IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISON)

2.

Case No: **35420 / 03**

UNREPORTABLE

Date heard: **17 & 21/02/2006**

Date of judgment: **4/8/2006**

In the matter between:

PAUL JACOBUS SMIT	PLAINTIFF
and	
THE MINISTER OF PUBLIC WORKS, RSA	1 ST DEFENDANT
THE SOUTH AFRICAN NATIONAL PARKS	2ND DEFENDANT
THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	3RD DEFENDANT
THE MARAKELE PARK (PTY) LTD	4TH RDEFENDANT
CCG 108 INVESTMENT (PTY) LTD	5TH DEFENDANT

JUDGMENT

DU PLESSIS J:

At all relevant times the plaintiff was, and it contends that it still is, the owner of portion 2 of the farm Hoopdal 96. By way of a notice of expropriation dated 8 November 2001 the first defendant, the national Minister of Public Works, purported to expropriate an un-surveyed portion of the plaintiff's farm.

The expropriation was done on behalf of the second defendant, the South African National Parks (Sanparks). Accordingly, Sanparks took possession of the expropriated property on 8 November 2001.

Contending that the expropriation is null and void, the plaintiff in December 2003, instituted action wherein it claims, among other relief, an order setting aside the expropriation and an order compelling Sanparks to retransfer the property to him (the plaintiff).

The matter was set down for trial on 17 February 2006. On that date the parties agreed to request the court to deal with only two issues. The other issues were separated and postponed *sine die.* For reasons that will become apparent, one of the two issues referred to has fallen away. This judgment concerns, apart form costs, only the following issue (as the parties have formulated it): "Is plaintiff's claim 'A3[1], for the setting aside of the administrative action complained of (being the expropriation) subject to the 180 day time period referred to in section 7(1) of PAJA" (PAJA being the **Promotion of Administrative Justice Act, 3 of 2000.)**

The parties agreed that no evidence or reference to discovered documents would be necessary in order to decide the formulated issue. What follows is a summary of the facts apparent from the plaintiff's particulars of claim.

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1 A3 is the prayer seeking the setting aside of the expropriation. The plaintiff also has a claim B, but that is not now relevant.

The expropriated property ("the property") is situated in close proximity to the Marakele National Park and within an area that San parks has earmarked for the expansion of Marakele. The third defendant, the national Minister of Environmental Affairs and Tourism, has approved the proposed expansion. Sanparks did not purchase all the properties required for the expansion. Instead, it entered into a "Contractual Park Agreement" with the fourth defendant, a private company.

In the Contractual Park Agreement, the fourth defendant recorded its intention to purchase properties within the area earmarked for the extension of Marakele. The plaintiff's property was one of these. In terms of the agreement, properties that the fourth defendant purchased were to be incorporated into Marakele as "contractual land" in terms of the National Parks Act, 57 of 1976. Still in terms of the agreement, the fourth defendant granted to Sanparks an option, valid for 30 years, in turn to purchase the relevant properties. For the 30year period, Sanparks granted to the fourth defendant rights to traverse the entire Marakele and certain exclusive rights over the properties incorporated into the park.

The fourth defendant did not purchase the plaintiff's property. On 25 October 2001 the acting Director-General of Public Works made a written submission to the first defendant seeking approval for the expropriation of the plaintiff's property in terms of the Expropriation Act, 63 of 1975. The stated

purpose of the expropriation was the inclusion of the property into Marakele. The approval was granted and the expropriation followed.

The plaintiff contends that the expropriation is null and void for a number of reasons, *inter alia* because the purpose thereof was to deal with the property in terms of the Contractual Parks Agreement which agreement the plaintiff contends is itself unlawful and invalid, also for a number of reasons. Against this background, the plaintiff seeks the orders that I have referred to, namely to set aside the expropriation and to compel Sanparks to retransfer the property to him.

I have pointed out that the parties have formulated two questions for the court's decision but that one has fallen away. I shall briefly explain why the one question has fallen away. Initially, the plaintiff contended that the Contractual Parks Agreement is "null and void" and it sought an order setting it aside. At the pre-trial conference, however, the plaintiff informed the defendants that it no longer sought such an order. Consequently, as between the plaintiff and the fourth and fifth defendants[2] the following question was formulated: "At the resumption of the trial, will it be competent in law for the Plaintiff to aver that the Contractual Park Agreement is null and void on the grounds set out in paragraph 18[3] of the Particulars of Claim, in circumstances where the Plaintiff no longer seeks an order setting aside the Contractual Park Agreement?" In the course of argument Mr Du Plessis for the plaintiff gave notice of the plaintiff's

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2 The fifth defendant is also a private company related to the fourth defendant.

