REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 291/07
Reportable

In the matter between:

CITY OF CAPE TOWN **APPELLANT**

and

HELDERBERG PARK DEVELOPMENT (PTY) LTD **RESPONDENT**

CORAM: MPATI AP, FARLAM, HEHER JJA, SNYDERS et KGOMO AJJA

HEARD: 14 MAY 2008

DELIVERED: 2 JUNE 2008

SUMMARY: Administrative law – section 28 of Land Use Planning Ordinance 15 of 1985 (Cape) – whether gives rise to independent cause of action for compensation – whether compensation claimable flowing from *ultra vires* decision not set aside – order in para 13.

Neutral citation: This judgment may be referred to as *City of Cape Town v Helderberg Park Development (Pty) Ltd* (291/07) [2008] ZASCA 79 (2 June 2008).

JUDGMENT

FARLAM JA

[1] I have had the advantage of reading the judgment of my colleague Heher JA, giving his reasons for holding that the appeal should be dismissed. In view of the fact that I think that the appeal should be allowed it is necessary for me to state my reasons for being of that opinion.

[2] I do not think that my colleague is correct in saying (in para 41 of his judgment) that on a proper construction of s 28 of the Land Use Planning Ordinance 15 of 1985 (commonly referred to by its acronym 'LUPO') the owner of land subject to an approved subdivision application has a claim for compensation from the local authority concerned in respect of those portions of the public streets vesting in the authority upon the confirmation of the subdivision which exceed the normal need therefor arising from the subdivision. It is instructive to have regard to the wording of the section which reads as follows:

'**Ownership, on subdivision, of public streets and public places**
The ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision under section 25 shall, after the confirmation of such subdivision or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision or is in accordance with a policy determined by the Administrator from time to time, regard being had to such need.'

[3] In my view it is not only the logical inference to be drawn, to use my colleague's language, 'as the correlative of the negative postulation as to compensation in the section that an owner is entitled to be compensated for over-generously provided streets and public places which vest in the local authority on confirmation of a subdivision. Consider these facts: A developer applies for approval of a subdivision. In his subdivisional plan, which is approved, he makes provision for over-broad streets and over-generous public places the provision of which is not 'based on the normal need therefor arising from the subdivision'. If my colleague is correct the developer will be able to claim compensation for the 'unneeded' portions

of the streets and public places, for which the local authority will have to pay. One would not lightly conclude that the lawgiver could have intended such a result.

[4] I also disagree with the final sentence of para 38 of my colleague's judgment. In this respect I agree with the submission of counsel for the appellant that the imposition of condition 'u' in the purported exercise of the powers vested in the local authority by s 42 of LUPO did not constitute expropriation because the owner was not obliged to submit to the vesting of his land subject to the condition. This is because the owner could have avoided the vesting of these portions of its land by not proceeding with the proposed subdivision: cf *Administrator Cape Province v Ruyteplaats Estates (Pty) Ltd* 1952 (1) SA 541 (A) at 550H-551F (on which the appellant's counsel relied), where Greenberg JA said:

'Before examining the Ordinance [the Townships Ordinance 33 of 1934 – the statutory predecessor to LUPO] in order to ascertain whether, under the powers conferred by it on the Administrator, he is entitled to expropriate without the payment of compensation, the contention of Mr *Diemont,* on appellant's behalf, that the condition does not amount to such expropriation, must be considered. His first point was that the condition does not compulsorily expropriate the respondent's property inasmuch as he is not compelled to establish a township. Mr *Duncan's* reply to this was that expropriation without compensation, which I shall describe as confiscation, remains confiscation even if it is applied only when the owner chooses to deal with his property in a certain manner. I am not satisfied that this wholly meets the point. In the absence of any authority that the principle of interpretation applies to cases where it is within the owner's choice whether his property is confiscated or not, and we were not referred to any, it may be open to question whether the principle applies to such cases. But without deciding whether it does or not, it appears to me that it can safely be said that part at any rate, of the reasons why the Court will not construe legislation as empowering confiscation is its injustice and harshness and these are undoubtedly greater when the confiscation is inevitable than when it only takes place where the owner chooses to deal with his property in a particular way. Consequently, assuming that the principle applies to such cases, I think that the Court will be less reluctant to construe legislation as empowering confiscation in this limited way than when the confiscation takes place whether the owner deals with his property or not. Another circumstance which adds to the point raised on behalf of the appellant is that, even when such a condition has already been imposed by the Administrator the appellant can avoid the confiscation by abstaining from availing himself of the permission to establish the township. There is nothing in the Ordinance which prevents him, notwithstanding the permission, from dealing with the ground in the same manner as he was entitled to do before the permission was granted. Indeed the grant of the permission can be treated by him as an offer by the Administrator to grant permission, on the condition stipulated, of which he, the owner, can avail himself or not, according to his own choice.'

