



IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: AR21/11

In the matter between:

STEYN'S FUNWORLD CC

Appellant

and

ETHEKWINI MUNICIPALITY

Respondent

JUDGMENT

SEEGOBIN J

[1] This is an appeal, with leave of the trial court (Norman AJ), against the whole of her judgment delivered on 13 May 2010.

[2] The preliminary question to be decided in this appeal is whether it should be entertained at all. As appears from what follows the factual background against which this question arises can be stated quite simply.

[3] The undisputed facts are: The appellant had leased certain land owned by

the respondent along the Durban beach front. The lease in question was a long lease (twenty five (25) years) which commenced on 1 May 1992 and is due to expire on 30 April 2019 without any right of renewal. A Notarial Deed of Lease ("the lease agreement") to this effect was registered on 31 March 1994. The main purpose of the lease agreement was to allow the appellant to operate an amusement park and all other activities associated therewith on the land concerned.

[4] In preparation for the 2010 FIFA World Cup Tournament which was due to commence on 11 June 2010, the respondent embarked on a project known as the "*Dairy Beach Node Redevelopment*". The Dairy Beach was an area identified by the respondent as requiring substantial attention to meet public demand for secure, neat and attractive recreational amenities and access to the Durban beachfront. This redevelopment would of necessity involve a portion of the leased property which is located in Dairy Beach between O.R. Tambo Parade (formerly Marine Parade) and the beachfront.

[5] One of the objectives sought to be achieved by the redevelopment was to provide covered stalls to accommodate twenty one (21) traders who were trading opposite the Protea Edward hotel on O.R. Tambo Parade. The overall aim of the respondent was to ensure that by the time the redevelopment was completed, all two hundred and fifty two (252) traders on the beachfront would be suitably accommodated with the twenty one (21) traders referred to above occupying a portion of the land leased to the appellant. The respondent also envisaged that if these improvements were completed timeously, this would contribute greatly to the city's economic growth and benefit everyone including the business of the appellant.

[6] With these aims and objections in mind, the respondent commenced as early as February 2008, advising the appellant of the proposed redevelopment and

invited the appellant to discuss the actual area to be excised from the leased portion for this purpose. The appellant was also provided with the plans which depicted the area to be excised. Some time in February 2010 the appellant recorded its attitude to the redevelopment and the negative impact this would have on its business. It accordingly requested an amount of R1.5 million from the respondent as financial assistance due to the proposed redevelopment. It seems that at some stage it even approached the respondent for a reduction of rental due to the loss of income it would allegedly suffer as a result of the redevelopment.

[7] By March 2010 it was clear that the appellant was not prepared to allow the respondent the right to excise a portion of the leased property in order to give effect to its redevelopment plans. With the World Cup looming, the respondent decided to invoke the provisions of Clause 26 of the lease agreement by issuing a notice on 17 March 2010 in terms of which it, *inter alia*, notified the appellant that it intends partially cancelling the lease in respect of six hundred and seventy six square meters (676m²) of the property for public purposes. It is this notice which triggered an urgent application by the appellant on 25 March 2010 in terms of which the appellant sought an interim order which, *inter alia*, interdicted the respondent from interfering with the appellants use and enjoyment of the leased premises and staying “*all expropriation proceedings*” pending the finalisation of the matter.

[8] An interim order was obtained by consent of the parties with the return date being 7 April 2010. On 6 April 2010, and on an urgent basis, the respondent brought a counter-application in which it sought, *inter alia*, a discharge of the rule *nisi* granted on 25 March 2010, an order directing the appellant to vacate the excised portions of the leased property, an order for cancellation of the lease insofar as the excised portions were concerned and an order allowing the appellant to exercise its right to claim compensation from the respondent in terms

of Clause 26 of the lease agreement.

[9] The matter came before Norman AJ on 13 May 2010. After hearing argument the learned acting judge granted an order in favour of the respondent in terms of paragraphs (a), (b), (c), (e) and (f) of its counter-application and indicated that she would provide reasons for the said order before the end of that week. Her full reasons were duly delivered on 21 May 2010.

