

In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No 21593/2004

In the matter between :

Conforth Investments (Pty) Ltd

Plaintiff

and

Ethekwini Municipality

Defendant

Judgment

Lopes J

[1] I am required to decide whether the defendant is obliged to compensate the plaintiff for the loss of its beneficial use, occupation and control of the immovable property forming the right of way servitude registered over Erf 669 Brickfield pursuant to Notarial Deed of Servitude of Right of Way No K00410/11S (hereinafter referred to as 'the property')

History

[2] Since 1892 Jan Smuts Highway (hereinafter referred to as 'the Highway') has abutted onto the northern boundary of Erf 669. For many years the Highway constituted the main road between Durban and Pietermaritzburg. The roadway has been widened and changed slightly from time to time and undergone a name change and is now called King Cetshwayo Highway. It is common cause that the Highway is under the ownership and control of Ethekewini Municipality (hereinafter referred to as 'the Municipality').

[3] On the 21st October 1986 the plaintiff, Conforth Investments (Pty) Ltd (hereinafter referred to as 'Conforth'), became the registered owner of Erf 669, which was then described as Erf 669 Brickfield 95/1 situated at 5 Jan Smuts Highway, Durban. Conforth wished to develop an oncology centre and a college of learning on the property and to that end in 1986 sought town planning approval for its rezoning.

[4] The town planning consent which was granted contained the following condition :

"The ownership of the portion of the site forming part of the existing road reservation to Jan Smuts Highway shall be donated and transferred to the South Central Local Council or a right of way servitude shall be donated and transferred to the South Central Local Council for the benefit of the public, the conveyancing costs, including the costs of survey, shall be borne by the Council.'

(The South Central Local Council was the predecessor of the Municipality).

[5] For some years nothing was done by Conforth to comply with this requirement, although it went ahead with the development of the oncology centre and the college. In this regard :

- (a) in 1997 Conforth signed an offer 'to donate and register a right-of-way servitude over the property in favour of the Municipality for the benefit of the public'. That was never accepted by the Municipality;
- (b) in 2001 the Surveyor-General approved a diagram setting out the parameters of the right-of-way servitude, but it was still not registered.

[6] During or about 2000 a dispute arose between Conforth and the Municipality when Conforth alleged that it had been paying rates over the property. That matter was settled between the parties, and, as I understand it Conforth was compensated for the incorrect payments, and Conforth has, since then, not paid rates over the property.

[7] In 2004 Conforth instituted the present action against the Municipality claiming rental from the Municipality for its use of the property. The relief now sought has changed from that which was originally sought, and Conforth now seeks an order for compensation. (I am only required to determine the right to compensation, and not the nature or extent thereof.)

[8] In 2011, and pursuant apparently to Conforth's desire further to develop its land and build a hospital facility thereon, Erf 669 was consolidated with the adjoining

Remainder of Portion 2 of Erf 667. A Certificate of Consolidated Title was registered on the 17th February 2011, simultaneously with the registration of a Notarial Deed of Servitude of Right of Way over the property in favour of the Municipality.

Conforth's claim :

[9] Mr *Gordon* SC who appeared for Conforth submitted that it was entitled to be compensated by the Municipality for the loss of the property or its use on the following grounds :

- (a) the registration of the servitude of right-of-way was not a gift or donation made by Conforth to the Municipality – that was done pursuant to the condition imposed upon Conforth (initially) by the 1996 town planning decision;
- (b) the imposition of that condition was unlawful because it constituted an arbitrary deprivation of property contrary to the provisions of s 25(1) of the Constitution;
- (c) if the condition imposed by the town planning decision constituted an act of expropriation, then Conforth is entitled to be compensated;
- (d) this court should recognise that the doctrine of constructive expropriation is now part of South African law and would entitle Conforth to be compensated.

Analysis :

[10] With regard to the registration of the servitude, I do not have any facts which reveal the reason why it was registered in 2011. Both parties appear to have ignored the necessity to register it after the 1996 town planning decision, at least

until the consolidation application was made. Although Conforth completed the project envisaged in 1996, the Municipality did not insist on the registration of the servitude. Conforth may have made tentative steps to do so (indicated by the 1997 offer and the 2001 drawing) but ultimately only did so at the time of registration of the deed of consolidation. That may have been self-serving because it was required by an official such as the Registrar of Deeds, but that is not clear from the papers, and the parties did not wish to lead evidence to clarify that aspect. I am therefore only able to proceed on the basis that Conforth acted in compliance with the 1996 town planning requirement in causing the servitude to be registered.

