IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE No: 4600/2012

In the matter between:-

SEALAND TRANSPORT SERVICES CC	First Applicant
ROAD MARINE CC	Second Applicant
RAV TRANSPORT CC	Third Applicant
CMT LOGISTICS CC	Intervening Applicant

and

ETHEKWINI MUNICIPALITY	First Respondent

JUDGMENT

Delivered on 23 November 2012

<u>Vahed J:</u>

[1] The respondent municipality ("the municipality") owns certain immovable property within its area of jurisdiction, which is described as Sites MA 129, 130 and 133 on Remainder of Erf 301, Springfield (Electron Road) ("the property"). The applicants (a term I will use to refer to the applicants and the intervening applicant) are in occupation of portions of the property. In the present application they seek an interdict restraining the municipality from evicting them from the property pending:-

a. the municipality providing the applicants with adequate notice and reasons for their eviction;

b. the municipality affording the applicants a fair hearing with an opportunity to make representations as to why they they ought not to be evicted from the property; and

c. and in the event that the municipality thereafter continues with the proposed eviction, that the applicants be afforded a reasonable opportunity to relocate, such to be a period of at least twelve months.

[2] At the hearing of the application the intervening applicant applied to join in the proceedings as an applicant, to make common cause with the original three applicants, and to seek the same relief. That was not opposed and I allowed their application to join.

[3] Prior to 28 February 2008, and in terms of a written agreement, Zedek Trading 82 CC hired the property from the municipality. As at that date the applicants were in occupation of separate portions of the property, each of them concluding agreements for that purpose with Zedek. In other words, each of the applicants was a sub-tenant, with Zedek being their landlord.

[4] The municipality terminated Zedek's occupation of the premises with effect from 28 February 2008. Zedek failed to vacate and litigation ensued in terms of which the municipality sought the eviction of Zedek, and all those occupying through it, from the property. In those proceedings (under

Case No 12482/2008 in this Court) Zedek opposed the municipality's claim for eviction and challenged the termination of its tenancy. Ultimately all of Zedek's defences were dismissed and, in terms of a written judgment handed down on 28 March 2011, Murugasen J issued the following Order:

"1. The respondent, Zedek Trading 82 CC, and all other persons in occupation under or through the respondent, are directed to vacate the immovable property described as Sites MA 129, 130 and 133 on Remainder of Erf 301, Springfield, and situate at Electron Road ('the property');

2. Failing immediate compliance with paragraph 1 of the order, the Sheriff of the High Court is authorised to evict the Respondent and all persons in occupation under or through the respondent, from the property.

3. The respondent is ordered to pay the costs of the application on an attorney and client scale."

[5] It appears that thereafter Zedek sought leave to appeal against that judgment and Order which was refused. The correspondence attached to the founding papers contain a reference to a "writ of ejectment" dated 02 December 2011 being delivered to, at least, the first applicant. On 12 December 2011 attorneys representing the first applicant wrote to the municipality's attorneys acknowledging receipt of the writ by the first applicant and stating further that:

"We have been provided with a copy of our landlord's petition to the Supreme Court of Appeal for leave to appeal the ejectment order.

Can you confirm that the ejectment will be held in abeyance pending the outcome of this application?

In any event, our client would like to continue occupying the property and would be happy to conclude an agreement of lease with your client and pay rental directly to your client in respect of the property.

In this regard we have suggested to our client that it withhold paying any further rental to [Zedek] and that the rental is to be paid into our trust account.

In the interim please could you advise us as to your clients (sic) approach to our clients (sic) ejectment and it (sic) willingness to conclude an agreement with our client regard (sic) to its continued occupation."

[6] Thereafter the eviction was held in abeyance pending the outcome of the petition proceedings. On 21 December 2011 the municipality's attorneys advised the first applicant's attorneys that the municipality was not willing to conclude any lease with the first applicant and that "[a]ny rental agreement between [the first applicant] and Zedek is a matter between the two parties".

[7] On 23 January 2012 the first applicant's attorneys responded to that communication in, *inter alia*, the following terms:

"Our client understands completely that it does not have a valid or binding lease agreement with your client and does not wish to confuse the litigation issues between your client and Zedek Trading with its approach to your client.

