THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 5/04

In the matter between :

BUFFALO CITY MUNICIPALITY Appellant

and

WILLY GAUSS First Respondent

THE PREMIER : EASTERN CAPE PROVINCE Second Respondent

Before: **MPATI AP, NAVSA, NUGENT, CLOETE & COMRIE AJA**

Heard: **19 NOVEMBER 2004**
Delivered: **2 DECEMBER 2004**

Summary: **Expropriation – Municipal Ordinance (Cape) 20 of 1974 – whether owner entitled to be heard before preliminary steps taken by local authority.**

J U D G M E N T

NUGENT JA:

[1] The Expropriation Act 63 of 1975 authorises (in specified circumstances), and regulates, the acquisition of property by the state. Its regulatory provisions are extended to local authorities by s 5, which provides that 'if a local authority has the power to expropriate property then such power may only be exercised, *mutatis mutandis*, in accordance with the Act'.

[2] The acquisition of property is effected under the Act by serving upon the owner a notice of expropriation containing certain information, including the date of expropriation (s 7), and ownership of the property then vests in the expropriator on that date (s 8). Compensation is payable to the owner for the loss of the property in an amount that, if it cannot be agreed upon, is to be determined by the High Court.

[3] A local authority – or at least one to which the Municipal Ordinance (Cape) No 20 of 1974 applies – does not have the power to expropriate property except with the prior approval of the provincial Premier.[1] Approval may be sought from the Premier only after the local authority has exhausted a prescribed procedure. First, it must resolve by special resolution to expropriate the property.[2] Then it must serve on the owner and on the Registrar of Deeds what is referred to as a 'preliminary notice', in which the owner is informed of the local authority's intention, and is informed that any objections to the proposed expropriation may be lodged with the Town Clerk within thirty days of the service of the notice.[3] Upon expiry of that period the local authority must transmit to the Premier any objections lodged by the owner, together with its comments and a copy of the preliminary notice, and must seek the Premier's approval for the proposal.[4] If the Premier approves the expropriation the local authority may proceed to expropriate the property in accordance with the Act (by serving a notice of expropriation on the owner). If the Premier does not approve the local authority must serve a notice on the owner and on the Registrar of Deeds withdrawing its preliminary notice.[5]

[4] In the present case the appellant – which is a local authority that is subject to the Ordinance – wishes to expropriate a farm portion that is owned

[1] The Ordinance refers to the Administrator but in terms of Item 3(2)(b)(ii) of Schedule 6 to the Constitution of the Republic of South Africa 1996 that is to be construed as referring to the Premier of the relevant province.

[2] Section 123(3).

[3] Section 123(4).

[4] Section 123(5).

[5] Section 123(6) of the Ordinance.

by the respondent for the purpose of accommodating the expansion of an existing informal residential settlement. On 3 May 1999 it decided – by special resolution – to expropriate the property. A preliminary notice was served on the respondent and on the Registrar of Deeds in the requisite form, and the respondent was also informed that he would be offered compensation in the sum of R60 000. The respondent lodged an objection to the proposed expropriation on three grounds. He said that he was himself planning to develop the property for medium and low cost housing and that preliminary plans to that end had been established; he questioned the adequacy of the compensation that was to be offered; and he questioned whether the expropriation was truly in the public interest.

[5] About three months later the respondent received from the appellant what purported to be a notice of expropriation together with a cheque for R60 000. Apparently the appellant had overlooked the fact that it had no authority to expropriate without the Premier's approval. When that was brought to its attention by the respondent's attorney the notice of expropriation was withdrawn and the cheque was returned.

[6] The appellant then sought the Premier's approval. Discussions and correspondence ensued but none of that is material to the issues that arise in this appeal. It is sufficient to say that before the Premier had either approved or disapproved the proposal (he had still not done so when the present proceedings were commenced) the respondent's attorney wrote to the appellant alleging that its decision to expropriate the property (taken by the special resolution of 3 May 1999) was unlawful because the respondent had not been given prior notice of the appellant's intention nor an opportunity to make representations before it was taken. The appellant was called upon to withdraw its preliminary notice, which the appellant declined to do, whereupon the respondent applied to the Eastern Cape High Court for an order reviewing and setting aside the decision and the resultant preliminary notice on the grounds foreshadowed in the letter. The application succeeded in the court *a quo* (Jones J) and this appeal is with the leave of that court.

[7] It has for long been a principle of our law – the common law at one time being its source[6] – that

'when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights,[7]the latter has a right to be heard before the decision is taken (or in some instances thereafter – see *Chikane's* [8]…at 379G), unless the statute expressly or by implication indicates the contrary.'[9]

[6] *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) 10 G-I

[7] The principle was extended in *Traub, infra,* to cases in which an affected person had a legitimate expectation of being heard.

[8] *Cabinet for the Territory of South West Africa v Chikane* 1989 (1) SA 349 (A).

[9] *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) 748G-H. See too *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) 10 G-I; *Transvaal Agricultural Union v Minister of Land Affairs* 1997 (2) SA 621 (CC) para 25.

[8] When the Constitution assumed sovereignty the principle was inevitably subsumed in constitutional principles regulating the exercise of public power. For as pointed out in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 45:

'It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change … Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed.'

