



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case no: 8102/2014

In the matter between:

**REALLY USEFUL INVESTMENTS NO 219
(PTY) LTD**

Plaintiff

And

CITY OF CAPE TOWN

First Defendant

**MINISTER OF WATER AND ENVIRONMENTAL
AFFAIRS**

Second Defendant

**MINISTER OF LOCAL GOVERNMENT,
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT
PLANNING, WESTERN CAPE**

Third Defendant

Date of hearing: 4 March 2015

Date of judgment: 27 March 2015

JUDGMENT

SAVAGE J:

Introduction

[1] The first defendant, the City of Cape Town ('the City'), raised an exception to the plaintiff's particulars of claim on the basis that no cause of action had been disclosed. A plea on similar grounds raised by the second and third defendants was separated for determination under rule 33(4). Both the exception and plea are now before this Court for determination.

[2] The plaintiff, Really Useful Investments No 219 (Pty) Ltd, instituted action during May 2014 against the City, the Minister of Water and Environmental Affairs, as second defendant and the MEC of Local Government, Environmental Affairs and Development Planning (Western Cape), as third defendant, each in the alternative, for payment of compensation under s 34 of the Environment Conservation Act 73 of 1989 ('the ECA') in an amount of R16 750 846 plus VAT, alternatively R2 818 422 plus VAT, and ancillary relief.

[3] The plaintiff is the owner of 39 immovable properties in a security estate in Hout Bay, Cape Town known as the Hout Bay Beach Club, situated west of the Disa River and between Princess Street and the seashore. Development plans were approved by the City's predecessors-in-law and the plaintiff commenced developing the properties until receipt of a directive dated 10 May 2011 made in terms of s 31A(1) and (2) of the ECA ('the directive'). This directive was designed to protect a wetland that covered part of the properties and placed limitations on the purposes for which the plaintiff may

use and/or on activities which may be undertaken on the properties. As a consequence, the plaintiff claims to have suffered actual loss in the form of the diminution in the market value of the properties which it seeks to recover under s 34 of the ECA from the City, alternatively the second defendant, further alternatively the third defendant. In the further alternative, the plaintiff claims that if it fails to provide for a claim for limitations imposed by a local authority or government institution, s 34 is unconstitutional and invalid and must be declared so in terms of s 176(1)(a) of the Constitution.

Applicable statutory provisions

[4] Section 31A of the ECA provides that:

- (1) *If, in the opinion of the Minister or the competent authority, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, competent authority, local authority or government institution, as the case may be, may in writing direct such person –*
- (a) *to cease such activity; or*
 - (b) *to take such steps as the Minister, competent authority, local authority or government institution, as the case may be, may deem fit,*
- within the period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.*
- (2) *The Minister or the competent authority, local authority or government institution concerned may direct the person referred to in subsection (1) to perform any activity or function at the expense of such person with a view to rehabilitating any damage caused to the environment as a result of the activity or failure referred to in subsection (1), to the satisfaction of the Minister, competent authority, local authority or government institution, as the case may be...'*

[5] Section 34 of the ECA creates a right to recover compensation in certain circumstances:

‘34. Compensation for loss

- (1) *If in terms of the provisions of this Act limitations are placed on the purposes for which land may be used or on activities which may be undertaken on the land, the owner of, and the holder of a real right in, such land shall have a right to recover compensation from the Minister or competent authority concerned in respect of actual loss suffered by him consequent upon the application of such limitations.*
- (2) *The amount so recoverable shall be determined by agreement entered into between such owner or holder of the real right and the Minister or competent authority, as the case may be, with the concurrence of the Minister of State Expenditure.*
- (3) *In the absence of such agreement the amount so to be paid shall be determined by a court referred to in section 14 of the Expropriation Act, 1975 (Act 63 of 1975), and the provisions of that section and section 15 of that Act shall mutatis mutandis apply in determining such amount.’*

[6] Section 37 of the ECA provides further that:

‘No person, including the State, shall be liable in respect of anything done in good faith in the exercise of a power or the performance of a duty conferred or imposed in terms of this Act.’

[7] In terms of s 24 of the Constitution:

‘Everyone has the right –

... (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

- (i) *prevent pollution and ecological degradation;*
- (ii) *promote conservation; and*

- (iii) *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*'

[8] The National Environmental Management Act 107 of 1998 (as amended) ('NEMA') falls within the ambit of the legislation envisaged by the 'reasonable legislative' measures referred to in s 24 of the Constitution. S 49 of NEMA provides that:

'Neither the State nor any other person is liable for any damage or loss caused by-

- (a) *the exercise of any power or the performance of any duty under this Act or any specific environmental management Act; or*
 (b) *the failure to exercise any power, or perform any duty under this Act or any specific environmental management Act,*
unless the exercise of or failure to exercise the power, or performance of failure to perform the duty was unlawful, negligent or in bad faith.'