[10] The primary dispute in the court *a quo* turned on the correct interpretation to be placed on the provisions of Clause 26 of the lease agreement. To place matters in perspective it is perhaps necessary to set out the full text of Clause 26 which reads:

“26. Expropriation

In the event of the land hereby demised, or any portion thereof, being required for any purpose in respect of which the City Council is vested under any Law or Ordinance with powers of expropriation, the City Council may cancel this lease, entirely or in respect of the required portion thereof, upon notice in writing, to the Lessee and shall pay to the Lessee as compensation such amount representing the value of all fixed assets erected by or on behalf of the Lessee which cannot be readily removed, as may be determined by mutual agreement, or failing mutual agreement by arbitration in terms of the Arbitration Act 1965 (Act 42 of 1965).”

[11] The respondent’s notice dated 17 March 2010, the validity of which was placed in issue by the appellant in the court *a quo*, read as follows:

“You are hereby notified that the Municipality intends partially canceling your lease under Notarial Deed of Lease K264/94L as amended to the extent indicated under and as depicted on the attached Plan SJ4582/10 –

1. All your rights of use and enjoyment in and to 575m² of Lease 66 on Erf 12281, Durban.
2. All your rights of use and enjoyment in and to Lease 66 on Erf 12881, Durban above 5.25 meters msl in extent 320m². Your lease of the staff change rooms and ablutions located below ground level will not be affected.

The cancellation of the lease rights will take effect on 23 March 2010 from which date the Municipality will assume occupation of the cancelled lease areas.

Your lease of the areas of land in question is cancelled in terms of Clause 26 of the Notarial Deed of Lease K264/94L, as amended, for public purposes.

Please be advised that the perimeter fence will be relocated to the new boundary identified as E,F,G,H,L,M,N,P,Q,R,S,U,V,W,X,Y,Z,A1,B1 on the attached SJ Plan, and the emergency exit from the change rooms will be realigned to ensure that this is located entirely within the remaining lease area. This work will be undertaken at the cost of the Municipality."

[12] The appellant's case both in the court *a quo* and in this court was that the respondent's notice was intended to be a notice of expropriation in which case the respondent was obliged strictly to invoke the procedures set forth in the Expropriation Act No.63 of 1975. The respondent's case on the other hand was that Clause 26 was nothing more than a reservation of its rights to reclaim the entire property or to excise a portion thereof in terms of the agreement at any time prior to its termination by effluxion of time for certain defined reasons. It contended that the notice of 17 March 2010 constituted a notice of partial cancellation of the lease agreement and not an expropriation notice as required in terms of the Expropriation Act.

[13] Having considered the arguments advanced by the respective parties on the

construction to be placed on the provisions of both Clause 26 of the lease agreement as well as the respondent's notice dated 17 March 2010, the learned Judge *a quo* concluded that the notice was nothing more than a notice of cancellation which the respondent was entitled to deliver in terms of Clause 26. It was not a notice of expropriation. From her judgment it appears that this finding was essentially based on the following considerations. First, the provisions of Clause 26 were agreed to by the parties when the lease agreement was concluded. Second, Clause 26 authorised the respondent to cancel the lease agreement in its entirety or in respect of a portion thereof for “**any purpose**”. Third, the clause entitled the respondent to act as it did without first having to obtain the consent of the appellant or having to comply with the procedural requirements set out in the Expropriation Act. Fourth, the respondent had proved that the purpose for which a portion of the land was required was for a public purpose and/or in the public interest.

[14] Shortly prior to the appeal being heard on 10 August 2011, the parties were requested to make submissions in terms of section 21A(1) of the Supreme Court Act 59 of 1959 (“the Act”). Section 21A(1) of the Act reads:

“(1) When at the hearing of any civil appeal to the Appellate Division [Supreme Court of Appeal] or any Provincial or Local Division of the Supreme Court [High Court] the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.”

[15] It is well established that where the relief sought on appeal is moot and would be of academic interest only, the merits of the appeal will not be entertained and the appeal will be dismissed on that ground alone.¹ Section 21A however confers a discretion on this court to deal with the merits of the appeal.

¹See: *Ethekwini Municipality v Combined Transport Services* (115/10) [2010] ZASCA 158 (1 December 2010);

also: *Port Elizabeth Municipality v Smit* 2002(4) SA 241 (SCA); *Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another* 2005(1) SA 47 (SCA)

This would be done where an appeal involves a question of law and which is likely to arise again.²

[16] The essential question for determination in considering the provisions of section 21A(1) is whether or not the appeal has any practical effect.³ It is accordingly necessary to consider the context of the matter as it was at the time when the application and counter-application were instituted and subsequent thereto.

