

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

CASE NO: 9827/2010

In the matter between:

HIBISCUS COAST MUNICIPALITY

Applicant

and

NICHOLAS JOHANNES STEYN

First Respondent

GERRIT GROBLER

Second Respondent

CLINTON COCKRELL

Third Respondent

DEBORAH COCKRELL

Fourth Respondent

CRAIG ROBERTSON

Fifth Respondent

GARTH HILL

Sixth Respondent

KENNETH KEARNS

Seventh Respondent

BYRON KEARNS

Eighth Respondent

MICHAEL BARNES

Ninth Respondent

SUSAN BARNES

Tenth Respondent

ROBERT HEARD

Eleventh Respondent

CAROL HEARD

Twelve Respondent

LOATHER FREY

Thirteenth Respondent

DIANE FREY

Fourteenth Respondent

MICHAEL SWANSON

Fifteenth Respondent

LINDA SWANSON

Sixteenth Respondent

LIONEL GILBERT

Seventh Respondent

SHELLEY GILBERT

Eighteenth Respondent

HYLTON REID

Nineteenth Respondent

SANDY CLARK

Twentieth Respondent

DAEL CLARK

Twenty-First Respondent

ALFRED FORD	Twenty-Second Respondent
KELWYN EDWARDS	Twenty-Third Respondent
KATHY EDWARDS	Twenty-Fourth Respondent
ROBERT NETHERCOTT	Twenty-Fifth Respondent
PATRICIA NETHERCOTT	Twenty-Sixth Respondent
DEREK GROGER	Twenty-Seventh Respondent
THE STATE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Twenty-Eighth Respondent

J U D G M E N T

KOEN J:

[1] The Applicant applies on motion for the following relief:

‘1.

An Order directing the First to Twenty-Seventh Respondents (inclusive) to demolish and remove the structures erected by them, or their predecessors in title, from the area depicted as Government Reserve on the plan which is annexed to the Notice of Motion marked “A” within one month of the date of this Order.

2.

Failing removal of the said structures within the said period of one month, an Order authorising and directing the Sheriff of this Honourable Court to demolish and remove the said structures and, in such event, directing the First to Twenty-Seventh Respondents to pay the costs of the removal of any structure erected by them or their predecessor in title.

3.

An Order directing the First to Twenty-Seventh Respondents to pay the costs of this application.

4.

Such further or alternative relief as to this Honourable Court may seem fit’.

[2] The relief is allegedly based on:

- (a) The Applicant’s rights as lessee of the Government Reserve. This portion of land was referred to as the ‘Admiralty Reserve’ in the Agreement of Lease concluded on 22 October 1952 between the Port Edward Health Committee and the Minister of Lands. That reserve was defined as ‘extending inland for approximately 150 feet from the high water mark of the Indian Ocean’ within the area of jurisdiction of the Port Edward Health Committee and extending from the right bank of the Inhlanhlinhlu river to the left bank of the Umtamvuna river, thence along the left bank of the Umtamvuna river to the prolongation of the southern boundary of the portion of land described as “Bush Reserve” and a triangular portion of Crown Land ...’ ; and/or
- (b) The Applicant’s alleged right and obligation to enforce compliance with the provisions of the Sea Shore Act 21 of 1935; and/or
- (c) The provisions of s 4 read with s 21 of the National Building Regulations and Buildings Standards Act 103 of 1977.

[3] A material issue arising in the application is the exact location and position of the true boundary of the Government reserve, if not overall, then at least in respect of the first two grounds upon which the relief is sought. The true position of the boundary of the reserve is a material consideration in determining which of the properties of the Respondents fall in the reserve and which beyond its boundary.

[4] The Applicants have relied on a boundary determined by a professional land surveyor, Mr Allan Lewis. The Respondents in turn rely on the report by a land surveyor Mr Mark Turnbull which locates the boundary in a different position. The Respondents with reference to *inter alia* the decision of D Pillay J in *The Body*

*Corporate of Dolphin Cove v KwaDukuza Municipality and another*¹ contend that a flexible and moving boundary is recognised in our law and that a dispute exists in this regard which requires to be ventilated through oral evidence in cross-examination. The matrix of the factual dispute is also somewhat compounded by the fact that Mr Lewis in preparing his survey during 2009 adopted a methodology which was different to the methodology applied by him during 1999 in determining the boundary, the latter methodology being conceded as apparently not being correct.