[9] As of 1 May 2005, s 49 of NEMA was amended to extend its application to any 'specific environmental management Act' defined in s1(1) of NEMA to include the ECA.¹

Evaluation

[10] Section 34(1) provides a right to recover compensation from the 'Minister or competent authority' for actual loss suffered for limitations 'placed on the purposes for which land may be used or on activities which may be undertaken on the land'. This is a statutory entitlement to recover compensation where actual loss has been caused as a result of a limitation placed on property rights and is distinct from a delictual claim for damages. As

¹ National Environmental Management Amendment Act 46 of 2003 which came into force on 1 May 2005

a statutory right to recover compensation, s 34(1) operates similarly to a compensation provision in circumstances of an expropriation, with the right arising in the circumstances contemplated in the provision and not limited to instances in which wrongfulness, negligence or unlawfulness exist.

[11] The fact that s 34 and s 37 of the ECA came into force contemporaneously and were not amended when s 31A was inserted into the ECA,² or when the later amendments to the ECA and NEMA were promulgated, evidences a legislative intent to keep the statutory right embodied in s 34 alive. It does not follow that the right to compensation contained in s 34 is limited by s 37 of the ECA, or by s 49 of NEMA, given the distinct nature and purpose of the provisions.

[12] If s 49 of NEMA applies as the operative limitation of liability provision to the ECA (which the plaintiff for current purposes accepts and is a conclusion that the maxim *lex posterior priori derogate*³ supports), it is material that s 49 does not limit other statutory rights to compensation such as that provided in s 36 of NEMA in cases of expropriation. This is clearly so given the imperative contained in s 25(2) of the Constitution that compensation be paid where there is an expropriation and there can be no doubt that compensation under s 36 is therefore not limited to circumstances in which wrongfulness, unlawfulness or bad faith exists. Furthermore, the reference in s

² By s 19 of the Environmental Conservation Amendment Act 79 of 1992

³ *New Modderdam Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 397; *Government of the Republic of South Africa and another v Government of KwaZulu and another* 1983 (1) SA 164 (A) at 201 F-G. The maxim *generalia specialibus non derogant* may also find application.

34(3) of the ECA to the court referred to in s 14 of the Expropriation Act 63 of 1975 determining the amount of compensation payable in the absence of an agreement between the parties provides further support for the conclusion that the s 34 right is intended to be dealt with in a similar manner to the statutory right to compensation for expropriation.

[13] Section 34 contemplates the lawful exercise of public power. Given that the exercise of public power is only legitimate where it is lawful,⁴ a right to compensation under s 34 could not have been intended to arise only when public power has been exercised unlawfully in that the exercise of the power would in such cases be illegitimate by virtue of its unlawfulness. The same applies to negligence given that the functionary exercising statutory power is under a duty to use due care and to take all reasonable precautions to avoid or minimise injury to others, and the failure to do so renders the conduct of the repository of the statutory power unlawful.⁵

[14] In *Arun Property Development (Pty) Ltd v City of Cape Town*⁶ Moseneke DCJ distinguished between a statutory right to compensation and a delictual claim, stating that:

‘... a party that has a statutory right to compensation is in a very different position to a plaintiff trying to establish a novel delictual claim. That party is entitled to rely on this right, which is statutorily entrenched, regardless of any alternative remedies available. The right to compensation... does not flow from the delictual claim for damages.’

⁴ *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 56

⁵ *Simon’s Town Municipality v Dews* (*supra*) at 196B-E; *Minister of Justice and Constitutional Development v X* (*supra*) at para 47

⁶ 2015 (3) BCLR 243 (CC) at para 69

[15] In *Johannesburg Municipality v African Realty Trust Ltd*⁷ Innes

CJ stated that:

‘Whenever the exercise of statutory powers is alleged to have resulted in injury to another the enquiry must always be - what was the intention of the Legislature? Did it intend that immunity from consequences should accompany the grant of authority, or did it intend that the authority should either not be exercised at all to the legal prejudice of others, or that if so exercised there should be an accompanying liability to make good any consequential damage?... Certain general considerations may be useful, but are not necessarily decisive. For instance, the Legislature is not presumed to intend an interference with private rights where no provision is made for compensation....’

[16] McNaughton LJ in the Privy Council decision of *Mayor of*

*Freemantle v Annois*⁸ said:

‘If persons in the position of the appellants, acting in the execution of a public trust, and for the public benefit, do an act which they are authorised by law to do, and to do it in a proper manner, the individual injured cannot maintain an action. He is without a remedy, unless a remedy is provided by the statute.’

