REPORTABLE

Case no: 422/95

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

M & J MORGAN INVESTMENTS

[PROPRIETARY] LIMITED FIRST APPELLANT

S.G. DAVEY SECOND

APPELLANT

and

PINETOWN MUNICIPALITY FIRST RESPONDENT

MINISTER OF HOUSING AND LOCAL GOVERNMENT [KWAZULU-NATAL] SECOND RESPONDENT

THE PREMIER [KWAZULU-NATAL] THIRD RESPONDENT

Court : Van Heerden, Howie, Olivier, Scott et Zulman JJA

Date of hearing : 16 May 1997

Date of delivery of judgment : 30 May 1997

JUDGMENT

2 OLIVIER. JA

The first appellant is the registered owner of immovable property, a stand known as Lot 4580, which is situated within the area of Pinetown Municipality. It is 8089 m^2 in extent. It has been developed by the erection on it of 42 flats in the form of three low-rise blocks known as Morgan Hall. The second appellant is the chairman of the Morgan Hall Residents Association. The first respondent is a local authority in terms of the Local Authorities Ordinance 25 of 1974 (N) ("the Ordinance"). The second respondent is the Minister of Housing and Local Government for the Province of KwaZulu-Natal in whom the powers relating to expropriation of property by local authorities, which had formerly vested in the Administrator for the Province of Natal in terms of the Ordinance, have now been vested in terms of the provisions of the Constitution Act 200 of 1993 (the Constitution). Third respondent is the Premier of the Province

of KwaZulu-Natal.

In 1986 the Durban Metropolitan Transport Board had a report prepared which deals with traffic congestion and other problems which it was anticipated would arise in the foreseeable future in the central areas of the Durban Metropolitan Network, including Pinetown. As a result of the projections and findings in this report the first respondent employed a firm of consulting engineers and planners to make recommendations for a solution to the traffic problem as it affects Pinetown. They brought out a report in July 1992 in which they made recommendations relating to the Central Business District of Pinetown.

These recommendations were accepted by the first respondent. To give effect to these recommendations would involve expropriating portions of immovable properties in private ownership for street widening purposes. Lot 4580 Pinetown would be one such property.

Lot 4580 is a piece of land, bounded on the western side by Crompton Street and on the south by Morgan Road, the two streets meeting at right angles. According to the recommendations, it would be necessary to take a portion of Lot 4580 and also of the adjacent piece of land, Remainder of Lot 2034, so as to make provision for a curving corner at the intersection of Crompton Street and Morgan Road. It was proposed to take 1550 square metres from Lot 4580.

On 13 December 1993 the first respondent set in motion the legal steps designed to lead to the expropriation of the said portion. These steps also led to an application made by the appellants in the Natal Provincial Division in August 1994 and to this appeal.

Before discussing the litigation further, I should explain the prescribed legal steps which had to be followed by the first respondent in endeavouring to expropriate land within its area.

A local authority in KwaZulu-Natal derives its power to expropriate

immovable property from the provisions of s 190 of the Ordinance which,

in so far as material, reads as follows:

(1) Subject to the provisions of the Expropriation Act, 1975 (Act 63 of 1975) and the succeeding provisions of this section, the council may, for the purpose of exercising or performing any power, duty or function conferred or imposed on it by or under this ordinance or any other law, expropriate or take the right temporarily to use immovable property within or without the borough

(2) A decision in terms of subsection (1) to expropriate or take the right temporarily to use immovable property shall not be valid except under authority of a resolution passed by a majority of the total number of councillors for the borough.

(3) Whenever the council has taken a decision in accordance with the provisions of subsection (2) it shall cause a notice to be served on the owner of the immovable property concerned-

(4) containing a description sufficiently clear to identify such immovable property, and

(5) informing such owner that

(i) it intends to expropriate or take the right temporarily to use such immovable property, and

(ii) any objections he may have to the proposed expropriation or taking may be lodged with the town clerk within thirty days of the service of such notice

and after the service of such notice any person who effects improvements to, demolishes, damages, alters or in any other manner impairs such immovable property shall be guilty of an offence.

