Reportable

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

CASE NO. 8525/2009

In the matter between:

**DURBAN POINT DEVELOPMENT COMPANY (PTY) LTD** **APPLICANT**

**and**

**DURBAN PADDLE SKI CLUB** **RESPONDENT**

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**JUDGMENT**

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**MURUGASEN, J.**

1] This is an application by the owner of immovable property for the eviction of a lessee whose tenure under a lease agreement between the parties has been duly terminated.

2] The applicant herein, Durban Point Development Company (Pty) Ltd seeks an order for the eviction of the Respondent, Durban Paddle Ski Club and any person or persons occupying by, through or under the respondent, from its property described as Remainder of Erf 12524 Durban (the property) situate on the Durban beachfront. The respondent was previously in lawful occupation of a portion of the property under and in terms of a written agreement of lease. The lease was terminated on notice by the applicant, and the respondent was obliged to vacate the property by or before 30 June 2008.

3] It is common cause that the property is to be developed as part of a

project termed the “Point Development Project” initiated by the eThekwini Municipality in 2001. The applicant has obtained the requisite approval to proceed with the next phase of the project which includes the construction of a ‘superbasement’ on the property and other sites owned by the applicant, and a small craft harbour. The applicant avers that the superbasement will be constructed within the confines of its own property and not encroach on land outside its boundaries.

4] The respondent opposes the application on the following grounds :

1) the relief sought would breach an undertaking allegedly given to the respondent in respect of its relocation;
2) the intended development is not in the public interest; and
3) the application for eviction is premature because review proceedings have been instituted against the dismissal by the Department of Environmental and Agricultural Affairs ( the department) of the appeals lodged by the respondent and others against the approval for the development granted to the applicant. There is further, a separate application in respect of the Beacons and Boundaries agreement and the dispute in respect of the determination of the high water mark, and consequently a prospect that the boundary or boundaries of the applicant’s property may be resurveyed, which may in turn impact on the area to be developed (which includes the area currently occupied by the respondent).

5] The respondent nevertheless deals with the issues under review and in the other application comprehensively in its heads of argument, only to thereafter concede that the issues do not lie within the purview of this application as they form part of the other application or review and are submitted to this court only in the context that the issues impact on the respondent’s contention that the court ought to direct that the eviction application be pended until the outcome of the other proceedings are determined.

6] In any event I am not persuaded that the issues ought to have been placed before this court as the issue to be decided in respect of the application for eviction is a narrow one which relates to the rights of tenure and to the protection and promotion of public interest only to the extent that such interest is affected by the eviction application and the proposed development of the property. This has resulted in the court being unduly burdened with voluminous, irrelevant and repetitive pleadings and supporting documentation, which has contributed to the delay in the finalisation of this application.

7] I am also unable to find that the review proceedings are a bar to the finalisation of this application.

In the premises the issues for determination are restricted to the termination of the lease and the first two grounds of opposition raised by the respondent.

**Termination of the lease**

8] No challenge to the applicant's ownership of the property lies for determination in this application and albeit the issue of ownership is raised by the respondent, the respondent states in the answering affidavit the it 'does not contest the applicant's right as owner to have the respondent evicted should the respondent unlawfully remain in occupation'.

9] It is common cause that the applicant in its capacity as registered owner of the property and lessor, served due notice of one calendar month on the respondent per a letter dated 14 December 2007 from its attorneys to the effect that the lease would terminate on 31 January 2008, and the applicant required the respondent to vacate the property by no later than 30 June 2008.

10] The respondent has acknowledged the right of the applicant as owner to evict it and despite its averments about the intended dates of occupation as opposed to the dates actually recorded on the agreements, there is no application for rectification of the relevant lease agreement and no challenge to the termination of the lease.

