

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

CASE NO.: 8513/10

DATE HEARD: 1 FEBRUARY 2012

DATE DELIVERED: 20 FEBRUARY 2012

In the matter of:

THE BODY CORPORATE OF DOLPHIN COVE

APPLICANT

AND

KWADUKUZA MUNICIPALITY

1ST RESPONDENT

KWAZULU-NATAL DEPARTMENT

AGRICULTURE, ENVIRONMENTAL AFFAIRS

AND RURAL DEVELOPMENT

2ND RESPONDENT

JUDGMENT

D. PILLAY J

Introduction

- 1] Following a mighty storm in March 2007, the Balito coastline in northern KwaZulu-Natal was devastated. The dunes adjoining the Dolphin Cove property development that the applicant body corporate manages was severely eroded. A promenade on the dunes was washed away. The first respondent municipality reconstructed the promenade in September 2009. In this application, the applicant seeks the removal of the promenade. It alleges firstly, that the promenade is

reconstructed on Dolphin Cove. Secondly, the municipality acted unlawfully and in breach of the National Environmental Management Act 107 of 1998 (NEMA) by constructing the promenade without prior authorisation of the second respondent, the KwaZulu-Natal Department of Agriculture, Environmental Affairs and Rural Development. Thirdly, as the promenade will compromise the integrity of the dunes, the stability of Dolphin Cove is threatened.

- 2] Although the municipality denies the encroachment, it cannot say where the boundary is until the High Water Mark (HWM) settles in about two years or so, and the surveyor general has resurveyed the property. However, as the property is defined by its extent which is fixed in its title deed it is *ager limitatus*. Accordingly, the applicant cannot claim more land than that registered against its title in the deeds registry.

- 3] As for committing offences under s 24F of NEMA, the municipality contends that s 24G allows it to correct its unlawful activity. To this end it has applied to the department to approve the construction of the promenade and is awaiting the latter's decision. As for destabilising the property, the municipality maintains that the promenade is a public facility constructed by public demand and extensive public participation to provide necessary access to the beach.

- 4] Is there an encroachment?

- 5] The starting point is the title deed to the property. The property was held under title deed 1152/1947. Originally it measured 10 075 acres or 4 077 square metres according to diagram SG no. 762/1945. In 1976 the property was subdivided. Accordingly, sub-divisional diagram SG 4928/1975 depicts the property as Lot 1 held under title deed no. 16461/1976 to measure 2039 square metres. By simple subtraction, the remainder was recorded as 2038 square metres. The remainder continued to be held under title deed 1152/47 but, the drawing

attached to it is not a consequence of a survey or measurement of the remainder after Lot 1 was severed.

- 6] Section 20 (1) (a) of the Land Survey Act 8 of 1997 (LSA) requires survey diagrams for subdivisions of land but does not insist on diagrams accompanying the remaining extent. Sub-section 2 provides that when a subdivision is registered, the surveyor general must define on the title deed of the remaining extent the geometrical figure representing the subdivision and deduct its numerical extent. Such deduction can be made on a general plan instead of on a diagram.
- 7] The LSA distinguishes between a 'diagram' and 'general plan'.¹ Significantly, a diagram is a document containing geometrical and verbal representations of a piece of land. In contrast, the general plan is a plan representing the relative positions and dimensions of two or more pieces of land. Therefore, the drawing attaching to the property is a general plan showing the remainder in relation to Lot 1 of Compensation Beach. SG no 762/1945 attached to the founding affidavit ² represents Lot 1 before it was subdivided. It reappears with the 1975 sub-divisional endorsement at page 439 in the bundle to show the remainder and Lot 1. Dolphin Cove is developed on the remainder with sectional plan (as defined in the Sectional Titles Act 95 of 1986 (STA)) SG657/1996 accompanying its title deed T5225/1996. ³
- 8] Deeds, diagrams and general plans are open to rectification. ⁴ Consequently, even though registered deeds must reflect the extent of the property and serve as *prima facie* proof of their contents, the extent of a property is not immutable or beyond rectification either in law or fact.
- 9] In this case, the eastern boundary of the property is the seashore. The

