REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Case No: 22557/2015
Case No: 25597/2011

Reportable: No
Of interest to other Judges: No
Revised: No

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SIGNATURE

Date:

In the matter between:

SUMMER SEASON TRADING 63 (PTY) LTD	Applicant
and	
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	1st Respondent
ILLEGAL OCCUPIERS OF THE REMAINING EXTENT OF PORTION 34 OF THE FARM KAMEELZYNKRAAL 547	2nd Respondent
MEC FOR LOCAL GOVERNMENT AND HOUSING, GAUTENG	3rd Respondent
MINISTER OF HUMAN SETTLEMENTS	4th Respondent

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS 5th Respondent

PREMIER, GAUTENG PROVINCE 6th Respondent

APPLICATION FOR LEAVE TO APPEAL

MOOKI J

1 The first respondent ("the City") seeks leave to appeal on the following grounds:

1.1 The Court did not enquire as to availability of adequate alternative accommodation when ordering relocation to the remaining extent of portion 34 of the farm Kameelzynraal 547 JR ("the property").

1.2 The Court had no information about alternative accommodation, there being no affidavits confirming the availability of alternative accommodation.

1.3 The Court had no information about the property. There was no consent by the occupiers. There were no negotiations between the City and the occupiers. The Court did not know the distance between the property and the current property. The Court did not have information whether the property was vacant are occupied.

1.4 The Court erred in refusing to grant the City leave to file further affidavits dealing with the current state of affairs given that the eviction order was granted more than a decade ago.

1.5 The Court, had the Court permitted the filing of further affidavits, would have been informed that the property was unavailable and that the property is 60 km away from the current property, is a proclaimed township, and was occupied.

1.6 The Court erred in refusing the holding of an inspection in loco as requested by the occupiers.

1.7 The Court erred in holding that the City was required to obtain the consent of the applicant before the City withdrew the 11 March 2015 expropriation notice, in that section 23 (1) of the Expropriation Act 63 of 1975 does not require a municipality to seek consent of a landowner before withdrawing an expropriation notice.

1.8 The Court erred in finding that section 79 (24) (a) (1) of the Local Government Ordinance, 17 of 1939 ("the Ordinance"), read with section 5 of the Expropriation Act 63 of 1975, did not authorise the City to expropriate the applicant's property.

1.9 The Court erred in finding that the City had to comply with section 9 (3) (a) of the Housing Act 107 of 1997 (The Housing Act") to expropriate the applicant's property, in that the City is not obliged to invoke the Housing Act where the purpose of the expropriation is to provide land to a community.

1.10 The Court erred in finding that the City did not withdraw the 11th of March 2015 expropriation notice in the manner set out in section 7 of the Expropriation Act.

1.11 The Court erred in finding that the expropriation was to circumvent and subvert the eviction order of 30 April 2013. The Court ought to have established whether the expropriation was for a public purpose or public interest.

1.12 Erred in upholding the contention that the land was not suitable for human settlement.

1.13 Erred that the City did not litigate in earnestness, whereas the City had no choice but to participate in the litigation.

1.14 The City raised genuine constitutional issues. There was no basis for costs on a punitive scale, and the Court ought to have applied Biowatch.

1.15 Erred in finding that the eviction order was an absolute bar to expropriation of the property.
1.16 Erred in finding that there can be no withdrawal of the expropriation notice without the consent of the previous owner, even where that owner expressly refused to grant consent.
2 The second respondent (the occupiers") seek leave to appeal on the bases that the Court erred:
2.1 In holding that the expropriation was for an ulterior purpose.
2.2 In holding that the eviction order had to be given effect.
2.3 By not exercising its discretion as set out in section 8 of PAJA in the finding that the Court could not undo the eviction order.
2.4 In holding that directing the City to start the expropriation process de novo would infringe the principle of separation of powers.
2.5 In holding that Donkerhoek was adjacent to the land, when Donkerhoek is some 60km away from the land.
2.6 By awarding costs against the occupiers in the eviction proceedings; in that the Court ought to have followed the decision in Biowatch because the occupiers were acting to protect their constitutional rights.
3 The application by the City does not meet the requirement for granting leave to appeal.
4 Leave to appeal "… *must not be granted unless there truly is a reasonable prospect of success.* Section 17(1)(a) *of the* Superior Courts Act 10 of 2013 *makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard."*[1]
5 The litigants, in their joint practice note, agreed that the date by when the relocation was to be effected and the costs in the eviction proceedings was one of the issues for determination by the Court.
6 The respondents did not, before the hearing of the matter, seek leave to place information before Court regarding the appropriateness or otherwise of the relocation of the occupiers.
7 The applicant made-out a case in its papers that the City acquired the property after the grant of the eviction order; that the property was near Kanana Village and that the property was suitable for relocating the occupiers. The City had every opportunity in its answering affidavit to indicate why, according to the City, the property was not as contended for on behalf of the applicant. The City did not do so. The City answered with a bare denial.
8 There is no merit to the grounds that the Court should have asked for affidavits before determining whether the occupiers should be relocated. The dispute on issues for determination were properly laid out in the papers.
9 There was, similarly, no cause for the holding of an inspection in loco. This is more so because the respondents did not dispute, in any meaningful way, averments on behalf of the applicant that the property was available for the relocation of the occupiers. The Court had already, in eviction proceedings, considered and made findings regarding, among others, the living arrangements and conditions of the occupiers. The issue could not be relitigated.
10 It was unnecessary for the Court to consider whether expropriation was for a "public purpose" once the Court determined that the City did not withdraw the first expropriation notice in accordance with the law. The City accepted that the second expropriation notice would have no legal foundation if the Court found that the withdrawal of the first expropriation notice was unlawful.
11 The City accepted that the applicant had to consent to the withdrawal of the first expropriation notice. There was no such consent. It follows that the second