[5] No input has on the papers been obtained from the Surveyor General's office. When this was pointed out in the heads of argument, a report in the form of a letter dated 2 October 2014 was obtained by the Applicant's attorneys from the Surveyor General: KwaZulu-Natal. It concludes with 'three hypothesis which can be tested by a court ...'. The difficulty with this report is that the parties themselves, particularly the Respondents have not had an opportunity to respond thereto.

[6] The issue is not just as simple as opting for one methodology or another. It is a matter of considerable importance requiring evidence as to why one methodology or another should be preferred. The issue as to which methodology is the correct one to rely on will have to be tested in cross-examination.

[7] There are also other factual grounds and arguments that present themselves in respect of the lease and the Applicant's reliance on the provisions of the Sea Shore Act 21 of 1935 but I do not consider it to be in the interest of justice that these be dealt with unless and until clarity has first been obtained as to the boundary of the reserve and hence whether the alleged offending structures fall within the reserve or on land outside the reserve with a different status.

[8] I was urged by the Applicant to conclude that the matter could nevertheless be decided on the third ground advanced by it, that is that the requisite approval was

¹ (8513 – 10) [2012] ZAKZDHC 13 (20 February 2012).

not obtained in respect of the structures in terms of the provisions of the National Building Regulations and Building Standards Act 103 Of 1977. Any prospects the Applicants might have in principle on that basis however appear to have its own potential problems in directing the removal of any such structures, having regard to the provisions of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 and the regulations thereto. Prime facie the structures appear to be on coastal public property for which specific approval to demolish might be required. Reference was made *inter alia* to regulations 16 and 18 finding application in that regard.

[9] The Applicant sought to overcome any problems in that respect by handing up an Amended Order Prayed which would direct the First to Twenty-Seventh Respondents to do all things necessary in order to obtain such permit or authorisation from the competent authorities referred to in the National Environmental Management: Integrated Coastal Management Act read with the National Environmental Management Act 107 of 1998 as required to demolish these structures and once such permit or authorisation has been obtained to demolish the structures and remove them from the area depicted as the 'Government Reserve'. Again the exact location of the boundary of the Government Reserve assumes some relevance and significance.

[10] The position of the exact boundary of the Government Reserve does not just simply involve determining which one of the competing methodologies is to find application, but it seems also to involve a dispute of fact as to its exact or correct position. That aspect should be referred to oral evidence. The matter will accordingly have to be adjourned for that purpose. The adjournment will also afford an opportunity for enquiries to be made as to what environmental authorisation is to be obtained and will also afford the parties the opportunity to respond properly to the Surveyor General's report.

[11] The following order is granted:

- (1) The application is referred for the hearing of oral evidence on a date to be determined by the Registrar on the following issues:
 - (a) Whether the boundary of the Government Reserve is along the line contended for by the Applicant and depicted on Annexure C to the founding affidavit, or along some other line and if along some other line, the position of such boundary;
 - (b) Which, if any, of the Respondents structures fall within the Government Reserve;
 - (c) Which, if any, of the structures of the Respondents fall within the sea shore contemplated in the Sea Shore Act 21 of 1935;
 - (d) Whether as a matter of fact a basis exists requiring any permission or authority whether in terms of the National Environmental Management: Integrated Coastal Management Act read with the National Environmental Management Act 107 of 1998, or any other legislation, to remove and demolish any such offending structures of the Respondents.
- (2) The evidence shall be that of witnesses who have deposed to affidavits and any further witnesses who may be called by either party, save that in respect of such witnesses who have not deposed to affidavits the Applicant furnish a statement of such witnesses evidence it intends calling 14 days before the hearing and the Respondent's furnish a statement of such evidence of any witness they may intend calling within 10 days prior to the hearing.
- (3) The provisions of Rules 35, 36, 37 and 38 shall apply to the hearing of the oral evidence.
- (4) The costs are reserved.

DATE OF HEARING: 15/10/2014

DATE OF DELIVERY: 29/10/2014

APPLICANT'S COUNSEL: CHADWICK

APPLICANT'S ATTORNEYS: SHEPSTONE & WYLIE

RESPONDENT'S COUNSEL: A J BOULLE

RESPONDENT'S ATTORNEYS: CLARKE SMITH ATTORNEYS