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

CASE NO: D12577/2016

In the matter between:

BHEKI DENNIS DLAMINI	APPLICANT
and	
KWADUKUZA LOCAL MUNICIPALITY	FIRST RESPONDENT
MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, KWAZULU-NATAL	SECOND RESPONDENT
MEC FOR HUMAN SETTLEMENTS, KWAZULU-NATAL	THIRD RESPONDENT
MINISTER OF HUMAN SETTLEMENTS	FOURTH RESPONDENT
THE REGISTRAR OF DEEDS, PIETERMARITZBURG	FIFTH RESPONDENT
MINISTER OF PUBLIC WORKS	SIXTH RESPONDENT

ORDER

In the result the following order shall issue:

(a) The application is dismissed.

J U D G M E N T

Delivered on: 26 July 2019

Mnguni J

[1] This is an application to challenge the expropriation of the property described as ERF 749 Groutville, Registration Division FU, situated within the area of jurisdiction of the first respondent in extent 3, 1351 (three comma one three five one) hectares (the property), together with the compensation of R117 000 offered thereon. On 5 September 2002 the property was registered in the name of the applicant. The property was acquired by his great grandfather who could not obtain the title deed on the property because of the racial laws of the time. Pursuant to an agreement reached between the family members the property was later transferred to him through the Upgrading of Land Tenure Rights Act.[1] The applicant and his family currently reside on the property and conduct all cultural functions thereon.

[2] The issues arising in this application will be better understood against the background that follows. Towards the end of December 2013 the applicant heard rumours circulating around the Groutville area that the property had been expropriated by the first respondent. Upon making enquiries from the first respondent's officials he was advised that the property had been expropriated against payment of R117 000 as compensation. The applicant requested the necessary documents from the officials proving that the property had indeed been expropriated and that he would be compensated. No documents were given to him.

[3] In early 2014, he again visited the offices of the first respondent to make enquiries. On this occasion he was shown a map on which it was indicated that his property was also affected by the expropriation. In early March 2014, he visited offices of the first respondent's attorneys and requested to be provided with documents proving that the property had been expropriated. The applicant was referred back to the first respondent.

[4] The applicant went back to the offices but he was not provided with any documents proving that his property had been expropriated. On 14 April 2014, he addressed a formal written complaint objecting to the expropriation process and the intended compensation of R117 000 offered. The first respondent ignored his objection. This prompted the applicant to make enquiries at the offices of the fifth respondent where he discovered that the property had already then been registered in the name of the first respondent.

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[1] 112 of 1991.

[5] The foundation of the applicant's objection was that the first respondent did not notify him of the expropriation of the property nor did it furnish him with any documents before and after the expropriation. On 22 June 2014, he approached his attorneys for assistance. He advised his attorneys that his property had been expropriated and of his dissatisfaction with the expropriation process. He was advised to obtain relevant documents proving that his property had been expropriated.

[6] On 3 July 2014, his attorneys addressed a letter to the first respondent advising that he was objecting to the expropriation both in terms of procedure and in substance. The first respondent did not respond to the letter.

[7] On 6 October 2014 he consulted with his attorneys who advised him to obtain the relevant documents relating to his expropriated property. Pursuant to that advice he telephonically contacted the first respondent's officials and requested the relevant documents but was informed that the documents were not available. On 2 December 2015 his attorneys informed him that they had managed to obtain the expropriation notice.

[8] Upon consultation with his attorneys he advised them that he was never served with nor had seen the expropriation notice before. On 14 March 2016 his attorneys addressed letters to the first and second respondents informing them that the applicant's property was unlawfully expropriated in that the procedure prescribed in the Expropriation Act[2] (the Act) was not followed. The letter demanded that the first respondent should withdraw its decision to expropriate his property. His attorneys alleged in the letter that the property was not inspected for the purpose of determining its value. The expropriation notice was not served in the manner prescribed by s 7(3) of the Act in that the original or a true copy of the notice was not delivered or tendered to be delivered or sent by registered post to the applicant. The first respondent did not publish, once a week during two consecutive weeks, in an Afrikaans and an English newspaper circulating in Stanger the notice complying with the provisions of subsec 7(2) or containing the other documents. Further the compensation of R117 000 was not just and equitable taking into account the size of the property and that there are buildings situated on the property. On 18 March 2016 his attorneys received an email from the second respondent advising that his

[2] 63 of 1975.

property was expropriated through the Housing Act[3] and that the matter would be referred to the fourth respondent for the third respondent's attention.

[9] His attorneys alleged also that the first respondent did not take into account the requirements set out in s 25 (3) of the Constitution when determining the amount of compensation. Importantly, his attorneys requested certain documents to be provided to them failing which they threatened to approach the High Court for the appropriate relief.