Our client's position is that it is an innocent party who concluded a lease with Zedek Trading in good faith, not being aware of your client's rights or its position in regard to the apparent termination of our client's landlord's lease.

Our client's business operations are heavily dependant (sic) upon its continued operation on the property. Our client is merely endeavouring to enquire of your client as to its intentions in relation to the property as it would seem that unless your client intends some kind of redevelopment, that it would be in its interest to receive rental in respect of the property. It that is so, then our client would like to express its interest in leasing the property from your client. In fact it would be prepared to pay rental to your client immediately in order to secure its rights.

To this end, our client would like to meet with your client's representative to discuss this possibility.

Our client does not wish this approach to be misconstrued as an endeavour to cause any difficulty in regard to the present litigation or compromise your client's rights in any way."

[8] On 24 April 2012 the first applicant's attorneys again wrote to the municipality's attorneys, on this occasion in, *inter alia*, the following terms:

"We confirm that we represent Sealand Transport Services CC, Road Marine Logistics CC and RAV Transport CC, who are the present occupiers of the property described as: Site MA129, 130 and 133 on Remainder of Erf 301 Springfield, known as 38-50 Electron Road, Springfield.

As we have previously stated, Sealand is paying rental into our trust account in respect of its occupation of the property as it is uncertain as to whether it should be paying rental to your client or Zedek Trading. We have advised our other clients to do likewise.

We note that your client has indicated that it is not willing to conclude a lease agreement with Sealand. Our clients would like to receive written reasons for this decision given that it has tendered to pay your client market related rental.

We would be grateful if you could advise us as to the present status of the litigation under Case No. 12482/2008 and whether you are aware of the outcome of the Applicant's application to the Supreme Court of Appeal.

We note at paragraph 42 of the judgment, the learned Judge records that your client has advised "*that it has an agreement with the subtenants and has given an undertaking that any occupier will not be evicted without recourse to due procedure*".

Please could you provide us with copies of your client's affidavits in which this arrangement is explained and provide us with details of the undertaking that your client has provided."

[9] On 30 April 2012 the municipality's attorneys responded indicating that there was no prospect of any lease being concluded with the applicants, that the Supreme Court of Appeal had refused Zedek's petition and that they had received instructions to proceed with the eviction.

[10] That evoked a response, dated 2 May 2012, in, *inter alia*, the following terms:

"As you will appreciate it is not in order for your client to proceed with the eviction of our clients from the premises.

We require the requested information from you and your client.

In particular our client (sic) would like to receive reasons for the decision to refuse to conclude a lease agreement. You will appreciate that the reason provided that "the site is desperately needed by their client department" is not particularly helpful nor does it assist our client (sic) in understanding how the decision has been arrived at. Please also provide us with the documents evidencing the basis for the decision.

In the interim our client (sic) requires your confirmation that your client will not proceed with the eviction until at the very least we hear from you meaningfully and our clients have had an opportunity to address your client's reasons in more detail."

[11] On 4 May 2012 the municipality's attorneys advised that they were instructed to proceed with the evictions and also furnished the applicants' attorneys with a copy of the Order made by the Supreme Court of Appeal which had been requested in the interim.

[12] On 5 May 2012 the applicant's attorneys wrote indicating that this application would be brought as a matter of urgency, anticipating that the application papers would be delivered by no later than 8 May 2012. As matters turned out the application papers were issued on 7 May 2012 and delivered by the sheriff on the same day. The matter was heard on 9 May 2012 when an Order was issued, by consent, regulating the exchange of affidavits and the further conduct of the matter. That Order also recorded an undertaking delivered by the municipality to the effect that it would not proceed with the evictions pending the final determination of this application.

[13] I have quoted at length from and referred in detail to that exchange of correspondence because it is against that backdrop that one gains a fine understanding of how the applicants' case developed.