[5] This passage was referred to in *Belinco (Pty) Ltd v Bellville Municipality* 1970 (4) SA 589 (A) at 597C-G and the point left open was answered as follows:

'The answer seems to me to depend in the main on the degree of freedom of choice. The rule is based on democratic dudgeon towards confiscation of private property, and the assumption that the elected Legislature shares that distaste. In the present case the appellant company owns land on which business premises already exist. It wishes to add to such premises, and the plans comply with the municipal building regulations. In these circumstances to withhold approval of the plans, unless the company surrenders nearly a quarter of its land without compensation, seems to me to be in effect holding it to ransom in its lawful ordering of its affairs; yet that is the sort of situation which clause 8 (A) (i) covers and would sanction. In principle the distinction between ransom and uncompensated expropriation seems to me so delicate as to lack any discernible robustness.'

[6] I do not think that it would be correct to say that the appellant's predecessor can be said to have been 'holding [the respondent] to ransom in its lawful ordering of its affairs'.

[7] Furthermore the owner could have appealed to the Premier under s 44 of LUPO against the imposition of the condition and on the basis of the concession made by the appellant for the purposes of the adjudication of this part of the case its appeal should have succeeded. If it had not it could have successfully taken the decision to impose the condition on review. But it did not do any of these things. It actually applied for the extension of the allegedly invalid approval of the subdivision (invalid because it was based upon an invalidly imposed condition) when it was due to expire. It thereafter proceeded with the subdivision for which it obtained approval and now seeks to be compensated for doing so. Although it calls its claim a claim for 'compensation', it is in truth, as counsel for the appellant contended, a claim for constitutional damages.

[8] This court has held on at least four occasions, (to all of which counsel for the appellant referred), in closely analogous situations, that a party who has at his or her disposal the remedy of review and does not make use of it will not be allowed to claim damages because, as it was put in the first of the cases to which we were referred, *Knop v Johannesburg City Council* 1995 (2) SA 1(A) at 33B, such a party

‘does not need action for damages to protect his [or her] interests; he [or she] has readily at hand the appeal procedure provided within the legislative framework’ to which may be added, in cases such as this, a review. See also *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA), *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) and *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) (confirmed on appeal by the Constitutional Court: see *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC)).

[9] Counsel for the appellant also referred us to what Van den Heever JA said in the *Ruyteplaats* case, *supra,* at 560H-561A, in particular his *dictum* (at 561A):

‘that if the conditions are struck out the consent itself is completely vitiated; for one consents to some definite thing, not in the abstract.’

[10] In my view, based on what Van der Heever JA said in the passage to which I have referred, what the respondent in this case wants to do is to take the benefits of the unlawful decision whilst being freed from the obligations flowing from it. This is something that public or legal policy considerations cannot contemplate. I agree with counsel for the appellant that the administrative act at issue cannot be disentangled: the decision or administrative act as a whole should either have been appealed or reviewed and set aside.

[11] In the circumstances I am satisfied that the appellant’s contention that the respondent’s remedies in this case were limited to internal appeal in terms of s 44 of LUPO and judicial review and that it is not entitled, where it failed to exercise those remedies, to claim a compensatory award must be upheld.

[12] This conclusion renders it unnecessary to consider the appellant’s further argument, based on the decision of this Court in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA), that condition ‘u’, even if *ultra vires* the local authority, is effective and binding until and unless set aside and that what the respondent is seeking to do is to mount an impermissible collateral challenge upon it. Furthermore the amendment sought by the respondent to which Heher JA refers in

para 54 of his judgment takes the matter no further and is refused.

[13] In my opinion the appeal should be allowed. Had the court *a quo* upheld the first special plea, as it ought to have done, it would have been unnecessary for it to deal with the second special plea of prescription. (The second special plea is referred to at footnote 2 of the judgment of Heher JA.)

[14] In the result, I make the following order:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced with the following:
   'The first special plea is upheld and the action is dismissed with costs.'

……..
IG FARLAM
JUDGE OF APPEAL

CONCURRING
MPATI AP
SNYDERS AJA
KGOMO AJA

HEHER JA:

[15] The respondent sued the appellant in the High Court, Cape Town for payment of compensation in the amount of R3 170 635,20 arising out of the vesting in the appellant of 0,9414 hectares of land pursuant to the provisions of s 28 of the Land Use Planning Ordinance 15 of 1985 (Cape).[1]

[16] Section 28 provides:

'The ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision under section 25 shall, after the confirmation of such subdivision or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision or is in accordance with a policy determined by the administrator from time to time, regard being had to such need.'

(The existence of such a policy as is mentioned at the end of the section does not arise in this case.)

