

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

Case No.: 920/2012
Date heard: 15 November 2012
Date delivered: 29 January 2013

In the matter between:

CAMERON SCOTT N.O.

First Applicant

ANTHONY JAMES CHARLTON REID N.O.

Second Applicant

and

**NELSON MANDELA BAY METROPOLITAN
MUNICIPALITY**

Respondent

J U D G M E N T

DAMBUZA, J:

[1] The applicants seek an order that the respondent be ordered to provide a supply of electricity to erf 6888 Korsten (the property). In the alternative, the applicants seek an order that the respondent's decision not to provide such electricity be reviewed and set aside and be substituted with the order sought in the main.

[2] Further, the applicants seek an order that the failure by the respondent to make a decision on a proposal for an amendment of a servitude which appears in the title deed relating to the property, be reviewed and set aside, and that the respondent be ordered to facilitate the amendment as proposed, by executing a notarial deed of amendment.

[3] The two applicants are trustees in the Cameron Scott Family Trust (the Trust). The Trust invests in immovable property and other capital investments.

[4] The respondent is the Nelson Mandela Bay Municipality, a municipality established in terms of the provisions of the Local Government Municipal Structures Act, 117 of 1998.

[5] During 2002 the Trust acquired the property in question. In 2010 the Trust set out to develop the property by building a warehouse thereon. The plans for the development were duly approved and construction started in the same year (2010).

[6] At some stage subsequent to completion of the building it became apparent that the warehouse encroached on a portion of the property which is reserved for public parking. It is common cause that the building plans in respect of the warehouse building had been approved by the respondent on two occasions prior to construction of the building. The reservation for public parking is set out in the following condition contained in the title deed relating to the property:

“In so far as concerns the figure HjuvklmnDEFGyxw on Diagram No. 137/1996 aforesaid:

Subject to the following conditions contained in Deed of Transfer 37968/1996 imposed by the Municipality solely in its favour and enforceable by it, binding the Transferee and its successor-in-title (all of whom are mentioned in the hereinafter mentioned expression “owner”) provided that the Municipality shall always have the right (on such terms as it may in its sole discretion impose)

to vary, or relax any of the said conditions by agreement with the owner, namely:-

(d) The property hereby transferred is subject to a servitude for parking purposes in favour of the general public” (emphasis supplied)

[7] It is the servitude referred to in this condition that is the subject of these proceedings. The encroachment on the parking area reduces the portion of the property reserved for public parking by 446m².

[8] Reverting to the building, it is not in dispute that on completion of the construction of the warehouse building, the Trust submitted an application for provision of electricity supply to the property. On 25 October 2010 the respondent furnished a quotation of the amount which the Trust had to pay therefore. Payment was made by the Trust, accordingly, on 27 October 2010.

[9] The property is located within a business area in Korsten, in close proximity with a number of other businesses. The parking area provided for in the servitude would be for use by members of the public visiting all these businesses.

[10] In attempting to compensate for the encroachment, the applicant has, since the discovery of the encroachment, made a number of proposals to the respondent. It is the last of these proposals that is the subject of this application. In essence the proposals suggest relocation of the portion of the parking reduced as a result of the encroachment to a different portion of the property. Included in the proposals and discussions relating thereto, was a

proposal made on behalf of the Trust to address a concern expressed by Mr Balu Naran, an owner of a neighbouring business property, regarding access by members of the public to the businesses from a nearby street, Essex Street. More specifically, in the three proposals submitted to the respondent, on behalf of the Trust, on 6 October 2010 it was suggested that additional 11 parking bays be provided on Essex Street, with a pedestrian alleyway and access control thereon to the businesses, to resolve the concern relating to access from Essex Street. Regarding the encroachment, the suggestion was that a portion of the property (identified in a diagram which forms part of the papers and described as bordering on Bester to Cottrell Streets) be reserved to compensate for the encroachment. The Trust would be liable for expenses related to the paving and marking of the “new” parking bays.

[11] In a letter dated 21 October 2010, addressed to the Trust, the respondent advised, amongst others that, “*certain proposals were put on the table to resolve, inter alia, the issue of access, but that your proposal has been rejected by the concerned landowners*”. Thereafter representatives of the Trust sought and ultimately secured a meeting with relevant functionaries of the respondent whereat the proposal under consideration was presented on behalf of the Trust. The allegation, on behalf of the Trust, that at the meeting held in July 2011 the proposal was tabled, on behalf of the Trust, and an undertaking was given that the respondent would advise the Trust of its decision in due course, remains undisputed.

[12] It is common cause that despite the proposal presented to the respondent in July 2011, the issue of the encroachment was never resolved; neither was the supply for electricity provided. It is in these circumstances that this application was launched.

