

What are an owner's property rights where the property is more than 60 years old?

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In the case of *Gees v Provincial Minister of Cultural Affairs and Sport, Western Cape and Others*, the court held that the onerous conditions imposed by a heritage authority for the re-development of the property in question did not constitute a deprivation of the constitutional property rights of the owner of the property.



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This ruling may have significant consequences for property owners seeking to develop buildings over 60 years old as the demolition of such properties, even when they aren't the subject of formal heritage status or protection may be subject to conditions imposed by regional and national heritage authorities.

What is the National Heritage Resources Act?

The National Heritage Resources Act 25 of 1999 is a piece of legislation which was enacted with a view to, amongst other things, empower civil society to nurture and conserve heritage resources so that they may be bequeathed to future generations; lay down general principles for governing heritage resources management throughout the Republic and introduce an integrated system for the identification, assessment and management of the heritage resources of South Africa. Section 34(1) of the National Heritage Resources Act states that “no person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority”.

What does the National Heritage Resources Act mean for me?

Very few property owners realise that if their home or any other structure on their land is more than 60 years old, any demolition, building works or even renovations and repairs to the building will have to be approved by the relevant provincial heritage resources authority. Homeowners are also often not aware that, if their property is in a declared conservation area (usually a particular type of special area designated as such in the local zoning scheme) the local authority's heritage management officials are required to ensure that the proposal is appropriate and “in keeping” with the character of the environs.

The Gees Case

In the recent decision of *Gees v Provincial Minister of Cultural Affairs and Sport, Western Cape and Others* (the full citation of which is above) the appellant wanted to re-develop a property with an unwanted building older than 60 years on it. Accordingly, he sought a demolition permit from the relevant heritage authority, which in this case was Heritage Western Cape (“the HWC”). Neither the property nor the building had formal heritage protection in terms of the National Heritage Resources Act 25 of 1999, but the building’s 60-years-plus age meant that demolition would require a special permit in terms of section 34(1) and of the Act.

The parties agreed that, while the building was not worthy of protection, the surrounding area was conservation worthy due to its large concentration of art deco buildings. The City of Cape Town (“the City”) was at the time conducting a survey in that area in order to convert it into a ‘heritage protection zone’. This would essentially mean, amongst other things, that approval would be required for the addition of new buildings on this site in question. The building had significance within its context of a well-preserved, coherent art deco streetscape spanning both sides of Davenport Road.

Findings of the various authorities and courts

The relevant heritage authority issued a permit to demolish, but attached certain very onerous conditions to it such as:

- a. that the new development on the site shall not exceed the town-planning envelope of the existing building;
- b. that the materials used for the façade of the new building are in keeping with the existing building; and
- c. that building plans for the new structure are submitted to Heritage Western Cape for its approval prior to any work commencing on site.

Although the owner appealed, the outcome was the same on appeal. The owner of the property was unhappy with this outcome, as it essentially curtailed his ability to develop the property in the manner and time frame that he saw fit. He thus challenged the imposition of the conditions in court. The appellant sought a High Court Order setting aside the imposed conditions, alternatively directing the responsible provincial minister (the first cited respondent in the matter) to reconsider the appeal.

The High Court refused the application and the appellant appealed to the Supreme Court of Appeal, arguing that the third respondent had exceeded its powers under s48(2) of the Act when imposing the conditions in question.

Are onerous conditions a deprivation of property rights?

The owner of the property argued that the Act did not authorise Heritage officials granting demolition permits to impose conditions on the development of property that had no formal heritage status.

The contrary view was that the word ‘including’ in s48(2) meant that the tribunal had a wide discretion to impose conditions on the issuing of permits. In the present case, the heritage resources that the authorities were bound to protect, extended beyond the building or property to the surrounding area with its large complement of art deco buildings, which were worthy

of protection and recognised as such by the City. Although the proposed designation of the area as a heritage area required further refinement and engagement between the owner and the public that was an ongoing process that would in the near future result in its formal protection. Where a heritage resource was potentially affected by an application brought under the Act, heritage authorities were obligated to impose such conditions as the Act would permit for the conservation of the affected area, even if that area were unprotected.

Court's finding

It was held that since the present conditions were clearly designed to enable HWC to fulfil its duties under the Act, they were lawfully imposed. This finding accorded with the conservation mandate of the HWC under the Act and was directly in line with its principles.

The court ultimately held that in the circumstances, there was no arbitrary deprivation of the appellant's rights of ownership: the imposition of the conditions was reasonable and equitable, having regard to the inherent responsibility of the appellant towards the community in the exercise of his entitlements as owner of the property in question. The appeal was dismissed.

Conclusion

The court in this case found that relatively onerous conditions in the demolition permit did not amount to a curtailment of the property owner's rights to deal with his property as he sees fit. This serves as recognition that in our present constitutional democracy, an increased emphasis has been placed upon the characteristic of ownership which requires that entitlements must be exercised in accordance with the social function of law in the interest of the community.

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