11] Consequently as the lease was lawfully terminated, the respondent's continued occupation after 30 June 2008 is unlawful. **(Cooper Landlord and Tenant 2nd edition pages 315- 316).**

**The Grounds of Opposition**

**The 'undertaking'**

12] As properly pointed out by Mr Salmon, the onus lies on the Respondent to prove that there existed 'a firm and binding undertaking' by the applicant to relocate the respondent and the other watersports clubs before summarily evicting them from their present sites and buildings, and that the undertaking was sufficiently certain and not a mere offer to negotiate.

13] In a letter dated 22 January 2008, the respondent alludes to the following statement by the applicant in a letter dated 1 August 2007 to Pravin Amar Development Planners :

> 'It is, and has always been the stated intention of the DPDC to accommodate as far as possible the various users of the sea and beach within the development framework of the Point Waterfront',

on which it relies as constituting the undertaking by the applicant.

14] The applicant denies that the aforegoing statement is an undertaking, contending that it cannot be construed as one nor was it addressed to or capable of being accepted as an undertaking by the respondent. In particular it did not confer on the respondent a right of occupation nor does it have a bearing on the eviction of the respondent. Furthermore the statement did not constitute an assurance that the respondent would be accommodated in the new small craft harbour, and no offer to accommodate the respondent was made or open for acceptance by the respondent. The applicant also points out that the alleged undertaking has also mutated in strength from being a stated intention to being an assurance that the respondent will be accommodated.

15] The applicant has submitted further that although there was no obligation on it to do so, it has made land available to the Point Watersports (Pty) Ltd which was constituted by all the watersports clubs in the Point area. By way of an agreement concluded in July 2008, all the clubs accepted a two-phased relocation. The respondent initially participated in the negotiations with the applicant, but later voluntarily withdrew from the negotiations which culminated in the agreement with the other clubs. Nevertheless the applicant has made provision for the accommodation of the respondent on the land set aside for the water sport clubs. The applicant denies that the site set aside for the relocation is unsuitable, contending that the respondent's objection about the high water mark is not valid as it will not affect the accommodation offered to the clubs.

16] The respondent on the other hand contends that the application is premature because, although it has accepted the offer by the applicant, the applicant has not provided alternative premises to the respondent in the same area from where access to the beach is ensured in compliance with its undertaking, and consequently the respondent is entitled to remain in occupation, until the applicant fulfils its obligations in terms of its undertaking.

17] Having considered the advices relied on by the respondent according to the 'golden rule' of interpretation per Joubert JA in **Coopers & Lybrand and Others v Bryant 1995 (3) SA 761 (A) at 768A - E**

> 'the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the document'

and further that :

> 'A particular word or phrase should never be interpreted in isolation '

in the context of the surrounding circumstances and related correspondence

and documents, in my view, the relevant statement does not warrant the construction that it is a 'solemn undertaking' or an assurance that the applicant will definitely accommodate the current occupiers of the property irrespective of competing demands, but is an expression of its intention to accommodate them as far as is reasonably possible, within the constraints imposed by the intended development as well as the requirements of the watersports clubs themselves to function effectively.

18] The reliance by the respondent on the existence of an undertaking is therefore in my view misplaced. Furthermore, I am not persuaded, despite the contentions of the respondents, that the applicant's stated intention may or ought to be elevated to a binding and enforceable contractual obligation.

19] Further, such intention could only come to fruition through negotiation between the parties, which is in fact what took place and culminated in the conclusion of the memorandum of agreement in July 2008, from which the respondent deliberately withdrew because of its dissatisfaction with the proposed relocation sites and the impact on its members.

20] It is remarkable that the three constituent clubs and their umbrella body, the Point Watersports Clubs, were satisfied with the arrangements for the relocation and accepted the site for their new clubs without raising the same objection as the respondent. And yet by the respondent's own admission the site occupied by it is relatively small, being approximately 900 square metres, compared to the site occupied by the other watersports clubs.

