."

[37] As indicated above the authorisation pertains to the "activity" instead of the development. That has to be correct because the legislature prohibited the start of environmentally risky activities without authorisation; in this way, NEMA does not interfere with economic and other activities not considered environmentally risky.

[38] Section 24(1) requires that "the potential consequences for or impacts on the environment of listed activities ...must be considered, investigated, assessed and reported on...". Since, some activities may be authorised and others not, depending on the environmental impact, it follows that the relevant authority would have to assess each individual activity.

[39] I agree with the applicants that the "statutory threshold ('any physical activity')" is low. Nevertheless, they have to show a link between that activity and each listed activity they intend undertaking. A development consists of many activities, most of which are not affected by the provisions of NEMA and ECA. The legislator in selecting activities that should form the subject of NEMA and ECA was acting in compliance with its mandate in terms of section 24 of the Constitution which provides that:

"Environment

Everyone has the right –

(a) *to an environment that is not harmful to their health or wellbeing; and*

(b) *to have the environment protected, ...through reasonable legislative or other measures...."*

[40] Not every activity the applicants intended to undertake in their development can remotely be considered as even potentially harmful to the environment. It follows that only those activities, the listed activities, form the subject of the NEMA and ECA enquiry. NEMA requires an applicant to apply for and obtain authorisation in respect of each listed activity it intends undertaking in a development.

[41] For an activity to qualify as having been "in furtherance" of a listed activity, there must be evidence that it advanced the activity i.e. some reasonably direct connection between the physical activity and the listed activity. I say this because the activity and its impact until completion are the focus of NEMA, it follows that any advancement must relate to the activity in a direct manner.

[42] As indicted above, the applicants have not attempted to show a connection between the activity and the individual listed activities; instead, they relied on a connection between the activity and the development. A development consists of many activities. I can therefore not determine whether there is a reasonably direct connection between the act of filling in the depression and any of the listed activities. It follows that the applicants are not entitled on these papers to a declaration that they are not required to apply for or be granted environmental authorisation under NEMA.

The applicants require ECA authorisation

[43] Even if I am wrong, the applicants cannot rely on the start of the road because they did so in contravention of item 1(d) in Schedule 1 of the Regulations promulgated in terms of section 21 of ECA. The regulations were promulgated in Government Notice 1182 dated 5 September 1997 as amended.

[44] Sections 21 and 22 of ECA, prohibit the undertaking of activities the Minister has identified that "in his opinion may have a substantial detrimental effect on the environment..." The Minister had, in Government Notice R 1182 Item 1(f) of Schedule 1, identified:

> *"(f) any road or track in an area regarded by the relevant authority as a sensitive area".*

[45] The applicants alleged that the relevant authority had not published its "regard" in any official notice or indeed by any other means. That was common cause in these proceedings. However, the applicants had not disputed the validity of the Notice; it follows that its provisions are binding. (See **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA) para 26)

[46] I am satisfied that the relevant authority, the first respondent's predecessor, regarded the area as sensitive, for the following reasons:

(a) As indicated in para 7(c) above, in December 1999, the relevant authority granted Stocks & Stocks ECA authorisation related to the construction of a sectional title caravan park.

(b) As appears from the background set out above, Stocks and Stocks was one of the applicants' predecessors.

(c) The following appears from the authorisation:

"ENVIRONMENTAL EXEMPTION RECORD OF DECISION

....Condition 1: The setback line for development is 60 metres beyond the 2,0m + MSL contour. No development, construction or gardening is allowed between the 60 metres setback line and the sea. A palisade

fence (which allows sand to move through) shall be erected on the 60 metres setback line..."

(d) The extract is in my view clear evidence of the "regard" in which the first respondent's predecessor (the relevant authority) held the property.

(e) In addition, in 1997 the Cape Nature Conservation, the then relevant authority's Conservation wing, proposed conditions that should apply to re-zoning and subdivision approval for certain erven including the property. Ellis had in the founding papers annexed the Municipal approvals issued to Stocks and Stocks in September 1997; the following appear from the correspondence:

"With reference to your application...my Council resolved ... on 9 September 1997 as follows:

(1) That the rezoning, subdivision and departures of Diaz Beach ...be approved.

....

(8.2) The southern dunes on both sides, the beach and in the estuary mouth ...have very high conservation value and all attempts should be made ...conserve these areas in an environmentally acceptable way.

An access road through this area may not be constructed....

(8.10) The coastline is physically highly sensitive and appropriate (sixty metres minimum) set-back line for development must be ...determined..."

[47] It follows that if the road or any part of it falls within the area regarded as sensitive, the applicants must obtain ECA authorisation. Francois Myburgh Naudé, an assistant manager in the Department of Environmental Affairs and Development Planning, Western Cape, attested to an affidavit in these proceedings and said that:

"The road will at its lowest points be 51 metres above the high-water mark."

[48] The applicants have not disputed that allegation. It is correct that the documents referred to above "pre-dated the acquisition of the property by the Applicants, they also materially pre-date the introduction of 'road' in the EIA regulations in May 2002." However, this does not detract from the fact that there exists objective evidence that the relevant authority regarded the area as sensitive for purposes of development.

[49] Ellis said that the road would only marginally encroach onto the 60 metre setback line. I therefore accept that the road will intrude on an area regarded as a "sensitive area" by the relevant authority. The applicants did not obtain ECA authorisation prior to filling and compacting the depression. It follows that they are not entitled to orders in terms of their prayers 3 and 4 of the Notice of Motion.

[50] Because the applicants started the road in contravention of ECA it can also not rely on the filling and compacting as an activity in furtherance of any listed activity.

CONCLUSION

[51] For the reasons stated above, I make the following order.

(a) The application is dismissed with costs.

BAARTMAN, J