[14] In the founding papers the applicants contended that they were entitled to the relief foreshadowed in the notice of motion in that they entertained a legitimate expectation that they would be accorded "due process" by the municipality prior to their eviction being sought and acted upon. The "due process", they explained, was their rights to a hearing and to make representations so as to ensure just administrative action and the protections afforded by the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

[15] They contend further that the municipality's refusal to grant them a lease to occupy the property and/or the refusal to entertain a hearing constitutes *administrative action* as defined in PAJA. PAJA defines that term thus:

"**'administrative action'** means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial ; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) *(a)*, *(b)*, *(c)*, *(d)*, *(f)*, *(g)*, *(h)*, *(i)* and *(k)*, 85 (2) *(b)*, *(c)*, *(d)* and *(e)*, 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) *(d)*, *(e)* and *(f)*, 126, 127 (2), 132 (2), 133 (3) *(b)*, 137, 138, 139 and 145 (1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4 (1);"

[16] The first problem that emerged was the contention that the municipality's decision relating to an apparently commercial transaction with regard to the proposed letting of land owned by it constituted *administrative action* as envisaged by PAJA, more so in circumstances where it (ie. the municipality) wanted the land to further its civic duty.

[17] In asserting that contention, Mr *Voormolen*, who appeared for the applicants, referred me to *Grey's Marine Hout Bay (Pty) Ltd v The Minister of Public Works* 2005 (6) SA 313 (SCA), and in particular to paragraphs 23 to 26 and paragraphs 30 to 32 thereof. Those paragraphs (omitting the citations, footnotes and case references) read as follows:

"[23] While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.

[24] Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of State. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.

[25] The law reports are replete with examples of conduct of that kind. But the exercise of public power generally occurs as a continuum with no bright line marking the transition from one form to another and it is in that transitional area in particular that

> '(d)ifficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33'.

In making that determination

> '(a) series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33.'

It has also been emphasised that the difficult boundaries

> 'will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.'

[26] It was submitted on behalf of the Minister that because the State is the owner of the property that is now in issue, and has all the ordinary rights of ownership, it may use the property as if it were a private owner and its conduct in doing so is not administrative action. While it is true that the State enjoys the private rights of ownership it was pointed out in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* that those rights are to be asserted within the framework of the Constitution. What is in issue in the

present case is not the use to which State ownership is being put but rather the manner in which those rights of ownership have been asserted.”

…

“[30] While 'rights' may have a wider connotation in this context, and may include prospective rights that have yet to accrue, it is difficult to see how the term could encompass interests that fall short of that. It has not been shown that any rights - or even prospective rights - of any of the appellants (or of any other person) have been adversely affected by the Minister's decision. None of the appellants has any right to use the property that has been let, or to restrict its use by others, nor has any case been made out that their rights of occupation of their own premises have been unlawfully compromised. As pointed out in *Kyalami Ridge*, at para [95]:

> 'The general rule is that the reasonable use of property by an owner is not subject to restrictions, even if such user causes prejudice to others.’

[31] Although in *Bullock's* case - in which the aggrieved party had continuously hired the affected property over a period of 32 years and had erected structures on the property that were vital for the use of its own property - an interest falling short even of a prospective right was recognised, it might be that the Court had in mind rather a legitimate expectation, grounded in past practice, that the affected property would continue to be available for the use of the aggrieved party. But even if reliance may be placed on an interest falling short of a prospective right - of which I am doubtful - I do not think that the appellants have shown that they have a peculiar interest transcending those enjoyed by the public at large.

[32] Nor has it been shown that any of the appellants (or any other person) has a legitimate expectation that the property would be left vacant, or even that they would be consulted, or their comments invited, before it was let. In considering what conduct would give rise to a legitimate expectation Corbett CJ, in *Administrator, Transvaal, and Others v Traub and Others*, cited the following passage from the speech of Lord Fraser of Tullybelton in *Council of Civil Service Unions and Others v Minister for the Civil Service*:

> 'Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.'

Those requirements were considered in greater detail in *National Director of Public Prosecutions v Phillips and Others*, which was cited with approval by this court in *South African Veterinary Council and Another v Szymanski*.”

