



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

NOT REPORTABLE

Case No: AR 552/18

In the matter between:

HUME HOUSING

APPELLANT

and

HIBISCUS COAST MUNICIPALITY

RESPONDENT

JUDGMENT

(delivered on 30 August 2019)

KRUGER J

[1] On the 18th April 2018, van Zyl J granted judgment in the following terms:

“(a) Judgment is granted in favour of the plaintiff against the defendant for payment of:

- (i) R2 200 000,00 exclusive of VAT, as compensation for the properties, namely Erven 2155 to 2164, 2170 to 2191 and 2197 to 2208 of Gamalakhe Township, KwaZulu-Natal.
 - (ii) The sum of R55 000,00 as a solatium.
 - (iii) VAT on the aforesaid sums at the applicable rate.
 - (iv) Interest on the said sums calculated at the rate and in the manner consistent with the provisions of s12(3)(a) of the Expropriation Act 63 of 1975 and with effect from 26 November 2010 to date of payment both dates inclusive.
- (b) The defendant will pay the costs:
- (i) Of the action under case number 13433/2011D, including the costs of senior counsel, where employed.
 - (ii) Of the application under case number 14041/10D, which will also include the costs reserved by Vahed AJ in para 10 of the order of 21 November 2011, including the costs of the proceedings on 10 and 17 December 2010 and 21 January 2011.
 - (iii) The costs of the application for leave to appeal against the order of Koen J dated 10 August 2012 in the application under case number 13433/2011D
- (c) Absolution from the instance is granted on the defendant's claim in reconvention in the action under case number 13433/2011D and the defendant will pay the costs thereof."

[2] The Appellant (who was the Plaintiff in the Court *a quo*) lodged an appeal in respect of paragraph (a)(i) of the aforesaid order. The Respondent (Defendant in the Court *a quo*) lodged a cross-appeal in respect of the entire judgment.

BACKGROUND

[3] The Appellant is the registered owner of the immovable properties described as Erven 2155 to 2164, 2170 to 2191 and 2197 to 2208, inclusive of the road reserve, situate in Gamalakhe Township, KwaZulu-Natal (hereinafter referred to "the

properties”). It had acquired the said properties for purposes of a housing development.

[4] Sometime after it acquired the properties, the properties were invaded and occupied by informal settlers who subsequently constructed various types of dwellings thereon. It is common cause that these dwellings were illegally constructed on the properties. Given the potential threat of violence, the Applicant negotiated with the Respondent for the possible sale of the properties to the Respondent at a fair and reasonable price. These negotiations however failed.

[5] Approximately twenty years later negotiations resumed between the parties.¹ It was ultimately resolved that the Respondent would acquire the properties from the Appellant “paying fair compensation to the Applicant”. This clearly was the intention of the parties although the record of the meeting reflects that the word “expropriation” was used interchangeably.

[6] Despite this consensus, there were no further developments. As a result the Appellant, by way of Notice of Motion, dated 25th November 2010, (Case No. 14041/10D) sought, *inter alia*, an order for the eviction of the illegal occupiers. In the alternative it sought an order directing, *inter alia*, the Respondent to “acquire the properties from the Applicant against payment of the sum of R2 508 000,00”. The Respondent opposed the application. On 21st November 2011 the matter presented before Vahed AJ (as he then was). Counsel representing the parties drafted an order, which was granted by Vahed AJ, in the following terms:

- “1. It is recorded that the terms of the order about to be made have been settled as amongst counsel but for the fact that the order is not going to be one by consent.
2. It is recorded that Attorneys Shepstone & Wylie and Mr Goddard appear for the 1st Respondent and the 5th to 38th Respondents.
3. That the 1st Respondent will acquire the properties referred to in the application, which are owned by the Applicant, once compensation determined as set out below has been paid. The 1st Respondent shall be entitled to effect transfer into its own name or into the name of its nominee(s).

¹ This was as a result of the Respondent instituting an action against the Applicant for payment of arrear rates and taxes and services.

