THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

South African National Parks v MTO Forestry (PTY) LTD and Another

From: The Registrar, Supreme Court of Appeal

Date: 17 May 2018

Status: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today, the Supreme Court of Appeal (SCA) dismissed an appeal brought by the South African National Parks (SANParks), against a judgment of the Western Cape High Court, Cape Town (the high court).

The issue at the centre of this appeal concerned the question whether the appellant had a duty to consult a public interest group, Parkscape, prior to approving variation of a previously agreed tree felling schedule in the Tokai Forest, Cape Town. The tree felling schedule was a term of a lease agreement which governed the relationship between SANParks and MTO Forestry, a private company contracted to harvest the trees. In terms of the lease agreement MTO was to clear fell the Tokai Forest plantations over a 20-year period, terminating in 2025.

The lease agreement had been concluded in 2005 with the Minister of Water Affairs and Forestry. Later, in the same year, the responsibilities and obligations of the Minister were assigned to SANParks. Because the Tokai Forest is located within a protected area, it had to be administered in terms of the National Environmental Management: Protected Areas Act (NEMPAA). Within this context, SANParks considered that a long-term strategic framework within which the Tokai Forest was to be managed was necessary. A public participation process was initiated. That process revealed divergent views – there was concern among some members of the public about the loss of shade trees, whilst some interest groups feared the impact of loss of diversity. These divergent concerns informed what ultimately became a management framework, which was intended to inform the actual management plan of the forest.

The events that culminated in these proceedings started halfway into the term of the lease agreement, in March 2015 when a major fire damaged most of the plantation components in the Upper Tokai Forest. MTO addressed a letter to SANParks requesting that it be allowed to fell the Dennendal portion of the Tokai Forest earlier than the previously agreed period and that it be allowed to exit the lease in 2017.

SANParks granted this request and on 29 August 2015 gave public notice of the acceleration of the harvesting schedule. Notwithstanding some written protestations by representatives of Parkscape, on 30 August 2016 the accelerated felling programme commenced leading to the institution by Parkscape of proceedings in the high court. Parkscape contended that the appellant's approval of the variation constituted administrative action and as such there had been an obligation on it to consult the public, including itself as a stakeholder, prior to granting the approval.

The high court found that indeed the appellant's authority and obligations in respect of the Tokai Forest, including the authority deriving from the lease agreement, constituted an exercise of public power. That court also found that the approval of the accelerated felling schedule amounted to an administrative action. As SANParks had failed to consult the public prior to granting the approval, its decision was reviewed and set aside.

On appeal to this court, SANParks insisted that no statutory duty prevented it from approving the accelerated schedule and that in fact the approval was made in terms of the private lease agreement. Accordingly there was no duty on it to consult with the second respondent or others prior to taking the decision to approve the variation request.

This court, in the majority judgment found that conclusion of the lease agreement was exercise of public power deriving from the National Forest Act in terms of which the lease was concluded. Such exercise of public power was administrative action deriving from section 55 of NEMPAA. Consequently SANPark had a duty to consult the public prior to approving the variation, especially in light of the public participation process that had preceded the management framework. This court held that Parkscape's assertion of a legitimate expectation to consultation before the approval was given was well made.

As a result, SANParks' appeal was dismissed with costs.

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