1 S1

2 55

3 Annexure B 39; s 44 of the Deeds Registries Act 47 of 1937

4 See for example sections 23, 24, 29, 31, 32, 33, 36 and 37 of the LSA

seaward boundary is determined by the HWM. The position of the seaward boundary has probably changed because the HWM has shifted seaward. The municipality acknowledges that if the HWM is resurveyed in a few years, it could result in the extent of the property increasing.⁵ However, it contends that Dolphin Cove cannot have more land than that held by its title deed. Furthermore, until the resurvey and amendments of the title deed and drawings occur, it maintains that Dolphin Cove is bound to the extent reflected in the existing title deed.

- 10] Mr Hoffman, the municipality's professional land surveyor confirms that the seaward boundary is the curvilinear line 12.19 metres from and parallel to the HWM but he persists that the HWM is that established on SR76/1941 and that there has been no resurvey of the HWM registered since.⁶ In support of his opinion, he contends that other land surveyors, including Mr B. Woombell had also adopted the HWM set in SR76/1941. Mr Hoffman opines that land surveyor Mr Baker, who established the Dolphin Cove sectional title scheme under SG657/1996 was wrong to adopt Mr Woombell's diagram SR1565/1975. Mr Hoffman acknowledges that the promenade 'appears to encroach slightly onto the property'⁷ and that this is 'an ostensible, minor encroachment' but persists that in his professional opinion he cannot state that there is an encroachment because it is not possible to re-establish the seaward boundary at this point.
- 11] As regards the property being *ager limitatus* Mr Hoffman aligns himself with Mr Boshoff, the municipality's previous land surveyor to opine that the extent of the property is clear, notwithstanding the curvilinear boundary. Nevertheless, he concedes that he is not competent as a land surveyor to express such an opinion. The municipality's stance, therefore, is that the applicant is bound to adopt the 1945 positioning

⁵ Mendez 189 para 25

⁶ Hoffman: 596 para 14

⁷ Hoffman: 599 para 26 - 27

of the HWM.⁸

- 12] Mr Hoffman cannot be right if for no other reason but that it is common cause that the HWM has shifted and its position is currently unknown. At least three transactions registered since 1945 show that the 1945 position of the boundary does not prevail.
- 13] During November 1975 and February 1976⁹ Mr Woombell surveyed the HWM under SR1565/1975 (SG 4928/1975). His resurvey showed the HWM to differ considerably from its original SR76/1941 position. As much as he wanted to adopt the 1941 position, the surveyor general refused to allow him to do so. The surveyor general required the diagram to be reframed with the boundary being on the irregular line 12.19 metres from the HWM of the Indian Ocean. This emerges from correspondence between the surveyor general and Wall Marriot Paul and Borgen between January and March 1976 attached to the affidavit of Mr Dinkele, the applicant's land surveyor.¹⁰ Surveyors Wall Marriot Paul and Borgen confirmed in their letter dated 12 March 1976 in reply to the surveyor general's instruction that 'the High Water Mark has been plotted, showing the resurveyed position'.¹¹ To complete the registration, SG4928/1975 and SR156/1975 were endorsed against SG762/1945.
- 14] Consequently, the resurveyed position was adopted and accordingly the surveyor general approved SG 4928/1975.¹² In the circumstances, the 1975 HWM replaced the 1941 HWM.
- 15] Furthermore, in February 1996 when the sectional title scheme for the Dolphin Cove development on the remainder was surveyed in terms of the STA, Mr Baker generated sectional plan SG D657/1996 which the