[18] Developing that submission Mr *Voormolen* picked up the theme of paragraph 31 quoted above and referred to paragraphs 13 and 14 in *Bullock*

NO & Ors v Provincial Government, North West Province, & Ano 2004 (5) SA 262 (SCA):

"[13] It was not suggested that the Premier was unable to take the decision to grant the servitude in the absence of legislation which specifically empowered him to do so: *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) (2001 (7) BCLR 652) paras [40], [41] and [55]. The submission on behalf of the first respondent was that the decision by the Premier was taken by an organ of State in its capacity as owner of the land in question, and the State was accordingly in no different position to that of any landowner who may freely grant or refuse to grant rights in property vested in such private owner. It was accordingly submitted that the decision is not capable of constituting administrative action.

[14] I emphatically disagree. The North West Province is landlocked. So is the adjacent province of Gauteng, the most populous province of South Africa, which has the Hartebeestpoort Dam close to its western border. The dam is a valuable recreational resource available to the public at large. Ownership of the foreshore is vested in an organ of State, the first respondent. A decision by the first respondent to grant, in perpetuity, a right over a part of the foreshore to one property owner to the exclusion of all other persons, significantly curtails access to that resource by the public. In my view, for the reasons which follow, the decision to grant the servitude can and must be classified as administrative action and therefore liable to be set aside by a court at the suit of a person who has the standing to claim such relief."

[19] As that portion of Mr *Voormolen's* argument unfolded I entertained considerable doubt as to whether the municipality's decision not to entertain the applicants' entreaties constitutes *administrative action* entitling the applicants to the relief they seek. When they read Murugasen J's judgment the applicants would have noted that she carefully considered the terms under which Zedek occupied the property.

[20] Zedek occupied the property only as an "interim measure" and in terms of a document described as a "short term tenancy agreement" which provided for its termination by the municipality on a number of grounds including the situation when "…the property was required by the [municipality]

for any purpose…". The judgment records that the property was urgently required by the municipality for use by its Water and Waste Service Unit.

[21] Notwithstanding that aspect being dealt with in the judgment the correspondence dealt with above reveals that the municipality's attorneys informed the applicants that the property was "…desperately needed by their client department".

[22] In preparing their founding papers in this application the applicants had recourse to the papers that served before Murugasen J. Indeed, a copy of the founding affidavit (including its annexures) that served before Murugasen J was annexed to the founding affidavit in this application. That document deals, in sufficient detail in my view, with the municipality's intended use of the property by the Water and Waste Service Unit.

[23] In my view there is nothing wrong or prejudicial with or concerning the municipality's intended used of the property and there was nothing untoward in the manner in which it did things. Both the intended use of the property and the manner in which the municipality went about achieving its objective were, in my view, perfectly reasonable. Neither *Grey's Marine* nor *Bullock* is of assistance to the applicant. Instead the statement in *Minister of Public Works & Ors v Kyalami Ridge Environmental Association & Ano (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) to the effect that "[u]nder the common law an owner of property ordinarily has no right to object to the use to which neighbouring property is put. The general rule is that the reasonable use of property by an owner is not subject to restrictions, even if such user causes prejudice to others" is the complete answer.

[24] I am accordingly of the view that my doubt was justified and I am compelled to conclude that the municipality's actions do not constitute administrative action.

[25] If I am wrong in that regard I turn to consider the contention that the applicants' entertained a legitimate expectation, in the sense described above, of fair administrative action on the part of the municipality. That was because section 3(1) of PAJA provides that "[a]dministrative action which materially and adversely affects the rights or ***legitimate expectations*** of any person must be procedurally fair" (my emphasis).

[26] I need now to examine the scope and extent of the legitimate expectation contended for by the applicants.

[27] It was argued by Zenek before Murugasen J that the municipality's failure to join the sub-tenants in that application was fatal. She dealt with that aspect of the case thus:

"**THE PROTECTION OF THE CONSTITUTIONAL RIGHTS OF THE SUBTENANTS**

38] Mr Marnewick argued that while traditionally sub-lessees did not have the right to receive notice of ejectment proceeding or to be joined in ejectment proceedings, the applicant was constrained by the provisions of Articles 25 and 34 of the South African Constitution to join the sub-lessees as interested parties with the right not to be deprived of property.

