THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 99/2015

In the matter between:

DAVID WILLOUGHBY ABBOTT	**APPELLANT**

And

OVERSTRAND MUNICIPALITY	**FIRST RESPONDENT**
THE MINISTER, DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM	**SECOND RESPONDENT**
THE MINISTER, DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	**THIRD RESPONDENT**
THE KLEIN RIVER ESTUARY FORUM	**FOURTH RESPONDENT**

Neutral citation: *Abbott v Overstrand Municipality* (99/2015) [2016] ZASCA 68 (20 May 2016)

Coram: Lewis, Cachalia and Tshiqi JJA and Fourie and Baartman AJJA

Heard: 6 May 2016

Delivered: 20 May 2016

Summary: Application for the review and setting aside of a municipality's decision to refuse to take steps to prevent damage being caused to immovable property by flooding – failure to prove that the municipality had the legal authority or obligation to take such steps – requirements for reliance on the doctrine of legitimate expectation also not met.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Blommaert AJ sitting as court of first instance):

The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

JUDGMENT

Fourie AJA (Lewis, Cachalia and Tshiqi JJA and Baartman AJA concurring):

[1] During 1982, the appellant, Mr David Willoughby Abbott, acquired immovable property (the property) bordering on the Klein River, in the district of Hermanus, Western Cape Province. In 1989 he erected buildings on the property, including a house on the bank of the Klein River. According to the appellant his house had subsequently been damaged by the flooding of the Klein River, and this led to litigation between him and the first respondent, Overstrand Municipality (the municipality), culminating in the present appeal.

[2] The Klein River forms part of the Klein River estuary (the estuary) which is an estuarine lake that seasonally opens and closes on normal river flow regimes. The estuary stretches from the sea (or mouth of the estuary, when closed) at Hermanus, to just beyond the hamlet of Stanford some 17.5 kilometres upstream. The estuary, and the property, are situated within the area of jurisdiction of the municipality.

[3] The estuary can be divided into three sections. The lower reaches, stretching from zero to three kilometres from the mouth comprise the mouth area and the inlet channels. When the mouth is closed it is separated from the sea by a sand-berm (the berm). To establish connectivity with the sea, the berm needs to be eroded by water from the estuary itself or by the sea, or to be artificially breached.

[4] The second part of the estuary is known as the 'vlei'. It comprises a large unconstrained main water body upstream of the mouth and tidal channels to where the estuary becomes a narrow confined channel. This stretches from approximately three to eight and a half kilometres from the mouth.

[5] The remainder of the estuary comprises the Klein River which is the area from eight and a half to 17.5 kilometres upstream from the mouth and stretches to a few hundred metres past the bridge at Stanford. This is where the property is situated, approximately 16 kilometres upstream from the mouth of the estuary.

[6] In July 2014 the appellant approached the Western Cape Division of the High Court, Cape Town, on application alleging that his dwelling had been damaged by the flooding of the Klein River in circumstances where the municipality was obliged, but failed, to take steps to prevent such damage. The main relief sought by the appellant was the review and setting aside, in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively in terms of the common law, of the municipality's decision to refuse to take any steps to prevent damage being caused to his house by the flooding of the Klein River. The appellant further sought the remittal of the matter to the municipality for reconsideration, 'which shall include consideration of steps to be taken to protect the house against any flooding of the house, which might be caused by the failure to artificially breach the berm of the mouth of the Klein River or to only breach such berm when the mean water level in the Klein River estuary exceeds 2.1 metres'.

[7] The appellant sought the following relief in the alternative:

(a) an order declaring that an established practice exists in respect of the breaching of the berm at the mouth of the estuary whenever low-lying properties were threatened with damage;

(b) an order declaring that the practice can only be lawfully departed from if the municipality takes reasonable steps to protect the appellant's house from damage resulting from a departure from the established practice;

(c) an order directing the municipality to take reasonable steps to prevent the flooding of the appellant's house.