⁸ Mendez 187 para 16

⁹ Hoffman's report 607 – 608 read with SG 4928/1975 at 653 and 541

¹⁰ Dinkele 553 - 4

¹¹ Dinkele 554 para 5

¹² Pg 653 and 541

surveyor general approved on 11 November 1996.¹³ The land data for this plan was obtained from SR771/1996. The curvilinear boundary was reproduced from Mr Woombell's drawing SR1565/1975 which related to Lot 1 of Compensation Beach before its subdivision. Beacons B and C representing the seaward boundary on the original diagram of Lot 1 i.e. on SG762/1945 coincide with the beacons on the working plan accompanying SG657/1996. Sectional plan SG657/1996 also reflects the seaward boundary as the curved line 12.19 meters from the HWM of the Indian Ocean. Once the surveyor general approved the general plan, everyone was entitled to rely on such approval until it changed¹⁴ because approval signifies that the requirements of the LSA have been complied with.¹⁵

16] When Mr Humphrey drew the sewer and drain servitude diagram SG2739/1977, he reported in SR1165/1977 that he had to resurvey the HWM to determine whether servitudes were required.¹⁶ The surveyor general inspected the HWM with Mr Humphrey on 7 October 1977. SG2739/1977 read with SR1165/1977 is therefore a two metre wide sewer and drain servitude over Dolphin Cove.¹⁷ Although Mr Humphrey's drawings do not depict the HWM, Mr Hoffman's drawings of May 2011 uses SR1165/1977 to position the HWM and 12.19 m so far seaward that the promenade appears as a complete encroachment on the Dolphin Cove property.¹⁸

17] The November 2010 drawing by Mr W. S. Burwood of Wall Marriot Paul and Borgen reproduced the boundary surveyed on SR128/1945 furthest from the HWM so that the promenade does not encroach on the applicant's property.¹⁹ This does not assist the applicant who attached it to the affidavit of Mr Dinkele. However, Mr Burwood places

13 Pg 570 and 720

14 *Ouderkraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA222 SCA

15 S 1 of LSA

16 674 – 657

17 673-4

18 605

19 JMD 4 566

the HWM set in SR1565/1975 on the seaward side of the HWM set in SR 128/1945. Juxtaposing SR 1565/1975 with SR128/1945 shows that the HWM has shifted significantly towards the ocean. In all the circumstances, Mr Hoffman's persistence that the HWM set in SR128/1945 must prevail is therefore unjustified.

18] Turning to the authorities, both sides relied on the same case law as to whether the property was *ager limitatus* or not. According to the authorities ²⁰ an *ager limitatus* is a plot of land enclosed on all sides by artificial boundaries and demarcated by such. An *ager non limitatus* is a plot bounded on one or more sides by some natural feature such as a river or, as in this case, the seashore. Irrespective of the sort of boundaries it has, a plot defined by measurement is also *ager limitatus* or, if not one in the pure sense, then is regarded as such for all practical purposes. ²¹

19] Simpson and Sweeny²² elaborate:

1. “*Ager Limitatus*” means, literally, “fixed field” and in Roman-Dutch law beaconed land rectilinearly bounded is *ager limitatus* and, abutting a river or sea, there can be no extension of this land area to midstream nor is the owner entitled to alluvion. On the other hand land bounded curvilinearly by a river or the sea is normally “*ager non-limitatus*” which in Roman-Dutch law is entitled to alluvion and by a principle of English law adopted in South Africa there is a rebuttable presumption that the land so bounded in relation to a river extends to midstream. In respect of the above there is no doubt: not unless a piece of land has a boundary relating to a river or the sea and in addition there are certain features relating to the numerical data, inclusive of the area, that appear in the title deed

20 Cited in *Durban City Council v Minister of Agriculture* 1982 (2) D&CLD 361 @369C

21 This is the approach of Didcott J in *Durban City Council v Minister of Agriculture* 1982 (2) D and CLD 369 C-D.

22 In the *Land Surveyor and the Law* 173

or diagram. When these features are present it seems that the land is *ager limitatus* or fixed and it is not entitled to alluvion nor can the piece of land be extended to midstream even though it is curvilinearly bounded by water.’²³