[9] The principle to which I have adverted is thus inherent in s 33 of the Constitution (read, at the time that is now relevant, with Item 23(b) of Schedule 6), which guarantees, amongst other things, the right to administrative action that is procedurally fair. Seen in that context the principle affords a right to be heard in the circumstances that I have described but any purported statutory exclusion of that right will necessarily be invalid if it results in administrative action that is procedurally unfair.

[10] The respondent has not as yet been deprived of his property. It is not disputed that ample opportunity has been afforded to him to be heard before that will occur, if it occurs at all, bearing in mind that the power to deprive him of his property does not lie with the local authority but with the Premier, and that the Ordinance makes express provision for the respondent to be heard before that power is exercised. We are thus not called upon to reconsider the question whether, in general, expropriation must be preceded by an

opportunity for the owner to be heard.[10] The argument before us was rather that the respondent was entitled to be heard before the appellant's decision was taken, because the effect of its decision (once conveyed in the preliminary notice) was to restrict the use of the property. For once a preliminary notice has been served on an owner and the Registrar of Deeds then the Ordinance provides in s 123(4) that

'(i) such owner shall not alienate, dispose of, let or in any other manner deal with the immovable property concerned unless and until such notice is withdrawn;

(ii) the Registrar of Deeds shall not register transfer of the immovable property concerned to any person except the municipality unless and until such notice is withdrawn, and

(iii) any person who demolishes, damages, alters or in any other manner impairs the immovable property concerned shall be guilty of an offence.'

[11] There is no suggestion that these restrictions have had any practical effect in the present case. It is not suggested that the respondent would have dealt with his property in some way that has now been prevented. Rather, it was submitted on his behalf that the respondent is prejudicially affected by the fact alone that the restrictions exist. Assuming that to be so the question that then arises is whether the Ordinance validly excludes the right to a hearing before those restrictions take effect.

[12] Whether the Ordinance, properly construed, excludes the right to a prior hearing by necessary implication (for it does not do so in terms) must necessarily be informed by whether such an exclusion would be procedurally fair in the circumstances (and thus consistent with s 33 of the Constitution),[11] bearing in mind that if it is possible to do so a court will avoid construing legislation into constitutional invalidity.[12]

[10] Cf *Pretoria City Council v Modimola* 1966 (3) SA 250 (A), but see MD Southwood *The Compulsory Acquisition of Rights by Expropriation, Ways of Necessity, Prescription, Labour Tenancy and Restitution* 52-3.

[11] Cf *Transvaal Agricultural Union v Minister of Land Affairs* 1997 (2) SA 621 (CC) paras 30 and 31.

[12] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 20; *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) para 35; *Zondi v Members of the Executive Council for Traditional and Local Government Affairs*, unreported Constitutional Court Case 73/03 dated 15 October

[13] The reason that the Ordinance subjects the property to restrictions once the owner has been informed of the intention to expropriate is plain enough to see. It is to maintain the *status quo* until the Premier has approved or disapproved expropriation. It is to avoid the expropriation meanwhile being frustrated or subverted. (A similar restriction that arises in the process for land restitution was said in *Transvaal Agricultural Union v Minister of Land Affairs* 1997 (2) SA 621 (CC) para 36 to serve a legitimate purpose.)

[14] Even when pressed to do so, the respondent's counsel could not tell us in what manner the temporary preservation of the *status quo* without a prior hearing operated unfairly upon the owner of property that was marked for expropriation. Nor can I see how it might operate unfairly. (I have already drawn attention to the fact that it had no adverse effect in the present case.) Its effect will be felt only by an owner who would otherwise have acted to alter the *status quo;* yet it is in precisely such a case that the Ordinance and the public interest requires that he be prevented from doing so. It is not the preservation of the *status quo* itself that prejudices the owner but rather the fact that he might be dispossessed of his property, but he has a full opportunity to be heard before that occurs. The learned judge in the court *a quo* stated that the respondent was prejudiced procedurally by the failure to hold a hearing before the resolution was taken and the notice was issued but did not expand on why that was so. It also needs to be borne in mind that it is open to the owner in an appropriate case (it is difficult to envisage one) to make representations to the local authority to withdraw its notice and to rescind its resolution if, unbeknown to the local authority when the decision was made, there was good reason not to expropriate, and more importantly, not to restrict the use of the property while the merits of expropriation were being considered. But once the local authority has marked the property for expropriation I can see no reason why the failure to afford the owner an opportunity to be heard before the *status quo* is temporarily preserved will operate against him unfairly.

[15] Clearly the Ordinance does not envisage a hearing before the local authority's decision is taken – that the owner is invited to object only after the decision is made necessarily means that no objection before then is contemplated – and this construction is not in conflict with the Constitution. In those circumstances the appellant's decision and the consequent preliminary notice were lawful and the application ought to have failed.

[16] The appeal is upheld with costs. The order of the court *a quo* is set aside and the following order is substituted:

'The application is dismissed with costs'.

2004 para 102.

R W NUGENT
JUDGE OF APPEAL

MPATI AP)

NAVSA JA)
CLOETE JA) **CONCUR**

COMRIE AJA)