[10] On the same day the applicant's attorneys received a letter from the then first respondent's attorneys, B.G. Singh and Company, informing them that the first respondent had followed the procedure as stipulated in the Act in expropriating the applicant's property. In the said letter the first respondent's attorneys stated further that the first respondent had convened no fewer than four meetings with the community of Charlotte Dale in relation to the expropriation of their lands. The letter also indicated that the notice of intention to expropriate was advertised in the Natal Mercury on 2 February 2012 and that expropriation was formally gazetted on 7 March 2013.

[11] On 2 December 2016 the applicant launched this application contending that the expropriation of his property was unlawful, invalid and should therefore be set aside, and that s 12 of the Act is inconsistent with the Constitution and invalid in so far as it does not allow for matters listed in s 23(3) of the Constitution to be taken into account in the determination of compensation. The applicant sought an order declaring s 12 of the Act unconstitutional. The applicant also sought a mandamus directing the fifth respondent to cancel the transfer of the property to the first respondent and to retransfer it to the applicant. The applicant also sought an order, to the extent necessary, that the 180 day period provided for in s 7(1) of the Promotion of Administrative Justice Act[4] (PAJA) be extended. In the alternative the applicant sought an order for the court to determine just and equitable compensation.

[12] The application was initially opposed by the first and third respondents. However, on 5 April 2017 the third respondent withdrew its opposition. The second respondent filed its notice to abide the decision of the court. Although the fourth and fifth respondents were cited as parties in the application these two respondents did

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[3] 107 of 1997.
[4] 3 of 2000.

not participate in these proceedings resulting in the first respondent being the only party persisting in its opposition to the application.

[13] In its opposing affidavit deposed to by its Municipal Manager Nhlanhla Joshua Mdakane, the first respondent states the following on the issue of condonation. The applicant's application for condonation is framed in the alternative, in the first instance he asserts that the application for review was made timeously. In the second instance, which is the alternative, he asserts that if the application was instituted outside the 180 period then the delay in instituting the application must be condoned. In both instances, the application for condonation is buttressed on 18 March 2016 being the date on which the applicant became aware of the decision to expropriate his property. This date is central to the application for condonation.

[14] The first respondent points out that even assuming 18 March 2016 to be the date on which the applicant became aware of the decision to expropriate his property, the applicant had to launch the review without unreasonable delay and not later than 180 days thereafter. He states that the founding affidavit was commissioned and the notice of motion dated on 1 December 2016 which is a delay of 258 days with no explanation. He denies that the applicant first became aware of the decision to expropriate his property on 18 March 2016 because the applicant concedes in para 27 of his founding affidavit that he was advised by an official of the first respondent that his property had been expropriated and that he would be paid an amount of R117 000 as compensation in December 2013. He also states that even on his own version the applicant was well aware at least as at 14 April 2014 being the day on which he addressed a letter to the first respondent objecting to the expropriation of his property.

[15] It is settled that a party seeking the extension of time must furnish a full and reasonable explanation for the delay which covers the entire duration thereof. Absent any explanation at all for the delay there is no basis for this court to exercise its discretion in the applicant's favour.

[16] He states that the applicant does not endeavour to account for a delay of more than one year during the period 6 October 2014 which is the date on which the applicant alleges to have consulted with his attorneys and contacted the first respondent requesting the relevant documents, and 2 December 2015 which is the next date on which the applicant alleges to have consulted with his attorneys.

[17] On any of the applicant's versions the 180 days envisaged in s 7(1) of PAJA had expired when he launched this application. He accordingly had to seek an order that the period be extended in terms of s 9. In terms of s 7(1):

'Any proceedings for judicial review in term so of s 6(1) must be instituted without unreasonable delay and no 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.'

In terms of s 9(1), the 180 day period may be extended for a fixed period by agreement between the parties or, failing such agreement, by a court on application. In terms of s 9(2) a court may grant an application in terms of s 9(1) where the interests of justice so require.

[18] The manner in which the discretion to extend the statutory time period should be exercised in respect of s 9(2) was described in *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* as follows:[5]

'…And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.' (Footnote omitted)

In *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited*, the Supreme Court of Appeal said:[6]

'…Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review

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[5] *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* [2010] 2 All SA (SCA); [2010] ZASCA 3 para 54.

[6] *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] 4 All SA 639 (SCA); [2013] ZASCA 148 para 26.

application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay… That of course does not mean that, after the 180-day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not ….'