- 20] The learned Didcott J observed that every plot is confined to its own limits therefore this is not a distinctive characteristic of *agri limitati*. Nevertheless, the limits of an *ager limitatus* plot are easier to identify even though locating them on the ground might sometimes prove difficult. Determining the boundaries of *agri non limitati* plots is harder because natural boundaries such as the seashore are not static. Instrumental to determining whether a plot is *ager limitatus* are the title deed and drawings that define the plot.²⁴
- 21] Innes CJ in *Van Niekerk and Union Government (Minister of Lands) v Carter* 1917 AD 359 reminds that in Roman Dutch Law, which recognises the distinction between natural and artificially bounded riparian properties, land granted by measurement and not in lump was *ager limitatus*. Measurement had to be the dominant feature of the grant.²⁵ The learned judge concluded:
1. ‘The whole matter is rather obscure, but I think it may be said that if a riparian property was not an *ager limitatus*, the law of Holland did not prohibit a recognition of the right of its owner to alluvion and to the bed of the stream without prejudice, of course, to due use by the public.’²⁶ (*sic*)
- 22] Roman Law also recognised the doctrines of *avulsio* when a piece of land is torn off forcefully and washes up against another’s land, and *alluvion* which is the gradual addition to land resulting in the owner

²³ Simpson and Sweeny 433

²⁴ *Durban City Council* 370 A

²⁵ *Van Niekerk* 375

²⁶ *Van Niekerk* 376

acquiring the land through alluvion or accession.²⁷ Accession causes boundaries to move with the variable HWM of the sea.²⁸

23] From the authorities I deduce that measurements and natural boundaries are not mutually exclusive factors that go to determining the size and position of land. If the title deed and drawing alone can fix the extent and position of the land, then it is *ager limitatus*. Determining the extent is not enough if the position of the land cannot be located. If the natural boundary determines the extent or position of the land, then it is *ager non limitatus*. Consequently, the extent of the land could also increase or decrease by *alluvion*, *avulsion* or by virtue of having a fluid curvilinear boundary.

24] Applying this deduction to the facts in this case, I find that title deed 1152/1947, sectional plan SG657/1996 and sectional title deed T5225/1996 defined the property by measurement by giving the length and angles of all its co-ordinates. However, measurement is not the only defining feature of the property. The title deed, diagram and general plan for Dolphin Cove fixed the eastern boundary as 12.19 metres from the HWM. Furthermore, a condition of the title deed is that Dolphin Cove²⁹ is transferred with the benefit of the use of the right of way 12.19 metres wide along the HWM. However, the seaward side of the property is a curvilinear boundary defined by the HWM. As the HWM is a fluctuating natural phenomenon, the position of the eastern boundary must also fluctuate. Naturally, if the boundary has changed the extent of the property would also have changed. The mere fact that all the parties and the surveyor general agree that the seaward boundary can only be positioned once the HWM is re-established fortifies my view that the property is *ager non limitatus*.

25] Because the municipality erected the promenade, it bears the onus of proving that it acted lawfully. That includes proving that its construction

²⁷ Jan Glazewski *Environmental Law in South Africa*, Butterworths 2000 350

²⁸ Simpson and Sweeny 135 at 815

²⁹ Section 11 (3) (b) Schedule of the STA para 4 d 41; title deed 1152/1947 para 4 d 53

does not trench on the rights of property owners. No one can build anything anywhere he likes and place a burden on the owner to prove her ownership of the property. The applicant did not consent to the construction of the promenade. The members of the applicant have a real and constitutionally protected right to property. The municipality bears the onus of proving that it has a right or duty to construct the promenade, to do so in the position that it has and that its right or duty trumps the property rights of the Dolphin Cove property owners.

