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

12135/2008

WEST END CENTRE CC **Applicant**

versus

ETHEKWINI MUNICIPALITY **First Respondent**

NELESCO 58 (PROPRIETARY) LIMITED **Second Respondent**

Judgment

Delivered on 8 July 2010

Steyn J

[1] Before me the applicant is seeking relief, such been brought by notice in terms of Rule 53(4):

1. That the decision of the first respondent to approve the building plans submitted by the second respondent in respect of the development of the property known as Erf 9 Isipingo, also known as Lot 9 Isipingo ("the property") under drawing No. 280508SJ (Municipal Ref: 374/08/D) be and is

hereby reviewed and set aside.

2. That the first respondent be and is hereby interdicted and restrained from considering any proposal or plans for the development of the property unless and until the question of the proposed road between Lots 9 and 10 Isipingo has been dealt with by the first respondent in a manner that this Honourable Court deems appropriate.
3. That the first and second respondents, jointly and severally pay the costs of this application.

[2] This application is opposed by the first respondent in main against the relief sought in the revised Rule 53(4) notice and by the second respondent it is opposed on the basis that the relief sought in terms of prayer 1 of the notice of motion has now become academic and that the further relief sought is impermissible. Second respondent is of the view that the relief, sought in terms of prayer 2, intrudes into the domain of the municipality and ultimately impinges upon the separation of powers doctrine. In this application Mr Vahed SC, acted for the applicant, Ms Henriques for the first respondent and Ms

Gabriel, for the second respondent.

[3] The application must be viewed against the following background facts:

Applicant acquired Lot 10 Isipingo during 2006. His neighbour is also the owner of Lot 9 and the second respondent in this application. In 2006 both properties, which share a common boundary, were undeveloped. Jadwat Road in Isipingo runs from south-east to north-west and abuts the north-western boundaries of both Lot 9 and Lot 10. The common boundary to the properties is the north-westerns boundary of Lot 9 and the south-eastern boundary of Lot 10. Over years it seems that Thomas Lane extended itself across Jadwat Road to form a road which traverse Lots 9 and 10 in the vicinity of the common boundary and continues till it links up with Lotus Road.

It appears to be common cause that the road where it traverses the two properties is not officially a public road, but has been used by the public road for many years. In fact first

respondent's officials regarded it as an unofficial public road, to the extent that they had erected stop signs at the intersection of this road and Jadwat road to control the flow of the traffic. Applicant contends that besides the flow of traffic being controlled by first respondent, it had in addition maintained the road:

> *"The road has been periodically hardened by the application of crusher run by the first respondent to facilitate the flow of traffic during the rainy season."*

[4] I don't intend to repeat the entire history leading to this application, since the relevant facts were comprehensively canvassed and dealt with by Van Heerden AJ in his judgment on interim relief. I will, however, highlight those facts important to the present application.

[5] On 17 October 2008, Van Heerden AJ confirmed para 1(a) of the rule *nisi* and reserved the question of costs for determination by the Court hearing the review application.

[6] It is evident from the papers that Mr Omar at all times considered the proposed road as being instrumental in his

decision to acquire Lot 10, as the commercial development for Lot 10 envisaged at least five shops, all of them facing the proposed road.[1] The conduct of the first respondent to demand that Mr Omar amend his building plans to make provision for the proposed road also served as sufficient proof that the proposed road would in the near future become official.

First respondent in its answering affidavit, deposed to by Mr Pillay, the Regional Co-Ordinator of Land Use Management, Ethekwini Municipality stated that the proposed road was adopted and incorporated into the Isipingo Town Planning Scheme in the following way:

> *"24. In order to actually give effect to the proposed road as shown in the Town Planning Scheme, the matter would then be passed onto the Land Acquisition Department of the Council for acquisition of those portions of privately owned property upon which the Council intended to construct the road. Once acquired, that portion of the property would then be marked as a road reserved in the Town Planning Scheme and in due course the road reserved would be surveyed and ultimately a road would be constructed thereon.*
>
> *25. Since the proposed road was adopted and incorporated in the Isipingo Town Planning Scheme, the Isipingo Town Board and more recently, the South Operational entity of the first respondent (which was formed when the constituent councils merged to*

1 See applicant's founding affidavit.

> *form the first respondent in 1996) to acquire those portions of private property on which the proposed road will traverse or thereafter to give effect to the road itself. I do not personally know the reasons for this, but must assume that the road itself was not required and the municipality was attending to other aspects of the development of the Isipingo."*

[7] On 3 August 1998 the first respondent also addressed a letter issued by the Physical Environment and Civil Services, to the previous owner of Erf 10, that reads:

> *"Council intends constructing a road between Jadwat Road and Lotus Road. The proposed road affects erfs 9 and 10 Isipingo.*
>
> *Attached is a plan indicating the proposed road servitude over your property.*
>
> *Please advise what compensation you would require for the road servitude. Compensation will be based on market value."*

[8] Second respondent in his answering affidavit never denies the usage of the road by the public. The submissions contained in his affidavit take issue with the status of the road as proposed to by the first respondent in 1998.[2] In the supplementary affidavit the second respondent contends that the proposed road does not form part of any applicable Town Planning Scheme provisions nor of any official municipal planning

2 See paras 23, 24 and 25.

documents.[3]

The aforementioned statement is strongly contested by the first respondent in its answering affidavit at para 19:

> *"As is evident from annexure "4" to the expert report of Mr Kairaj Soni, filed on behalf of the second respondent the proposed road has at all material times be included in the Isipingo Town Planning Scheme in the course of preparation which was adopted on May 1985. Accordingly, it is incorrect to describe it as Mr Soni does as, "nothing more than a shifting concept and at this stage no more than an idea"."*[4]

Importantly, in my view, the usage of the road by the general public was also not disputed by the first respondent.