(4) After the expiration of the period of thirty days contemplated by subsection (3)(b)(ii) the council shall-

(6) transmit to the Administrator the objections (if any) lodged by the owner in terms of subsection 3(b)(ii) together with its comments thereon and a certificate by the town clerk that the provisions of subsection (3) have been complied with, and

(7) obtain the Administrator's approval of the proposed expropriation or taking as the case may be.

(5) (a) If the Administrator approves the proposed expropriation or taking the council may proceed to expropriate or take the right temporarily to use the immovable property concerned in accordance with the provisions of the

Expropriation Act, 1975 (Act 63 of 1975).

(b) If the Administrator does not approve the proposed expropriation or taking, the immovable property concerned may be dealt with as if the notice contemplated by subsection (3) had never been issued.

(6) The provisions of subsections (3) and (4)(a) shall not apply to or in respect of the expropriation of or the taking of the right temporarily to use immovable property for the purposes of-

(8) storm, surface or subsoil drainage, or

(9) sewerage,

whether upon or under the surface of any land.

(7) For the purposes of this section "immovable property" includes any right, interest or servitude in or over immovable property.

A local authority's right to expropriate immovable property is therefore strictly circumscribed. It may expropriate immovable property only for the purpose of exercising or performing any power, duty or function conferred or imposed on it by the Ordinance or any other law and then only, except where s 190(6) applies, with the approval of the

Administrator which can only be given in respect of a specific property or specific properties or portions thereof. Before the local authority can seek the Administrator's approval it has to take a decision in terms of s 190(2) and thereafter take the steps and comply with the procedure laid down in s 190(3) and (4). Only after the approval of the Administrator has been obtained may the local authority proceed to expropriate the immovable property in respect of which such approval has been obtained. It does so by serving a notice of expropriation in terms of s 7 of the Expropriation Act and complying with the provisions of that Act. The local authority therefore acquires the right to expropriate a particular property or portion of it by adopting a resolution in terms of s 190(2); and by complying with the procedure laid down in ss 190, (3) and (4) and obtaining the requisite approval of the Administrator (s 190 (5)(a)), but the expropriation itself is effected under the provisions of the Act (s 190(5)(a)).

The function of the Administrator in terms of s 190 of the Ordinance

is exercised under the Constitution by the Premier of KwaZulu Natal, who has delegated his authority to the second respondent. For the sake of simplicity and because certain of the events in regard to this matter occurred before the Constitution took effect, I shall refer throughout to the functionary in whom the authority now vests as the Administrator.

On 13 December 1993 the Town Council of the First Respondent adopted the following resolution:

(10) That subject to compliance with the formalities and in order to proceed with the upgrading of roads in the Pinetown CBD, authority be granted for the Executive Director : Corporate Services to expropriate Lot 4275 Pinetown and portions of Rem of Lot 3607, Lots 4580, 2451, 2034, 6385 and 10144 Pinetown as indicated on plans AL 1077/A, 1070 and 1072 to 1076, respectively.

(11) That the Executive Director : Corporate Services be authorised to negotiate the acquisition of portions of Lots 2478, 2486 and 11137 from the State as indicated on plans AL 1071, 1078/A and 1079/A respectively.

Plan AL 1072 referred to in the resolution is a survey diagram depicting Lot 4580 and that portion proposed for expropriation.

On 14 December 1993 the Town Clerk acting on the strength of the said resolution addressed a letter to the first appellant which reads:

> Upgrading of Pinetown CBD Roads: Lot 4580 Pinetown
>
> According to my records you are the registered owner of Lot 4580 Pinetown.
>
> In order to cater for projected increases in traffic volumes on the roads in the CBD the Council plans to commence the next phase in upgrading such roads early in the new year.
>
> I now give you notice in terms of the Local Authorities Ordinance (25 of 1974) that it is my Council's intention to expropriate approximately 1550 square metres of the said Lot 4580 Pinetown as depicted on the attached plan AL 1072. I am also required to advise you that with effect from the date of service of this notice any person who effects improvements to, demolishes, damages, alters, or in any other manner impairs such immoveable property, shall be guilty of an offence.
>
> Any objection to the proposed expropriation must be lodged with the undersigned within thirty days of this notice.

This letter was obviously sent pursuant to s 190(3).