21] However as the respondent has failed to establish an undertaking on the part of the applicant and as the applicant has adequately established that the property is required for the intended development, the respondent is obliged to vacate the property. It cannot rely on its own undertaking to do so, conditional upon when the applicant has a real need for the property, which will arise only once the impediments to the commencement of the development have been surmounted, especially as the respondent has itself contended that it is highly unlikely that the applicant will get the necessary

approval, including the approval from parliament, as the projected development is 'not in the general interests of the wider public, as demonstrated in the expert Social Impact Assessment Report'.

22] The right of the applicant as owner to its property or to develop or utilise it as intended, cannot be made subservient to an undertaking by the respondent as unlawful occupier to end its occupation only when the applicant is ready to proceed with the development, as such a situation will erode the rights integral to the ownership of property.

**Public Interest**

23] The respondent also opposes the eviction on the grounds of public interest, contending firstly that it is itself a public interest body, secondly that the eviction will deprive the public of the benefit of access to the beach and the members of the respondent of a suitable place to launch its paddleskis, and thirdly, the adverse environmental impact of the intended development.

24] The applicant denies the status claimed by the respondent on the basis that not a public interest group as defined in S29 of the constitution of South Africa, but a private club with approximately 300 members and has imposed restricted access to the beach. Only 112 members signed the memorandum in support of the respondent's opposition.

25] I deal with the contentions sequentially.

26] The respondent is a private club with limited membership, which promotes and protects the interests of its members, and is therefore not a public interest group as defined in the constitution. While it is a member of the Save Vetch's Association which is a public interest group and its affiliated interests will be promoted and protected by the Save Vetch's Association which has instituted the review proceedings referred to *supra,* the respondent's membership does not invest the respondent with the same status and does not assist the respondent in its resistance to the application for its eviction.

27] Furthermore a perusal of the membership of the respondent does not persuade me that it is representative of the demographics of the general public who will benefit from the wider use of the facilities envisaged under the intended development of the property.

28] It appears reasonable to infer from the conclusion of the memorandum of agreement between the applicant and the watersports clubs that there has been reasonable engagement with the respondent and other occupiers, although the respondent withdrew from the negotiations. There must of necessity be practical and logistic difficulties to overcome in the process of relocation which includes the inability to provide exactly the same facilities as existed prior to the relocation, which in turn imposes on the parties an obligation to consult and negotiate an arrangement satisfactory to all. Negotiation does not entail demand and supply as the conduct of the respondent seems to suggest, despite its protestations that it has always maintained a reasonable and open door policy with the applicant.

29] This is borne out by the following excerpt from page 2 of the Record of Decision dated 13 February 2009 (page 750 of the indexed papers) :

> 'Option "S" will accommodate all the present functions in terms of beach activities albeit in a reduced capacity. The present arrangement of activities will change with swimmers, surfers and boaters utilising different areas of the beach to ensure safety of all parties. Clubs will be consolidated in an area adjacent to the new North Pier with storage facilities to house their boats.'

30] I am alive to the strong opposition by the respondent to the reliability of the Record of Decision to inform the court fully of the practical and logistical hurdles that the applicant will have to overcome and its contention that as the applicant is consequently not in a position to commence the development the eviction is sought prematurely. This contention has already been put to rest and in any event the respondent's appeal against the Record of Decision was

dismissed on 6 August 2009.

31] While conceding that the Point Waterfront Development Protocol is not applicable or binding on the applicant as it was not a condition of the transfer of the property when it was sold and transferred to it, the respondent contends that the Protocol is applicable by necessary implication, because the eThekwini Municipality is a fifty percent (50%) stakeholder in the applicant and is 'duty bound to strive for the ideal behind the protocol in the interests of its citizens'.

32] The eThekwini municipality is a stakeholder in the trust which owns a fifty percent interest in the development. There is therefore public involvement in the development and public interest and benefit must be a decisive factor in relation to the determination of any issue relating to the intended development.

