IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR215/2015

KZN/DBN CASE NO: 5461/2007

In the matter between:

HIBISCUS COAST MUNICIPALITY — APPELLANT

And

MARGATE AMUSEMENT PARK (PTY) LTD — 1ST RESPONDENT

MINISTER OF PUBLIC WORKS — 2ND RESPONDENT

Coram : Jappie JP, van Zyl et Henriques JJ
Heard : 3 February 2016
Delivered : 25 February 2016

ORDER

On appeal to the full court of appeal from the KwaZulu-Natal Division of the High Court, Durban (Radebe J, sitting as a court of first instance):

Condonation Application

1. The late filing of the notice of appeal by the appellant is condoned.
2. The appellant is directed to pay the costs occasioned by the application for condonation.

Appeal

1. The appeal is upheld with costs, including that of the applications for leave to appeal and the costs of two counsel where employed.
2. The whole of the judgment and orders of Radebe J granted on 28 February 2012 are set aside.
3. The first respondent is directed to vacate by 29 February 2016, the premises currently utilized as the Margate Amusement Park and more fully described as a portion of the seashore, in extent [4…….] meters square, which is situate to the south of the lagoon adjacent to Lot [3……], in the Township of [M…….], City of [A……], Province of KwaZulu-Natal.
4. The First Respondent is directed to pay the costs of the proceedings in the court *a quo*, including all reserved costs, save for the costs in the main application up to 11 October 2010, which costs remain as per paragraph 5 of the order of Ndlovu J.

JUDGMENT

HENRIQUES J:

Introduction

[1] This is an appeal against the entire judgment and orders granted by Radebe J on 28 February 2012 in which she dismissed the application for the eviction of the first respondent and granted orders upholding the first respondent's counter application and directed the appellant to pay the first respondent's costs of the counter application including the reserved costs of 11 October 2010.

[2] A preliminary matter which requires attention is the application for condonation for the late filing of the appellant's Notice of Appeal. A formal application for

condonation has been made and the appellant has, on an affidavit, explained the reasons for the delay in filing the notice of appeal. Having considered this explanation and the appellant's prospects of success in the appeal, we are satisfied that the application for condonation ought to be granted.

[3] The first respondent's legal representatives have, by way of a letter dated 15 December 2015, informed the court it will not oppose the appeal, is aware of the date for the hearing of the appeal and has indicated it will abide the decision of this court.

[4] I do not propose to traverse in detail the judgment of the court *a quo* and deal with all the misdirections and grounds of appeal relied on by the appellant as these are a matter of record. I propose to deal only with two findings of the court *a quo* which, in my view, are decisive of the appeal.

Issues decisive of the appeal

[5] The issues which in my view are decisive of the appeal are the following:-

[5.1] Was the appellant entitled to an order for the eviction of the first respondent when the matter served before Radebe J. Of relevance to the determination of this issue is the effect of the orders of Ndlovu J of 11 October 2010, the court *a quo* finding that the appellant had abandoned its original claim for the eviction of the first respondent and had through its conduct negotiated a new lease.

[5.2] Whether the appellant's decision to terminate the first respondent's sub-lease and the notice to vacate, amounted to administrative action requiring compliance with PAJA.

[6] Before dealing with these issues, it is useful to set out the events which occurred prior to the matter serving before Radebe J.

[7] In May 2007, the appellant instituted an application for the eviction of the first respondent from the premises utilized as the Margate Amusement Park (the premises) as a consequence of the contract of sub-lease terminating. Such proceedings were opposed by the first respondent who filed a counter application. In such counter application the first respondent submitted that the decision to terminate the sub-lease and effect the closure of the premises be set aside. This was because such decision constituted administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and there had been procedural non-compliance with the provisions of s3 of PAJA. In addition it sought to declare invalid the notice by the appellant to the first respondent dated 5 October 2005 directing it to vacate the premises.