I should add that no relief was sought against the second to fourth respondents.

[8] The appellant's notice of motion is certainly not a model of clarity, but when it is read in conjunction with the founding affidavit and in particular the appellant's replying affidavit, it appears that the case put forward by the appellant was the following:

(a) for many years it had been the established practice of the municipality and its predecessors to artificially breach the berm at the mouth of the estuary when the water level in the estuary exceeded 2.1 metres above mean sea level (amsl), so as to prevent flood damage to low-lying riparian properties;

(b) during 2010 the municipality departed from this settled practice by deciding to artificially breach the berm only at a much higher level, without taking steps to protect the properties of those affected by such decision, including the property of the appellant;

(c) the decision to artificially breach the berm at this higher level resulted in the flooding of the appellant's property by the Klein River causing structural damage to his house;

(d) on 12 August 2013 the municipality advised him in writing that it was not legally bound to take any steps to prevent his house from being flooded by the Klein River.

[9] It has to be emphasised that the relief sought by the appellant was not aimed at addressing the artificial breaching of the berm. He did not seek an order

compelling artificial breaching of the berm; in fact, the relief sought by him was only directed at the municipality taking measures to protect his property from flood damage which, he alleged, it had done in the past.

[10] The municipality opposed the application and, in the event, it was heard by Blommaert AJ who dismissed the application with costs, but granted the appellant leave to appeal to this court.

[11] The court a quo approached the matter on the basis that, in order to '[get] out of the starting blocks', the appellant had to prove that the municipality's conduct, of which he complained, was the cause of the damage to the house. However, in view of the disputes of fact on the papers as to the cause of the damage, Blommaert AJ held that the matter had to be decided on the municipality's version, and he accordingly dismissed the application. Although I agree that the application fell to be dismissed, I intend to follow a different route in reaching this conclusion.

[12] As stated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 22, there is now only one system of law grounded in the Constitution which regulates administrative action. The court's power to review administrative action is founded in PAJA and the Constitution itself. In s 1 of PAJA 'administrative action' in relation to an organ of state (such as the municipality in this instance) is defined as the taking of a decision, or the failure to take a decision by the organ of state, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation. Section 6 of PAJA codifies the grounds for judicial review of administrative action, while s 8 prescribes the remedies a court may grant in proceedings for judicial review.

[13] In his notice of motion the appellant relied on s 6(1) of PAJA to review and set aside the municipality's decision to refuse to take any steps to prevent flood damage to his house. However, all that s 6(1) provides is that any person may institute proceedings for review of an administrative action. As I see it, the application was in effect one in terms of s 6(2)*(g)* of PAJA, for the review of the municipality's failure to take a decision to prevent damage being caused to the appellant's house by the

flooding of the Klein River. Therefore, to succeed with the application he had to show that the municipality was under a legal obligation to take steps to prevent damage from being occasioned to his house by the flooding of the Klein River. See *Commissioner, South African Revenue Service v Trend Finance (Pty) Ltd & another* [2007] ZASCA 59; 2007 (6) SA 117 (SCA) para 27; *Offit Enterprises (Pty) Ltd & another v Coega Development Corporation & others* [2010] ZASCA 1; 2010 (4) SA 242 (SCA) para 43 and *Thusi v Minister of Home Affairs & others* [2010] ZAKZPHC 87; 2011 (2) SA 561 (KZP) para 42.

[14] The logical starting point in determining whether the municipality had the legal obligation (and the necessary power) to take steps to protect the appellant's house from flooding, is the Constitution. Section 156(1) of the Constitution confers on municipalities executive authority and the right to administer the local government matters listed in Part B of Schedules 4 and 5 of the Constitution, and any other matter assigned to it by national or provincial legislation.

[15] The local government matters listed in Part B of Schedules 4 and 5 do not confer any authority on the municipality relative to the breaching of the berm in the estuary and the protection of riparian property owners against flooding. By contrast, Part A of Schedule 4 of the Constitution lists the areas of 'Environment' and 'Nature conservation' as concurrent national and provincial functions.