It was the appellant's case that the provision of the land in question was not based on the normal need for it arising from the granting of a subdivision application.

[17] The appellant raised a special plea to the particulars of claim[2] in which it alleged that the respondent enjoyed no claim in law to payment of financial compensation as claimed or at all, on grounds set out at length in that plea (to which I shall return). By agreement the parties disposed of the special plea as a separated issue under rule 33(4). The respondent called as a witness Mr Hilton Campbell, a professional engineer and a representative of the company, who had been intimately involved in drafting and submitting an application to rezone the respondent's property. That application led eventually to the subdivision and vesting of the land

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1The matter has a long history. Neither party has been involved from the beginning. Both are successors-in-title to original parties. The distinctions are however immaterial to the present dispute and when I refer in this judgment to either party I intend also to embrace the appropriate predecessor if so required.

2There were in fact two special pleas. The second, which raised prescription, was dismissed by the trial court and the defendant did not seek leave to appeal against that order. For convenience sake I will refer to the first special plea as if it were the only such plea.

which gave rise to the claim. Mr Campbell also testified about negotiations which he conducted with the appellant's officials from time to time. The appellant called no witnesses.

[18] The learned judge dismissed the special plea with costs. He refused an application for leave to appeal. This appeal is brought in consequence of leave granted by this Court.

[19] A proper understanding of the dispute requires extensive reference to the pleadings. Its determination will, in my view, also turn on the place of s 28 in the scheme of the Ordinance.

[20] The particulars of claim in the action contained the following allegations which have relevance to this appeal:
(In these pleadings the 'plaintiff' is the present respondent and the 'defendant' is the appellant.)

1. Prior to 1996 the plaintiff's predecessor owned the remainder of erf 18835, Strand, approximately 32 hectares in extent.
2. The land was zoned 'undetermined' as contemplated in Chapter 2 of the Ordinance.
3. During 1996 the owner applied to the local authority then possessing jurisdiction to rezone the land so that it could be subdivided for the purposes of development.
4. On 3 April 1997 the plaintiff became the owner of the land.
5. On or about 24 April 1997 the local authority approved the rezoning in terms of s 16(1) of the Ordinance.
6. In granting the application the local authority imposed certain conditions purportedly in terms of s 42(1) and (2) of the Ordinance including the following:

   '(u) that a 32 m wide road reserve of Broadway extension located on the whole of the [western] boundary of the remainder of erf 18835, must be given off free of charge before any sub-divisional plan will be approved'.
7. At the time of the granting of the rezoning application and the imposition of the condition,

(a) a 16 metre wide street along the western boundary would have been adequate, according to accepted town-planning and sound traffic engineering criteria, to give access to any development that might occur pursuant to the subdivision of the land itself; and

(b) the purpose of the condition was not only to give road access to any development that might occur pursuant to the subdivision itself, but also to ensure that Broadway would be extended as an arterial and/or metropolitan road which would in the fulness of time take over and complement the regional function of such other roads in the area, catering for regional traffic, serving as a major collector road and providing access to neighbouring developments.

8. About March 2001 the plaintiff applied to the defendant in terms of s 24(1) of the Ordinance for the subdivision of the land. The application was accompanied by and particularised in a plan which depicted the proposed subdivision.

9. The application and the plan provided for –

(a) in compliance with condition (u), the creation of a 32 metre wide public street of about 2,1986 hectares in extent; and

(b) the creation of one land unit of about 0,4150 hectares in extent.

10. The defendant granted the subdivision application and advised the plaintiff thereof on 11 July 2001.

11. At the time that the defendant granted the application:

(a) a 16 metre wide street along the western boundary of the land would have been adequate, according to accepted town planning and sound traffic engineering criteria, to give road access solely to any development that might occur pursuant to the subdivision of the land itself; and

(b) the contemplated 32 metre wide street along the western boundary of the land, being twice as wide as that which would have been adequate, was necessary to serve the additional purpose of ensuring that Broadway would be extended as an arterial and/or metropolitan road.

12. The plaintiff thereafter–

(a) submitted a general plan or diagram of the subdivision to the Surveyor-General in terms of the Ordinance, which was subsequently approved;

(b) complied with the requirements of s 27(1) of the Ordinance; and

(c) sold portion A and on 11 January 2002 obtained registration into the name of the purchaser.

13. In the premises:

(a) the subdivision was deemed to be confirmed on 11 January 2002, in terms of s 27(3); and

(b) ownership of Broadway extension *ipso jure* vested in the defendant as from 11 January 2002, in terms of s 28.

14. Section 28 of the Ordinance provides, by necessary implication, that if the provision of public streets over land, indicated as such at the granting of an application for subdivision of land, is not based on the normal need therefor arising from the subdivision, the owner shall, to the extent that it is not so based, become entitled to just and equitable compensation from the local authority in whose area of jurisdiction the land is situated, when, upon the confirmation of the subdivision, ownership of those streets vest in that local authority.