It appears from the supplementary answering affidavit filed by Mr Soni that in his view the municipality had failed to proclaim or declare or acquire the proposed road and hence it should not be considered as a public road.[5] The municipality, however, denies the correctness of this statement.

[9] Ms Gabriel in her submissions was asked firstly, to explain the second respondent's denied awareness of any problems

3 See para 29, page 195.
4 See pages 242 - 243.
5 See para 7, page 294.

relating to the plans as initially claimed in the answering affidavit when Mr Jadwat claimed that the plans were approved and that they acted upon approved plans at the time they commenced the construction. Secondly, that they ceased the work after an order was issued by first respondent to stop the construction.

Ms Gabriel submitted, notwithstanding the letter at page 101 of the papers, that the second respondent was not aware of the fact that the plans were erroneously approved and accordingly, so it was argued, had no clear certainty that the construction was unlawfully erected. In light of this submission, I consider it necessary to quote from the relevant part of the letter. It reads as follows:

> *"It was brought to your attention that this application was erroneously approved in that the application did not satisfy the requirements of the applicable town planning scheme. The Department had endeavoured to meet with you in order to rectify the problem, but to date, no amicable responses have been received. The issues on the building plan that have been communicated to you are:*
>
> > *The incorrect building line provision being provided;*
> > *The issue of the proposed road traversing Erf 9;*
> > *The height of the building exceeding 4.5 metres.*
>
> *It is therefore deemed appropriate that you be given a chance to respond prior to Council proceeding, in terms of*

Section 67(3) of the Town Planning Ordinance, No. 27 of 1949, to nullify your plan through a court of law. Your attention is drawn to the provisions of section 67(3) of the Town Planning Ordinance, No. 27 of 1949 which reads as follows:

> *"(3) (a) …the local authority shall not grant its authority if the proposed building or structure, development, use or subdivision is in conflict with any duly adopted provision of its scheme in the course of preparation.*
>
> *(b) Any grant of authority in conflict with the provisions of paragraph (a) shall be null and void."*

Accordingly, you are HEREBY GIVEN NOTICE to cease all work immediately, failing which the Municipality will have no alternative but to institute legal proceedings against you to ensue the cessation of such work.

The Municipality's rights to have Plan No. 374/OB/B formally revoked, if necessary, by a court of law and to ensure that any buildings erected contrary to the town planning scheme are demolished, are hereby expressly reserved."[6]

The aforementioned letter is dated 19 September 2008. It is evident from the letter that the second respondent was made aware of the plans being erroneously approved prior to the date the letter was issued, if due regard is paid to the first paragraph of the letter. The language is clear and there is no ambiguity.

[10] Mr Duran in his affidavit stated that his investigations found "nothing on any of the Town Planning Schemes". This statement is in stark contradiction with his own conduct since

6 See RA1 of the papers.

he was the responsible person who had drawn the plans of the applicant and who had provided for the said road on the building plans of the applicant. Mr Duran's view should be considered in light of his prior knowledge and conduct which far more supports a conscious awareness on his part of the proposed road than not.

[11] Ms Gabriel vigorously argued that in considering whether the road presently used by the public, qualifies as a public road due consideration should be given to the common law concept of immemorial usage.

She placed reliance on *Rampersad v Goberdun*[7] in support of her submissions whether the road could be considered as a public road. In my view the dictum is distinguishable from the facts before me, in that the court had to decide whether a specific road was a '*via publica'* or a '*via vicinalis*'. Dave-Wilson JP stated it as follows:

> *"[B]efore the Court can determine that the public have a right to use a road to the detriment of the owner of the land clear evidence of that right must be produced. There is no such*

7 1929 NPD 32.

> *evidence here. The road has never been proclaimed a public one; it is neither in, nor does it lead to, a town or village, and there is nothing to show any user by the public immemorial or otherwise."*[8]

(My emphasis)

[12] As alluded to in the summary of the facts, *supra* there is ample evidence of the usage by the public in the present case and in addition this road is not situated on a piece of land in the middle of nowhere it is in the busy business centre of Isipingo. The *Rampersad* case is simply not relevant.

[13] The question arises, whether for the reasons submitted by Ms Gabriel, or for any other reasons, it should be concluded that the road is not a public road since no servitude has been registered, nor has the local authority served a notice of expropriation.