[16] It follows that any powers which the municipality may wish to exercise with regard to the estuary have to be assigned to it by national or provincial legislation. By virtue of the amalgamation of municipalities the estuary has since 5 December 2000 fallen within the areas of jurisdiction of the municipality and the Overberg District Municipality (the latter's area of jurisdiction also encompassing several other local municipalities). However, no power or duty to manage or control the estuary and to take measures to protect riparian properties, has been assigned to the municipality by national or provincial legislation.

[17] The National Environmental Management Act 107 of 1998 (NEMA) which commenced on 29 January 1999, provides in s 24(2)*(a)* that the national minister responsible for environmental affairs may identify activities which may not

commence without an environmental authorisation from the 'competent authority'. Various activities have subsequently been listed under s 24(2)*(a)* of NEMA, thereby empowering the third respondent (the MEC) to, inter alia, authorise an activity such as the artificial breaching of the berm at the mouth of the estuary. The delegate of the MEC duly authorised the artificial breaching of the berm when approving the mouth management plan and its revision submitted by the fourth respondent (KREF) in 2010 and 2013, as recorded in more detail in para 30 infra.

[18] The Nature Conservation Ordinance 19 of 1974 (Cape) also contains provisions dealing with the management and control of 'inland waters', ie all waters which do not permanently or at any time during the year form part of the sea. This would include a body of water such as the estuary. Section 16(1)*(c)*(ii), read with s 16(1)*(e)*, of the ordinance, confers the power on CapeNature (the Western Cape Nature Conservation Board) to take such steps as may be necessary or desirable for the achievement of the objects and purposes of the ordinance, including the power to take such measures as may be necessary or desirable for the control of fish and aquatic growths in the estuary. These powers conferred on CapeNature are sufficiently wide to encompass the power to manage the estuary, including the management of the breaching of the berm between the estuary and the sea. I should add that, as explained by Ms Lara van Niekerk, an estuarine specialist, employed by the CSIR and an advisor to the municipality, artificial breachings of the berm at lower than natural breaching levels, reduces the volume and duration of water-flow out to sea with resultant increased sedimentation in the lower vlei. This has had an adverse effect on the ecology of the vlei. Therefore, the breaching of the berm at higher and, if possible, natural levels, will have (and has had) positive results. In short, breaching at higher levels is required to prevent the vlei from silting up to the detriment of the estuarine ecology.

[19] It is possible that, in the future, the municipality may be authorised to administer the estuary under the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (ICMA) which commenced on 1 December 2009. Chapter 4 of ICMA provides for estuarine management in order to address the lack of effective management of estuaries. To that end a protocol has been published under ICMA in May 2013, which provides for the management of estuaries

through the development and implementation of individual estuarine management plans. However, the municipality will only be authorised to manage the estuary under the provisions of ICMA if it agrees, and has the capacity, to do so, in accordance with s 156(4) of the Constitution. This has not happened and therefore the municipality does not have any authority under ICMA to manage the estuary, including the breaching of the mouth of the estuary.

[20] The appellant contends that, notwithstanding the provisions of s 156 of the Constitution and the other legislation referred to above, the municipality does have the necessary authority to manage the estuary and to protect the riparian properties against flood damage. For this submission the appellant relies on a pre-constitution resolution, embodied in a council minute of the then Hermanus Municipality dated 9 September 1991, and the contents of a public newsletter distributed by the Hermanus Municipality in November 1991. The council minute records that a letter had been received from the Chief Director: Nature and Environmental Conservation (CDNEC) (the predecessor to CapeNature) suggesting that the Hermanus Municipality should take over control of the management of the estuary, including 'die oopmaak van die mond'. The Hermanus Municipality resolved that it was prepared to accept full control over the estuary, but requested the CDNEC to define the council's powers and responsibilities in this regard. There is no evidence of the CDNEC defining these powers and responsibilities, but in the newsletter of November 1991 the Hermanus Municipality reported as follows:

'For the first time the responsibility of deciding whether or not to open the lagoon rested with the municipality as complete control of the lagoon, rather than just the recreational aspects thereof, has been handed over to us. This includes the controversial opening of the lagoon each year, after prior consultation with the CSIR and in accordance with the guidelines laid down by them.'

