THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case No: 943/12

In the matter between:

THE CITY OF CAPE TOWN **APPELLANT**

and

ARUN PROPERTY DEVELOPMENTS (PTY) LTD **RESPONDENT**

Neutral citation: *City of Cape Town v Arun Property Developments* (943/12) [2014] ZASCA 56 (16 April 2014)

Coram: Navsa, Ponnan, Theron, Willis JJA and Mathopo AJA

Heard: **18 March 2014**

Delivered: **16 April 2014**

Summary: **Interpretation – interpretation of section 28 of Land Use Planning Ordinance (LUPO) – section not amounting to expropriation – no compensation due.**

ORDER

On appeal from: Western Cape High Court, Cape Town (Dlodlo J sitting as court of first instance):

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'(a) It is declared that the plaintiff is not entitled to compensation in terms of s 28 of LUPO.

(b) The plaintiff is ordered to pay the defendant's costs, including the costs of two counsel.'

JUDGMENT

Mathopo AJA (Navsa, Ponnan, Theron and Willis JJA concurring):

[1] The question for determination in this appeal is whether the respondent, Arun Property Development (Pty) Ltd (Arun), is entitled to claim compensation from the appellant, the City of Cape Town (the City) in terms of section 28 of the Land Use Planning Ordinance (LUPO), for portions of certain public streets (the excess land) pursuant to a subdivision granted by the City, for which Arun applied and which, purely for the purposes of this case are accepted to be in excess of the normal needs therefor arising from that subdivision. The answer to that question follows on an interpretation of s 28 of LUPO the provisions of which allow for a vesting in the City, without compensation of public spaces and streets relative to the needs of the development.

[2] The Western Cape High Court (Dlodlo J), wherein Arun instituted an action against the City for compensation for the excess land, held, that in terms of s 28 of LUPO the excess land automatically vested in the City and that since no review remedy was available to Arun, the City was obliged to compensate it and that such compensation was to be calculated in terms of the provisions of the Expropriation Act 63 of 1975 (the EA). The High Court accordingly issued orders to that effect and ordered the City to pay Arun's costs. It is against those findings and orders that the present appeal is directed. The appeal serves before us with the leave of the high court. I pause to state that the high court in arriving at the conclusions referred to above was

aware of the majority decision of this court in *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) which dealt with the interpretation of s 28 of LUPO in a manner that the high court appreciated called for a decision contrary to that reached by it. This will be addressed later.

[3] At this stage it is necessary to set out in brief, in the paragraphs that follow, the relevant factual background. In doing so, I borrow largely from the high court's judgment.

[4] The respondent, Arun Property Development (Pty) Ltd, is the registered owner of portions 57 and 61 of the farm Langeberg 311, Durbanville (the property). Arun purchased the property from the University of Stellenbosch (the University) during 1997 and it was thereafter consolidated to form Erf 10357. Prior to Arun's purchase of the property, the University had, in or about 1987/1988 instructed City planners, architects and consulting engineers to advise it regarding the future use and development of the property. They had advised the University that the property fell within the logical expansion area of the Durbanville district and that the value of the property would be optimised if it was used for township development purposes.

[5] During the course of those investigations the advisers, considering the relevant planning documents that regulated municipal planning in the area, established that various planning instruments, such as structure plans adopted in terms of s 4 of the LUPO and transport plans for the Cape Metropolitan Area, which had been established in terms of the Urban Transport Act 78 of 1977, made provision for a hierarchy of roads. Thus, for example, the Provincial Executive Committee had approved a structure plan for the area north of the N1 in terms of s 4(6) of LUPO on 13 June 1988 (the 1988 structure plan), which provided for five categories of roads.

[6] This planning structure burdened the property with a planned primary road

system consisting of:

(a) an order 1 (trunk roads and main roads) road: North/South Kuilsriver highway (previously known as Main Road 81 and currently known as Main Road 81 and the R300 extension);

(b) an order 2 (primary distributors) road: East/West De Villiers extension (also known as Golf Course Road); and

(c) an order 2 (primary distributors) road: North/South Brackenfell Boulevard in the East.

