Case Number 520/99
Reportable

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of

GC STEINBERG
Appellant

AND

SOUTH PENINSULA MUNICIPALITY
Respondent

Composition of the Court: HEFER ACJ; HARMS,

MPATI JJA; CLOETE

AND BRAND AJJA

Date of hearing:
20 August 2001

Date of delivery: 19 September 2001

SUMMARY

Deprivation/expropriation of rights in property – s 25 of the Constitution – 'constructive' expropriation – approval of road scheme not yet implemented does not amount to a taking.

JUDGMENT

CLOETE AJA

INTRODUCTION

[1] The appellant seeks an order directing the respondent to take all steps necessary 'to complete the expropriation process implemented in respect of', or alternatively, to expropriate, certain immovable property of which she is the owner. Reliance for this relief was placed on the doctrine recognised in some foreign jurisdictions and variously termed 'constructive' or 'regulatory' expropriation or 'inverse condemnation'. The application was dismissed by Traverso J in the Cape of Good Hope Provincial Division and the appellant appeals with the leave of this Court.

[2] The relevant facts can be stated briefly. The property is situated in Wynberg in the area of jurisdiction of the respondent, which is a local authority. The property falls within the area affected by a road scheme. The road scheme (having first been proclaimed by a Provincial Notice published in the Provincial Gazette of 26 March 1969), was approved by the Administrator in Provincial Notice 3/1974 dated 16 January 1974 published in Provincial Gazette 3761 on 25 January 1974. If and when the road scheme is implemented as proclaimed, a road will cut across the property. The appellant purchased the property in 1994 and took transfer in 1997. (It may be said, in passing, that before the appellant purchased the property, she was aware of the road scheme.)

THE LAW

[3] Section 25 of the Constitution provides, to the extent relevant for present purposes, as follows:

> '(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application –
> (a) for a public purpose or in the public interest; and
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.'

[4] A fundamental distinction is drawn in section 25 between two kinds of taking: a deprivation and an expropriation.[1] It is only in the case of an expropriation that there is a constitutional requirement for compensation to be paid. The purpose of the distinction is to enable the State to regulate the use of property for the public good, without the fear of incurring liability to owners of rights affected in the course of such regulation. The essence of the distinction and the fact that it is well established in our law, appears from the following passage in *Harksen v Lane NO and* Others 1998 (1) SA 300 (CC) at 315G – 316C:

> '[33] The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law. In *Beckenstrater v Sand River Irrigation Board*, Trollip J said:
> "(T)he ordinary meaning of 'expropriate' is 'to dispossess of ownership, to deprive of property' (see eg *Minister of Defence v Commercial Properties Ltd and Others* 1955 (3) SA 324 (N) at 327G); but in statutory provisions, like secs 60 and 94 of the Water Act, it is generally used in a wider sense as meaning not only dispossession or deprivation but also appropriation by the expropriator of the particular right, and abatement of extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right. That is the effect of cases like

[1] Chaskalson and Lewis, in the chapter on property in *Constitutional Law of South Africa,* para 31.6; van der Walt *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 120 and *Constitutional Property Clauses* (1999) 333; Kleyn 'The constitutional protection of property: a comparison between the German and the South African approach' (1996) 11 SAPL 402 427; Southwood, *The Compulsory Acquisition of Rights* (2000) 14-15.

Stellenbosch Divisional Council v Shapiro 1953 (3) SA 418 (C) at 422-3, 424; *SAR & H v Registrar of Deeds* 1919 NPD 66; *Kent NO v SAR & H* 1946 AD 398 at 405-6; and *Minister van Waterwese v Mostert and Others* 1964 (2) SA 656 (A) at 666-7."'

[5] A similar distinction is made in other countries, for example, Zimbabwe [2] and Malaysia [3] although the Supreme Court of India has held[4] that there was no difference between the meaning of 'deprived' in Art 31(1) and 'acquisition' or 'taking possession of' in Art 31(2) of the Indian Constitution.

[6] The principle of constructive expropriation creates a middle ground, and blurs the distinction, between deprivation and expropriation. According to that principle a deprivation will in certain circumstances attract an obligation to pay compensation even although no right vests in the body effecting the deprivation. It is the determination of those circumstances which can give rise to problems.[5] The Appellant's counsel urged this Court to have regard to the position in the United States of America.