[13] The application is opposed on three grounds, namely, that:

1. the respondent has no power to effect the amendment sought;
2. contrary to the practice in this Division, the relief sought is couched in final terms whereas the requisites for a final relief have not been satisfied, and
3. there has been no joinder of the Registrar of Deeds as prescribed in the rules of practice in this Division.

I deal with these issues in reverse order.

Was it necessary to join the Registrar of Deeds?

[14] In contending that the application is fatal for non-joinder of the Registrar of Deeds, the respondent relies on Rule 15(f) of the Rules of Practice in this Division which provides that:

“As a general rule, notice must be given to the Registrar of Deeds in all applications for authority or for an order involving the performance of any act in a deeds registry (including an application for a change in matrimonial regime) before the court is called upon to issue an order, even in the form of a rule nisi”.

[15] As it is submitted in the applicant's Heads of Argument the Rule mirrors the provisions of section 97 of the Deeds Registries Act No 47 of 1937, which read thus:

"Before any application is made to the court for authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days' notice before the hearing of such application and such registrar may submit to the court such report thereon as he may deem desirable to make".

[16] The provisions of section 97 are considered to be merely directory and the court may condone late notice to the registrar or dispense with the Registrar's report, although the court usually attaches importance to that report.¹ I agree with the submission, on behalf of the applicant, that neither the Rule nor the provisions of section 97 of the Deeds Registries Act require "*joinder*" of the registrar of Deeds. All that is required is that the Registrar be given notice of the proceedings. Ordinarily, an application is brought on notice and addressed to the registrar and a particular person when relief is claimed against such a person, or where it is necessary and proper to give such a person notice of the application.² In so far as notice should be given to a party against whom no relief is sought, the principles relating to joinder only apply in cases where the relief claimed is of such a nature that the rights and interest of the person may be affected by an order the court may make

¹ Nel H S Jones, *CONVEYANCING in South Africa*, 4th edition at 14 and the authorities cited therein.

² Rule 6(2) of the Rules regulating practice in Superior Courts

pursuant to the application.³ In this case no rights and/or interests of the Registrar are likely to be affected by the order that this court may give. I do accept that the law requires that notice be given to the Registrar, but I consider relevant, in favour of the applicants, the fact that the application was served on the office of the Registrar and a report prepared by the Registrar forms part of the record. I am therefore satisfied that the purpose which the rule was intended to serve has been met.

Whether the requirements for a final relief have been met?

[17] The respondent contends that the applicant has failed to satisfy the requirements for a final relief. Specifically, the contention is that the applicant has failed to establish a clear right to a decision,⁴ given the respondent's case that the applicant's proposal was rejected.

[18] I do not agree. The submission by *Mr Euijen* who appeared on behalf of the respondent was that the applicant was advised of the rejection of its proposal in the letter dated 21 October 2010. Indeed, the relevant portion of that letter reads: "*it is further recorded that certain proposals were put on the table to resolve. Inter alia, the issue of access, but your proposal has been rejected by the concerned land owners*". The letter refers to the issue of access, which is not the relevant proposal for the purposes of this application, but I am prepared to accept that a reader would have concluded from the overall content thereof, that the proposal in question was also rejected. But rejection of the proposal by the concerned land owners is a response or

³ Erasmus, Superior Court Practice, at B1-41

⁴ See *Setlogelo v Setlogelo* 1914 AD 221 at 227

representation by the land owners concerned and not a rejection by the respondent. The respondent remained enjoined to consider the proposal in the context of such rejection and make its own decision thereon, and communicate that decision to the Trust.

[19] Even further, as I have stated after receipt of the letter of 21 October 2010 the applicant submitted a further proposal to the respondent. The respondent “says” it, again, held a meeting (I assume the meeting held in July 2011) and considered the later proposal and, because nothing therein persuaded it to change its earlier decision, the proposal “remains rejected”. This response is vague. It conflates the earlier proposal with the proposal in question. It is not the respondent’s case that a decision was taken to reject the last proposal on its own merits, neither is its case that the Trust was informed of the rejection of the proposal in question. It is not in dispute that there was an obligation on the respondent to inform the Trust of its decision pursuant to consideration of the applicant’s latest proposal. And as I stated earlier, the allegation on behalf of the Trust that an undertaking was made at the meeting held in July 2011, to advise the Trust of the respondent’s decision remains undisputed. I am satisfied that applicant’s right to a decision has been established. I am further satisfied that the right of the Trust to a response has been interfered with by the failure to make the required decision.

