NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 14688/2009

In the matter between:

THE ETHEKWINI MUNICIPALITY APPLICANT

and

SOTIRIOS SPETSIOTIS RESPONDENT

JUDGMENT

GORVEN J

[1] The applicant seeks to evict the respondent from the commercial premises known as the XL Restaurant situated at 130 South Beach Walk. It is common cause that the applicant is the owner of the property and has leased the premises to the respondent, which lease ends in 2014. This being the case, the applicant bears the onus to prove a valid termination of the right of the respondent to occupy the premises.[1] This it seeks to do by proving that the right in and to the lease of the respondent has been expropriated. The respondent denies that the expropriation is valid in law, raising this as a collateral challenge as envisaged in *Oudekraal Estates (Pty) Limited v City of Cape Town and Others*[2]. The matter was dealt with as being urgent in the

[1] *Chetty v Naidoo* 1974 (3) SA 13 (A)
[2] 2004 (6) SA 222 (SCA) at para [32]

light of the need to begin work on the project mentioned below. I did not understand this to be contested in argument. It has also, therefore, been necessary to prepare this judgment with some degree of urgency.

[2] On 11 May 2009 the respondent received a notice of intention to expropriate. What gave rise to this notice was the decision taken by the applicant to upgrade the beachfront ahead of the 2010 FIFA football world cup tournament. The applicant says that this upgrade includes the development of a wide promenade that runs all the way from Ushaka Marine World in the south, along the beachfront to the Suncoast Casino and on to the Moses Mabhida Stadium in the north. The premises in question are situated along the proposed path of the promenade. It says that, in the vicinity of the premises, and as part of the upgrade, a “kick-about” area, comprising public open space, will be developed. The leased premises comprise approximately one-third of this area. Ground levels will need to be reshaped between the promenade in the east and the new parking node to the west. The respondent asserts that the upgrade can be achieved without interfering with the premises or, at most, with a re-siting of the outside seating for the restaurant. It was clear from the papers that the respondent, in making the assertion, was doing so with reference to the initial proposal concerning the upgrade. This was contained in what was referred to in the papers as the Background Information Document (“BID”). The applicant, in reply, states that, after the initial public consultation process had taken place, it modified the proposal and informed all participants at the public meeting, which included the respondent, of the modifications. This was contained in what was referred to

in the papers as the Basic Assessment Report ("BAR") which was the next step in the public participation process. This modified proposal, in both alternative routes for the promenade, requires the demolition of the restaurant. It says that even if the promenade were able to skirt the premises, the levels would not be correct and the premises will have to be demolished.

[3] The notice of intention to expropriate included the following content:

> In order to carry out certain improvements for public purposes it will be necessary for the Municipality to acquire your rights of usage and interests in and to the above immovable property under and in terms of the existing Memorandum of Agreement of Lease entered into between yourselves and the eThekwini Muicipality (sic). This the Municipality is obliged to achieve by means of expropriation in the interests of efficient administration.
>
> Any inconvenience or anxiety that the expropriation procedure causes is sincerely regretted and accordingly every effort will be made to assist you with any problems or queries you may have.
>
> However, before the Municipality proceeds any further you are:
>
> a) hereby given notice in terms of section 190 of Ordinance 25 of 1974 of the Municipality's future intention (subject to the approval of the Premier of KwaZulu-Natal) to expropriate your rights in terms of the existing agreement (Copy attached), and
>
> b) invited to submit within 30 days of the date of this notice a written statement detailing any objections you may have to the proposed expropriation…
>
> The initiation of expropriation proceedings does not preclude the Municipality from entering into a negotiated settlement agreement.

The notice then offered an amount of compensation and requested the respondent to indicate within 15 days if he was prepared to accept this offer.

[4] On 29 May 2009 the respondent delivered a letter in reply. In it he referred to the notice, rejected the offer of compensation as being inadequate, stated what he thought was adequate and said “Additionally I wish to place on record that I am of the view that proper grounds do not exist that entitle you to expropriate my lease”. He gave no reasons for this assertion. He thereafter indicated that he was happy to negotiate with a view to reaching agreement on a consensual cancellation of the lease but reserved all his rights. This was followed by another letter dated 25 June 2009 which referred to further negotiations and rejected an increased offer of compensation. This appears to have been followed by a further letter dated 26 July 2009 which does not form part of the papers.

[5] By letter dated 12 August 2009, the applicant wrote to the Department of Local Government and Traditional Affairs requesting the consent of the Premier to the expropriation. The letter included that of the respondent received on 29 May and those dated 25 June and 26 July respectively. By letter dated 14 September 2009 the applicant was informed that the MEC for Local Government and Traditional Affairs had approved the expropriation. The relevant expropriation notice was then served on the respondent on 18 September 2009, requiring him to vacate the premises by 19 October 2009.