3 The paragraph setting out the grounds upon which the plaintiff contended that the agreement is null and void.

intention to amend the particulars of claim so as to delete the allegation that the agreement is "null and void" and to replace it with the allegation that it is "unlawful and invalid". This amendment prompted Mr Cockrell for the fourth and fifth defendants no longer to require the determination of the second question. As the second question originated from a point that the fourth and fifth defendants wished to argue *in limine,* the need to decide the second question has fallen away. Mr Cockrell submitted that, in view of the lateness of the plaintiff's amendment, the plaintiff must be liable for the costs occasioned by its belated amendment. shall deal with that submission immediately. The parties spent two days arguing the first question with which I shall presently deal. On the first day, Mr Du Plessis spent some time on submissions relating to the second question but there is no doubt that the arguments would in any event have gone into a second day. Therefore, save possibly for preparation fees, the amendment did not occasion wasted costs in the proceedings before this court. It might occasion wasted costs in future however. For instance, the defendants might seek to amend their respective pleas to deal with the amended particulars of claim. In the circumstances the trial court will be in a better position to decide on the appropriate order regarding the costs wasted by the amendment. I shall reserve those costs.

I now turn to the remaining issue and I repeat, for ease of reference, the question that the parties formulated: "Is plaintiff's claim 'A3' for the setting aside

of the administrative action complained of (being the expropriation) subject to the 180 day time period referred to in section 7(1) of PAJA".

Section 7(1) of PAJA provides:

"(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

Section 6(1) of PAJA provides:

"(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action."

Counsel were agreed that the expropriation constitutes "an administrative action" in terms of section 6(1). The issue is whether the plaintiffs action constitutes "proceedings for judicial review in terms of section 6 (1)" as envisaged in section 7(1).

In a nutshell, plaintiffs counsel contended that the plaintiffs claim is a *rei vindicatio* aimed at the retransfer of his property. The claim to set aside the expropriation is ancillary to the main claim for retransfer. Therefore, the plaintiff's attack on the administrative action (the expropriation) is not direct but indirect or collateral. It follows, so the argument went, that the plaintiff's collateral attack on the administrative action does not constitute "proceedings for judicial review in terms of section 6 (1)". Put differently, counsel's contention is that because the plaintiff's action is primarily aimed at the retransfer of his property, he did not, in the words of section 6(1), "institute proceedings in a court ... for the judicial review of an administrative action." In the result, the argument concluded, the plaintiff's action does not fall within the ambit of section 7(1) and the 180 day time limit provided for in section 7(1) does not apply.

The essence of counsel's argument to me seems to be that the plaintiff's attack on the validity of the expropriation does not fall within the ambit of section 7(1) (is collateral) because the setting aside of the expropriation is not the main purpose of the plaintiffs action. Having regard only to the wording of sections 6(1) and 7(1), there is nothing to indicate that they only deal with proceedings that were instituted primarily to review administrative action and to obtain relief, such as the setting aside of the action. Mr Du Plessis submitted, however, that the answer to the question posed is not that simple. Counsel submitted that if the sections are interpreted in the light of our common law of

review, collateral attacks on the validity of administrative actions fall outside the ambit thereof. I do not propose to deal with that argument and the basis thereof at this stage. I shall first determine whether the plaintiff's attack on the validity of the expropriation is indeed collateral.