[21] The particulars of claim relies upon various alternative causes of action including an actual or constructive expropriation of the excess portion of the road reserve and the payment of just and equitable compensation based on s 25 of the Constitution. The special plea is adapted accordingly. Because of the conclusion I have reached, it becomes unnecessary to examine all save two of the alternatives or the responses to them.

[22] The plaintiff pleaded, in paragraph 27 of its particulars of claim that ‘only in the event that it shall be necessary for this Honourable Court to determine the validity of [condition (u)]’, that condition was *ultra vires* the provisions of sections 42(1) and 42(2) of the Ordinance and therefore void for the same reasons as are referred to in paragraph [6] at point 7.

[23] As a final alternative the plaintiff introduced by amendment a cause of action which had earlier been pleaded in its replication in the following terms:

‘On or about 4 December 2000, and at Somerset West, alternatively at Strand, the Plaintiff and the

Municipality concluded a written agreement ("the agreement"), a copy whereof is annexed hereto marked "B".

7.2 Clause 7.1 of the agreement provides as follows:

> **"7.1 The Parties record that in terms of letter 16/1/5/2/1/197 dated 24 April 1997 the rezoning of Erf 18835 was approved on certain conditions which include the following:**
>
> **"(u) that a 32 m wide road reserve of Broadway extension located on the whole of the eastern boundary of the remainder of erf 18835, must [be] given free of charge before any sub-divisional plan will be approved."**
>
> **On signing of this agreement HPD agrees to allow the transfer process to take effect without prejudice to their rights (if any) to compensation for the above road reserve."**

7.3 The following were express terms of the agreement:

> 7.3.1 The plaintiff would allow the transfer process of the land constituting the road reserve referred to in condition (u) to take effect;
>
> 7.3.2 Such agreement, and the consequent transfer of such land, were without prejudice to the Plaintiff's rights (if any)to compensation for such land.'

On this factual basis the plaintiff relied upon a proper construction of the agreement or a tacit term flowing from it that, if it had any rights to compensation for the land, it would not be precluded from enforcing those rights by the words 'free of charge' in condition (u). The plaintiff also averred that clause 7.1 of the agreement constituted an amendment of condition (u) as contemplated in s 42(3) of the Ordinance.

[24] The defendant's special plea was lengthy. Several of the plaintiff's factual averments were repeated and some were added. Various legal conclusions were drawn. The additional factual averments were these:

1. The plaintiff did not appeal in terms of s 44 of the Ordinance against the imposition of the condition or apply in terms of s 42 for its amendment.
2. In April 1999 the plaintiff applied in terms of s 16 of the Ordinance for the extension of the validity of the rezoning of the land and on 21 April 1999 the local authority granted approval for the extension of the rezoning approval for a period of two years, subject to conditions which incorporated, inter alia, condition (u).
3. On 12 November 2002 the plaintiff instituted an application to review and set aside or amend the rezoning decision by which condition (u) had been imposed. After the defendant had opposed the application and delivered its

answering affidavits the plaintiff withdrew the application and tendered payment of the defendant's costs.

4. The plaintiff complied with the requirements of condition (u) by framing and submitting for approval a plan of subdivision in respect of the land which gave effect to the said condition, and after obtaining the defendant's approval of the subdivision in accordance with the plan, securing the confirmation of the subdivisional approval by transferring a unit of land in the subdivision as contemplated by s 27 of the Ordinance.

[25] In the special plea the defendant raised and relied on the following legal conclusions drawn from all or certain of the facts asserted by the plaintiff and added to by it in the special plea:

1. The obligation imposed on the plaintiff in terms of condition (u) fell to be complied with according to its tenor as a matter of law unless and until it was set aside or amended, either in terms of the Ordinance or on judicial review (neither of which had occurred).
2. By (a) failing to appeal or apply for an amendment, and/or (b) agreeing to allow the transfer process to take effect, the plaintiff waived any right it may have had to apply for a review and setting aside or amendment of the decision imposing condition (u) and limited itself to a claim for compensation for the land.
3. Section 28 finds no application on the facts of the claim in the context of the incidence of [condition (u)] imposed in terms of s 42 of the Ordinance.
4. The plaintiff's litigious remedy in the context of its allegation that condition (u) was outside the local authority's powers under the Ordinance, in so far as the extent of the land to be ceded was concerned, was limited to obtaining the judicial review and setting aside or amendment of the decision in terms of which the rezoning condition was imposed.