[7] No application for rezoning and subdivision of the property with the view to a township development would have been approved by either the local or provincial authorities unless such a development plan was reconcilable with existing planning, and in particular, unless it made provision for and indicated the required public road reserves therein. The University's consultants met with the relevant municipal officials to, inter alia, determine what the City's requirements in respect of the provision of civil services for development on the property were. The officials confirmed that the approval of any development proposal was going to be dependent on compliance with existing planning for road infrastructure as referred to above.

[8] The University subsequently lodged certain applications in the early 1990's with the City to obtain the necessary approvals for township development, including one for the rezoning of the property. On 3 September 1992 the University was informed in writing that the Ministerial representative had approved the application to rezone the property from agricultural to township development. The approval was informed, inter alia, by a Traffic Impact Assessment prepared by consulting engineers. This report pointed out that the development of the property was not going to have a significant impact on the existing road infrastructure. It was reported that such impact could be addressed by relatively minor improvements to the existing road system.

[9] After Arun acquired the property it employed its own team of consultants, whose investigations confirmed the background summarised above. Arun's town planning consultant was informed that the requirements with regard to the road infrastructure as set out in the 1988 structure plan and related documents, such as transport plans for the Cape Metropolitan Transport Area, had to be complied with. This included the obligation to provide for the planned higher order roads over the property as referred to above. Arun's consultants prepared and submitted to the City a subdivision application (the application was prepared taking into account the requirements of the road infrastructure). The City approved the three phases of the development on three different occasions. Each one of the approvals included confirmation of the rezoning of specified portions of the property to 'Public Streets' as well as conditions relating to the design of the road infrastructure.

[10] On 10 September 2001 Arun instituted the action referred to in para 2 above. An exception was taken by the City to the particulars of claim, with the result that Arun amended its particulars of claim on 23 April 2003. These amended particulars of claim were met with four additional exceptions from the City. Erasmus J dealt with the exceptions and upheld two of them.

[11] The case advanced for Arun is that only a part of the property designated for public streets could be said to be based on the 'normal need' for public streets arising from the subdivision. Arun's claim for compensation was for the loss of its ownership of the excess land, which, it contended was surplus to the normal need.

[12] In support of its case, Arun relied on the minority judgment of Heher JA in Helderberg and contended that the remarks of Farlam JA, writing for the majority, when dealing with section 28 of LUPO were obiter and not binding. The court below agreed with Arun. I will in due course turn my attention to that case.

[13] In the court below the parties agreed to a separation of issues in terms of Rule 33(4). The separated issues were:

'(a) Does the excess land remain vested in the Plaintiff, or has it vested in the Defendant in terms of s 28 of the Land Use Planning Ordinance 15 of 1985 (C) ('LUPO')?

(b) If the excess land has vested in the Defendant in terms of s 28 of LUPO, is the Plaintiff entitled to compensation in respect of the excess land in terms of s 28 of LUPO?

(c) If the Plaintiff is entitled to compensation in terms of s 28 of LUPO, is such compensation to be reckoned as contended for in terms of paragraphs 19 or 20 of the particulars of claim?'

[14] Arun called four witnesses in support of its case who were ultimately unhelpful in resolving the issue. The parties were agreed that in resolving the dispute an assumption could be made that a part of the public roads in the approved subdivision were in excess of the normal needs of the development.

[15] Before us counsel for the City conceded that the City was wrong to agree to a separation on that assumption. He accepted that in the event of a ruling in favour of the City, the assumption and the agreed separation, far from having the effect of being dispositive of the matter would, probably result in protracted litigation. Put simply, the assumption would have to be revisited to determine whether the excess land was indeed surplus to normal needs. Counsel for Arun, on the other hand, was undeterred, unsurprisingly, as the suggestion for a separation on the agreed basis was initiated by him. This court has warned on numerous occasions that courts should not be led by counsel but should be vigilant to ensure that a separation of issues does indeed lead to expedition. See in this regard *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) para 21.