[21] This submission of the appellant, however, takes no account of the re-allocation of public powers and responsibilities by and in terms of the Constitution in 1996. In addition, as I will in due course illustrate, the municipality did not, in fact, assume control of the management of the estuary and the breaching of the berm, but, at most, was represented on committees, consisting of various interested parties which attended to these matters.

[22] I should add that, in his replying affidavit, the appellant also sought to rely on certain regulations (Overberg Regional Services Council Regulations for the control of the sea-shore and the sea situated within or adjoining the area of jurisdiction of the Overberg Regional Services Council, GN R35, *GG* 15624, 15 April 1994) made by the Overberg Regional Services Council (the Overberg RSC), promulgated in 1994 pursuant to s 10(1) of the Sea-Shore Act 21 of 1935. The appellant avers that the control of the sea shore within its area of jurisdiction then vested in the Overberg RSC and that the municipality as the successor of the Overberg RSC, is now clothed with the powers conferred in terms of the 1994 regulations. Therefore the appellant contends that the municipality has in terms of the 1994 regulations the power to control the sea shore, including the estuary.

[23] As pointed out by the municipality, there is simply no merit in the appellant's reliance on the 1994 regulations. Firstly, the Overberg District Municipality, and not the municipality, is the successor-in-law to the Overberg RSC with regard to the management of the sea shore within the area of its jurisdiction. Furthermore, the 1994 regulations contain a prohibition on the opening of the mouth of a river where a bar of sand has developed between the mouth of the river and the sea blocking tidal interchange. It follows that the municipality has derived no powers from the 1994 regulations to exercise any authority or control over the estuary or to take steps to protect riparian owners from flooding. For the sake of completeness I should add that the municipality does exercise some authority over the estuary, but with regard to certain constitutional functional areas only, namely the licensing and control of boats in the lagoon and the recreational aspects of the lagoon.

[24] From this it follows that there is no legislation (whether national or provincial) which has assigned to the municipality the power or the duty to manage the estuary and to take measures to protect riparian properties. Therefore, the appellant has failed to show that the municipality was under a legal obligation to take steps to protect his house from flooding by the Klein River. It should also be borne in mind that the municipality cannot lawfully assume powers it does not have, nor can it be compelled to take steps it has no authority to take. See *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* [1998]

ZACC 17; 1999 (1) SA 374 (CC) para 56; *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* [2007] ZASCA 28; 2008 (3) SA 1 (SCA) paras 11-13. The application for review under PAJA accordingly had to fail.

[25] Although it is not necessary, I consider it appropriate to briefly deal with the factual premise of the appellant's case, to show that, at a factual level too, the application for review was beset by insuperable difficulties. At the outset I should refer to the appellant's change of stance at the hearing of the appeal. His case on the papers was that his house was damaged by the flooding of the Klein River. However, during argument on appeal, counsel for the appellant attempted to pin his colours to the mast of damage caused to the house by the gradual ingress of water and not by flooding. This was not the case that the municipality was required to meet. It is abundantly clear from the notice of motion and the affidavits deposed to by the appellant that he relied on the actual flooding of his house as the cause of the damage. Counsel for the appellant sought support in the affidavit of an engineer who had inspected the house on behalf of the appellant, but, ironically, the affidavit contained references to the 'continuous flooding of the house', 'cracks [that] were caused by the water flooding the area' and that steps are to be taken 'to protect the house from further flooding'. The appellant is accordingly not entitled to stray from the case made out on his papers.