[19] As it is apparent from para 36 of the founding affidavit and on his own version the applicant had knowledge of the reasons for the expropriation on 2 December 2015 on receipt of the notice of expropriation from his attorneys. The applicant asserts that he received information about the process followed during the expropriation of his property and that it was only then that he identified perceived irregularities, and could make an informed decision whether to review the decision of the first respondent. The applicant's attorneys threatened legal proceedings against the first respondent on 3 July 2014 to review the application alleging then that he had not received notice of the expropriation which is the same complaint he now advances in this application.

[20] Mr *Boulle* who appeared on behalf of the first respondent submitted that there is no proper explanation why the threatened proceedings were not instituted then because the reasons for the expropriation were irrelevant then and now as the complaint was and remains procedural in that no notice was given. In correspondence exchanged on 14 March 2016 the first respondent's then attorneys made its stance clear to the applicant's attorneys. Oddly enough, almost two years later, (from 03 July 2014) the applicant's attorneys addressed a letter dated 14 March 2016 to the first respondent demanding from the first respondent to withdraw the expropriation. Aggrieved, the applicant had no choice but to apply to court to review and set aside the decision because the first respondent was then functus officio.[7] Instead of simply instituting review proceedings as originally threatened in July 2014, the applicants' attorneys sent unnecessary correspondences and delayed until December 2016.

[21] According to the applicant from December 2013, he requested the documents and information from the first respondent regarding the expropriation, it was not given

[7] *Matoto v Free State Gambling and Liquor Authority & others* (987/2017) [2018] ZASCA 110 (12 September 2018) para 11.

to him, and it was only given to him in March 2016. For a period of approximately two years and three months and armed with the knowledge that his property had been expropriated and that transfer of ownership had taken place, the applicant did nothing. Having carefully considered the explanation proffered by the applicant I am not persuaded that the delay in bringing the review application has been explained in a manner which is even remotely satisfactory. In light of this finding I find it unnecessary to entertain the review application.

[22] A point in limine raised by the applicant was that the first respondent's answering affidavit is defective and follows to be regarded as pro non scripto because it did not comply with the Regulations in terms of the Justices of the Peace and Commissioners of Oaths Act[8] which was published in GN R1258 in GG 3619 of 21 July 1972 (as amended). Mr *Magardie* who appeared for the applicant contended that Ramnath Mahabeer Bagwandas (Mr Bagwandas) who signed the affidavit as a commissioner of oaths is employed as the Assistant Director of Human Settlements with the first respondent and is listed as contact person/author in a memorandum requesting the first respondent's resolution to expropriate the property. He submitted that Mr Bagwandas acted irregularly in commissioning the answering affidavit because he played a role in the administrative process resulting in the expropriation of the applicant's property.

[23] Not according to Mr *Boulle*. He submitted that reg 7(1) must be read with reg 7(2) which provides that subreg (1) shall not apply to an affidavit or a declaration mentioned in the schedule. Item 2 of the schedule reads that a 'declaration taken by a commissioner of oaths who is not an attorney and whose only interest therein arises out of his employment and in the course of his duty'.

[24] In *Eskom Holdings Limited v Nigrini N.O.*[9] the court held that in fact it appears probable that the commissioner of oaths is not an attorney and being the holder of an office described above, has no interest in the present matter other than that which arises from her employment and in the course of her duty. In the circumstances the point in limine has no substance and falls to be rejected.

[25] With regard to the complaint about the late filing of the answering affidavit, it would make no sense to uphold this argument and disregard the affidavit especially because the applicant has already furnished a reply thereto. In any event, even if I

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[8] 16 of 1963.

[9] *Eskom Holdings Limited v Nigrini N.O.* (4338/2015) [2016] ZAFSHC 27 (25 February 2016).

am wrong in this regard, this will not assist the applicant in light of the conclusion that I have come to in this application.

[26] With regard to the issue of costs I am of the view that the principles enunciated in *Biowatch Trust v Registrar, Genetic Resources, & others*[10] apply. In the circumstances, there should be no order as to costs.

Order

[27] In the result the following order shall issue:

(a) The application is dismissed.

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Mnguni J

Appearances

Heard:	19 February 2019
Delivered:	26 July 2019
For the Applicant:	Mr S.G. Magardie
Assisted by:	Mr L. K. Siyo and Mr M.Z.F Suleman
INSTRUCTED BY:	Legal Resources Centre
REF:	TM/20/2014
TEL:	031-301 75 72
For the First Respondent:	Mr A. J. Boulle
INSTRUCTED BY:	Buthelezi Mtshali Mzulwini Inc.

[10] *Biowatch Trust v Registrar, Genetic Resources, & others* 2009 (6) SA 232; 2009 (10) BCLR 1014 (CC); [2009] ZACC 14.

REF.: KDM 1.2/ZM
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