[20] It was also submitted on behalf of the respondent that the Trust does have an alternative remedy in that it could have brought an application for

amendment of the servitude in terms of the Removal of Restrictions Act, No 84 of 1967. The alternative relief suggested by the respondent would still have required that consent of the respondent be obtained, as the only entity with *locus standi* in respect of the right in question.⁵ On the evidence before me I can only conclude that even if the Trust had taken the route suggested by the respondent it would have encountered the same difficulty that led it to approach court. I am satisfied that a proper case has been made for both the relief based on PAJA and for specific performance. In the context of Administrative Law, a *Mandamus* is available to serve two purposes; to compel performance of a specific statutory duty, and to remedy the effects of unlawful action already taken.⁶ Lastly, the requisite that an applicant for a final order of interdict becomes relevant, in my view when the applicant concerned could have obtained adequate relief through an award of damages.⁷

Is the relief sought by the applicants competent?

[21] Firstly, if the order is granted, any act by the respondent, in compliance therewith, will not be an administrative decision; it will be an act of compliance with an order of court. Consequently, there is no merit in the contention, by the respondent, that the relief sought is incompetent because there will have been no consultation by the respondent, with members of the public as required by law.

⁵ See the discussion below on the procedure where an amendment of restrictive conditions; also *Ex Parte Saiga Properties (Proprietary) Limited* [1997] 2 All SA (E) 474.

⁶ Baxter; Administrative Law, at 690.

⁷ See discussion on final interdicts in the *LAWSA Vol 11* at 289.

[22] The respondent further contends that the applicant has not shown any exceptional circumstances justifying imposition, by the court, of its decision on the respondent as required in terms of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA). Section 8(1)(c)(ii) of PAJA provides that a court or tribunal, in proceedings for judicial review in terms of section 6 (1) of that Act , may grant an order that is just and equitable, including orders setting aside the administrative action, and, in exceptional cases, substituting or varying the administrative action or correcting a defect resulting therefrom.

[23] The question of when a court will substitute its own decision for that of an administrative authorities has enjoyed the attention of the courts and legal writers on many occasions. Baxter⁸ says the following in the issue:

“The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislature. Thus it is said that:[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances this principle will be departed from. The overriding principle is that of fairness:

‘the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and....although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.’”

⁸ *Supra* at 681.

[24] In *Steenkamp No v Provincial Tender Board, Eastern Cape*⁹ Moseneke DCJ held that:

“It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate, effectively the right violated. It must be just and equitable in light of the facts, the implicated constitutional principles, if any, and the controlling law...The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law”.

[25] With these principles in mind I turn to consider the question of the appropriate remedy to be granted in this application. It is not in dispute that the encroachment by the applicant was erroneous. The respondent is itself also guilty of approving the Trust building plans erroneously. The building now stands complete. There is no counter proposal by the respondent as to how the impasse can be resolved. The Trust derives no benefit from the money paid to the respondent in 2010 for provision of electricity supply; the respondent is content with retaining possession of the money whilst providing no value for it. It is not the respondent's case that the land offered by the Trust is not suitable as substitute for the reduced parking. At this stage it seems that the only course open to the Trust would be to demolish the building or a

⁹ [2006] ZACC 16; 2007(3) SA 121 (CC); 2007(3) BCLR 300 (CC) para 29; See also *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (3) BCLR 229 (CC) at 259D-F.

portion thereof. Such a course would be unfair, in my view, given that the encroachment was not intentional and that there is a proposal to adequately compensate therefore, the cost of which will be borne solely by the Trust.

[26] The frustration experienced by the applicants (and the Trust) as a result of the delay by the respondent in making a decision is evident from numerous emails addressed to the respondent's officials on behalf of the Trust. The majority of these emails failed to elicit response from the respondent. The Trust has, in the meantime, not been able to use the building for the purpose for which it was built because of the failure to provide for supply of electricity to the property. On the evidence before me I can only conclude that when the agreement to provide for electricity was concluded the respondent was already aware of the encroachment.

[27] Further, contrary to the respondent's contention that the servitude is incapable of amendment by agreement between the parties, I am satisfied from the language used in the condition, that such an agreement was envisaged and authorised when the condition was imposed.

[28] Having considered these issues I am satisfied that on the evidence on record that this court can make a decision on the proposal and that considerations of fairness justify imposition of the court's decision on the respondent. The matter, however, does not end there.

[29] The relief I grant must also take into consideration the issue of whether the applicant should have given notice of the application to other business or land owners and/or members of the public (the interested parties). The submission on behalf of the respondent is that notice should have been given to interested parties (i.e. those whose rights might be affected by the order sought). Alternatively, the applicants should have brought an application for a Rule *Nisi* as per practice in this Division in applications for amendment of restrictive conditions of title.