[7] It is extremely difficult to distil any single principle from the body of case law built up by the Supreme Court of the United States of America around the Fifth Amendment and the Fourteenth Amendment to the Constitution (usually referred to as the 'Due Process Clause' and the 'Takings Clause' respectively). In *Pennsylvania Coal Co v Mahon* 260 US 393, 415 (1922), Holmes J writing for the Court said:

> 'The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking.'

The problem is to determine when the exercise of a regulatory power 'goes

[2] *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZS) especially at 502 F-H where it is pointed out that the distinction is contained in almost all the post-colonial constitutions granted by Britain in Africa.

[3] *Government of Malaysia and Another v Selangor Pilot Association (a Firm)* [1978] AC 337 (PC) 347G-348A.

[4] *The State of West Bengal v Subodh Gopal Bose and Others* [1954] SCR 587; *Dwarkadas Shrinivas of Bombay v The Sholapur Spinning and Weaving Co Ltd and Others*[1954] SCR 674; *Saghir Ahmad v The State of Uttar Pradesh and Others* [1955] 1SCR 707.

[5] For example, the relatively straightforward position in Switzerland (as to which see van der Walt *Constitutional Property Clauses* 359 ff) may be contrasted with the complicated and uncertain position in Germany (as to which see Kleyn, *op. cit.* note 1, *supra).*

too far' so as to become a regulatory taking which requires compensation.[6] The Supreme Court has itself said in *Penn Central Transportation Co et al v New York City et al* 438 US 104, 123-4 (1978):

> 'While this Court has recognised that the "Fifth Amendment's guarantee ...[is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.'

This statement has been repeated by the same Court: *Kaiser Aetna v United States* 444 US 164, 174-5 (1979); *Hodel v Irving* 481 US 704, 713-4 (1987); *Lucas v South Carolina Costal Council* 505 US 1003, 1015 (1992).

[8] Despite the clear distinction made in section 25 of the Constitution between deprivation and expropriation, there may be room for the development of a doctrine akin to constructive expropriation in South Africa – particularly where a public body utilises a regulatory power in a manner which, taken in isolation, can be categorised as a deprivation of property rights and not an expropriation, but which has the effect, albeit indirectly, of transferring those rights to the public body: see, for example, the dissenting judgment of Lord Salmon in *Government of Malaysia v Selangor Pilot's Association (supra,* footnote 3) at 352G – 353H and 357D-E and the majority judgment at 349H.[7] However, development of a more general doctrine of constructive expropriation, even if permissible in view of the express wording of s 25 of the Constitution, may be undesirable both for the pragmatic reason that it could introduce confusion into the law, and the theoretical reason that emphasis on compensation for the owner of a right which is limited by executive action could for instance adversely affect the

[6] Some of the numerous contributions made by academic authors on the point have been collected by van der Walt, *'The Constitutional Property Clause'* 121 footnote 21.

[7] Where it is said that Lord MacDermott's decision in *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 '[H]ad regard to ... the fact that statutory prohibition was a colourable device to secure property without compensation ...'

constitutional imperative of land reform embodied in subsections (4), (6) and (8) of section 25 itself.[8]

[9] It is, however, not necessary to decide whether, and if so, subject to what limitations, a doctrine of constructive expropriation can or should be developed in South Africa. There is a more fundamental problem facing the appellant in the present matter.

THE POSITION OF THE APPELLANT

[10] The appellant's principal complaint is that she has been unable to sell the property. As an afterthought she has added the further complaint that she is unable to erect a music studio on the property for the use of her husband, who is a musician. She attributes both disabilities to the existence of the road scheme. The first allegation is not properly established on the facts, but it is not necessary to rest the decision of the appeal on this narrow ground alone. The second allegation is wrong in law as there is nothing precluding the appellant from erecting the studio, if it would not fall within or five metres from the statutory width of the approved road; whereas if it would fall within the area mentioned, it can be built with the approval of the

[8] Those subsections provide:

'(4) For the purposes of this section-

(a)the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b)property is not limited to land.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).'