[6] By the time the matter was argued it was not contested that the applicant had followed the correct procedures under the Ordinance and the Expropriation Act, No. 63 of 1975. The respondent limited his attack on the

application to two grounds. The first was that, since expropriation amounts to administrative action, the provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA") applied but had not been complied with. The second was that it had not been established by the applicant on the papers that the expropriation was rationally connected to a public purpose or to the public interest as is required by s25(2)(a) of the Constitution of the Republic of South Africa, 1996 ("the Constitution")[3]. I will deal with these grounds in reverse order. It should be mentioned that these points were raised for the first time by way of a supplementary answering affidavit filed after the applicant had delivered its replying affidavit.

[7] Whilst the respondent challenged the assertion of the applicant in the founding affidavit that the redevelopment required the expropriation since the restaurant had to be demolished, he limited his attack to the route of the promenade asserting that it did not require demolition of the leased premises, only at most the relocation of some seating. Nowhere did he deal with the averment in the applicant's founding affidavit that the demolition was necessary in order to re-develop the South Beach node or that the levels between the promenade and the parking would need to be altered. This was made even clearer in the replying affidavit where it is stated that the "development of this node comprises both the development of the promenade and the development of the 'kick-about' area with its associated earthworks and reshaping of the land. This development requires the demolition of the XL Restaurant". It further stated that the leased premises comprise

[3] This reads "Property may be expropriated only in terms of law of general application – (a) for a public purpose or in the public interest."

approximately one-third of the "kick-about" area. In addition, the respondent incorrectly relied for his contentions on the BID and not the BAR. The respondent stated that he did not deny the benefits of fully developing the South Beach node. His only attack was on the need to expropriate the lease for that purpose. As mentioned above, the respondent raised this issue in a supplementary affidavit but did not deal with the facts referred to above in the applicant's replying affidavit in support of his position such as the issue of the ground levels and the location of the "kick-about" area. I am satisfied that the applicant has proved a need to demolish the leased premises in order to achieve the proposed redevelopment. There is therefore a rational connection between the expropriation and the redevelopment of this part of the beachfront which is for a public purpose.

[8] As regards the failure to comply with PAJA, it was accepted by Mr Mullins SC who, together with Mr Pillemer, appeared for the applicant, that the provisions of PAJA apply to such expropriations.[4] Mr Pammenter SC, who appeared for the respondent, submitted that, while s190(3)(b)(ii) of the Ordinance was complied with, compliance with this section falls short of all the requirements set out in s 3 of PAJA. In particular he submitted that the procedure under the Ordinance:

1. Did not afford the respondent a reasonable opportunity to make representations, as is required by s 3(2)(b)(ii) of PAJA; and

2. Did not give the respondent an adequate opportunity to present and dispute information and arguments, as is required by s 3(3)(b).

[4] See, in this regard, *Buffalo City Municipality v Gauss & Another* 2005 (4) SA 498 (SCA)

[9] It is necessary to frame the provisions relied upon within the context of s 3 as a whole. This was done, in a matter where the attack was on a failure to allow legal representation at a tertiary institution's disciplinary enquiry, in *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others*[5] in the following terms

> s 3(2)(a) recognises and reaffirms what had long been axiomatic in the common law, namely that a 'fair administrative procedure depends on the circumstances of each case'… Section 3 makes provision for legal representation only in a 'serious or complex' case in which, 'in order to give effect to the right to procedurally fair administrative action', an administrator decides, in the exercise of a discretion, to grant an opportunity to obtain 'legal representation'.
>
> [10] There is a marked contrast between certain rights spelt out in s 3(2)(b) which 'must' be given and the 'opportunities' spelt out in s 3(3) which 'may, in [the administrator's] discretion, also' be given. The opportunity of obtaining legal representation is one of the latter. What is more, neither these rights nor the opportunities is cast in stone. 'If it is reasonable and justifiable in the circumstances' s 3(4)(a) allows an administrator to depart from them.[6]

[10] S 3(2)(b)(ii) provides:

> In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –
>
> (ii) a reasonable opportunity to make representations".

