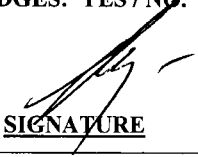




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
28/07/2016	
<u>DATE</u>	<u>SIGNATURE</u>

CASE NO: 47407/2015

DATE: 28/7/2016

IN THE MATTER BETWEEN:

MBOMBELA LOCAL MUNICIPALITY

Applicant

And

THE PREMIER, MPUMALANGA PROVINCE

1st Respondent

THE REGISTRAR OF DEEDS, MPUMALANGA

2nd Respondent

THE LOWVELD SHOW SOCIETY

3rd Respondent

NGHWAZI IT INVESTMENT (PTY) LIMITED

4th Respondent

JUDGMENT

KOLLAPEN J:

Introduction

1. This application involves a challenge brought by the applicant to the legality of Proclamation No. 80 of 1983 published in the Provincial Gazette of 16 February 1983. The application is opposed by the third respondent and it does appear that the essential facts underpinning the application are not in dispute. They may be summarised as follows:

- a) Portion 39 of the Farm Nelspruit 312 JT ('the property') was donated by the applicant to the third respondent on the 25th of November 1950 and subsequently transferred to the third respondent in terms of Deed of Transfer No 12164/1953.
- b) The Deed of Transfer incorporated numerous conditions of title and they include the following which are relevant for the purpose of this application:
 - i. The property shall be used by the transferee for the sole purpose of conducting thereupon Agricultural shows.
 - ii. No trade or business for which any licence shall be required shall be conducted upon the said property nor shall any Co-operative society as visualised by the Co-operative Societies Act No. 28 of 1922, or any amendment thereof, in any manner whatsoever, function upon the said property.
 - iii. The property shall be used for Agricultural Show purposes only.

- iv. The property shall not be leased, except for sporting purposes, to any persons or concerns without the consent in writing of the Town Council of the Municipality of Nelspruit (hereinafter referred to as "The Council"), which said consent shall not be withheld unreasonably.
 - v. No residence, except such as may be required for the occupation by the Supervisor employed by the transferee shall be erected upon the property.
 - vi. No sale of intoxicating liquor of any description whatsoever, shall be permitted upon the property.
 - vii. The foregoing conditions (ii) to (vi) inclusive shall not apply during the period when any Agricultural show is being held or conducted by the transferee upon the property.
 - viii. The transferee shall not be permitted in any manner whatsoever to alienate the said property to any person or organisation, save for the purpose of conducting thereon of Agricultural Shows and further subject to the conditions foregoing.
- c) On the 1st day of February 1983, the then Administrator of the Transvaal, Mr Willem Cruywagen acting in terms of Section 2 of the Removal of Restrictions Act No 84 of 1967 removed conditions B(i), (ii), (iii), (iv) and

viii) in Deed of Transfer No 12164/1953. The decision of the Administrator was published on the 16th of February 1983 in the Provincial Gazette.

d) Given the considerable passage of time that has elapsed from the publishing of the decision in 1983, no copy of the record evidencing the decision, or any application that may have preceded it and the deliberations that may have led to the decision, has been traced. Accordingly no record has been filed in terms of the provisions of Rule 53(1)(b). Affidavits by officials of the applicant have been filed attesting to the attempts made, without success, in locating the record of the decision.

2. Section 2 of the Removal of Restrictions Act No 84 of 1967 ('RORA') provided the then legal framework within which the Administrator was empowered to alter, suspend or remove restrictions in respect of land.

It provided as follows:

'2. Alteration, suspension or removal of restrictions or obligations in respect of land by the Administrator

(1) Whenever the Administrator of a province in which the land in question is situate, is satisfied –

(a) that it is desirable to do so in the interest of the establishment or development of any township or in the interest of any area,

whether it is situate in an urban area or not, or in the public interest; or

(b) that the land in question is required –

(i) for ecclesiastical purposes by the owner or purchaser thereof; or

(ii) for public purposes by the State or a local authority; or

(iii) for the use or erection of any building by the State or a local authority; or

(iv) for purposes incidental to any purpose mentioned in subparagraphs (i) to (iii), inclusive,

he may, subject to the provisions of this Act, of his own accord or on application of any person in terms of Section 3, by proclamation in the Official Gazette of the province, alter, suspend or remove either permanently or for a period specified in such proclamation, and either unconditionally or subject to any condition so specified, any restriction or obligation, which is binding on the owner of the land by virtue of –

(aa) a restrictive condition or servitude registered against the title deed of the land; or

(bb) a provision of a law relating to the establishment of townships or to townplanning; or

(cc) a provision of a by-law or of a regulation or of a town planning scheme; or

(dd) a provision of a town planning scheme and a restrictive condition or servitude registered against the title deed of the land; or

(ee) a provision of a town planning scheme and a provision of a law relating to the establishment of townships or to town planning,

and which relates to –

(aaa) the subdivision of the land; or

(bbb) the purpose for which the land may be used; or

(ccc) the requirements to be complied with or to be observed in connection with the erection of buildings or the use of the land.