[26] In his founding papers the appellant alleged that his house was subjected to continuous or repeated flooding. In due course it became common cause that this was a gross exaggeration. In his replying affidavit the appellant made it clear that from 1989 to 2010 no flooding of his property had occurred. He stated that it was 'only when the decision was taken that artificial breaching of the river mouth would cease', that the flooding of his property commenced. This decision was taken in March 2010. However, the appellant mentioned only two specific flooding incidents subsequent to March 2010, namely one in September 2011 and the other in November 2013 (the latter, however, being a kind of flooding for which the municipality was not responsible). This left only one incident of flooding (in September 2011), which is a far cry from his allegations of continuous or repeated flooding of his property. I should add that, during the flood of September 2011, as depicted in photographs taken by the appellant, the water did not reach his house.

[27] Apart from this gross exaggeration, the appellant's version that it was only after the decision in March 2010, to artificially breach the berm at the higher water level of 2.6m amsl, that rising water levels caused damage to his property, is seriously undermined by the evidence of the municipality. This undisputed evidence shows that in 1997, 1998, 1999, 2001, 2003, 2006 and 2007 the berm was breached at levels between 2.63m and 2.8m amsl, all of which are years when the appellant says he suffered no damage to his property. It is further significant that on 14 August 2012, when the berm breached naturally with the water level at 2.77m amsl, the appellant experienced no flooding at his property. All of this tends to show that any flooding of the appellant's house (which on the appellant's version had in any event only taken place in September 2011) was probably not related to the breaching of the berm.

[28] A repeated allegation in the appellant's papers is that, during episodes of flooding, the municipality had taken preventative measures to protect low-lying riparian properties, including his property. The impression gained from the founding affidavit is that there had been a long established practice by the municipality to protect riparian properties against flooding, including properties along the Klein River where the appellant had constructed his house. The municipality, however, denied the existence of such a practice, stating that the only protective measures which were taken were those to protect low-lying properties on the vlei against strong wind and wave action. This was confirmed by Mr Martens who, at the relevant time, was the officer at CapeNature who attended to the taking of such protective measures. According to Mr Martens no protective measures were ever taken to protect the low-lying properties along the banks of the Klein River, other than to communicate telephonically with the appellant as to the water levels in the vlei. Mr Martens also denied that he ever went to the appellant's property, as suggested by the appellant. It follows that there was a material dispute of fact as to the existence of the practice contended for by the appellant. The version of the municipality can certainly not be rejected out of hand as being far-fetched and untenable, particularly where it is confirmed by Mr Martens of CapeNature.

[29] To this one should add that the evidence also does not bear out the existence of a practice (particularly prior to 2010 as suggested by the appellant) of artificially breaching the berm at the mouth of the estuary when the water level in the vlei reached a level of 2.1m amsl. On the contrary, the available breaching evidence shows that during the period 1990-2010 artificial breaching at a level of 2.1m amsl took place on only three occasions, ie in 1990, 1994 and 1996. Thereafter artificial breaching took place on seven occasions at water levels substantially in excess of 2.1m amsl.

[30] The appellant's contention that the municipality was the party who managed the estuary and attended to the breaching of the berm, is also incorrect. What the evidence shows is that various role players, including the municipality, have through the years been responsible for deciding whether or not the berm should be artificially breached and, if so, at what level breaching should take place. To this end advisory committees were formed, the present being KREF, consisting of representatives of various government agencies and civil society organisations with an interest in the proper management of the estuarine ecosystems, including representatives of the municipality. Mouth management plans were devised by these bodies, which included a plan approved under the auspices of KREF, following a 'breaching indaba' on 4 March 2010. This mouth management plan was approved by the Western Cape Department of Environmental Affairs and Development Planning and is the plan presently in place for the management of the estuary, including the artificial breaching of the berm when necessary. This plan provides that, in the absence of crisis conditions, the minimum water level at which artificial breaching could be considered is 2.6m amsl. During June 2013 KREF revised the mouth management plan to allow breaching even if the water level in the vlei was lower than the minimum preferred water level of 2.6m amsl. The revision was sought due to the decreased mean annual runoff, which meant that there may be years in future where the system does not reach the required level for breaching, which would be ecologically damaging. On 22 August 2013 the revised mouth management plan was approved by the Western Cape Department of Environmental Affairs and Development Planning.