Baxter (Administrative Law, p. 676) writes that the "legality of an administrative act may be subjected to judicial review in one of two ways: either directly or indirectly (collaterally). The action is attacked directly where the proceedings and the remedy applied for have as their main purpose the setting aside, correction, prevention, or remedying of the action ... in question. Indirect or collateral attack arises where the legality of administrative action becomes an issue as an incidental feature of the litigation" (The underlining is mine). The underlined portion of the quotation lends support for counsel's argument: It may be accepted that the plaintiff primarily seeks the return of his property and that the setting aside of the expropriation is a step in that direction. On the other hand, the formulation of what a collateral attack comprises does not support counsel's argument. In this case the validity of the expropriation is not only an issue that arose in the course of the litigation. The plaintiff pertinently seeks an order setting aside the expropriation. I am inclined to the view that where such is the case, the review cannot be said to be collateral. While not the main purpose of the action, one of the purposes of the action is to have the expropriation reviewed and set aside. The validity of the expropriation is not only an issue. The plaintiff directly seeks an order setting it aside based on the alleged

invalidity. I realise that this view does not fully accord with the passage that I have quoted from **Baxter** but I think with respect that the learned author overlooked a situation such as the present. I may be wrong and for that reason do not base this judgment on my stated inclination.

Counsel for the defendants submitted that the term "collateral attack" applies only to instances where the invalidity of the administrative action is raised as a defence to coercive action by a public authority. For this proposition counsel relied on what **Howie P** and **Nugent JA** said in **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) 222 (SCA)** at paragraph 35: "It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question". I do not think that in its terms or in its context the statement was intended exhaustively to define a collateral attack on an administrative act. Counsel also referred me to V & **A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others 2006 (1) SA 252 (SCA)** where **Howie P** said: "The defence which the respondent sought to raise in this respect has sometimes been called 'collateral challenge', ... In brief, it is applicable in proceedings where a public authority seeks to coerce a subject into compliance with an unlawful administrative act. If these proceedings are not of that nature then the

grounding order[4] will have legal effect until set aside." (Paragraph 10) Again, I do not think that the learned judge sought exhaustively to define what a collateral attack on an administrative action comprises. The learned judge was dealing with an attempt to raise the invalidity of an administrative action as a defence in litigation between private individuals. I am prepared to accept in plaintiff's favour that there may be instances in which a plaintiff could rely on the invalidity of an administrative action without the need formally to have it set aside and that such reliance will also constitute a collateral attack (See again the quotation from **Baxter**). The question now is whether the present is an instance where the plaintiff needs formally to have the expropriation set aside. If it is, the plaintiff's attack cannot be said to be collateral.

As a general proposition an administrative action has legal effect until a competent court or tribunal sets it aside (See the last sentence quoted from paragraph 10 of the **V & A Waterfront Properties-**case). In the **Oudekraal Estates**-judgment the proposition was formulated thus: "Until .... (the administrative act under consideration) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question" (Paragraph 26). Applying the general rule to the present matter, the expropriation stands and has legal consequences until it is set aside.

4 The administrative action under consideration.

As with most general rules, the one under consideration has exceptions. In the **Oudekraal Estates**-judgment the learned judges said: "Thus the proper enquiry in each case - at least at first - is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependant on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court. But just as some consequences might be dependant for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question. When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases - where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act - that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act." (See paragraphs 31 and 32)

In the present case transfer of ownership in the property to Sanparks was dependant upon the validity of the expropriation. The expropriation is the legal

causa for the transfer of ownership. Does it follow from the passage I have quoted that the present is an exception to the general rule and that the plaintiff does not need to have the expropriation set aside and that his challenge could be said to be collateral? In context the learned judges of appeal said no more than that, in the circumstances set out, a subject may use a collateral challenge as a defence to coercive action. I am unconvinced that the learned judges of appeal were formulating a wider exception to the general rule. Counsel did not refer me to direct authority for the proposition that the present is an exception to the general rule. In the result I conclude that the general rule applies and that the plaintiff cannot succeed with his prayer for the retransfer of the property until and unless the court sets aside the expropriation. It follows that the plaintiffs attack is not a collateral challenge but "proceedings for judicial review in terms of section 6 (1)" as contemplated in section 7(1) of PAJA.

The finding that the plaintiffs attack is not collateral makes it unnecessary to consider counsel's argument that no collateral attack falls within the ambit of section 7(1) of PAJA.

The first question posed must therefore be answered in the affirmative. Costs must follow the result. The first to third defendants were represented by two counsel as was the plaintiff. In the circumstances the costs of two counsel must be allowed.

In the result the following order is made:

1. The first to fifth defendants' point *in limine* is upheld with costs, including, in the case of the first to third defendants, the costs of two counsel.

3. The question of the wasted costs occasioned by the plaintiff's amendment to paragraph 18.1 of the particulars of claim is reserved.

B. R. DU PLESSIS
Judge of the High Court

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