[5] 2002 (5) SA 449 (SCA) at paras [9] & [10]
[6] Footnotes omitted

As mentioned above, the notice of intention to expropriate specifically invited the respondent to "submit within 30 days of the date of this notice a written statement detailing any objections you may have to the proposed expropriation". This is an invitation to make representations. The respondent took up this invitation and made submissions which, in fact, went beyond objections and dealt with the question of attempting a settlement. Mr Pammenter submitted that, because the respondent said in his answering affidavit that "To the best of my knowledge the proposed upgrade did not contemplate the expropriation and demolition of the premises when the Applicant applied to the Provincial Authorities in terms of the National Environmental Management Act", he was unaware of the purpose for which it was proposed to expropriate. It was quite clear what the proposed expropriation was for. The respondent, on his own version, had seen the BID and had attended the public hearing on 22 January 2009. He knew that the expropriation was about the beachfront upgrade. This was clear from his letter received on 29 May 2009 and that dated 25 June 2009. In the former, he claimed that there were no proper grounds to expropriate, a contention that he has persisted with to date. In the latter, he referred expressly to the proposed beachfront development. In addition, he had a number of meetings with officials of the applicant at which his architect was present and at which he presented submissions about the need to expropriate. Once again, despite raising this in the supplementary affidavit, he did not gainsay the applicant's assertion in the replying affidavit that he, along with all those who attended the meeting on 22 January 2009, been informed when the BAR was made public, which document showed the need to expropriate and why it was

necessary. All that was required to comply with s 3(2)(b)(ii) was that he had a reasonable opportunity to make representations. I am of the view that the applicant proved that he was afforded such an opportunity.

[11] S 3(3)(b) provides as follows:

> In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to –
>
> (b) Present and dispute information and arguments".

The first thing to note is, as was mentioned in the *Peninsula Technikon* case, that the rights accorded in this section are discretionary. Mr Pammenter suggested that, since the public participation was done within the context of the environmental legislation and the consent sought thereunder, it did not comply with PAJA. However, as mentioned above, the respondent engaged in an active process of presenting and disputing the need to expropriate based on the redevelopment of the beachfront. Even if this did not constitute compliance, Mr Pammenter did not suggest why such discretion should have been exercised in favour of the respondent. He suggested only that, given the prior involvement of the respondent, the applicant should have made a special approach to him after BAR was produced since it modified the proposal in such a way that the expropriation of the lease became necessary. The short answer to this is that at the latest by the date he received the notice the respondent must have become aware of this change in plan since it was intended to expropriate the rights to the lease. He was invited to detail any objections and responded to the invitation. His correspondence containing this was put up to the MEC prior to his making the decision to approve the

expropriation. Once again, no response was given in the supplementary affidavit to the averment that he had been informed of BAR which detailed the need for expropriation. In addition, as is clear from the papers and the correspondence, meetings were held where the respondent's architect met with officials from the applicant and made proposals based on the respondent's contention that the expropriation was not necessary. This was done prior to the final notice of expropriation. The administrative action was not done in a vacuum. Prior to it a public participation process had been undertaken, the proposal modified and the previous participants informed of it, environmental permission was sought and received and the request for permission to expropriate was considered in the light of the objection and further input of the respondent. Of some importance, too, is the fact that the objection lacked any content; it did not set out any reasons for the contentions of the respondent even though he had been invited to do so. S 3(2)(a) provides, as was set out in the *Peninsula Technikon* case, that fair administrative procedure depends on the circumstances of each case. I am of the view that the procedure adopted in this matter was fair in all the circumstances.

[12] Mr Pammenter submitted that, because these sections had not been complied with, the respondent is entitled to seek reasons for the decision to expropriate and, if not satisfied, to seek to set aside the decision on review. I have already found that there is no force in this contention since the premise on which it rests has been rejected. In argument Mr Pammenter went beyond his heads of argument to submit that, in the notice of expropriation, reference

should have been made to the respondent's right to seek reasons for the decision. I can find no warrant for this. In addition, even if it were so, the respondent soon after consulted his present attorney of record who sent a letter requesting certain information, but not specifically requesting reasons for the decision. This was responded to by the applicant and reasons were given in response to one of the queries.

[13] I can therefore find no basis on which the respondent would be likely to succeed in reviewing the decision to expropriate. As indicated above, I am of the view that the applicant has made out a case that the expropriation is for a public purpose and that the procedure was fair in all the circumstances. That being the case I am of the view that the applicant has proved a valid termination of the respondent's right to occupy and is entitled to the order sought.

In the result I grant an order as follows:

1. That the respondent is, and all persons occupying through him are, hereby directed to vacate Erf 12281 Durban, more commonly known as the XL RESTAURANT, situate at 130 South Beach Walk forthwith.

2. That should the order in paragraph 1 above not be complied with, the Sheriff or his Deputy be and is hereby authorized to eject the respondent and all persons from the property.

3. That the respondent is to pay the costs of the application.

Date of hearing:	3 November 2009
Date of judgment:	6 November 2009
Counsel for the Applicant:	SR Mullins SC and R Pillemer instructed by Berkowitz Cohen Wartski.

Counsel for the Respondent:	CJ Pammenter SC instructed by Livingston Leandy Incorporated.