[26] Prior to the commencement of the hearing the parties recorded a 'Note of Agreement in respect of consideration of the First Special Plea' which became Exhibit A in the trial. It reads:

'For the purposes of the determination of the Defendant's first special plea (which is limited to the

question of whether a claim for compensation in the circumstances is competent in law), it may be assumed by the Court (without derogation from the content of paragraphs 9, 12-14, 18-26 of Defendant's general plea, as amended, dated 22 August 2006 in the event of the matter subsequently proceeding to trial on the issues stood over for later determination, if neither of the special pleas is upheld) that a width of less than 32m road reserve for the extension of Broadway Extension was needed for the provision of road access to the subdivision proposed on the remainder of erf 18835, Strand. In clarification of the aforegoing, for the purpose of determining the first special plea, which is in the nature of an exception, it may be assumed that the imposition of the condition, referred to in the special plea as "condition (u)" was *ultra vires* the powers of the local authority in terms of the Land Use Planning Ordinance 15 of 1985 (LUPO). Accordingly, it will not be necessary for the trial of the special pleas for the parties to establish the actual road width needed directly related to requirements resulting from the rezoning and subdivision of erf 18835, Strand, (within the meaning of s 42 of LUPO) or to provide the 'normal need' for road space (within the meaning of s 28 of LUPO), but their right to do so later in respect of the issues not falling for determination at this stage pursuant to the separation of issues is reserved.'

In short, the appellant accepted, for the purposes of the special plea, (i) that the imposition of the whole or a part of condition (u) was *ultra vires* the powers of the appellant, and (ii) that the whole or a part of the road reserve which vested in it under s 28 was not 'based on the normal need' for such road arising from the subdivision of the respondent's land.

[27] When the matter was argued before us counsel for the respondent contended that s 28 stood independent of s 42 and fell to be interpreted in such a manner as conferred or recognised a right of compensation as a necessary implication. Counsel for the appellant by contrast (and in the face of a concession in his heads of argument) submitted that the case based on s 28 could not be divorced from the conditions imposed under s 42 and the nullity of part or the whole of a decision to impose rezoning conditions could not effectually be raised as a collateral challenge to the validity of a subdivisional approval (which resulted in the vesting of the whole of the road reserve shown on the subdivisional plan). It is obvious that the scheme of the legislation is essential to the adjudication of the respective arguments.

[28] The Ordinance provides the legislative framework for town and regional planning in the province. A principal land use control is 'zoning' which, in terms of s 2 (xxxiii), 'when used as a noun, means a category of directions setting out the

purpose for which land may be used and the land use restrictions applicable in respect of the said category of directions, as determined by relevant scheme regulations'. Land set apart by a zoning scheme for a particular zoning, irrespective of whether it comprises one or more land units or part of a land unit, is referred to as a 'zone' (s 2 xxxi). All land in a municipality is zoned according to a zoning map framed in terms of s 10 of the Ordinance.

[29] An owner may apply to alter the zoning of his property (s 17) and the Administrator or the council (as the case may be) may grant or refuse the application (s 16 (1)).

[30] Section 22 provides that no application for subdivision which involves a change of zoning may be considered unless and until the land concerned has been zoned in terms of Chapter II (secs 7 to 21). Applications for rezoning and subdivision can be considered simultaneously. When a subdivision is confirmed (in terms of s 27) in whole or in part, it is to that extent deemed to be a substitution scheme, ie a scheme which takes the place of an existing zoning scheme (s 14(4)(a)).

[31] In terms of s 23 lawful subdivision of land can, except in the case of the specific exceptions there mentioned, only take place in accordance with an application granted under s 25 of the Ordinance.

[32] Section 25(1) provides that either the Administrator or, if authorised thereto by scheme regulations, a council, may grant or refuse an application for the subdivision of land. Once an application has been granted, the owner shall submit a general plan or diagram to the Surveyor-General (s 26).

[33] Section 27 provides:

'(1) If a Surveyor-General has approved a general plan or diagram as contemplated by section 26, the owner concerned shall, within a period of five years after the application has been granted under section 25 or within such longer period as the Administrator or the council concerned, as the case may be, may determine, furnish the registrar of deeds concerned with such documents and information as he may require, comply with the requirements of the said registrar in connection with the cancellation of existing conditions of title, provide services in accordance with a condition imposed under section 42(1) in respect of the subdivision and obtain the registration of at least one land unit.

(2) Where an owner has failed to comply with the provisions of subsection (1) in relation to a subdivision or a part thereof, the granting of the application under section 25 shall be deemed to have lapsed in relation to the said subdivision or part thereof at the expiry of the period contemplated by subsection (1), and the diagram or general plan concerned shall be amended in accordance with the requirements of the Surveyor-General.

(3) As soon as the provisions of subsection (1) have in relation to a subdivision or part thereof been complied with in such manner that the granting of the application concerned under section 25 cannot lapse in terms of subsection (2) of this section, such subdivision or part thereof shall be deemed to be confirmed.'