The period for the lodging of objections was afterwards extended by the Town Clerk to 31 March 1994.

On 27 January 1994 representatives of the first appellant, including its attorney and architect, met with officials of the first respondent. At this meeting certain preliminary objections to the proposed expropriation were raised. It was agreed that these objections would be referred to the first respondent's engineering and planning consultants, and that their comments on the objections would be conveyed to the first appellant.

On 10 February 1994 the first appellant's attorneys furnished the first respondent with a report which first appellant had obtained from an engineer, Mr O.H. Besselaar, in which he commented on the road scheme in respect of which the expropriation was to be made.

One of the proposals by Besselaar was that a smaller portion of Lot

4580 be taken. The first respondent's consultants did not agree with Besselaar. A further meeting of representatives of the parties was held at the property on 27 February 1994.

In a letter dated 30 March 1994 the first appellant's attorneys lodged its written objections to the proposed expropriation of portion of Lot 4580 with the first respondent. In this letter objections to the proposed road scheme and the envisaged expropriation were raised on a large number of grounds. These objections included the following: that the scheme had not been given sufficient exposure to public opinion; that in terms of Besselaar's report there were viable alternatives which would have a less severe impact on Lot 4580; and that a cost saving could be effected by the adoption of a less ambitious street development scheme which would involve the expropriation of a smaller portion of Lot 4580.

In a letter dated 14 April 1994 the Executive Director: Corporate

Services conveyed to the first appellant the comments of the first respondent's consultants on the preliminary objections raised. This letter contains a summary of the consultant's report to the first respondent dated 7 February 1994.

The first appellant was not satisfied with the manner in which the first respondent was proceeding and requested advice as to the procedure that it should take to voice its dissatisfaction and objections. The Town Clerk advised the first appellant accordingly.

The appellants in due course submitted documents setting out their objections to the proposed expropriation. The documentation was referred to the Management Committee as a preliminary step to obtaining the first respondent's comments for the purposes of section 190(4). In response, the Executive Director: Corporate Services furnished a written report to the Management Committee dated 13 May 1994. In addition the managing

member of the first appellant, Mr. Singleton, was allowed to address the Management Committee. It appears from the minutes of a meeting of the Management Committee held on 24 May 1994 that Singleton did address that meeting and that he elaborated on the objections which the first appellant had raised previously. It also appears that a partner of the first respondent's consultants, Palkowski, responded to these objections in Singleton's presence.

At this meeting the Management Committee recommended to the Council that the comments made by the Executive Director: Corporate Services of the first respondent in his report dated 13 May 1994 be adopted by the first respondent as its comments on the objections submitted.

In this report the Executive Director: Corporate Services pointed out that the land to be expropriated from Lot 4580 could be reduced from 1550 m^2 to about 1000m^2 (which would include 350m^2 of land encumbered by

servitudes) by a minor re-orientation of the road and by retaining the fill.

This report was obviously based on reports of first respondent's consultants.

It appears from Palkowski's affidavit that the consultants had in fact, as a result of discussions with the first appellant's representatives, redesigned the curve in order to minimise the impact of the proposed expropriation on first appellant's property.

At a meeting held on 30 May 1994 the first respondent passed a resolution adopting the Executive Director: Corporate Service's report of 13 May 1994 as its comments in terms of s 190(4) on the objections which had been raised. This resolution was passed by a majority of the total number of councillors.

In compliance with the provisions of s 190(4) the first respondent transmitted a large number of documents to the Administrator, including its resolutions dated 13 December 1993 and 30 May 1990, the report dated

13 May 1994 of the Executive Director: Corporate Services, the objections

by first appellant and other owners of properties proposed for expropriation, the comments by first respondent's consultants dated 25 February 1994 on Besselaar's report and various plans of the land proposed for expropriation. It would appear that the plan transmitted in respect of Lot 4580 was a new plan, numbered 1072A, showing the redesigned curve into Morgan Road and the reduced area of Lot 4580 proposed for expropriation. A comparison of plan 1072 with plan 1072A shows that the curve was redesigned so that it followed a sharper bend resulting in a reduction of the land to be expropriated in the final plan. At no place was the curve moved so as to include any land not previously planned for expropriation or not included in plan 1072.