He also exhorted the court not to persist with an apartheid era attitude that the rights of the registered landowner were paramount to the exclusion of the rights of all others, including subtenants, by failing to afford recognition to the property rights of the subtenants, which extended to any property, movable or immovable which the sub-tenants had on the leased land to conduct their business, albeit subsidiary to those of the landowner.

39] This court recognizes that there is a constitutional imperative that the property right of all occupiers of land must be weighed against that of the owner of the property, and that these property rights have been recognized by the superior courts as rights worthy of protection.

However this property is utilised for commercial purposes and the benefit derived by the subtenants is financial as is the benefit to the respondent. The same constitutional protection afforded to the occupants of residential property does not apply. **(Ndlovu v Ngcobo; Bekker & Another v Jika 2003(1) SA 113 S C A)**

40] The effect of the respondent as lessee subletting is to create a lease between the respondent and the sublessee without creating a contractual nexus between the sublessee and the original lessor, viz, the applicant and without affecting the original lease or the contractual rights and obligations between the applicant and respondent.

41] It is therefore not for the respondent to insist that the subtenants be joined. The decision lies with the applicant and a risk that the applicant must take should it decide not to join the subtenants as parties to this application.

42] Furthermore any order of this court will not preclude the subtenants from exercising any right of recourse that they may have against the applicant and any grievance that the subtenants may feel against the Applicant may be ventilated at their instance and in any forum they consider appropriate. The applicant has in any event advised that it has an arrangement with the subtenants and has given an undertaking that any occupier will not be evicted without recourse to due procedure.

43] I am therefore not persuaded that should this court order the ejectment of the respondent given the facts and circumstances of this case, it would be neglecting its constitutional and common law obligations to protect the rights of the subtenants."

[28] In the founding affidavit in the present proceedings the deponent, who is the first applicant's managing member, says that:

"Upon perusing the judgment the First Applicant became aware of the undertaking given by the Respondent, and despite not having any knowledge of any agreement, expected the Respondent to contact them in due course regarding its eviction or potential further agreement regarding the leasing of its share of the property. A legitimate expectation of a fair procedure in respect of the Applicants (sic) future on the property was thus formed. Despite the undertaking, none of the Applicants were ever contacted by the Respondent, no agreement was ever reached with them and no hearing or fair procedure has been given."

[29] The second and third applicants, in confirmatory affidavits, merely confirmed what the deponent to the founding affidavit said without adding any additional facts.

[30] After the matter was first in court on 9 May 2012 the founding papers were, by agreement, supplemented. The supplementary affidavit, deposed to by the same person who deposed to the founding affidavit, says the following about the legitimate expectation:

"I wish to make it clear that the undertaking provided by the Respondent in the earlier proceedings (case number 12482/2008) created the legitimate expectation on the part of the Applicants that the Respondent would follow fair administrative procedure in dealing with the Applicants. It is that administrative procedure that the Applicants seek to enforce in this application and the right to lawful, reasonable and procedurally fair administrative action in terms of section 33 of the Bill of Rights and of PAJA."

[31] The deponent to the affidavit delivered by the intervening applicant, in addition to confirming that he had read the founding papers, says that intervening applicant "…equally requires a fair administrative procedure to be followed before the Respondent makes a decision regarding the Intervening Applicant's continued operation from the premises".

[32] I am accordingly unable to ascertain when and how the second, third and intervening applicants came to form, each for their own part, the legitimate expectation relied upon. They do not claim to have read Murugasen J's judgment and neither do they say when and how they gained knowledge of its contents.

[33] As for the first applicant, it appears that until shortly prior to 24 April 2012 it only contended for a right to remain on the property because Zedek was pursuing its appeal remedies.

[34] In addition, the applicants claim not to have any knowledge of the "…arrangement with the subtenants…" and of the "…undertaking that any occupier will not be evicted without recourse to due procedure…" as referred to by Murugasen J in paragraph 42 of her judgment. They were not present at court when Zedek's case was argued and were not party to those proceedings.

[35] Notwithstanding those shortcomings I shall assume, for the purposes of what follows in this judgment, that the applicants gained knowledge of that judgment and of the terms quoted above soon after it was delivered.