[17] A statutory right to compensation under s 34 is precisely such a remedy.

[18] Numerous examples of provisions limiting liability exist in our law,⁹ the purpose of which is to provide a defence in circumstances where a delictual claim would ordinarily be available to a claimant who has suffered damages or loss as a result of unlawful conduct. Such a defence is specifically

⁷ 1927 AD 163 at 171-2

⁸ 1902 AC 213 referred to in *African Realty* at 176

⁹ Such as s 42 of the National Prosecuting Authority Act 32 of 1998 which provides that: ‘No person shall be liable in respect of anything done in good faith under this Act’

directed at the wrongfulness element of delictual liability.¹⁰ It is not a defence to a statutory entitlement to recover compensation such as provided in s 34. In *Minister of Constitutional Development v X*¹¹ Fourie AJA stated that:

‘To my way of thinking s 42 of the NPA Act seeks to introduce a ground of justification for conduct which is prima facie wrongful. Therefore, wrongful conduct that would otherwise give rise to delictual liability may be justified and rendered lawful by virtue of the statutory immunity conferred in terms of s 42 of the NPA Act. It is a defence specifically directed at the wrongfulness element of delictual liability. It is trite that in the case of a defence of this nature the onus rests on the defendant... to plead and prove the defence...’.

[19] Corbett CJ in *Simon’s Town Municipality v Dews*¹² in considering the meaning and effect of s 87 of the now repealed Forest Act 122 of 1984,¹³ which limited liability where a power had been exercised or a duty performed in good faith, stated that such a provision should be:

‘...interpreted against the general background of the law relating to statutory authority as a defence to a delictual claim. Conduct which would otherwise give rise to delictual liability may be justified and rendered lawful by the fact that it consists of the exercise of a statutory power.’¹⁴

[20] That the environment is held in public trust for beneficial use in the public interest and that it must be protected is embodied in s 24 of the Constitution and the provisions of NEMA. However, legislative prescripts

¹⁰ *Minister of Justice and Constitutional Development v X (supra)* at para 46

¹¹ 2015 (1) SA 25 (SCA) at para 41

¹² 1993 (1) SA 191 (A)

¹³ Section 87 provided that: *‘No person, including the State, shall be liable in respect of anything done in good faith in the exercise of a power or the carrying out of a duty conferred or imposed by under this Act’*

¹⁴ At 195I-J; *Minister of Constitutional Development v X* 2015 (1) SA 25 (SCA) at para 46

which protect the environment from unlawful activity and hold responsible those who harm it cannot be construed to limit or restrict other statutory entitlements, such as provided in s 34, unless this is apparent from the language of the statute read in context.

[21] In interpreting a statute, courts must have regard to the text, context and purpose of the legislation, cautious of an interpretation that *'...leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration'*.¹⁵ Furthermore:

'...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...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'.¹⁶

[22] A statutory right to recover compensation is clearly provided in s 34 and is one neither limited nor restricted by s 37 or s 49 which are provisions whose purpose it is to provide a defence to a claim in delict. To find differently would be to strain at an interpretation that does not accord with the language of the provision read in context and the statute as a whole. It follows that the plaintiff's particulars of claim as it stands discloses a cause of action and does

¹⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 26

¹⁶ At para 18

not lack averments which are necessary to sustain an action within the contemplation of rule 23(1).¹⁷

[23] For these reasons both the exception raised by the first defendant and the defence put up in paragraph 15.3 of second and third defendants' plea, separated under rule 33(4), must fail. There is no reason as to why costs should not follow the result, which costs are to include the costs of two counsel.

Order

[24] In the result, the following order is made:

1. The first defendant's exception to the plaintiff's particulars of claim is dismissed with costs.
2. Paragraph 15.3 of the second and third defendants' pleas to the plaintiff's particulars of claim is struck out with costs.
3. The defendants are to pay the plaintiff's costs related to the hearing of the matter, including the costs of two counsel, which costs are to be paid jointly and severally, the one paying the other to be absolved.

K M SAVAGE

Judge of the High Court

¹⁷ *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) at 52G-H; *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) at 32 D-E; *First National Bank v Perry NO* [2001] 3 All SA 331 (A)

Appearances:

Plaintiff: A M Breitenbach SC with A E Erasmus and A Christians
Instructed by Du Plessis Hofmeyr Malan Inc.

First Defendant: G Budlender SC with Ms S van Zyl
Instructed by Smith Ndlovu Summers Attorneys

Second Defendant: P Farlam, M Bishop and N Pakade
Instructed are by the State Attorney