[1] MEC for Health, Eastern Cape v Mkhita 2016 JDR 2214 (SCA), para 16

expropriation notice could not be lawfully issued. It was unnecessary, therefore, for the Court to address, for example, whether:

11.1 The expropriation was for a "public purpose".

11.2 The City could expropriate pursuant section 79(24)(a)(1) of the Ordinance.

11.3 Section 9(3)(a) of the Housing Act applied.

12 The grounds of appeal on these points have no substance. For example, and in relation to Section 9(3)(a) of the Housing Act, the City's entire case is that the occupiers were already settled on the land. There was therefore no new land to be given to the occupiers, following which they would then build houses on that land.

13 The Court is not persuaded that it erred in its finding that the expropriation was not intended to subvert the eviction order. The Court's justification for this view is as detailed in the judgement.

14 The City did not request the applicant to consent to the City withdrawing the first expropriation notice. The circumstances preceding the withdrawal of the first expropriation notice are detailed in the judgement.

15 The Court found that the expropriation notices were not effected in accordance with the law. The issue of whether an eviction order is an absolute bar to expropriation is immaterial on a determination that expropriation was not effected in accordance with the law.

16 The Court is not persuaded that it erred in its finding regarding how the City litigated and in saddling the City with a punitive cost order. The bases for the findings are as set out in the judgement.

17 The application by the occupiers equally does not meet the requirements for the grant of leave to appeal.

18 The grounds of appeal by the occupiers are, in the main, encompassed in those made by the City. I do not repeat the views of the Court in relation to those grounds of appeal that are common to the respondents.

19 The decision in *Staufen Investments (Pty) Ltd v The Minister of Public Works and Others*[2] does not support the contentions advanced on behalf of the occupiers. The issues in that decision are also distinguishable from those considered by this Court.

20 The discretion in section 8 of PAJA is not unfettered. The Court's view regarding the exercise of its discretion is detailed in the main judgement.

21 I am not persuaded that the Court erred in its finding that it would violate the principle of separation of powers were the Court to order the City to embark on an expropriation of the property.

22 The applicant set-out the details regarding Donkerhoek in its founding papers. There was no challenge that Donkerhoek was not adjacent to the property. The referencing of Donkerhoek being 60 km away from the property is a clear error, which the respondents accepted during the hearing of this application.

23 Biowatch is not authority for the view that a litigant is never saddled with costs where such a litigant acts to protect a constitutional right. The Constitutional Court has stated that:

Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.[3]

24 The Constitutional Court also remarked that:

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[2] 2020 (4) SA 78 (SCA)

[3] Biowatch Trust v Registrar Genetic Resources and Others 2009 (6) SA 232 (CC), para 16

Thus, litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. Nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves. What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution.[4]

25 It bears pointing out that the applicant was equally seeking to vindicate a right in the constitution. The occupiers do not enjoy a privileged position that renders them immune from a cost order.

26 I make the following order:

26.1 The applications by each of the first respondent and the second respondents are dismissed.

26.2 The respondents are ordered to pay costs.

Omphemetse Mooki
Judge of the High Court
Heard: 1 February 2024
Delivered: 11 March 2024

For the applicant: H S Havenga SC
Instructed by: Peet Grobbelaar Attorneys

For the first respondent: W R Mokhare SC (with K Phuroe)
Instructed by: The State Attorney, Pretoria

For the second respondent: C du Toit
Instructed by: Gilfillan du Plessis Attorneys

[4] Biowatch Trust, para 17