[36] In *Administrator, Transvaal & Ors v Traub & Ors* 1989 (4) SA 731 (A) Corbett CJ, after extensively reviewing the authorities, both foreign and local, at 758 D described the doctrine of legitimate expectation as being "…sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken".

[37] In *MEC for Education: Northern Cape Province, & Ano v Bateleur Books (Pty) Ltd & Ors* 2009 (4) SA 639 (SCA) Jafta JA said (footnotes omitted):

"[67] The application of the doctrine of legitimate expectation is determined on a case-by-case basis. The test for establishing whether a legitimate expectation exists is twofold. A party claiming that its expectation has been adversely affected by administrative action must prove, by means of accepted facts, either that the decision-maker had made a promise or that it followed a regular practice which the claimant reasonably expected to continue and be extended to it. Once this is established, then the court must determine whether, in the circumstances of the particular case, the facts introduce a legal duty which obliges the decision-maker to afford the claimant a predecision hearing. This entails a value judgment to be made by the court while bearing in mind the need to strike the balance referred to in *Traub*."

[38] Although that statement was made in a minority judgment it appears that the majority judgment accepted that it correctly reflects the state of our law.

[39] In an earlier decision in *Walele v City of Cape Town & Ors* 2008 (6) SA 129 (CC) Jafta AJ (he was then an acting judge in the Constitutional Court) said (footnotes omitted):

"[37] Since the concept of legitimate expectation referred to in s 3 of PAJA is not defined, it must be given its ordinary meaning as understood over a period of time by the courts in this country. But the difficulty is that administrative action is defined in s 1 of PAJA as a decision which adversely affects the rights of another person. In the definition no reference is made to a decision affecting legitimate expectations. Yet s 3 refers to administrative action that affects legitimate expectations. Applying the definition to the interpretation of s 3 will lead to absurdity. Therefore, I am willing not to apply it and to assume that s 3 of PAJA confers the right to procedural fairness also on persons whose legitimate expectations are materially and adversely affected by an administrative decision. In the context of s 3, administrative action cannot mean what was intended in the definition section. Applying the definition to s 3 would lead to an incongruity or absurdity not intended by Parliament. The general rule is that a definition meaning may not be applied if its application will lead to such consequences."

[40] In paragraph 15 of the decision in *Duncan v Minister of Environmental Affairs & Tourism & Ano* 2010 (6) SA 374 (SCA) I am reminded that:

"[r]eliance on the doctrine of legitimate expectation for any purpose presupposes that the expectation qualifies as legitimate. The requirements for the legitimacy of such expectation have been formulated thus:

(a) The representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications.

(b) The expectation must have been induced by the decision-maker.

(c) The expectation must be reasonable.

(d) The representation must be one which is competent and lawful for the decision-maker to make.

(See, for example, *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) (2001 (2) SACR 542; 2002 (1) BCLR 41) para 28; *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) (2003 (4) BCLR 378) para 19; Lord Woolf, J Jowell & A Le Sueur *De Smith's Judicial Review* 6 ed (2006) paras 12-029 et seq.)"

[41] It is useful to track the authorities relied upon in *Duncan*.

[42] *South African Veterinary Council & Ano v Szymanski* 2003 (4) SA 42 (SCA) refers, with approval, to the following passage in *National Director of Public Prosecutions v Phillips & Ors* 2002 (4) SA 60 (W):

"[28] The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:

(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': *De Smith, Woolf and Jowell (op cit* at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

(ii) The expectation must be reasonable: *Administrator, Transvaal v Traub (supra* at 756I - 757B); *De Smith, Woolf and Jowell (supra* at 417 para 8-037).

(iii) The representation must have been induced by the decision-maker: *De Smith, Woolf and Jowell (op cit* at 422 para 8-050); *Attorney-*

General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346 (PC) at 350*h* - *j*.

(iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E - G."

[43] And in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350*h* – *j* the Privy Council said:

"The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in any way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry."

[44] During argument Mr *Voormolen* conceded that an examination of the "undertaking" recorded by Murugasen J is necessary to underpin the applicants' reliance on the doctrine of legitimate expectation. That concession was, in my view, correctly made. He however contended that that examination must be one confined to the judgment alone, without regard to anything that unfolded before Murugasen J during argument. I do not agree.