- 26] On the municipality's own version, it cannot prove that the construction is not on land owned or managed by the applicant. On the contrary, Mr Hoffman's drawing and drawings approved by the surveyor general suggest that if survey SR76/1941 applies, the promenade encroaches partially. If survey diagram SR1565/1975 applies, then the entire promenade encroaches on Dolphin Cove. As the municipality does not know where the seaward boundary is and cannot say conclusively whether there is or is not an encroachment, it fails to discharge its onus.
- 27] Even if I were to accept Ms Gabriel SC's submission for the municipality that the applicant is bound by the extent of the property as reflected in its title deed, the municipality must, as Mr Salmon SC submitted, measure the property to locate its exact position. Knowing the size of the property is not enough; its exact location must also be known to determine its boundaries to establish whether there is an encroachment. I accordingly find that the promenade the municipality constructed encroaches on Dolphin Cove. This finding prevails until a resurvey of the HWM proves otherwise.
- 28] Does the construction of the promenade comply with NEMA?
- 29] Following the storm damage of March 2007, the municipality applied to the department to construct a continuous walkway to replace the one

washed away in the storm. The department granted authorisation on 30 September 2008. However, the authorisation did not include approval for the promenade in front of Dolphin Cove because the municipality's own expert, Mr Bundy had recommended an elevated promenade and not one fixed on a rock.³⁰

- 30] The municipality submitted an amended application on 19 May 2009 to authorise it to construct a continuous promenade between Library Way and Emberton. As this amended application was for a board and chain promenade situated leeward of the frontal dune at beach level, it still did not meet Mr Bundy's recommendation for an elevated promenade. Nevertheless, the department approved this, the first amended application, on 24 July 2009 on the basis that it was a non-substantive amendment that did not affect the environmental rights of interested parties.³¹ The proposed board and chain structure had to comply substantively with the drawing attached to the authorisation. The proposed route had to comply substantially with the plan attached to the authorisation. Importantly, the authorisation prohibited the board and chain structure from hindering the beach morphodynamics.³²
- 31] Unsurprisingly, Mr Bundy once again refused to support a ground level boardwalk because it impacted adversely on the environment.³³ The first amended authorisation was accordingly abandoned.
- 32] On 14 August 2009, the municipality applied for a second amendment in order to change the position of the promenade.³⁴ The second amendment was for a wooden walkway elevated 100 millimetres from the ground so that it impacts minimally on the dune system. However, the route differs from that approved in the first amended authorisation. Mr Bundy, who applied for the second amendment represented that

30 A letter Plomp 765 para G; Mendez 187; Annexure AP1 295 para

31 Mendez Annexure AP1 293 para 3 (a) ; 294

32 Mendez Annexure AP1 294 para 4

33 A letter Plomp 766 para K

34 Mendez Annexure AP1 appendix E 320

the affected bodies corporate had endorsed the routing according to the Bohlweki SSI application.³⁵ Construction of this walkway commenced about 3 September 2009³⁶ and was completed within a week after the applicant allegedly approved in principle. However, on 26 October 2009, the department issued a pre-directive to the municipality resulting in the municipality abandoning the second amendment.³⁷

- 33] On 4 March 2010, the department informed the municipality that as the promenade had been constructed in breach of the environmental assessment conditions, s 24G did not apply. In an apparent contradiction to this information the department asked the municipality for its s 24G application on 26 October 2010, after the municipality delivered its answering affidavits in this application. The municipality complied. The department rejected the application on 24 March 2011 and called for a fresh submission supported with a coastal management report. At a meeting on 28 March 2011 the department reiterated its request for a special report from Mr Bundy.
- 34] Mr Bundy complied in April 2011 by requesting condonation of the boardwalk as presently constructed because of the significant social and economic benefits from tourism. However, Mr Bundy's report is qualified. In addition to preferring the position the promenade to be further leeward,³⁸ he cautioned that in the long term the bay will most likely have to be defended. And, if defences are established within the bay the beach will continue to deflate.³⁹
- 35] More than eight months have passed and the department's response to the application for condonation of the presently constructed promenade is still awaited. It has not acted in any way against the

35 322

36 Issues Trail Report pg 330

37 Plomp 767

38 Plomp AP3 805

39 The Bundy Report 805

municipality, notwithstanding its powers of instituting criminal prosecution or imposing administrative fines for offences committed under s 24F of NEMA.