[31] Finally with regard to the factual difficulties faced by the appellant, the court a quo correctly held that there was a material dispute on the papers as to the cause of the damage to the appellant's house. I do not intend traversing the respective versions in any detail, save to allude to the municipality's contention that flooding which might occur at the appellant's property is in all probability related to the occurrence of major river floods, rather than to high water levels in the vlei. The municipality's version is based on expert opinion that flooding of the appellant's property would occur regardless of whether the mouth is open or closed. This version can certainly not be rejected out of hand as being so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence. It follows that, on this basis too, the review application was doomed to failure.

[32] What remains, is the appellant's alternative cause of action (see para 7 supra) in which he invoked the doctrine of legitimate expectation. He submitted that, as the municipality and its predecessors had for many years exercised various levels of control over the estuary, in particular by following a policy of breaching the berm at the lower level of 2.1m amsl to protect low-lying riparian properties, this has given rise to a legitimate expectation on his part that the practice would only be departed from if reasonable steps were taken by the municipality to protect his property from flooding by the Klein River.

[33] It will be immediately apparent that the appellant attempted to invoke the doctrine of legitimate expectation to substantiate his claim for substantive relief, ie an order directing the municipality to take reasonable steps to prevent his house from flooding. In *Meyer v Iscor Pension Fund* [2002] ZASCA 148; 2003 (2) SA 715 (SCA) para 27, this court confirmed that the doctrine of substantive legitimate expectation has not yet been adopted as part of our law. Our courts have applied the doctrine in the narrow procedural sense only, ie as being confined to the right to a hearing before the legitimate expectation is disappointed, and not in the wider sense of conferring substantive benefits on the party having the expectation. See *Meyer v Iscor Pension Fund*, supra, para 25; *South African Veterinary Council & another v Szymanski* [2003] ZASCA 11; 2003 (4) SA 42 (SCA) para 15; *Walele v City of Cape Town & others* [2008] ZACC 11; 2008 (6) SA 129 (CC) para 35 and *MEC for*

Education, Northern Cape Province & another v Bateleur Books (Pty) Ltd & others [2009] ZASCA 33; 2009 (4) SA 639 (SCA) para 23.

[34] As emphasised in *Walele*, para 38, the inquiry for determining the existence of a legitimate expectation is primarily factual, and the focus is on objective facts giving rise to the expectation. In view of my findings above with regard to the factual premise of the application, it follows that, even on the acceptance of the doctrine of legitimate expectation of a substantive benefit as part of our law, the application was doomed to failure. This is so as the appellant had in several respects failed to establish the factual basis for his alleged legitimate expectation. In particular, he failed to establish the existence of an established practice where the berm was artificially breached at a maximum water level of 2.1m amsl. He also failed to show that the decision to breach was taken by the municipality. Further, the appellant failed to prove that the breaching of the berm was a protective measure taken for the benefit of his property, as opposed to the low-lying properties adjacent to the vlei. In fact, the evidence showed that he had never benefited from the protective measures taken to protect low-lying properties along the vlei against wind and wave action.

[35] In the result the appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

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P B FOURIE

ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:	A C Oosthuizen SC (with him J H Loots) Instructed by: KSS Keller Snyman Schelhase, Cape Town Phatsoane Henney Inc., Bloemfontein
For Respondent:	A Breitenbach SC (with him A Erasmus) Instructed by: Fairbridges Attorneys, Cape Town McIntyre van der Post, Bloemfontein