[30] The practice of issuing a Rule *Nisi* where amendment of conditions of title is sought is not recognised only in this Division. In *Ex parte: Saiga Properties (Proprietary) Limited*¹⁰ Leach J (as he then was) referred to this procedure as set out by Nienaber J in *Ex parte Rovian Trust (Pty) Limited*.¹¹ At 478 of *Ex parte Saiga Properties* Leach J held that:

“The practice of issuing a rule *nisi* in a case such as this has developed as a result of the difficulty of identifying substantial numbers of interested parties, the probable impossibility of securing the express consent of all such parties and the high cost of serving the application on all of them even if identified...But that practice does not obviate the necessity for steps to be taken to obtain consent of parties, clearly interested and readily identifiable: for example the owners of land immediately adjacent to the property in question, the local authority or the relevant township board. Nor does it do away with the necessity of giving such interested parties notice of the application so as to enable them to oppose the relief sought if so inclined.”

¹⁰ [1997] 2 All SA 474 (E) at 478e-g

¹¹ 1983 (3) SA 209 (D)

[31] I do agree with the applicant's contention that the servitude in question is not a restrictive right in the strict sense; that it is a personal right registered in favour of the respondent and that only the respondent has *locus standi* to enforce same. I accept the distinction by *Mr Richards* on behalf of the applicants, that unlike the servitude in question, restrictive conditions of title (in the narrow sense) are statutory restrictions imposed on the owner of the land in pursuance of a specific township establishment legislation, and registered against the title deeds of erven for the *reciprocal benefit of owners for the benefit of owners and for the purposes of retaining a specific character of the neighbourhood*.

[32] However, this does not, in my view, detract from the fact that the servitude translates to a right enjoyed by members of the public, although held only by the respondent. My view is that considerations of justice and fairness demand that those who enjoy the right flowing from the servitude must be made aware of the impending alteration to the right they enjoy. I do not agree that the distinction between the personal servitudes in question and praedial servitudes is sufficient ground to deprive those who enjoy the rights flowing from the personal servitudes of that notice.

[33] In this case the notice would not be intended to afford the interested parties opportunity to consent to or to oppose the proposed amendment; it would serve to ensure that interested parties are afforded opportunity to make to the court such representations as they deem necessary to ensure the most informed decision. It is also of significance that, on the evidence, there were

objections to previous proposals and, I am not able to determine from the record whether those who had objected to previous proposals, together with any other interested persons, were alerted to the proposal under consideration. A submission is made in the applicant's Heads of Argument that the owners of the neighbouring businesses were at all times represented by Mr Naran. There is no evidence, however, as to the identity of the business owners represented by Mr Naran and/or the scope of Mr Naran's authority.

[34] Having considered all these issues I am satisfied that the applicants have made out a good case for the order sought. However, I will only grant a provisional order, to afford interested parties opportunity to make representations prior to finalization of the application. I find no reason, however, why the respondent should not comply with its obligation to provide supply of electricity, pending the finalization of the application.

[35] The following order shall therefore issue:

1. A Rule *Nisi* do hereby issue calling upon interested parties to show cause before this Court on or before 5 March 2013 at 09h30 why the following order should not be granted, that:

- 1.1 within seven days of this order, the respondent is to provide a supply of electricity to the applicants at erf 6888 Korsten as undertaken by it in the electricity supply

agreement dated 27 October 2010 concluded between the applicant and the respondent;

- 1.2 The failure of the respondent to make a decision on the applicant's proposal for the amendment of the servitude described in paragraph VI (d) of title deed T3295/2003 annexed as CS 1 to the founding affidavit (the servitude), as contained in annexure CS 24 to the founding affidavit (the proposal) be declared unlawful;
- 1.3 The respondent be ordered to execute a notarial deed of amendment of the servitude to give effect to the proposal contained in annexure CS 24 to the founding affidavit, by cancelling the servitude contained in paragraph VI of Deed of Transfer 3295/2003 in respect of erf 6888 Korsten over the portion of said erf marked "Area to amend 446m²" on annexure A to the said CS 24 and to register the said servitude over that portion of the said erf marked as: "amended area 446m²" on annexure B to the said CS 24 and to take the necessary steps to register same in the Deeds Office, against payment by the applicants of the costs of such steps.
- 1.4 The respondent be ordered to pay the costs of this application.

2. A copy of this order shall:
 - 2.1 be served on all the land owners of the properties adjoining erf 6888 Korsten;
 - 2.2 be published once in "*The Herald*" newspaper and in "*Die Burger*" newspaper.
3. Paragraph 1.1 of this order shall operate with immediate effect pending the finalization of this application.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the applicants:

Mr JG Richards

Instructed by:

Anthony Incorporated, Port Elizabeth

For the respondent:

Mr TMG Euijen

Instructed by:

Gray Moodliar Attorneys, Port Elizabeth.