[45] In *Administrator, Cape, & Ano v Ntshwaqela & Ors* 1990 (1) SA 705 (A) Nicholas AJA said at 715 F – 716 C:

" In *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) Trollip JA made some general observations about the rules for interpreting a Court's judgment or order. He said (at 304D - H) that the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it.

The position is essentially no different from that where a patent specification is interpreted. That consists of three main parts: the title, the body of the specification and the claims. And the interpreter must be mindful of the objects of a specification and its several parts. The purpose of the claims is to delimit the monopoly claimed. If the meaning of a claim is clear and unambiguous, it is decisive and cannot be restricted by anything else stated in the body or title of the specification. On the other hand, if it is ambiguous, the body or title of the specification must be invoked to ascertain whether at least a reasonably certain meaning can be given to the claim. See *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 615B - D. Similarly, the order with which a judgment concludes has a special function: it is the executive part of the judgment which defines what the Court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it.

It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

[46] It will be recalled that the Order made by Murugasen J (see para 4 above) is not qualified in any respect. It was not made subject to the "undertaking" or "arrangement" recorded in paragraph 42 of her judgment nor does it even refer to that paragraph. It would seem therefore, in the light of *Gentiruco* and *Ntshwaqela*, and adopting a generous interpretation, that the Order made by Murugasen J is at odds with paragraph 42 of her judgment.

[47] Given that discrepancy, was it safe for the applicants to rely upon paragraph 42? Was the "representation underlying the expectation … clear, unambiguous and devoid of relevant qualification"? Did the applicants seek clarification or did they simply proceed at their peril?

[48] In the applicants' replying affidavit the deponent states:

"Furthermore, I point out that when the judgment was handed down, the applicants' attorneys wrote to the respondent's attorneys bringing the attention of the relevant paragraphs of the judgment to the respondent's attorneys. The respondent's attorneys did nothing to dispel the legitimate expectation that had been created in the mind of the applicants. They merely said they would revert once taking instructions…"

[49] That statement is misleading in the extreme and the deponent to the affidavit and its draftsperson are both deserving of censure. As I have set out above, the judgment was delivered on 28 March 2011 and the first time that paragraph 42 thereof was referred to or a suggestion that a request for reasons would be forthcoming was made was in the letter of 24 April 2012; four days short of a year and a month later! As the correspondence reveals, a pertinent request for reasons was only made on, Wednesday, 2 May 2012. The respondent's attorneys, on 3 May 2012 indicated that that request had been referred to the municipality. On, Saturday, 5 May 2012 this application was threatened, with the papers being delivered on, Monday, 7 May 2012. I am in full and perfect agreement with the submission made by Mr *Broster*, who appeared for the municipality, that given the pace at which matters unfolded, that it was eminently reasonable for the municipality to focus its attention on the application and furnish such explanation and reasons as may be necessary when it delivered its answering papers.

[50] In my view the matter demanded further investigation by applicants before resorting to litigation. The apparent conflict between Murugasen J's Order and paragraph 42 of her judgment, if the applicants wanted to ignore the clear terms of that Order and rely on any suggestion of a legitimate expectation, was clearly indicative of such an approach. In any event, and

given additionally that the applicants wanted to rely on a statement, not made to them personally by the author personally, but instead recorded “third-hand” so to speak, called for a cautious approach to be adopted.

[51] It is for those reasons that I reject Mr *Voormoolen’s* submission that I ought to look solely at the judgment and conclude that regard must be had to what unfolded before Murugasen J and the submissions made to her. The applicants, in reply, have put up a complete transcript of the argument before Murugasen J. It is to that that I now turn.

[52] As the above extract from the judgment reveals, Mr *Marnewick* appeared for Zedek. Ms *Norman* appeared for the municipality. When the matter was called Mr *Marnewick* raised a point *in limine*, supported by an application handed up from the Bar, which he said entitled him to argue first. The point related to the non-joinder by the municipality of, *inter alia*, the present applicants whom he referred to as “sub-tenants”. He explained it thus:

“…the fact that we have a number of named persons who are carrying on business there who have no knowledge of these proceedings and the point I wish to argue is that the old law which we had before 1994 where the rights of such persons were actually ignored in court. They were ignored. The first thing they would see would be a warrant of execution, a warrant of ejectment from the Sheriff throwing them off the property.”