3. It appears to be common cause between the parties that RORA does not provide for the removal of a restriction that relates to the alienation of land and that if one has regard to the wording of Section 2 (b)(aaa),(bbb) and (ccc) the restrictive condition must relate to either the sub-division of land, the purpose for which the land may be used, or the requirements to be observed in connection with the erection of buildings or the use of land.
4. The stance of the applicant in challenging the lawfulness of the Administrator's decision is that Condition B(viii) relates to the alienation of land and therefore falls outside of Section 2 of RORA. To that extent it submits that the Administrator acted unlawfully and to that extent the Court should review and set aside Proclamation No 80 of 1983 alternatively such portions of the Proclamation that remove conditions relating to the alienation of the property.

5. In opposing the relief claimed, the third respondent has firstly placed in issue whether the application was brought within a reasonable time and then on the merits its stance is that there is no basis to challenge the lawfulness of the Proclamation and in particular the removal of Condition B(viii) as that condition did not relate to the alienation of the land but rather the purpose for which the land may be used and thus fell within the remit of the Administrator as contemplated in Section 2(b)(bbb).

The issues in dispute

The delay principle

6. The decision challenged in these proceedings was made in 1983 and a considerable time has elapsed since then. The stance of the applicant is that it acquired knowledge in February 2015 that the third respondent had entered into an agreement of sale in respect of the property and that the implications and effect of the proclamation have only now manifested themselves
7. The applicant states further in its founding affidavit that it *'was not alive to the consequences of the Proclamation and did not appreciate its effect, and could not therefore reasonably have brought the application before now. It is respectfully submitted that it has brought the application within a reasonable time, given the facts as set out above. To the extent that condonation is required, same is sought'*.

8. The third respondent disputes when the applicant would have become aware of the conditions in question and their effects. It points out that in 1998 the applicant advised the third respondent that it had no objection to the lifting of the remaining conditions when the property is sold to a third party and therefore the third respondent must have become aware of the conditions, their removal and the effect thereof and should have brought these proceedings then already if it felt aggrieved.
9. In reply however, and the correspondence between the parties exchanged in 1998 clearly demonstrates that at the time, what in effect occurred was that the third respondent was desirous of selling the property and acquiring an alternate site to which it could relocate. The applicant was under those circumstances willing to consent to the sale provided that its interests were protected by including similar conditions in the title deed of the new showgrounds property with the same conditions of title.
10. Clearly a relocation was what in reality was being considered and the applicant would not have been required to consider the impact and implications of the 1983 Proclamation at that time.
11. The circumstances that prevailed in February 2015 were certainly distinguishable from those that prevailed in 1998 and I am satisfied that the applicant would not have had cause to interrogate the conditions of title then.

12. Thus while a long time has passed, the clock as it were, only started ticking in February 2015 and these proceedings were launched in June 2015. There has in my view been a satisfactory explanation advanced to account for the timeline.
13. The applicant also contended that there would be no prejudice occasioned to the third respondent by the effluxion of time as no other party was affected by the Proclamation in organising their affairs. In essence it impacted only upon the applicant and the third respondent as a result of the donation of the property and the conditions attached to it. The respondent took the view that not only the parties but the public at large were affected by the Proclamation. I am not convinced that such a broad characterisation is accurate. While the conditions related to the land which was intended to be used for public purposes, its scope and operations largely operated as between the parties.
14. In ***GQWETHA v TRANSKEI DEVELOPMENT CORPORATION LTD AND OTHERS*** 2006 (2) SA 603 (SCA) the court set out the following as the approach in dealing with delay:

‘Whether there has been undue delay entails a factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances including any explanation that is offered for the delay. A material fact to be taken into account in making that value judgment – bearing in mind the rationale for the rule – is the nature of the challenged provision. Not all decisions have the same potential for prejudice to result from their being set aside.’

15. In addition the sale of the property was also subject to the condition that restrictive condition B(ix) be removed. Under those circumstances any possible prejudice to the third respondent is limited given the residual rights that vest in the applicant in terms of condition B(ix).
16. In conclusion, I am, for the reasons given, not satisfied that the delay principle is applicable in the circumstances or that the application should fail purely on account of it.

Merits

17. The core of the dispute is whether condition B(viii) of the conditions of title is a condition which relates to 'the purpose for which land may be used' as contemplated in Section 2(1)(b)(bbb) of RORA or whether it is a condition which relates to the alienation of land.
18. If it is the former then it would have fallen within the remit of the Administrator's powers while on the other hand if it was essentially characterised as a condition that related to the alienation of the land then it would fall outside of the Administrator's remit and render that part of the exercise of his power *ultra vires*.

19. The relevant condition reads as follows:

viii. The transferee shall not be permitted in any manner whatsoever to alienate the said property to any person or organisation, save for the purpose of conducting thereon of Agricultural Shows and further subject to the conditions aforegoing.