4. That the compensation will be determined in accordance with Section 12(1), 12(2) and 12(3) of the Expropriation Act 63 of 1975.
5. That the Applicant will deliver a summons and particulars of claim within 10 days. The 1st Respondent will deliver a plea and counterclaim, if any, within 10 days thereafter, and the Applicant a plea in reconvention and replication, if any within a further 10 days.
6. That the provisions of the Uniform rules of Court will apply.
7. It is ordered that the Respondent currently occupying the property will not be required to vacate, pending finalisation of the said proceedings.
8. For the purpose of the Act the date of Expropriation insofar as it requires to be defined for the purposes of that Act, in determining compensation, is 26th November 2010.
9. That the Applicant shall not as from the date of this order, be liable for rates or taxes on the properties.
10. That the costs of today are reserved. All previously reserved costs orders, including those of today will be decided in the above proceedings.
11. That it is recorded that the 4th Respondent has agreed to fund the acquisition in paragraph (1) above. Nothing herein will affect the Applicant's right to receive a payment from the 1st Respondent.
12. That any amounts found payable by any party to the other, will be payable *pari passu* with the other."

[7] The action before van Zyl J arose from paragraph 5 of the aforesaid order. The parties agreed upon the appointment of Mills Fitchet (Natal) (Pty) Ltd as an expert valuer. Mills Fitchet valued the land at R2 200 000,00 excluding Value Added Tax; determined a *solatium* of R55 000,00 and placed a value of the structures on the property at R3 790 00,00 excluding Value Added Tax.

[8] On the day of the trial before van Zyl J, it was common cause that the Respondent had paid the sum of R2 200 000,00 plus interest in the sum of R863 628,91 to the Appellant. The issues before the Court *a quo* and indeed before us on appeal are the following:

- (a) Whether the Appellant is entitled to compensation in respect of the structures built on the land or whether he is only entitled to the value of the land only;

- (b) whether the Respondent is liable for the payment of Value Added Tax in respect of its acquisition of the land; and
- (c) Whether the Respondent is liable for the payment of costs as outlined in the judgment of van Zyl J.

[9]

(a) **Is the Appellant entitled to compensation in respect of the structures built on the land?**

Mr Stokes SC, on behalf of the Appellant, submitted that as buildings erected on land accede to the land, all of which become one indivisible unit and cannot be owned separately, - *superficies solo cedit* – it follows that the Appellant was, by operation of law, the owner of the land and buildings as one indivisible unit. Accordingly, as I understand his submission, the compensation payable to the Appellant must, by operation of law, include the value of the buildings erected on the land. In theory, I cannot fault these submissions. It is however trite that each case must be considered on its own merits. There are, in my view, two essential aspects that require consideration. Firstly, what was the intention of the parties and secondly how does one interpret the order of Vahed AJ (set out above).

[10] At the outset (and as set out earlier in the judgment), the parties were *ad idem* that the land had been unlawfully occupied and that illegal/unlawful structures had been erected thereon. It was at that initial stage that the Appellant sought to sell the properties to the Respondent. At that stage, what the Appellant sought to sell was the land only. Indeed there were no improvements at that stage. The Respondent negotiated with the Appellant for the purchase of the land only. Unfortunately these negotiations were unsuccessful.

[11] When negotiations resumed some twenty years later, the Appellant was still intent on selling the “land” to the Respondent at a fair market price. It was clearly the intent of the parties that what was offered to the Respondent to purchase was the land only or unimproved land. This intent is evident from the numerous correspondences exchanged between the parties.

[12] When the application under Case No. 14041/2010D was launched, it was still the intention of the Appellant to sell the land only to the Respondent. The Appellant sought an order in the following terms:

“That the First and/or Fourth Respondents are directed to acquire the properties from the Applicant against payment of the sum of R2 508 000,00 within 90 days of date of this order”.

Interestingly the amount sought for the purchase of the properties was R2 508 000,00 – which is the value of the vacant land – R2 200 000,00 plus Value Added Tax at the then prevailing rate of 14%. The Appellant did not claim any amounts in respect of improvements on the properties. The reason for this is obvious – the Appellants had not improved the land.

[13] From the aforesaid, it is clear that the intention of the parties, from the outset and persisted with some twenty years later, was for the Appellant to sell and for the Respondent to acquire the unimproved land only. I am accordingly of the view that the Appellant is not entitled to compensation in respect of the illegal structures that have been built on the properties.