[17] In supplementary heads filed on behalf of the respondent, counsel for the respondent took the point that the disputes which arose between the parties and which resulted in urgent applications being brought by both sides, were now of academic interest only and as such the appeal fell to be dismissed. She further drew attention to the following facts which were common cause in the court *a quo*, viz: (a) the dispute had arisen pursuant to a project to conduct extensive improvements at the Dairy Beach Node; (b) the respondent was obliged to undertake and complete the work before the commencement of the 2010 FIFA World Cup Tournament in June 2010, and (c) there was a need to accommodate twenty one (21) street vendors who required shelter. She further submitted that in determining the present issue, it was important to have regard to what transpired after the decision of the court *a quo*. It seems that subsequent to the determination of the applications by the court *a quo* but prior to the application for leave to appeal and the commencement of the 2010 FIFA World Cup, the parties agreed that some of the work could be undertaken and as such there would be no need for an application to suspend the orders in terms of Rule 49(11) of the Uniform Rules. Thereafter the appellant permitted the respondent to occupy certain portions of the disputed property and to effect improvements thereto. It was pointed out that to some extent these works were substantially completed, in others they were suspended due to these proceedings and the rest is currently in

²See: Land & Landbouontwikkelingsbank van Suid Africa v Conradie 2005(4) S 506 (SCA)

³See: Premier, Provinsie Mpumalanga v Groblersdalie Staderaad 1998 (2) SA 1136 (SCA) at 1141 D-E

progress. The shelters in particular have been completed. More importantly the 2010 FIFA World Cup Tournament, the event giving rise to the need to redevelop the Dairy Beach Node has passed. In light of all this, it was submitted that the need to properly interpret the provisions of Clause 26 and related issues of urgency in the counter-application were resolved which renders the present appeal as having no practical effect.

[18] In supplementary heads of argument filed on behalf of the appellant, the main contention advanced was that *“the appellant and public in general would want affirmation whether the respondent’s conduct as alerted to should in general be sanctioned and/or scrutinized”*. It was further submitted, *inter alia*, that *“the appellant is desirous of having the expropriated portion returned to it (this would follow were the above Honourable Court to find in favour of the appellant) and if the appeal fails; the respondent will insist on the remaining portion being transferred/delivered to it.”*

[19] The view I take of this matter is that the practical result of the agreement [para.17 *supra*] concluded between the parties after the determination of the applications by the court *a quo* appears to be that they have effectively resolved all their differences. The agreement allowing the respondent to proceed with the redevelopment on the disputed portion of land was concluded before the commencement of the 2010 FIFA World Cup Tournament and certainly before the appellant’s application for leave to appeal was heard. In my view, there is accordingly no longer any dispute or *lis* between them. The circumstances giving rise to the respondent’s plans to redevelop the Dairy Beach Node no longer exist. The appellant’s contention that the merits of the appeal should be determined and if found to be in it’s finding, would allow the appellant to have the *“expropriated”* portion returned to it, loses sight of the fact that substantial changes have and continue to be effected to the disputed portion.

[20] In my view, as matters presently stand, there is no live issue which exists between the parties that require resolution. The appellant has not provided any evidence to establish that a similar dispute, based on similar facts, will arise in the future. Whether or not the respondent will again in future enforce its rights in terms of Clause 26 of the lease agreement is at best speculative. It is a known fact that “*courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise ..*”.⁴

[21] In *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others*,⁵ Ackerman J, referring to *JT Publishing (Pty) Ltd & Another v Minister of Safety and Security & Others*⁶ said the following at paragraph 21 (footnote 18):

“A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.”

[22] I accordingly find that the issues which were raised in the court *a quo* have now become academic. The matter is clearly moot and no factual basis exists for the exercise of this court’s discretion to entertain the appeal. It follows therefore that the appeal falls to be dismissed.

ORDER

[23] I accordingly make the following order:

4 See: *Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another*, *supra*, at para. [41]

also *EThekweni Municipality v Combined Transport*, *supra*, para. [15]

5 2000(2) SA 1 (CC)

6 1997(3) SA 514 (CC)

The appeal is dismissed with costs.

JAPPIE J

I agree

KRUGER J

I agree

Date of Hearing : 10 August 2011

Date of Judgment : 26 August 2011

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