[11] S 25(1) of the Bill of Rights contained in Chapter 2 of the Constitution provides that :

‘(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.’

That a ‘deprivation’ of property would include all the limited real rights recognised at common law has been made clear in *First National Bank of SA LTD t/a Wesbank v Commissioner, South African Revenue Service and Another* 2002 (4) SA 768 (CC) at paragraphs 47 – 50. These rights would include servitudinal rights and partial or limited rights of ownership.

[12] In *First National Bank* the court pointed out that there is a distinction between ‘deprivation’ and ‘expropriation’. The word ‘expropriation’ as used in s 25(2) refers to a narrower form of interference with an owner’s rights than does ‘deprivation’. Any

‘deprivation’ of property would be required to be justified in terms of s 26 of the Constitution, failing which it would be unconstitutional.

[13] Mr *Topping*, who appeared for the Municipality submitted that no deprivation had taken place because :

(a) in terms of s 208 of the Local Authorities Ordinance 25 of 1974 :

‘208 Public streets and public places to vest in council

The ownership, management and control of all public streets (other than main roads and national roads maintained by the Provincial Administration of the Province of Natal) and public places within the borough and the land comprised in such streets and places shall vest in the council which may assign names to such streets and places.’

(b) accordingly, and as the property had ‘vested’ in the Municipality long before Conforth acquired ownership of Erf 669, Conforth had no rights in and to the property of which it as been deprived.

[14] Mr *Gordon* submitted that a reliance upon s 208 was nonetheless unlawful because it remained a deprivation of property (subject to s 25(1) of the Constitution) without compensation, which was arbitrary and hence unconstitutional.

[15] I was referred to *Coverdale v Charlton* 1878 (4) QBD 104 (CA) for an analysis of the meaning of the words ‘vest in’. That case concerned the right of a local board to let pasturage on a street which ‘vested in’ a local board pursuant to legislation. As was pointed out in that case however, the meaning to be given to the words ‘vest in’

must depend in part upon the subject to which the words relate – in that case a ‘street’ - and it was on that basis that the Court of Appeal dealt with the concept of ‘vest in’. In this case it is the streets and the ‘land comprised in such streets and places’ which ‘vest in’ the council. This distinguishes much of what was said in *Coverdale* insofar as that case is authority for a decision in this matter.

[16] Mr *Topping* submitted that there can be no deprivation of property where the owner has never been in possession or control of it, and has never had any benefit from it. The act of registering the servitude of right-of-way achieved no utility because it added nothing to the rights of the Municipality which already had ‘ownership, management and control’ of the property. He recorded that it was common cause between the parties that the Highway was a public street as defined in the Ordinance.

[17] Mr *Topping* submitted that in order for the deprivation of the property (if that is what s 208 achieved) to be deemed to be ‘arbitrary’ the operation of s 25(1) must be deemed not to have provided sufficient reason for the particular deprivation or must be procedurally unfair. (See *First National Bank* at paragraph 100 for the factors to be considered). Procedural fairness does not apply to Conforth because the property had ‘vested in’ the Municipality long before it purchased the property.

[18] Considering the circumstances of this matter, in order to determine whether 'sufficient cause' existed for the deprivation of the property, the following are relevant :

- (a) the purpose of s 208 is clearly to enable the proper control, administration and management of public roads;
- (b) the purpose of the deprivation and the person whose property is affected cannot assist Conforth here. Conforth never had the use of the property at any stage. In truth, none of its representatives could suggest that when the company purchased Erf 669 they envisaged that they would be able to use or benefit from, the property. This is not a case where the state wished to construct a road or other facility, required land to do so, and took away Conforth's land to achieve that object. The property has only existed in the form of the Highway (subject to periodic widening, etc) for over the last one hundred years, and the object of the provisions of s 208 were clearly to regulate the ownership, management and control of the existing streets and public places, and not to acquire new ones. That is dealt with differently;
- (c) the fact that the deprivation embraced all aspects of Conforth's use of the property does not render the deprivation arbitrary because the provisions of s 208 deal only with 'all public streets ... and public places within the borough and the land comprised in such streets and places';
- (d) this is not a situation where Conforth was asked by the state to bear a burden (i.e. the deprivation of its property to achieve the public purpose of a road), which should have been borne by the public at large. Compensation in such circumstances is inapplicable;

(e) the extent of the deprivation (if it were such) in this matter has no economic impact whatsoever on Conforth and its rights as it saw them when purchasing Erf 669 including the property.