The submission of these documents as required by s 190(4) led to an application by the present appellants in the court a quo. They claimed

relief set out as follows in the notice of motion:

(a) That: (i) The First Respondent be and it is hereby interdicted and restrained from submitting its decision to expropriate the immovable property described as Lot 4580 Pinetown to the Second Respondent and/or the Third Respondent for approval in terms of Section 190 of Ordinance 25 of 1974 (Natal); and

(ii) That Second Respondent and Third Respondent be and they are hereby interdicted and restrained from considering or approving the decision of the First Respondent to expropriate the said property in terms of Section 190 of Ordinance 25 of 1974 (Natal);

(b) That Section 190 of the Local Authorities Ordinance No. 25 of 1974 (Natal) be and it is hereby declared to be unconstitutional and of no force or effect and the decision of the Council of the First Respondent, taken on the 30 th May, 1994, to expropriate Lot 4580, Pinetown, is hereby set aside;

(c) That the decision of the First Respondent taken on the 30 th May, 1994, to proceed with the expropriation inter alia of the immovable property

described as Lot 4580, Pinetown, be and it is hereby reviewed and set aside.

The relief sought in para, (b) of the notice of motion was not proceeded with.

In the affidavits accompanying the notice of motion, several complaints against the steps taken by the first respondent were raised. They form the substance of this appeal.

After the issue of a rule Mid on 8 September 1994, the Court a quo (Thirion J) on the return day granted a final order as follows:

(a) The Second and Third Respondents are interdicted and restrained from approving, in terms of section 190(5)(a) of the Local Authorities Ordinance 25 of 1974, the proposed expropriation of portion of First Applicant's property Lot 4580, Pinetown,

(i) until they have furnished the First Applicant with copies of all reports and information which have been transmitted to Second and Third Respondents and which are

materially relevant to the proposed expropriation and with which the First Applicant has not as yet been furnished.

(ii) until the expiry of a period of 60 days after service of a written notice on the First Applicant; which notice shall be served at the same time as, or subsequent to, the furnishing of the copies of the reports and information referred to in (i) above
and in which notice the First

Applicant shall be informed that any comments or representations which it may wish to make on or with regard to the said reports or information shall be lodged with the Second or Third Respondents and the Town Clerk of Pinetown within 30 days of service of the notice.

(12) Save as aforesaid the rule nisi granted on 8 September 1994 is discharged.

(13) The Applicants are ordered to pay the Respondents' costs.

With leave of the court a quo, the appeal is now before us.

The first contention, also argued in the court a quo is that on 13 December 1993 the first respondent did not pass a resolution in which it determined to expropriate Lot 4580. The argument is that a resolution which grants authority to the first respondent's employee, the Executive Director: Corporate Services, to expropriate property (on the face of it a delegation of authority) cannot be construed as a decision by the first respondent itself to expropriate the properties in question. It was argued that the resolution simply does not express an intention by the first respondent to expropriate, and without changing the words and meaning significantly, cannot be interpreted to express this intention.

On behalf of the first respondent it was submitted that it is clear that it regarded the resolution as passed in terms of s 190(2) and that the letter that followed was manifestly written in terms of s 190(3).

The resolution records, in the first instance, that "formalities" are to

be complied with and thereafter authorises the Executive Director: Corporate Services to "expropriate", inter alia, part of the first appellant's land. Plainly the first respondent did not have the power at that time to exercise any right to expropriate nor could it delegate any such right. It was consequently argued on behalf of the respondents that the resolution ought therefore to be construed as a resolution making a decision to expropriate in terms of s 190(2) of the Ordinance and further as a directive to the first respondent's Executive Officer to give effect to that decision.

In my view the resolution of 13 December 1993 was meant to be, and was, a resolution in terms of s 190(2), and the "authority" granted to the Executive Director: Corporate Services was merely a directive to that officer that the necessary administrative steps be taken in terms of s 190(3) to give effect to the resolution.