[53] During the course of argument it transpired that in addition to Zedek’s sub-tenants there were 15 families, described as “informal residents”, also residing on a portion of the property. During the course of argument Ms *Norman* said the following:

“M’Lady, I have had a look at the application and I have had a look in particular to paragraph 3.1 which deals with these 15 other families who are not named and I’ve referred to them in passing to my learned friend as ghosts because they are not identified. We don’t know whether in fact there are any 15 other families. But be that as it may, M'Lady, this does not affect the case that is before M'Lady because the respondent, that is the deponent to this affidavit, if I may draw M'Lady's attention to page 13, paragraph 3.2, he says:

> 'I was under the mistaken impression that as these informal residents were unlawful occupants of the subject property, it was not important to have mentioned them.'

So clearly these occupants are not occupying that piece of land through the respondent. So whatever order M'Lady would grant, it would not affect them because they are in, according to the respondent's view, they are in unlawful occupation. He did not grant them permission. They are not occupying this land through the respondent. So even if the respondent is evicted, they will not be affected. And my instructions are in fact to give an undertaking to M'Lady that these families, because according to the respondent, they are in the process of dealing with the council to get housing. If that is the case and even if it were not the case, these 15 families, if the order is granted, they would be not be evicted until and unless there has been compliance with the PIE Act. So it doesn't change the situation at all."

[54] Ms *Norman* continued her argument by making reference to a then recent decision of the Supreme Court of Appeal dealing with informal residents on commercial property and went on thus:

"But be that as it may, M'Lady, we say in so far as these people are concerned, if they are there, my instructions are to give an undertaking and to make that recorded by this Court that they will not be removed in any way other than in terms of the PIE Act".

[55] Ms *Norman's* reference to the PIE Act is, of course, a reference to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998.

[56] To my mind it is absolutely clear that the undertaking delivered by Ms *Norman* was restricted to the informal occupation by the, so-called, "15 families" and was by no stretch of the imagination extended to include the "sub-tenants". I have carefully examined the entire transcript and although in one or more other instances the terms "15 families" or "ghosts" or "sub-tenants", when taken out of context, could be said to have become confused,

the import of the undertaking outlined above was in no way diluted. To put matters beyond the pale, towards the end of her argument, Ms *Norman*, said the following:

"We ask M'Lady to grant the applicant the orders sought in the Notice of Motion and in so far as the subtenants, if M'Lady finds that the subtenants, they are nameless according to this, M'Lady as a matter of proper precaution, M'Lady could incorporate in the order that the order must be executed as it is sought with the exclusion of those families, if there are any families on site".

[57] Although Ms *Norman* again used the term "subtenant" her submission is abundantly clear. She was referring **only** to the 15 families.

[58] And so it is that context is everything.

[59] The applicants cannot contend for any legitimate expectation and are accordingly not entitled to the relief sought.

[60] Having said that I need to address specifically the applicant's request for time to relocate as foreshadowed in sub-paragraph 1 c above. To my mind everything the applicants sought was underpinned by the legitimate expectation contended for. As I have found, that contention was unfounded. The result is that the applicants find themselves in no better position than Zedek. When Zedek's right of occupation terminated so did that of the applicants; and when Zedek is compelled to vacate the property they are similarly compelled. There is consequently no basis in law for the applicants to claim to be allowed a period of time to relocate.

[61] The application is dismissed with costs, such costs to be borne jointly and severally by the applicants, the one paying, the others to be absolved, and are to include all costs reserved on previous occasions.

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Vahed J

CASE DETAILS:

Date of Hearing	:	18 October 2012
Date of Judgment	:	23 November 2012
For the Applicants	:	V Voormolen
Instructed by	:	Cox Yeats 21 Richefond Circle Umhlanga Ridge
For the Respondent	:	J P Broster
Instructed by	:	Ndamase Incorporated 4 Palm Boulevard Gateway