CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 53/05

HELICOPTER & MARINE SERVICES (PTY) LTD	First Applicant
THE HUEY EXTREME CLUB	Second Applicant
and	
V & A WATERFRONT PROPERTIES (PTY) LTD	First Respondent
VICTORIA & ALFRED WATERFRONT (PTY) LTD	Second Respondent
SOUTH AFRICAN CIVIL AVIATION AUTHORITY	Third Respondent

Decided on : 1 December 2005

JUDGMENT

THE COURT:

[1] This is an application for leave to appeal against a judgment and order of the Supreme Court of Appeal (the SCA) granting a final order in favour of the first and second respondents interdicting the applicant from operating a helicopter from a helipad in the Victoria and Alfred Waterfront in Cape Town.

[2] The first respondent, through its agent, the second respondent, leased a helicopter landing site in the Victoria and Alfred Waterfront in Cape Town to the first applicant. In terms of the lease, the first applicant undertook to comply with the rules of the Civil Aviation Authority.

[3] During January 2004, the Civil Aviation Authority (third respondent) issued an order grounding the helicopter in terms of the Aviation Act 74 of 1962 until a proper assessment of its airworthiness could be made by its inspectors. Thereafter in early February 2004, fearing that the applicants would ignore the grounding order, the first and second respondents launched an urgent application seeking an order restraining the applicants from operating the helicopter in breach of the terms of the lease and the grounding order. The Cape High Court dismissed the application but the SCA, on appeal, overturned the Cape High Court order and granted a final interdict.

[4] The applicants now seek leave to appeal to this Court against the SCA judgment and order. They raise two issues on appeal: first, they argue that the SCA wrongly refused to allow them to attack collaterally the validity of the grounding order made by the Civil Aviation Authority. In refusing the applicant a right to attack the order collaterally, the SCA relied upon its recent judgment in the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA). In this Court, the applicants argue that, in the *Oudekraal* case, the SCA set the limits for collateral attack too narrowly. The second argument raised by the applicants relates to the requirements for the grant of a final interdict.

[5] In the *Oudekraal* case, the SCA reasoned as follows:

> "[T]he proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.
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> But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question. When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. *It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act – that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act.*"[1] (our emphasis)

It is not necessary to decide in this case whether the circumstances for permitting a collateral attack as identified by the SCA in *Oudekraal* are too narrowly drawn or not and we refrain from doing so.

[6] The respondents have relied upon a term of the lease which required the applicants to comply with the rules and regulations of the Civil Aviation Authority. A failure to do so would constitute a breach of the contract between the first respondent and the first applicant. The applicants argued unsuccessfully in the SCA that the case should be seen as one in which the Civil Aviation Authority was indirectly seeking to

[1] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paras 31-32.

obtain compliance with its grounding order through the first and second respondents. The SCA, correctly in our view, rejected this argument.

[7] It is clear from the facts that there was no reason preventing the applicants from seeking an order setting aside the grounding decision made by the Civil Aviation Authority, indeed the applicants had previously had such a decision set aside. Yet the applicants took no step to obtain such relief. Moreover, the respondents were entitled to require the applicants to comply with the terms of the lease. Even were the rules of collateral attack to be set more broadly than in the *Oudekraal* case, it would not be just to extend them to cover the facts of this case. As a matter of contract, the respondents are entitled to require the first applicant to comply with the grounding order made by the Civil Aviation Authority. Once there is a grounding order in existence, the first respondent is entitled to rely on its mere factual existence. If the first applicant disputes its validity, its remedy is to have the grounding order set aside.

[8] On the facts of this case, therefore, it is our view that the applicants have no prospects of success on appeal in relation to the collateral challenge. It is therefore not in the interests of justice to grant them leave to appeal to this Court. On the second issue they raise, the grant of a final interdict, even if it is as a constitutional matter, a question we do not decide, we also consider that the applicants have no prospects of success and it is therefore not in the interests of justice to grant leave to appeal.

[9] The following order is therefore made:

The application for leave to appeal to this Court is dismissed with costs.