This is borne out not only by the wording of the resolution, but also by its interpretation by all concerned (including the appellants), and by its place in the prescribed procedural sequence. In this respect the judge a quo correctly remarked:

> As the heading to the resolution indicates, it deals with the acquisition of land for the scheme for the upgrading of streets in the central business district of Pinetown, a scheme which by then must have occupied a great deal of the Council's attention. The "formalities" referred to in the resolution could only have been steps which had to be taken in terms of section 190(3). It was so understood by the town clerk - hence his letter of the 14 th December 1993 quoted earlier in this judgment. That the resolution of the 13 th was intended to be a resolution in terms of section 190(2) it is also borne out by the steps taken by the Council in consequence of the objections raised by the First Applicant to the proposed expropriation. The Council referred the objections to its Management Committee and on 30 th May 1994 adopted the recommendation of that committee that the comments contained in the report of the executive director: corporate services be adopted as the Council's comments on the First Applicant's objections. The resolution of the 30 th May 1994 was taken in terms of the provisions of section 190(3) and (4). Clearly the resolution of the 13 th December 1993 was part of

the ongoing process of complying with section 190 with a view to obtaining the Administrator's approval in terms of section 190(4) and was intended to be a resolution in terms of section 190(2). The Council could not have granted the authority to the executive director: corporate services to proceed with the process of obtaining the consent of the Administrator, if it itself had not resolved to expropriate the property. If the Council had purported, by the resolution of the 13 th December 1993, to delegate to the executive director: corporate services the power to expropriate the property, it would not have involved itself to the extent which it did, in the process of obtaining the Administrater's approval. It referred the objections to its Management Committee which conducted a hearing which was addressed by First Applicant's managing member and others. The recommendations of the Management Committee were considered by the Council at its meeting on 30 th May 1994. It is evident from the discussions at that meeting that the Council was itself handling the matter of obtaining the requisite approval under section 190(5).

That the appellants understood the resolution to be one in terms of

s 190(2) of the Ordinance is clear from their reaction to the Town Clerk's

letter of 14 December 1993, which was obviously drafted in terms of s

190(3) of the Ordinance (and which in terms of the Ordinance could only

be done after a decision had been taken in terms of s 190(2)), by taking all the steps previously described.

The contention that the resolution was merely a delegation of power also lacks logic. In order to delegate a power to do something specifically (as in this case), the delegating authority must have decided to have the thing done. The resolution may have been ineptly worded, but it clearly implies a decision by the first respondent to expropriate.

The first contention was, therefore, correctly rejected by Thirion J.

The second contention raised by the appellants was aimed at obtaining an order reviewing and setting aside the procedure followed by the first respondent as being irregular and unlawful. It proceeds on the following basis:

(i) If the resolution of 13 December 1993 properly construed amounted to a decision by first respondent to expropriate, it related to the property described on Plan AL1072 and not that described on Plan AL1072/A.

(ii) There was no resolution to expropriate the land as described in Plan AL1072/A apart from the resolution of 30 May 1994.

(iii) The resolution of 30 May 1994 is not contended to have been a resolution in terms of s 190(1) and in any event was not followed by the notice required by s 190(3).

It was submitted by the appellants that upon a proper interpretation of s 190 of the Ordinance it was not open to the first respondent unilaterally to vary the area of the land depicted on the plan unless, properly constituted in terms of s 190(2), it passed a new resolution reflecting such variation and once again resolved in terms of s 190(1) to expropriate the land as depicted in the amended plan.

It was argued that the same position obtains even where agreement is reached in relation to a variation, but that in any event, in the absence of such an agreement, any unilateral variation, whether the first respondent perceives it to be to the advantage of the property owner or not, has to be dealt with by a fresh resolution in terms of s 190(2). This is so because

there is no provision in s 190 for the first respondent to do anything more

than transmit the objections lodged by the owner to the Administrator together with its comments thereon. First respondent had no lawful authority at that stage of the procedure to vary its original decision without its Council passing a fresh resolution to expropriate in terms of s 190(2) and affording the owner the right to object to the amended expropriation in terms of s 190(3).

The respondents' answer to this contention was that if the first respondent, acting through its officials and advisors, were satisfied that the impact of an expropriation could be lessened it was entitled so to act and it contended that it might even do so unilaterally.