20. The applicant takes the view that if one has regard to the language used then it is clear that the condition pertains to the alienation of the property and is therefore not a condition capable of being removed, altered or suspended under Section 2 of RORA.

26. The stance of the third respondent is that while the condition in question created a prohibition on alienation, it did not constitute a blanket prohibition. The prohibition on alienation contemplated by the condition would not apply where the alienation would result in the property being used for the purpose of conducting agricultural shows. Its stance therefore is that the condition is essentially one relating to use rather than to alienation and as such falls within the scope of RORA.

Analysis

21. In ***NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY*** 2012 (4) SA 593 at 603F-604D, the Supreme Court of

Appeal described the present state of the law with regard to the interpretation of documents as follows:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is therefore objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

22. If one has regard to the document as a whole (including the other conditions of title as well as the circumstances under which it came into existence) then the following is evident:

22.1 The property was donated to the third respondent with the object of holding agricultural shows thereon and the applicant in condition B(ix) reserved the right to retake possession of the property if it was not used for this purpose.

22.2 In so far as the conditions explicitly provided for the use that the property was to be put to, conditions B(i) and B(iii) provide for this firstly in relation to the position of the transferee (B(i)), and then in relation to the property itself in (B(iii)).

22.3 From this it would follow that those two conditions in their totality deal comprehensively with the question of the use of the property.

22.4 That being the case the scope and purpose of condition B(viii) falls to be determined. If it is, as was contended for by the third respondent, a condition relating to use then the obvious question that arises is what purpose it could conceivably serve given the existence of conditions B(i) and B(iii). In this regard if B(viii) is a condition that relates to use rather than alienation, then it would appear to be a superfluous, unnecessary and an irrelevant condition to the extent that what the

applicant contends is the scope of the condition, is already covered by existing conditions in the form of B(i) and (ii).

22.5 In this regard it should therefore follow that for the condition to have any relevance and to distinguish it from the other conditions of title it must be construed as a condition relating to the alienation of the property. In any event when one has regard to the language used, which is essentially a prohibition on alienation, and the rest of the conditions, then the conclusion must follow that it is a condition that relates to alienation rather than to use.

22.6 Given that the property was donated to the third respondent, then it is also sensible and reasonable for the third respondent to wish to have an interest in any proposed alienation of the property and to ensure that in such event its use would continue in the light of the purpose of the grant. This in my view fortifies the position that the condition relates to alienation and as such would have fallen outside of the powers of the Administrator.

22.7 The legal nature of an act of alienation of immovable property stands apart from the question of the legal nature of the use the property may be put to. While, as in this case, the conditions that would apply to the alienation of the property are associated with its use, that in itself does not change the nature and the characterisation of the condition. Put simply, it hardly matters that the scope of the alienation of the property

is associated with the use to which it is put; it remains a condition that relates to alienation.

22.8 In addition and as indicated the property was donated to the third respondent for specific purposes. Condition B(viii) contemplates a sale to a third party and it will make business sense that such a condition may well stand on a different footing than the conditions that relate to use as found in B(i) and (ii) and (iii) simply on account of the fact that a transfer of dominium is contemplated. Therefore to simply conflate it as a condition related to use loses sight of this historical reality and the circumstances that would have existed when the condition came into existence.

23. I would for these reasons conclude that Condition B(viii) is a condition that relates to the alienation of the property, that it falls outside of the scope of Section 2 of RORA and that it was therefore not competent for the then-Administrator to remove it as Proclamation 80 of 1983 does. The applicant would accordingly be entitled to relief.

The remedy

24. Given that the challenge in these proceedings relates exclusively to the removal of Condition B(viii), my view is that the relief need not go beyond that which is required to address the mischief. In this regard setting aside the Proclamation in

its entirety is neither required nor desirable to the extent that the removal of the other conditions is not in contention.

My view is that reviewing and setting aside the removal in Proclamation No 80 of 1983 of Condition B(viii) would suffice and be legally permissible.

ORDER

26. I would make an order in the following terms:

- I. That portion of Proclamation No. 80 of 1983 that effects the removal of Condition B(viii) from Deed of Transfer No 12164/1953 is hereby reviewed and set aside;
- II. The second respondent is interdicted from transferring Portion 39 of the Farm Nelspruit 312 JT held by Title Deed T12164/1953 from the third respondent to the fourth respondent.
- III. The third respondent is ordered to pay the costs of the application.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

47407/2015

HEARD ON: 25 MAY 2016

FOR THE APPLICANT: ADV. D VETTEN

INSTRUCTED BY: BDK ATTORNEYS (ref.: R C Krause/ag)

FOR THE THIRD RESPONDENT: ADV. P G CILLIERS SC (appearing with ADV.
J H ROELOFSE)

INSTRUCTED BY: KRUGER AND PARTNERS INCORPORATED
(ref.:AVN/nm/00002309)