[34] As appears from s 28, quoted above, after confirmation of subdivision ownership of all public streets and places indicated as such when an application for subdivision is granted automatically vests in the local authority concerned. If the provision of such streets and places is based on 'the normal need therefor arising from the subdivision' such vesting takes place without

compensation by the local authority.[3]

[35] Section 39(1) binds every local authority to observe, comply and enforce compliance with the provisions of the Ordinance, the provisions incorporated in a zoning scheme and conditions imposed in terms of the Ordinance.

[36] A contravention or failure to comply with the provisions of a zoning scheme or conditions imposed in terms of the Ordinance is a criminal offence which carries substantial penalties (s 39(2) read with s 46(1) and (2)).

[37] Section 42 deals with the imposition of conditions. It provides:

'**42.** (1) When the Administrator or a council grants authorisation, exemption or an application or adjudicates upon an appeal under this Ordinance, he may do so subject to such conditions as he may think fit.

(2) Such conditions may, having regard to—

(a) the community needs and public expenditure which in his or its opinion may arise from the authorisation, exemption, application or appeal concerned and the public expenditure incurred in the past which in his or its opinion facilitates the said authorisation, exemption, application or appeal, and

(b) the various rates and levies paid in the past or to be paid in the future by the owner of the land concerned,

include conditions in relation to the cession of land or the payment of money which is directly related to requirements resulting from the said authorisation, exemption, application or appeal in respect of the provision of necessary services or amenities to the land concerned.'

[38] Finally, s 44 confers a right of appeal against the refusal or granting or conditional granting of an application in terms of the Ordinance.

[39] Counsel for the appellant submitted that s 28 is a vesting clause and does not contain a power of expropriation. That vesting is its primary object there can be no doubt. However the implications of the phrase 'without compensation' cannot be ignored. In theory the automatic vesting of land occurs in terms of s 28 at the voluntary instance of the landowner who elects to rezone his land, provides for roads

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3A submission by appellant's counsel, briefly maintained, that the vesting itself depends on the existence of a normal need, is in conflict with the syntax and punctuation of the section.

and public places in his application for subdivision and causes the subdivision to be confirmed. But that is to ignore the substance. It is not the owner's choice whether or not to give such land to the local authority but the unavoidable result of a statutory provision which applies to all cases. It is sophistry to submit, as the appellant's counsel has done, that the fact that the owner can refrain from rezoning or subdividing his land confers freedom of choice. That is to place stagnation above development while the Ordinance is intended to regulate development in an orderly fashion not to stultify it. In addition, if the owner has knowledge of the statute, he will be aware that only land that falls within the defined terms of s 28 must be yielded without compensation. Such an owner can hardly be said to part willingly with land which is not vested as a result of normal need for it arising from the subdivision, unless compensation is to be paid, albeit that he has caused it to be shown as a public place or street in his subdivisional diagram. Thus, the provisions of s 28, although primarily concerned with the vesting of land, are founded in a compulsory taking and when, abused in the manner set up by the respondent's case, give rise to a situation so close to confiscation that application of the statutory principle of interpretation is both appropriate and necessary.

[40] There is of course a settled rule of interpretation that a legislative intention to authorise expropriation without compensation will not be imputed in the absence of express words or plain implication: *Belinco (Pty) Ltd v Bellville Municipality* 1970 (4) SA 589 (A) at 597C. Expropriation is the compulsory deprivation of ownership or rights usually by a public authority for a public purpose. See eg *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) at 515A-C. But the rule extends beyond expropriation in the strict sense to the interference with or injuring of persons' rights. See Steyn, *Die Uitleg van Wette* 5ed 105 *et seq*.

[41] Consistent with the rule of interpretation, and even without need to resort to the Constitution, s 28 is capable of meaning that the vesting of public places and streets beyond the normal need arising from a particular subdivision will give rise to a claim for compensation at the instance of the former owner of the land.[4] Indeed that is the only logical inference to be drawn as the correlative of the negative

4In so far as the section may be capable of any other meaning, the least onerous interpretation should be preferred: *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 735G.

postulation as to compensation in s 28: if it were not so the conditional clause linking the absence of compensation with normal need would be superfluous. But of course s 28 must, in so far as it compulsorily requires the giving up of land to a local authority, be interpreted in the spirit of s 25(2) of the Constitution ie subject to the payment of just and equitable compensation.

[42] Counsel for the appellant submitted that the respondent's claim is properly categorised as one for constitutional damages. I respectfully disagree. Section 28 describes the *quid pro quo* for land which automatically vests under its provisions as 'compensation'. No wrongful act gives rise to the claim, which is the consequence of a lawful vesting. In addition, to equate 'compensation' with damages is not reconcilable with authority: *Apex Mines Ltd v Administrator, Transvaal* 1986 (4) SA 581 (T) at 601B-H and the cases there cited.