[14] I turn now to consider the order of Vahed AJ (as he then was). The Court *a quo*, in considering the said order and in particular paragraph 4 thereof, concluded that the reference to the Expropriation Act in the said order merely identified the mechanism to be used in determining the value of compensation to be paid to the Appellant. Although no specific reference was made to Section 12(5) of the Expropriation Act, the Court *a quo* was of the view that these provisions could not be excluded. As a consequence and in terms of the provisions of Section 12(5)(c), the Appellant was not entitled to compensation for the structures erected on the properties as the properties were enhanced in an unlawful and illegal manner. I can find no misdirection by the Learned Judge in arriving at this conclusion. I fully agree with the sentiments expressed by van Zyl J that “at the level of just and equitable compensation I cannot conceive that it would be either just, or equitable, to compensate a landowner for improvements illegally erected on his property by an unlawful occupier, when such compensation has to be paid out of the public purse.”

[15] I am accordingly of the view that the Appellant is not entitled to compensation for the improvements to the properties. The Appellant's appeal therefore falls to be dismissed.

[16]

(b) **Value Added Tax**

In the Court *a quo* and in argument on appeal, Mr Goddard SC, on behalf of the Respondents, submitted that the Respondent did not acquire the property from a sale but in terms of a Court order. In terms of Section 7(1)(9) of the Value Added Tax Act 89 of 1991, Value Added Tax is to be levied upon the "supply" by a vendor for goods in the course of any enterprise carried on by it. The submission, as I understand it, is that some performance or act on the part of the vendor is required in order to attract the payment of Value Added Tax. As the transfer of the properties was in terms of an order of Court and not an act by the vendor, the submission is that the Respondent is not liable for the payment of Value Added Tax.

[17] After considering the relevant provisions of the Value Added Tax Act and the definition of "supply" contained therein, van Zyl J held that from the outset, the intention of the parties was for the Respondent to acquire the properties via a sale. Once payment was received, the Appellant was obliged to give transfer of the properties to the Respondent. This constituted "supply" in terms of the Value Added Tax Act and accordingly the Respondent was liable for the payment of Value Added Tax. I can find no misdirection in the reasoning and conclusion of van Zyl J. The Respondent's cross-appeal in respect thereof is to be dismissed.

[18]

(c) **Costs**

The Respondent has appealed the entire costs order granted by van Zyl J. The Respondent contends that in respect of the application under Case No. 14041/2010D, it should be entitled to costs from the institution of the matter up to and including 21st January 2011. This submission was also presented in the Court *a quo*. Having considered the circumstances surrounding the entire matter, van Zyl J, in the exercise of his discretion, ordered that the costs be paid by the Respondent.

This included the costs of the trial as well. In making the order, van Zyl J was critical of the attitude adopted by the Respondent and found “no good reason to exercise my discretion in favour of the Municipality by awarding it the costs of these wasted exercises”. There is no basis or justification to interfere with the exercise of the learned Judge’s discretion. Neither could Mr Goddard SC offer any reason for this court of appeal to interfere with the discretion exercised by van Zyl J. The Respondent’s appeal relating to the costs must also fail.

CONCLUSION

[19]

It is noted that the judgment of the Court *a quo* is to be corrected in certain respects. It is common cause that the Respondent had paid the capital sum of R2 200 000,00 as well as the interest thereon. It had also paid the sum of R55 000,00 as a *solatium*. Paragraph (b)(iii) relating to the costs of the application for leave to appeal the order of Koen J, was also tendered. The Appellant paid the Respondent’s claim in reconvention in Case No. 13433/2011 and tendered the costs thereof. Paragraph (c) of the order is to be deleted.

[20] I accordingly grant the following order:

1. The appeal is dismissed.
2. The cross-appeal is dismissed.
3. The judgment of the Court *a quo* is varied as follows:
 - (a) By the deletion of paragraphs (a)(i), (ii) and (iv).
 - (b) Paragraph (a)(iii) is amended to read as follows:
Value Added Tax on the sum of R2 200 000,00 at the rate of 14%.
 - (c) By the deletion of paragraph (b)(iii) and;]

(d) By the deletion of paragraph (c).

4. Each party is to pay their own costs of the appeal.

KRUGER J

BALTON J

I agree

MASIPA J

I agree

DATE OF HEARING:	29 July 2019
DATE OF JUDGMENT:	30 August 2019
FOR THE APPELLANTS:	Stokes SC
INSTRUCTED BY:	Eversheds Sutherland (KZN) Inc
FOR THE RESPONDENT:	Goddard SC
INSTRUCTED BY:	Shepstone & Wylie