[16] It is now necessary to focus on s 28 of LUPO, which provides:

'**Ownership, on subdivision, of public streets and public places.** —The ownership of all public streets and public places over or on land indicated as such at the granting of an application for

subdivision under section 25 shall, after the confirmation of such subdivision or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision or is in accordance with a policy determined by the Administrator from time to time, regard being had to such need.'

[17] Both the majority and minority decisions in Helderberg now call for attention. In that case Farlam JA (with whom Mpati AP, Snyders AJA and Kgomo AJA concurred) focused, right at the commencement of his judgment, on the provisions of s 28 of LUPO.[1] He disagreed with the interpretation placed on the section in the minority judgment by Heher JA, namely that on a proper construction of that section an owner of land subject to an approved subdivision application has a claim for compensation from the local authority concerned in respect of those portions of the public streets vesting in the authority upon the confirmation of the subdivision which exceed the normal need therefor arising from the subdivision.[2] Farlam JA took issue with Heher JA that his conclusion was logically compelling as the language of s 28 was such that it was 'the correlative of the negative postulation as to compensation in the section that an owner is entitled to be compensated for over-generously provided streets and public places which vest in the local authority on confirmation of a subdivision.'[3]

[18] In support of his contrary conclusion Farlam JA provided the following example: 'consider these facts: A developer applies for approval of a subdivision. In his subdivisional plan, which is approved, he makes provision for overbroad streets and overgenerous public places the provision of which is not "based on the normal need therefor arisisng from the subdivision" If my colleague is correct the developer will be able to claim compensation for the "unneeded" portions of the streets and public places, for which the local authority will have to pay. One would not lightly conclude that the lawgiver could have intended such a result.'[4]

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[1] Para 2.
[2] Paras 1 and 2.
[3] Para 3.
[4] Para 3.

[19] Farlam JA might rightly have added to his remarks, noted in the preceding paragraph, that a further perverse effect would be that the property development might because of the generous provisions be particularly attractive to affluent buyers and the owner would benefit twice if compensation could be claimed from the local authority.

[20] The judgment of Farlam JA went further and disagreed with Heher JA that section 28 constituted the power of expropriation. The learned judge of appeal reasoned that the owner could have resisted it by not proceeding with the development or it could have appealed to the Premier of the Province under section 44 of LUPO against such vesting.[5] Farlam JA might even have said further that if the facts called for it, an owner could bring it to the attention of the local authority that both it and the owner's consultants erred or even one of them and could have called on the local authority to consider the error and revisit such condition or approval. Or an owner could have lodged an appeal on that basis, in the event of the local authority contending that it was not legally competent to revisit its prior approval.

[21] Farlam JA went further and called to mind that this court has on several occasions, in analogous situations, held that a party who has the remedy of judicial review and does not make use of it will not be allowed to claim damages.[6] At para 10 of his judgment the following appears:

'I agree with counsel for the appellant that the administrative act at issue cannot be disentangled: the decision or administrative act as a whole should either have been appealed or reviewed and set aside.'

[22] In his minority judgment Heher JA was, as already alluded to, adamant that s 28 had vesting as its primary purpose and reasoned that its provisions were founded in a compulsory taking. He went on to say that a legislative power authorising expropriation without compensation will not lightly be countenanced. He concluded that an owner had

[5] Paras 4 and 11.
[6] Para 8.

a right to compensation based on the provisions of s 28 of LUPO.[7]

[23] The primary purpose of s 28 is to vest roads and public places based on the normal need therefor upon confirmation of a subdivision in a local authority, so as to enable it to fulfil its obligations as a local authority in relation thereto. The wording is clear. It certainly is not to enable an expropriation of land not based on the normal need therefor. Such a power, without a prescribed procedure, as contended for by Arun, would, in any event, be constitutionally questionable. It will offend against s 25 of the Constitution which prevents the arbitrary deprivation of property. Importing the provisions of the EA, ex post facto, as Arun seeks to do, is an exercise in desperation.