[43] In considering an application for subdivision under s 25 of the Ordinance a local authority will no doubt take into account the extent of public roads and places shown on the subdivisional map and the need for such. It will also weigh the financial implications to it flowing from the vesting of such roads and places, knowing that it is only where what is provided is based on normal need arising from the subdivision that such land comes to it free of compensation. In the circumstances I find nothing anomalous in requiring a local authority to pay for the excess beyond normal need irrespective of whether the developer has deliberately or accidentally provided for more public space than he was obliged to.

[44] Counsel for the appellant also referred to *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) in which this Court declined to recognise negligence in the exercise of a statutory power as wrongful conduct and, therefore, refused a claim for damages, on the ground that the appellant had not used an available legislative remedy (appeal) to set matters right. In *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) the same approach was taken where an interdict would have anticipated and eliminated the appellant's source of loss. The availability of review proceedings may also be a consideration in appropriate circumstances where the existence of a legal duty is in question: *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at 167H-168E.

[45] It seems to me, however, that these cases stand on an entirely different footing from the present appeal. Wrongfulness is not relevant here. Our decision is not policy-based. Indeed as will be seen the court is, in the circumstances of this case, not vested with any discretion. The question at issue is the effect of the absence of a lawful power in a public body to take a decision in one statutory context and on which that body subsequently seeks to rely in order to justify its actions in a second (and different) statutory context. That situation was resolved in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) without reference to the *Knop* line of cases. I shall shortly return to a consideration of what this Court decided in *Oudekraal* and explain why I see it as relevant to the respondent's cause of action.

[46] Section 28 caters for the passing of ownership to a local authority without the need for formal transfer of ownership and the possible delays and disputes to which that process may give rise. It enables the local to control and manage such places and streets as soon as the applicant for subdivision is legally entitled to exercise his approved rights. The section lays down its own criteria for compensation which apply to all cases of subdivision including those consequent upon rezoning. It serves a purpose independent of a condition laid down under s 42 providing that land be ceded free of charge, and operates irrespective of whether such a condition has been imposed. It is plain from s 22 that a change of land use involving subdivision only acquires the legal force of rezoning (as a substitution scheme) in consequence of the confirmation of the subdivision, and, therefore, not *ipso facto* in consequence of the imposition or acceptance of conditions imposed under s 42. The importance of the legality of the confirmation in the process, irrespective of preceding defects, is therefore obvious. I think the concession by counsel for the appellant in his heads of argument that s 28 has 'a role and function quite discrete from conditions imposed in terms of s 42' was correctly made.

[47] Given the differences in purpose and language between s 28 and s 42 it is unnecessary for a claimant for compensation under the first-mentioned section to rely on the zoning provisions which attach to the land or the conditions imposed on such zoning. That the respondent referred to them in its, perhaps unnecessarily

lengthy, historical introduction to its particulars of claim cannot change the source of its right of action and the averments necessary to sustain it or result in the assumption of a greater onus. All that the respondent was required to do was to bring itself within the terms of s 28. That it did by the allegations, other than its averments relating to condition (u), which it included in its particulars of claim.

[48] The respondent did not, as the appellant's counsel argued, challenge the validity of the subdivisional confirmation. On the contrary, its case was that that confirmation took place in accordance with the prescriptions of s 28. That being so, only that portion of the road reserve shown on the plan which was provided on the basis of normal need arising from the subdivision conferred the benefit (on the appellant) of vesting free from compensation.

[49] The appellant's special plea (read with the pre-trial admissions) met the claim with a confession and avoidance. Having pleaded reliance on condition (u) to stymie the compensation claim the appellant admitted (for the purposes of the special plea) that that conditions had been *ultra vires* the authority which imposed it but rejoined that the respondent was prevented from raising the nullity because it had neither appealed under s 44 or set aside condition (u) aside on review. The applicable principle, appellant's counsel submitted, was that an unlawful administrative act is capable of producing legally valid consequences for so long as it is not set aside: *Oudekraal Estates (Pty) Ltd v City of Cape Town*, *supra*, at 242B. But that principle is not absolute.