36] It is clear from the above that without authorisation or condonation for the construction of the promenade, the municipality has committed an offence in terms of s 24F. Hence its application for rectification of its unlawful commencement of activity in terms of s 24G.

37] Government notice R386 promulgated under s 24(2) (a) and (d) of NEMA authorises a listing of activities which may not commence without environmental authorisation from the competent authority;⁴⁰ furthermore, investigation, assessment and communication of the potential impact of such activities must follow the prescribed procedure.⁴¹ Included on that list are

- a. Construction or earth moving activities in the sea or within 100 metres inland of the high water mark in respect of fixed or floating jetties or slipways, embankments, stabilising walls, buildings or infrastructure; and
- b. The prevention of free movement of sand including erosion and accretion, by means of planting vegetation, placing synthetic material on dunes and exposed sand surfaces within a distance of 100 metres inland of the HWM of the sea.

38] The competent authority as defined in s 1 of NEMA is the Member of the Executive Counsel (MEC). To rectify its unlawful commencement of activities the municipality has to apply to the MEC who may then direct the municipality to compile a report containing

- a. an assessment of the impact of the activity of the environment;
- b. mitigating measures undertaken;
- c. public participation in compiling the report and how issues raised have been addressed;

⁴⁰ S24(2) (a) of NEMA

⁴¹ Government Notice R 386 21 April 2006

- d. an environmental management programme.

After considering the report and any further information, the MEC may

- a. direct the municipality to cease the activity either wholly or in part and rehabilitate the environment on certain conditions; or
- b. issue an environmental authorisation subject to conditions.

39] However, before the MEC takes either of these steps, the municipality must pay an administrative fine not exceeding one million rand which the MEC must set. In this case, the MEC has not set such a fine. In fact, the MEC and the department have not responded at all either to the s 24G application or to this litigation,⁴² notwithstanding Mr Bundy's concerns about the damage the promenade may be causing to the environment. The MEC is not cited in these proceedings as he or she should have been; however the municipality makes no issue of this.

40] It is a defence to a charge of commencing a listed activity without authorisation to show that the activity commenced or continued in response to an emergency in order to protect human life, property or the environment. In this case, the municipality's reason for constructing the promenade without authorisation is public pressure for such a facility. The building of the promenade is therefore not a response to an emergency. Furthermore, the municipality risked acting irrationally by allowing itself to submit to public pressure. Public pressure and tourism are not compelling reasons to excuse the municipality's conduct. Public pressure can hardly ever be a basis for commencing or continuing a listed activity unlawfully. Nor can the socio-economic benefits of tourism. The environment, if damaged irreversibly will be lost forever. Consequently, the municipality's reasons for constructing the promenade is neither a defence contemplated in s 24F (3) of NEMA nor a justifiable ground for breaking the law.

⁴² S24G(2) and 2A of NEMA

- 41] Section 24G is not an invitation to commit offences so that they can be corrected later. The seriousness of a s 24F offence is self-evident from the heavy penalties it attracts. A fine not exceeding five million rand or imprisonment not exceeding ten years, or both such fine and imprisonment may be imposed.
- 42] A general principle of NEMA is that environmental management must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable and environmental options.⁴³ Furthermore, environmental justice requires that adverse environmental impact should not be allowed to unfairly discriminate against any person.⁴⁴ Decisions must take into account the interests, needs and values of all interested and affected parties.⁴⁵ They must be taken in an open and transparent manner and access to information must be provided in accordance with the law.⁴⁶
- 43] Furthermore, there must be intergovernmental coordination and harmonisation of policies, legislation and actions relating to the environment.⁴⁷ Conflicts of interest between organs of state should be resolved through conflict resolution procedures.⁴⁸ The principles identify coastal shores as one of the sensitive, vulnerable, highly dynamic or stressed ecosystems that requires specific attention in management and planning procedures.⁴⁹ Co-ordination, harmonisation and cooperative government are therefore consistent themes of NEMA.⁵⁰
- 44] The municipality was aware before it constructed the promenade that the department had to authorise its construction. It had to know also