[19] Thus s 208 does not purport to deal with the deprivation of private property. The fact that the property is described in the records of the Registrar of Deeds as being included in the consolidated Erf 944 and the diagram forming part of the Title Deed, cannot bestow upon Conforth a right of ownership which already vested in the Municipality. Even if the provisions of s 208 constitute a deprivation of Conforth's property, the threshold requirements of it being done in terms of a law of general application and it not being arbitrary are satisfied. In those circumstances there has been no 'deprivation' of property as envisaged in s 25(1) of the Constitution.

[20] The next question to be considered is whether, notwithstanding that the property does not fall within s 25(1), there has been an expropriation in terms of s 25(2) of the Constitution, and whether compensation is payable. Any act of expropriation however involves an interference with an owner's right in and to property. For the reasons set forth that has not taken place and the section is inapplicable.

[21] It only then remains for me to consider whether the doctrine of constructive expropriation is part of our law, and applicable in the present matter.

[22] In this regard I have had reference to the section on constructive expropriation as set out in Constitutional Property Law, A J van der Walt (Juta) at pages 209 FF.

[23] Constructive expropriation deals with a situation where by virtue of a statutory provision, a property owner suffers loss which could justify the conclusion that compensation is necessary even though the State did not, and did not intend to, acquire ownership of the property. Here the state is required to compensate a property owner for a loss caused by a limitation on the rights in and to his property which was not intended, but which had the effect of expropriating those rights.

[24] The basis on which the principle operates is that when statutory intervention causes excessive and unfair loss to an owner, the owner should receive compensation even though the state does not necessarily require the use of the property for public purposes. Where one is dealing with formal expropriation, the statute or administrative decision which declares the intention to expropriate property is the key factor, where as in constructive expropriation the intention is to regulate control of the property rather than to expropriate it. With constructive expropriation the property is not acquired by the state, and the state may not even acquire any benefit from it.

[25] The unfairness which constructive expropriation would appear to be aimed at is when an individual person suffers a deprivation of property and is required to bear a statutory burden on behalf of the rest of society without being compensated.

[26] It is important that the interference with the property be significant, such as where it deprives the owner of the property of all of his rights of ownership or enjoyment in and to the property, or so interferes with the proprietary value of the property that it is rendered useless.

[27] As I understand it, the concept of constructive expropriation would not inhibit the imposition of burdens which would be viewed as administrative easements for a public utility on the basis that the burden imposed is insignificant.

[28] Although the question whether constructive expropriation is part of South African law has been raised, it has not yet been authoritatively decided. (See *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA). In that matter the applicant sought to compel a local authority to complete an approved expropriation process initiated by a road scheme by the local authority. The scheme had the effect of preventing the applicant from selling or properly using her land. The case for the applicant appears to have been based on the fact that the road scheme was approved, but not executed by the local authority and did not constitute a proper expropriation, but amounted to constructive expropriation entitling her to a

remedy. The application was ultimately unsuccessful because although the scheme had been approved it had not, and may not ever be put into operation.

[29] For the reasons which follow, I am of the view that it is unnecessary for me to decide whether constructive expropriation should form part of our law, or should be applied in this case.

[30] What we are concerned with in this matter is the condition which was laid down by the Town Planning Board in 1996. It was that condition with which Conforth alleges it was complying when agreeing to the registration of the servitude of right of way. When it did so, and indeed at the time the condition was imposed in 1996, ownership of the property already vested in the predecessor of the Municipality and it was neither necessary for the condition to be imposed by the town planning decision, nor was it necessary for the applicant to have acted upon it. Furthermore in acting upon the decision there has been absolutely no prejudice to Conforth because there has been no financial prejudice whatsoever to it as a result of the fact that ownership and control of the property vested in the Municipality by virtue of the provisions of s 208.

[31] In any event, and even if there had been some prejudice to Conforth in acting upon the condition contained in the town planning decision, it cannot complain now about having done so. It stood by and failed to take any steps to review the town

planning decision for almost fifteen years. In those circumstances the entire action seems to rely upon a strained construction of the law.

[32] In those circumstances I am of the view that even if it were applicable, constructive expropriation would find no application in this case.

[33] I make the following order :

‘The action is dismissed with costs.’

Date of hearing :22nd November 2013

Date of judgment : 28th November 2013

Counsel for the Applicant : D A Gordon SC(instructed by Seevnarayan Attorneys)

Counsel for the Respondent : I L Topping (instructed by Linda Mazibuko)