33] Consequently although the eThekwini municipality is not the applicant herein but a stakeholder and the development is a substantial commercial undertaking, it must nevertheless act with due regard to its duty to act fairly and to the benefit of the public. As a public authority, it must balance all relevant public interests and with due regard to its duty of fairness, it must act to the benefit of the public. This is not a commercial transaction in which the local authority may exercise a contractual right without regard to its obligation to act in the public interest. **(see Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001 (3) SA 1013 (SCA) para 16 - 18).**

34] However, that being said, it does not serve the respondent to resist eviction from unlawful occupation on the ground that it is protecting the public interest as it is not incumbent upon or necessary for the respondent to do so in the light of the obligations imposed on the applicant and the local authority.

35] The applicant is required to obtain the necessary plans and approvals prior to the commencement, during and after the completion of the construction in compliance with the relevant legislation and bylaws. Such

compliance is intended to ensure that no unlawful encroachment on public property or the property rights of others or infringement of any law or bylaw by the applicant occurs in the intended development and that the development does not constitute a potential hazard to the public and other users.

36] Similarly, the high water mark issue is an integral part of an application already instituted in respect of the beacons and boundaries, which may in due course have a material bearing as it will determine where the Eastern boundary of the applicant's boundary lies. But it is a risk assumed by the applicant should it commence construction prior to the determination of that application.

37] The applicant is clearly aware of this and these are matters which it will have to take responsibility for and engage with the relevant authorities in connection therewith. These concerns do not have a bearing on the right of the applicant to evict an unlawful tenant who remains in occupation in contravention of his obligation to vacate the property. However in terms of the alternative order prayed the relief sought by the applicant will be enforceable only after the applicant has obtained all the required planning approvals.

38] Furthermore I am satisfied from the documentation before me that the applicant has engaged in consultation with the public and other interested bodies in accordance with its obligation to the general public to ascertain what is in the public interest, I am also satisfied that the development embraces the constitutional obligation on the local authority to provide social and economic development as well as to promote public interest by developing a facility which will attract and benefit tourists and locals alike.

39] To the contrary, I find no merit in the contention of the respondent that its right to remain in occupation of the property is inextricably connected to the balancing of the development and its advantages such as job creation, with broad environmental considerations and that it ought therefore be allowed to remain in occupation of the applicant's property pending finalisation of the review proceedings, adequate measures being taken to protect the

environment, and the determination of the issues in relation to the high water mark and the fixing of the rectilinear boundary and that the application for eviction is premature as 'there is no immediate or apparent reason why the respondent has to go'.

40] In the premises the applicant is entitled to the relief it seeks. However as the alternative order sought by the applicant permits the respondent to remain on the premises until the requisite planning approvals are granted, I am persuaded that it is appropriate, given the duration of the respondent's occupation of its present premises.

**Costs**

41] There is no reason why costs ought not follow the result. In the light of the nature and conduct of the proceedings herein, I am of the view that an order including the costs of two counsel is appropriate.

The following order do hereby issue:

1. Subject to paragraph 3 of this order, the respondent, Durban Paddle Ski Club, (and any person or persons claiming to occupy by, through or under the respondent) is directed to vacate forthwith the immovable property (and the buildings erected thereon) described as the "Remainder of Erf 12524 Durban", situate in the Durban Point Waterfront.

2. In the event of the respondent failing, refusing or neglecting to comply with the order granted in terms of paragraph 1, the Sheriff of this Court, or his duly authorised Deputy, is hereby authorised and directed to forthwith eject the respondent and any person or persons claiming to occupy by, through or under the respondent, from the aforesaid immovable property (and the buildings erected thereon), and to hand vacant possession thereof to the applicant.

3. Paragraph 1 hereof will come into operation one month after the respondent's attorneys have been notified in writing by the applicant's attorneys that the applicant has obtained all the required planning approvals and intends to commence construction, including site preparation, on the said immovable property.

4. The respondent is directed to pay the costs occasioned by this application, such costs to include those consequent upon the employment by the applicant of two counsel when so employed.

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