43 S2(4) (b) of NEMA

44 S2(4) (c)

45 S2 (4) (g)

46 S 2 (4) (k)

47 S 2 (4) (l)

48 S 2 (4) (m)

49 S 2 (4) (r)

50 For example s 11 and 12

that it was committing an offence by constructing the promenade without authorisation. The 'in principle' agreement to construct the promenade, if it was secured, appears to have been obtained from some members of the applicant in the absence of their attorney and in exchange for relaxing the position of the promenade substantially.⁵¹ The municipality was aware that the applicant was legally represented. However, it surreptitiously sought to secure an oral agreement about a much disputed real right in circumstances that are suspiciously informal. As an organ of state and the third tier of government, it is shocking that it disregards not only the law and the rights of individual property owners but also the advice of its own expert Mr Bundy.

- 45] The s 24G process is merely an application which may secure authorisation after the fact. It may also result in the municipality being directed to cease the activity by removing the promenade. It is not for this court to anticipate what the outcome of the s 24G application would be. However, the fact that currently, the promenade encroaches on private property must be a material consideration, not least because the right to property is constitutionally protected. The encroachment raises the spectre of expropriation which in turn has financial implications. Whether the construction of the promenade justifies the costs of expropriating private property is a matter for the MEC's decision. However, neither the s 24G application nor Mr Bundy's report mention the encroachment and the unhappiness of the property owners. Unsurprisingly, in this application Mr Hoffman also downplays the encroachment. As soon as the encroachment is acknowledged then the municipality has to speak the language of compensation and expropriation, which it avoids doing because of the financial implications.
- 46] However, the s 24G application has nothing to do with the applicant and the property owners it represents. They are not party to it nor do they support it. It affects them only if it is granted. In the absence of an

51 ISS trial 335

emergency to protect human life, property or the environment, the municipality had no right or duty whatsoever to trench upon their property rights.

- 47] The municipality persists that they engaged in extensive public participation before constructing the promenade and when applying for authorisation. It maintains that the department was satisfied that there had been sufficient consultation and public participation. The applicant denies that it was consulted about constructing the promenade and maintains that it was not aware that the consultations that did occur were part of the process of applying for authorisation. The applicant understood that it was participating in the process of obtaining authorisation from the department for the beach and dune restoration.

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- 48] Whether there was consultation sufficient to meet the requirements of NEMA is a dispute which I cannot resolve on the papers. However, it is not necessary for me but for the MEC considering the s 24G application to resolve. For the purpose of determining this application, it is common cause that the applicant did not consent to the encroachment.

- 49] The promenade is unlawful not only because it encroaches on property of private owners but also because its construction is an offence and the department has not authorised it.

Does the promenade adversely impact on the environment?

- 50] As for the applicant's third ground, namely that the construction of the promenade has long term adverse impact on the environment, Mr Bundy in his April 2011 report submitted in support of the s 24G application confirms that while there may be 'some significant short-term

social benefits as espoused by political and public bodies’⁵³ he opined that ‘(t)he long term natural processes are however, compromised by the development of an additional structure in close proximity to the beach’.⁵⁴ The promenade provides access to the beaches. As a tourist attraction, it contributes to the local economy. However, as presently constructed it will destabilise dunes for the following reasons:

- a. the construction disturbs the dune lamellae and compromises the integrity of the dunes;
- b. the structure adds weight to the dunes;
- c. the structure alters the surface water run off and the aeolian movement on and around the dunes
- d. the structure alters the latent ecological processes associated with the dunes.⁵⁵

51] In the circumstances, whilst there are short to medium term positive socio-economic implications of the promenade, the biophysical implications are negative. In Mr Bundy’s opinion, the negative impact is ‘relatively high’.⁵⁶

52] Notwithstanding his opinion as to the long term impact of the promenade, Mr Bundy suggested as a way forward that the construction be condoned. However, when asking for the condonation, he points out that a more stable option would be to route the promenade further leeward but that would result in encroachment onto private properties resulting in negotiations with private owners. He also points out that the route and structure has a limited lifespan of about ten years before defence of the beach front or further retreat will have to be undertaken. He urges the municipality to monitor and evaluate the coastal processes and cautions residential owners of the effect of their structures on the supra tidal coastal dynamic; in time the local authority and residential owners might have to take protective and

53 Bundy 796 para 3

54 Bundy 79**

55 Bundy 801 para 3

56 Bundy 803

mitigating measures.⁵⁷

- 53] With the further erosion of the frontal dune that Mr Bundy anticipates, the applicant's building is at risk for as long as the unauthorised promenade remains.

Costs

- 54] On 24 November 2009, the applicant demanded that the municipality remove the promenade immediately. Mr Mendez persisted that the promenade had been authorised and that it was outside the Dolphin Cove boundary. On 15 December 2009, the applicant extended its deadline to 15 January 2010 for the municipality to remove the promenade. On 23 August 2012, the applicant launched this application.
- 55] The applicant became aware for the first time of the municipality's application to the department for a further amendment to the first authorisation when it received a letter dated 26 October 2009 addressed to the municipality from the department. That letter recorded that the dune and promenade works were unauthorised and that the municipality should bring an application in terms of s 24G of NEMA. The municipality complied only in April 2011, more than 7 months after this litigation commenced.
- 56] The municipality is in flagrant violation of NEMA, the property owner's rights to a safe environment and their rights to their property. It refused to accept the advice of its own environmental expert, Mr Bundy on three occasions.
- 57] The applicant seeks costs on an attorney and client scale. To decide many of the issues in dispute e.g. whether Mr Mendez bullied the members of the applicant, oral evidence is required. Consequently, I make no findings about the disputed issues. However, given the

⁵⁷ Bundy 805 – 806

municipality's flagrant, repeated and continuing breach of the law and most importantly, the risk its promenade poses for the environment, an adverse cost order is justified. Once damaged, restoring the environment might be impossible. An order for costs against the municipality is ultimately satisfied from public coffers. Instead, the persons responsible for this mismanagement of the environment and squandering of public funds to defend criminal conduct should be held accountable.

Order

- 58] The first respondent municipality is ordered at its own cost:
- a. to permanently remove the hardened promenade, along the dunes between Clarke Bay and Emberton, Balito, Kwazulu-Natal;
 - b. to make good the damage caused to Dolphin Cove in the construction of the promenade; and
 - c. to relocate the fence to its original location on the boundary of Dolphin Cove;

within fourteen (14) days of the date of service of this order.

- [59] The applicant shall serve a copy of this judgment on

- a. the auditor-general to investigate whether the cost of this litigation amounts to the sort of irregular, fruitless and wasteful expenditure that is disallowed in terms of Chapter 15 of the Municipal Finance Management Act 56 of 2003 and to act accordingly;
- b. the state attorney on behalf of the Kwazulu-Natal Department of Agriculture, Environmental Affairs and Rural Development;

- [60] The second respondent municipality shall pay the applicant body corporate's costs as between attorney and client

D. Pillay J

Appearances

For the Applicant:

Instructed by:

Adv Salmon SC

Norman Brautenseth & Associates

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For the Respondent:

Adv Gabriel SC

Instructed by:

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