[24] I find the reasoning of Farlam JA, referred to above, compelling and do not agree, for the reasons already stated, that the reasoning of Heher JA is persuasive.

[25] I fail to see how the imposition of a condition by the local authority in *Helderberg* distinguishes that case from this one, particularly since that case like the present involved the interpretation of s 28 and both concern the remedy at the disposal of an aggrieved owner. By the same token I fail to understand how Farlam JA's remarks could have been construed as obiter, as the high court purported.

[26] It is in my view necessary to deal with the submission on behalf of Arun in respect of the structure plans adopted in terms of the provisions of LUPO, referred in paragraph 5 above. Such a plan, as rightly contended by Arun, cannot be construed as authorising expropriation in excess of the needs of the development. That takes the matter no further. The question whether the roads and public spaces are in excess of the needs of the development is a factual one and the right to contest its vesting, must as pointed out above depend on the circumstances.

[7] Paras 39, 40 and 41.

[27] The submission on behalf of Arun that it was entitled to its alternative prayer; that it be declared that the excess land remains vested in it, is fallacious, for the reasons that follow. First, there is no factual foundation to conclude that there is indeed excess land. Second and importantly, there is an administrative decision that remains extant, namely the approval of the subdivision, that has not been undone, either by way of appeal, review or otherwise.

[28] Furthermore, it was submitted on behalf of Arun that the time it takes to resolve appeals in terms of LUPO is that it would be uneconomical to resort to that avenue for relief is no answer to the interpretation question. Those practical problems have to be resolved with the local authority. In the event of a condition being imposed unilaterally, that is punitive and will have the effect that land in excess of the needs of the development is demanded by the local authority an early challenge by way of an application to review the decision can be undertaken by an owner. Owners and the local authority should each take greater care in this regard when submitting an application for and approving a subdivision.

[29] It is necessary to say something about the manner in which Dlodlo J dealt with the adjudication of this case. He was bound by the decision of this court in *Helderberg*. He recognised that he was 'treading on dangerous ground by even considering to differ from the judgment of the Supreme Court of Appeal.' Nonetheless, he went on to say: 'But the facts in the instant compel me to administer justice in the manner set out in the order I make…'

[30] In *True Motives 84 (Pty) Ltd v Mahidi & another* 2009 (4) SA 153 (SCA) this court said the following:

'[100] The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn

foundational to our Constitution.[8] Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions.'

[31] The court below erred in the first place in holding that there was merit to the submission by counsel for Arun, that *Helderberg* was distinguishable. Second, in holding, contradictorily, that the majority judgment was obiter but that it was in any event differing from this court. Third, by stating that it was necessary for this court to revisit its interpretation of s 28 of LUPO.

[32] Following these conclusions, Arun's claim ought to have been dismissed in the court below. Counsel for Arun suggested that further litigation options might remain for Arun. Whilst I fail to see how that is so, in the substituted order hereafter I shall answer what appears to be the substantive issue in the matter.

[33] For the reasons stated, I make the following order:

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following:

'(a) It is declared that the plaintiff is not entitled to compensation in terms of s 28 of LUPO.

(b) The plaintiff is ordered to pay the defendant's costs, including the costs of two counsel.'

R S Mathopo
Acting Judge of Appeal

[8] Constitution Chapter 1, Founding Provisions, s 1─the Republic of South Africa is founded on values that include '*(c)* Supremacy of the Constitution and the rule of law'.

Appearances

For the Appellant:	J H Roux SC (with him C Carolissen)
	Instructed by:
	Cliffe Dekker Hofmeyr Inc, Cape Town
	Phatshoane Henney Inc, Bloemfontein
For the Respondent:	S P Rosenberg SC
	Instructed by:
	Du Plessis Hofmeyr Malan Inc, Somerset West
	Webbers, Bloemfontein