[8] The application served before Ndlovu J on 11 October 2010 on the opposed motion court roll. Ndlovu J issued the following order:

> "1. That a declaratory be and hereby issued that the lease between the Applicant and the first Respondent pertaining to the premises referred to in paragraph 1 of the Notice of Motion shall terminate on 31st October 2010.
> 2. That the Notice of Motion be amended by adding the relief in paragraph (1) above as paragraph 5 of the Order sought.
> 3. That the Applicant be given leave to approach the Court on ten (10) days' notice to the 1st Respondent on the same Court papers duly supplemented as far is necessary for an order ejecting the 1st Respondent from the said premises.
> 4. That the 1st Respondent's Counter-application and Interim application in terms of Rule 30 (A) are adjourned *sine die.*
> 5. That each party is to bear its own costs in respect of the main application.
> 6. That the costs of the 1st Respondent's Counter-application and Interlocutory application in terms of Rule 30 (A) are reserved."

[9] The parties were at idem that paragraph 7 as reflected in the order of 11 October 2010 was not granted by Ndlovu J[1].

[10] Subsequent to Ndlovu J's order being granted, the first respondent through its legal representative initiated discussions. The request on compassionate grounds

[1] The word "order" appears to have been omitted from paragraph 1 of the order.

was for the first respondent to be allowed an additional time to vacate the premises. The appellant agreed to an extension in effect allowing the first respondent to continue to occupy the property until 31 January 2011 in order to trade over the Christmas period. With effect from 1 February 2011 the first respondent would cease all trading activities and dismantle and remove all equipment and hand over vacant possession of the property to the appellant on 1 March 2011. A resolution of the Council of the appellant was obtained confirming the eviction application could be resolved on this basis and the first respondent granted an extension of time within which to vacate.

[11] In addition the appellant's attorney prepared a settlement agreement as well as a confession to judgment in terms of rule 31(1). The first respondent did not sign the settlement agreement or the confession to judgment and failed to vacate the premises. Numerous written requests were addressed to the first respondent requesting it to vacate. On 2 March 2011, the first respondent intimated that it had no intention of vacating the premises despite the settlement discussions.

[12] The appellant in compliance with paragraph 3 of Ndlovu J's order, approached court and filed supplementary affidavits for an order seeking to evict the first respondent from the premises. In addition it sought an order dismissing the first respondent's counter application and an order for the first respondent to pay the costs thereof. This is what served before Radebe J.

[13] In dismissing the application for the eviction of the first respondent, the court *a quo* found that a 'new' lease agreement had been negotiated and concluded between the parties. This 'new' lease was sanctioned by the Council of the appellant and in addition the appellant demanded and was paid rental for the period of the new lease. As a consequence, the original claim was abandoned and the appellant could not now supplement its papers claiming the eviction of the first respondent.

[14] These findings of the court *a quo* are incorrect and in my view ignore the effect of the order of Ndlovu J. The effect of the declaratory order issued by Ndlovu J was to resolve the issue in the eviction application namely whether the first respondent's sub-lease had terminated and when. The appellant would be entitled on the basis of

that order to evict the first respondent had it remained in occupation of the premises after 31 October 2010. It could approach the court, on ten days notice to the first respondent once it had supplemented its papers in the original application for its eviction as the first respondent's right to occupy terminated when the contract of sub-lease ended.[2] This issue was *res judicata* [3] and could not be revisited by Radebe J.

[15] The discussions which occurred after Ndlovu J's order and which resulted in the extension of the time period within which the first respondent had to vacate, did not result in a new cause of action. This was an indulgence granted by the appellant to the first respondent and merely afforded the first respondent more time within which to vacate the premises. The payments for its continued occupation constituted the equivalent of occupational damages. The resolution of the Council of the appellant to afford the first respondent additional time to vacate was clearly necessary as Ndlovu J's order meant that the first respondent's sub-lease had expired with the effluxion of time on 31 October 2010 and it was seeking an indulgence which had to be sanctioned by the Council. It constituted no more than an extension of the time period within which it had to vacate. [4]

[16] Properly interpreted,[5] paragraph 3 of the order of Ndlovu J merely entitled the appellant to approach the court as a consequence of non-compliance with the declaratory order and not the original *lis* between the parties. [6]

[17] In upholding the counter application, the court *a quo* in essence found that the decision to evict the first respondent was an administrative decision and had to follow the requirements of PAJA as it was for the benefit of the 'public' and the decision was taken by the appellant exercising a public power. It was of the view that the appellant "was required to act fairly when exercising powers derived from a contract".