It is common cause that the first respondent did amend the plan depicting the land to be expropriated. The resolution referred to Plan AL1072. The plan forwarded to the Administrator was Plan AL1072/A.

It was attached to the copy of the resolution of 13 December 1993.

The contention now under discussion is, in my view, over technical and lacks common sense. Such an approach is not to be encouraged.

In the present case the alteration in the area of the property to be expropriated is not so substantial as to render ineffectual the resolution already taken. That resolution referred to a piece of land which encompasses the altered smaller piece now sought to be expropriated. The first respondent is not taking more than the area envisaged in its resolution, but only part of it, i.e. less of the same identified piece. There is no suggestion that the appellants are or will be prejudiced by taking less than was originally decided. Furthermore, the reduction in area was made to accommodate the first appellant's objection that the portion originally to be expropriated was in excess of what was needed for the purposes of the road scheme.

There is no substance in this objection and it was rightly rejected by

Thirion J.

The third contention raised by the appellants is that the audi alteram partem was violated when the first respondent decided to request the Administrator to approve expropriation of the smaller portion of Lot 4580 according to Plan AL1072/A without first giving the appellants an opportunity to object to the amended plan.

The rules of natural justice, of which audi alteram is one, form a cornerstone of administrative law. They ". . . facilitate accurate and informed decision-making; secondly they ensure that decisions are made in the public interest; and, thirdly they cater for certain important process values." (Baxter Administrative Law, 538). The audi alteram partem rule was said by Voet 2.4.1 (Gane's translation) to "rest on the highest equity." Ptahhotep in the 6 th Egyptian Dynasty (2300 - 2150 BC)

lauded the rule (Baxter op. cit. 539) and coined the dictum:

> Not all one pleads for can be granted. But a good hearing
> soothes the heart.

Nevertheless, if the rules of natural justice are efficiently to serve the purpose for which they exist and if they are to retain their great legitimacy, they must be applied appropriately.

It follows that the enquiry is whether these rules, including the audi-rule rule, are applicable in the present case having regard to the scheme of the Ordinance.

As explained previously, the legislative scheme is:

(i) a decision is taken to expropriate (s 190(2); thereafter

(ii) the expropriatee is entitled to notice of that decision and to be informed that there are thirty days within which to object to the proposed expropriation: thereafter

(iii) the local authority is required by s 190(4) to transmit the objections to the Administrator, together with its comments thereon

(iv) if approval is given, the local authority may proceed to expropriate in terms of s 7 of the Expropriation Act (s 190(5)(a)).

In my view, the audi-rule was amply complied with in that the appellants had been given a fair opportunity, not only to submit objections, but to address the Management Committee, in respect of essentially the same proposed expropriation as was referred to in the resolution of 13 December 1993. Because the amended expropriation was essentially the same in all material respects as the original, their comprehensive objections to the latter necessarily covered the amendment as well.

The appellant's third contention also fails.

The fourth contention by the appellants is that the first respondent failed to undertake a thorough environmental impact study relating to the envisaged expropriation of the first appellant's land. Reliance was placed by counsel for the first appellant on s 29 of the Constitution. The

Constitution came into effect on 27 April 1994 i.e. after the resolution of 13 December 1993, but before the resolution of 30 May 1994.

Sec. 29 reads as follows:

> Every person shall have the right to an environment which is not detrimental to his of her health or well-being.

I do not wish to belittle the value which a proper environmental impact study could have in appropriate expropriation cases, e.g. at Saldanha Bay for the development of a steel industry, or at the St. Lucia estuary, or in the Kruger National Park for the development of mining. But I am of the view that it was not necessary for the first respondent to have undertaken such a study, and this for a reason that is unaffected by whether s 29 of the Constitution is applicable in the present instance or not. For the appellants did in fact voice their environmental concern in their letter of objection. The Administrator, when considering the matter, will be able

to consider this objection and, if necessary, will be able to call for an environmental impact study. To require the first respondent to undertake such a study in circumstances such as the present where the proposal involves no more than facilitating the flow of traffic in an urban environment and before being requested by the Administrator to do so is, in my view, unreasonable.

The fourth contention also fails.

The appeal is dismissed with costs.

Concur :

Van Heerden JA
Howie JA Scott JA
Zulman JA