[50] The success of the special plea depended on the appellant's ability to rely on condition (u). Inherent in the condition was a compulsion to make over to the local authority free of charge land which was not directly related to requirements resulting from the application for rezoning and was therefore unlawful. The settled law is that the target of such compulsion is entitled to await events and resist only when the unlawful condition is invoked to coerce it into compliance: *Oudekraal Estates (Pty) Ltd v City of Cape Town*, *supra,* at 245F-G; See also *Boddington v British Transport Police* [1999] 2 AC 143 (HL) at 157H-158D.[5] Neither failure to challenge the

5The court *a quo* held that the imposition of condition (u) of itself amounted to coercion. I do not agree. It merely provided the grounds on which the local authority sought to justify withholding what was the respondent's due in the form of compensation.

unlawfulness by appeal or review is a bar to the exercise of the right to defend oneself in such a case. As was said in *Oudekraal* at 246B:

'It is important to bear in mind (and in this regard we respectfully differ from the Court *a quo*) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and *ex hypothesi* the subject may not then be precluded from challenging its validity. On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy.'

[51] Because condition (u) was not an element in the respondent's cause of action, its reliance on the nullity of the condition was, properly analysed, a defensive challenge to the appellant's attempt to enforce the condition and thereby to deny the respondent its s 28 remedy. The fairness of recognising such a challenge in the circumstances of this case is manifest: no third party derives any interest from condition (u) and the local authority, the very author of the unlawful condition, seeks to benefit itself by enforcing the illegality. As appears from the passage last quoted considerations such as delay cannot operate as a bar to the raising of the defence.

[52] The trial court found that the agreement of 4 December 2000[6] embodied an amendment to condition (u). I respectfully disagree. Although it may be, when no other person's interests are affected by a proposed amendment, that the local authority and the owner of the land can reach an agreement to amend zoning conditions without formality, and thereby comply with s 42(3), the terms of the agreement in this case and the evidence of Mr Campbell indicates otherwise. The respondent had taken the view that condition (u) was, at least in so far as it stipulated for a transfer of the full road reserve free of charge, beyond the council's powers. But the respondent also wished to press on with the development of its land urgently. It took a pragmatic decision to transfer the whole of the road reserve to the local authority but to record that its willingness to do so was without prejudice to its right to be compensated accordingly. The council, on the other hand, did not wish the agreement to be interpreted as a concession on its part of the existence of any such right. Hence it insisted on the parenthetical 'if any'. Thus, the respondent acquired no

6 See paragraph [10] above.

acknowledgment of a right, but at the same time succeeded in making clear in relation to its subsequent conduct, that it acted on the basis of its assertion that it possessed a right to compensation. This latter aspect is of importance, since it negates the submission of the appellant's counsel that, in pursuing and confirming the subdivision on the foundation of a plan which showed the full 42m width as road reserve, the respondent tacitly consented to vesting the entire area in the local authority free of charge.

[53] A further consideration which flows from the interpretation of the undertaking in the letter is this. When the respondent applied to review and set aside the decision which resulted in the imposition of condition (u), its application was met by the appellant, on the ground, inter alia, that the respondent had, by agreeing to proceed to transfer, waived its right to apply to set aside the decision which gave rise to the obligation to transfer. This was manifestly a deadly riposte and the respondent promptly abandoned the application. Knowing, as it has at all material times, that transfer was undertaken with the reservation of the respondent's claim to compensation, it appears to me to be cynical in the extreme for the appellant to raise the failure to set aside the decision on review as an answer to the claim for compensation. In the circumstances, for this reason also, the conclusion I have reached satisfies the dictates of fairness between the parties.

[54] For the aforegoing reasons the special plea provided no sustainable answer to the respondent's claim. The court *a quo* was correct in refusing to uphold it.

[55] During the course of his argument Mr *Newdigate* applied to amend prayer A2 of the particulars of claim (Prayer A1 related to the claim for compensation). It presently reads as follows:

'To the extent that it is necessary to make an order to this effect in order to entitle the Plaintiff to the relief sought in prayer A1 above, an order declaring that condition "u" imposed by the Helderberg Municipality on or about 24 April 1997 in terms of annexure "A" hereto, was *ultra vires* the provisions of section 42(1) and 42(2) of the Land Use Planning Ordinance, No 15 of 1985 (Cape), and therefore void, alternatively, to the extent that the condition required a cession of the land "free of charge", it was *ultra vires* the provisions of section 43(1) and 42(2) of the Ordinance, and to that extent void.'

Counsel sought to add the words ‘and to that extent is set aside’ before the full stop. Mr *Binns-Ward* opposed the amendment. There is in principle no reason why the court’s power to amend should not be exercised at the stage of appeal, *Bellairs v Hodnett* 1978(1) SA 1109 (A) at 1150F, but if that is to be done the result must at least bear some relevance to the appeal. As I have found that the special plea cannot succeed albeit that the assumed *ultra vires* act has not been set aside, the amendment serves no purpose at this stage. It may however, have a bearing on the issues in the trial. But that is a matter that can properly receive the attention of the trial court should the application be renewed. Accordingly I think it is advisable to make no order on the application.

[56] I would dismiss the appeal with costs including the costs of two counsel.

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J A HEHER
JUDGE OF APPEAL