IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 8562/2007

DATE: 16 AUGUST 2011

In the matter between:

GE PROPERTY & MARKETING (PTY) LTD Applicant

and

SWAANSWYK HORSE OWNERS & RIDERS' ASSOCIATION Respondent

J U D G M E N T

ALLIE, J:

In this matter, I think that given the long duration that this matter has been coming along, of course, and given the fact that it involves clearly issues of interest to both sides inasmuch as it involves a private individual in the form of a juristic entity's right of use and occupation of its land and it involves an association which clearly has a sector of the public's interest at heart, that I at least give an *ex tempore* ruling on aspects of this matter, which I now wish to do.

Having read these papers yesterday and having looked at the authorities both referred to in the heads and the authorities on point, I am of the view that despite the fact that the respondent relies on a letter written by the administrator, when refusing the application of this applicant, to have the erf in dispute rezoned and subdivided and despite the fact that the respondent relies on this letter to establish that the administrator intended to impose, and allegedly did in fact impose, a condition on the use of this land, namely use for equestrian purposes, the letter and the paragraph in the letter of 21 October 2009, which can be found on page 104 of the record, in itself does not provide this court with sufficient evidence and support from which one can draw the conclusion that in fact a condition of this nature was imposed by the administrator.

Firstly, I am not persuaded that the administrator had the authority when refusing an application for rezoning and subdivision, which is in effect what it did when it upheld the appeal of the objectors to the rezoning and subdivision, to impose a condition such as has been suggested on behalf of the respondents. Nor am I persuaded that the administrator in fact had the intention of imposing such condition, because the paragraph relied upon is not phrased in mandatory terms, it is not phrased in terms which suggest that it is imposing a

condition of any sort, nor does it say it is imposing a condition for use by members of the public. I am also not persuaded by the arguments and papers before me that the local authority can in fact implement such a suggestion. I would place paragraph 3 no higher than a suggestion by the administrator. I have no evidence before me that in fact the zoning by the local authority includes amongst its categories, zoning specifically for equestrian purposes.

So without that information before me, and information clearly that the respondent relies upon, not facts which the applicant relies upon, I have to say regrettably that I am not convinced that the respondent has shown or proved that there in fact is an intention by the local authority to implement the suggestion by the administrator that this land be used for equestrian purposes only. I cannot make a finding on these papers that the land is to be used for equestrian purposes only. It clearly was the intention of the owners of the land, initially in 1993 when it applied for the subdivision and rezoning of the Steenberg development, to in fact use the land for that purpose, but it did not indicate for how long that will be the case, and as a private individual it was not bound by the local authority, nor was it bound by its lessee at the time, who is the respondent today, to do so for any length of time beyond the time which it voluntarily agreed to, namely a period of 10 years

in totality.

It is common cause that the respondent occupied this property initially by virtue of an agreement of lease, which has now expired in 2006. It is common cause that they remain in occupation of this property and that they refuse to so vacate the property and that they in fact believe that not only do they, but also members of the horse riding community as it were, have a right of some sort to continued use of this property for equestrian purposes. But I am not persuaded on these facts before me and on the papers and the arguments before me that such a right continued beyond the duration of the agreement of lease.

Turning to the issue of whether in fact the municipality will in the future decide to limit the use of this property for equestrian purposes, that is clearly not something for this court to decide today. It may well be that the municipality will at some stage impose such a condition that it be used for equestrian purposes, but I have no evidence before me that if and when the municipality does so, that it will be for the benefit of the riding community or the public at large. I cannot see on what basis it could impose a condition for the public at large, when it involves private land, owned by a private individual or private entity and where the rezoning and subdivision approval

of the Steenberg Golf Estate was not made subject to this land being set aside at the time for the use of the public at all or for the use of any one entity indefinitely.

So in the circumstances, even if one assumes that there is such a condition as is suggested by the respondent imposed, it certainly does not vest the respondent with a right to remain in occupation of this property now or at any time in the future. And as we ought well to be aware that the use of a property by a private entity or private individual, ought not to be unduly fettered unless there is a legal basis for such fettering and I can see no basis, on these papers and on the argument, for concluding that there is a legal basis for limiting the owner's right to use and occupy his property beyond the limitations imposed by the municipality. From these papers I can only establish that the zoning is currently still that of rural, and to that extent, it is limited by the use of the property for rural purposes, clearly that is a limitation imposed legally and validly and for which I do not have to pass any judgment.

As far as I am concerned, the scenario of the owner being bound to make it available for equestrian use, sketched by the respondent is definitely not borne out by the common cause facts nor is it borne out by the legal arguments advanced on behalf of the respondent. So having found that there is no

condition at present limiting the applicant to use this property for equestrian purposes nor limiting the applicant to make the property available only to the respondent and to members of the public. I am inclined to grant the relief sought by the applicant.

Turning to the issue of the cost of two counsel. Clearly by virtue of the additional legal arguments raised by the respondent belatedly in its heads, the matter became more complex and I would, therefore, grant the cost of two counsel. Turning to the issue of costs on attorney and client scale. By virtue of the fact that the applicant brought this application as one to compel the respondents to vacate as a result of the fact that their lease had expired and by virtue of the fact that it is common cause that the respondent initially occupied this property on the terms and conditions stated in the lease agreement, the terms and conditions of the lease agreement would apply and that would include, of course, legal costs being awarded on an attorney and client scale.

I suggest that a draft order be presented to me in chambers, to include the cost of two counsel and costs on an attorney and client scale. And so I am in effect suggesting that I am prepared to granted an order evicting the respondent and all occupants occupying under its aegis and directing the

respondent to pay the costs as set out in the supplementary notes of the applicant. So I suggest you still bring me a draft order though.

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ALLIE, J