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[2] *Premier, Eastern Cape and Another v Sekeleni* 2003(4) SA 369 SCA
[3] *Eke v Parsons* [2015] ZACC 30 para 31
[4] *Barnard v Thelander* 1977 (3) CPD 933 at 940
[5] *Eke* supra para 29; *Ansafon (Pty) Ltd v The Master, Northern Cape Division* [2014] ZASCA 170 (14 November 2014) para 9, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18
[6] *Eke* supra para [36]

[18] At paragraph 35 of the judgment the court *a quo* concluded " *The Applicant's decision to terminate the lease constitutes administrative action. It follows that it is reviewable in terms of PAJA. It cannot be dealt with in terms of the principles of the law of contract. The decision of the Applicant to effect the closure of the amusement park situate on the premises is reviewable in terms of PAJA and stands to be set aside, for the reasons of failure to comply with requirement for procedural fairness; for the reasons that it fails to meet the test of objective rationality; is taken on reliance on wrong principles, namely those of the law of contract; had been influenced by unsubstantiated considerations of an alleged state of disrepair of the amusement park; and, the applicant's state of dissatisfaction with the condition of the amusement park was based on a notion of subjectivity rather to that of reasonableness.*"

[19] In my view the court *a quo* erred in this finding. As already mentioned the first respondent occupied the premises by virtue of a contract of sub-lease. The issue became *res judicata* once the declaratory order had been issued by Ndlovu J. It is now settled law that the decision by the appellant to terminate its contract with the first respondent does not amount to administrative action. Such decision of the appellant to terminate the contract of the first respondent, although made by an organ of State, does not constitute administrative action and thus PAJA does not apply.[7]

[20] It was thus not open to the court *a quo* to find that the appellant had to act in a 'procedurally fair' manner when terminating the contract of sub-lease. Similarly, the notice to the first respondent requiring it to vacate the premises is not invalid as it does not constitute administrative action envisaged in PAJA.

[21] It follows that the court *a quo*'s findings in this regard were incorrect and the appeal must succeed. In the premises the appellant is entitled to orders upholding the appeal and setting aside the entire judgment and orders of Radebe J of 28 February 2010.

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[7] *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 SCA para 18; *City of Tshwane v Nambiti Technologies (Pty) Ltd* 2015 ZASCA 167 (26 November 2015) para 34

[22] There is also no reason why the appellant ought not to be awarded the costs of the appeal and the costs reserved on 11 October 2010 by Ndlovu J in respect of the counter-application and the interlocutory application.

[23] In the premises the following orders are made:

Condonation Application

1. The late filing of the notice of appeal by the appellant is condoned.
2. The appellant is directed to pay the costs occasioned by the application for condonation.

Appeal

5. The appeal is upheld with costs, including that of the applications for leave to appeal and the costs of two counsel where employed.
6. The whole of the judgment and orders of Radebe J granted on 28 February 2012 are set aside.
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8. The First Respondent is directed to pay the costs of the proceedings in the court *a quo*, including all reserved costs, save for the costs in the main application up to 11 October 2010, which costs remain as per paragraph 5 of the order of Ndlovu J.

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JAPPIE JP

I agree

VAN ZYL J

Date of Hearing	:	3 February 2016
Date of Judgment	:	25 February 2016
Counsel for Appellant	:	K J Kemp SC (assisted by S I Humphrey)
Instructed by	:	Seethal Attorneys c/o Stowell & Co. 295 Pietermaritz Street, Pietermaritzburg Ref: G J Campbell/SEE9/0018/CW