Administrator[9] in which case compensation may not be payable were the property to be expropriated.[10] But it is by no means certain that the property will be expropriated: approval of the road scheme does not oblige the respondent to construct the road as envisaged in the scheme, or at all[11] and the scheme is presently under review. In all the circumstances, it is not surprising that the appellant's counsel found himself unable to say when the property was 'expropriated', how the compensation for the 'expropriation' was to be quantified and when and to whom such compensation became, or would become, payable.

[11] The fallacy in the argument advanced on behalf of the appellant is that it postulates that advance notification by a public authority of a possible or even probable intention to embark on a course of conduct which, if ultimately persisted in, must necessarily result in a taking, is to be equated to

[9] s. 17(1) of the Roads Ordinance no 19 of 1976 (C) provides:

'Notwithstanding the provisions of any other law no person shall erect or install or cause or permit to be erected or installed on land owned by him or under his management or control any structure the whole or any portion of which falls within-

(a) the statutory width, or

(b) five metres from the boundary of the statutory width

of any public road except with the permission of and in accordance with plans, standards and specifications approved by the road authority and, in the case of a road authority which is a council, of and by the Administrator'.

'Public road' is defined in s. 2 as 'a public road proclaimed as such in terms of section 3'. The road which will cut across the property if the road scheme is implemented, was proclaimed under s. 3(1).

[10] s. 17 (4)(b) of the Ordinance provides:

'Any permission or approval granted under this section shall –

(b) not be construed as derogating from the provisions of section 34(2)'.

s. 34 deals with compensation. Subs.(2) provides::

'The provisions of this section shall not be construed so as to require or, except with the prior approval of the Administrator, to authorise a road authority which is a council to pay compensation in respect of improvements made within the statutory width of a public road or public path after such width was fixed.'

[11] s. 3(2) of the Ordinance provides:

'The Administrator may, either of his own accord or on the application of the road authority concerned ... by proclamation in the *Provincial Gazette* withdraw any proclamation issued in terms of subsection (1)'.

an expropriation. If this were the law a public authority such as the respondent would be obliged to acquire and compensate the owners of all rights which might be affected by a proposed undertaking in the public interest, in advance of a final decision as to the extent of the undertaking or even whether it will be implemented at all. The consequence would be that forward planning and good government would become economically impossible.

[12] The proper analysis of the position is that although the approval of the road scheme might affect the value of the property, it was nothing more than advance notification of a possible intention to construct a road which, if implemented in the form approved, would result in a taking. It was not in itself a taking. (Compare *Davies and Others v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZSC) at 237 C-D.)

[13] The learned judge in the court *a quo* reasoned that the appellant at all times knew about the road scheme and acquired the property subject thereto; that the commercial realities facing the appellant were not brought about by any intervening legislative or administrative action on the part of the respondent; and that it could accordingly not be said that the appellant had been deprived of her property, in as much as the limitations of her proprietary rights existed at the time she acquired the property. In view of the conclusion reached above, it is not necessary to consider the correctness of this approach; and in view of the relief sought by the appellant, it is unnecessary to consider what rights, if any, the appellant may have to challenge the approval of the road scheme or what rights she or her successor in title may have if a decision is made to implement the scheme: cf *Palazzolo v Rhode Island et al*, a decision of the United States Supreme Court dated 28 June 2001[12].

CONCLUSION

[14] The appeal accordingly cannot succeed. The only point which remains for consideration is whether the respondent should be allowed the

[12]The decision is not yet reported but may be found at http://supct.law.cornell.edu/supct/html/99-2047.ZS.html.

costs of two counsel. The arguments advanced on behalf of the appellant, if upheld, would have had serious consequences for the respondent. Furthermore, although leave to appeal was refused by the court below, it was granted by this Court. In the circumstances it was a wise and reasonable precaution for the respondent to brief two counsel on appeal.

ORDER

[15] The appeal is dismissed with costs which shall include the costs of two counsel.

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TD CLOETE
ACTING JUDGE OF APPEAL

CONCUR
HEFER ACJ
HARMS JA
MPATI JA
BRAND AJA