Both Mr Vahed and Ms Gabriel filed a joint note on 31 May 2010, referring me to a decision of the SCA delivered on 27 May 2010.[9]

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8 *Ibid* at 35.

9 See *Ethekwini Municipality v Brooks* (411/09) [2010] ZASCA 74.

I have considered and analysed the judgment and I am respectful agreement with Griesel AJA's view as stated in *Brooks supra* that section 1 of the Local Authorities Ordinance[10] sets out the legal criteria to be applied in considering whether a particular road qualifies as a public road. The facts of this case is however distinguishable from the *Brooks* case and furthermore the application of the statutory criteria approved of by the SCA does not necessarily bring one to the same result as will be seen from the application demonstrated later in this judgment.

Section 1 defines a public street as –

> *"(a) has been established by a local authority or other competent authority as a public street.*
> *b) has been taken over by or vested in a local authority as a public street in terms of any law.*
> *c) The public has acquired the right to use; or*
> *d) Which is shown on a general plan or diagram of any private township situate in the area of a local authority filed in the Deeds Registry or the Surveyor-General's Office and to which the owners of erven or lots in such township have a common right of use."*

It is significant in the matter before me that it was never

10 No. 25 of 1974.

disputed that members of the public enjoy the unrestricted access to the said road.

I have carefully considered the affidavits filed by the second respondent and it was not placed in dispute that members of the public have the *de facto* use of the road to the extent that the first respondent has to control the traffic and maintain the surface of the road. The first respondent through its conduct took control of the street and maintained the street. Measured against the criteria listed in 1(b) and (c), the road qualifies as a public road. It is evident that the first respondent failed in its obligation to acquire the land that they intend reserving for public purposes[11] timeously. It is not unreasonable to have expected that the municipality either acquire the land or to have entered into an agreement with the applicant and the second respondent.

[14] I find *Nathan Brothers v Pietermarizburg Corporation*[12] apposite, albeit not directly on point, where it was held that a

11 See s 67Sept stipulating the legal requirements for acquiring land.
12 22 NLR 26. Also see *Osborn v Durban Corporation* 1929 NPD 277.

town council's power to regulate and pass by-laws required that such by-laws would be of general application Tatham J succinctly stated:

> *"This indeed is only what one would expect, for it is almost inconceivable that the legislature would clothe a local authority with such powers as would enable it arbitrarily to discriminate between inhabitants."*[13]

In the given circumstances the applicant is trying to enforce his right not to be discriminated against. The papers support the notion that every inhabitant should be treated equally. This is a thread that runs through the papers filed on behalf of the first respondent. Much can be said that it took the municipality a long time to obtain this insight, but rather too late than never.

[15] I turn now to what was probably Ms Gabriel's main argument when she contended that the relief in terms of prayer 2 infringes upon the *audi alteram* principle as set out in *City of Cape Town v Reader and Others*[14] and *True Motives 84 (Pty) Ltd v Mahdi and Another*.[15]

13 O*p cit* at 279.
14 2009 (1) SA 555 (SCA).
15 2009 (4) SA 153 (SCA).

I fail to see how the relief sought if slightly amended would lead to an infringement of the powers of the first respondent. In making submissions on behalf of the first respondent Ms Henriques, rightly in my view, argued that the prayer as presently framed seeks to bind the first respondent to a situation where whatever plan is submitted, it will have to provide for the proposed roadway. I agree that the order prayed for, is presently too widely framed. The application is however focused on specific building plans, regarding a specified area, which already narrows the scope of the order prayed for.

[16] I agree with the remarks of Van Heerden AJ *supra* that given the specific facts of this matter, the first respondent has exhibited its unreliability by erroneously approving the second respondent's building plans and that it is necessary and justified for the applicant to take steps to protect his rights, by approaching this court to avoid a re-occurrence of the earlier demonstrated conduct.

[17] Accordingly I am satisfied that the applicant is entitled to the

relief and can see no reason why costs should not follow the result.

[18] Order

1. That the decision of the first respondent to approve the building plans submitted by the second respondent in respect of the development of the property known as Erf 9 Isipingo, also known as Lot 9 Isipingo ("the property") under drawing No. 280508SJ and/or reference number 67108/b be and is hereby reviewed and set aside.

2. That the first respondent be and is hereby interdicted and restrained from considering any proposal or plans for the development of the property unless such plans or proposals accommodate the proposed roadway between Lots 9 and 10 Isipingo in a manner substantially similar to the manner in which Lot 10 Isipingo has been made to accommodate such roadway. The applicant or any subsequent owner of Lot 10 Isipingo should be notified of the approval of plans that impact on the rights of the owner of Lot 10 Isipingo.

3. That the first and second respondent, jointly and severally, pay the costs of this application, such to include those costs reserved on previous occasions.

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Steyn J

Date of Hearing:	25 May 2010
Date of Judgment:	8 July 2010
Counsel for the applicants:	Adv R Vahed SC
Instructed by:	Attorneys Omar & Jazbhay
Counsel for the first respondent:	Adv J Henriques
Instructed by:	Naidoo Maharaj Inc.
Counsel for the second respondent:	Adv Gabriel
Instructed by:	Halstead Paola