

SOUTH AFRICA / JUDGMENT

Tembu Convenience Centre CC and Another v City of Johannesburg and Others (2011/44745) [2017] ZAGPJHC 460 (15 September 2017)

[2017] ZAGPJHC 460

COURT

South Gauteng High Court, Johannesburg

BEFORE

L Windell

CASE / FILE NUMBER

2011/44745

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

Case

No: 2011/44745

In

the matter between:

TEMBU CONVENIENCE
CENTRE CC FIRST
PLAINTIFF
JOHN ZAKHELE
RADEBE SECOND
PLAINTIFF
and
CITY OF
JOHANNESBURG FIRST
DEFENDANT
JOHANNESBURG
DEVELOPMENT AGENCY SECOND
DEFENDANT
JOHANNESBURG ROADS
AGENCY THIRD
DEFENDANT
ENGEN PETROLEUM
LIMITED FOURTH
DEFENDANT

KHELINA
CAROLINE
MAZIBUKO FIFTH
DEFENDANT

JUDGMENT

WINDELL, J:

INTRODUCTION

- [1] This is an action for damages against the first to third defendants (“the defendants”) arising from the alleged permanent diversion or closure of a road as contemplated in section 67 of the Local Government Ordinance 17 of 1939 (T) (“the Ordinance”).
- [2] The first plaintiff, Tembu Convenience Centre CC, carries on business as an Engen service station (“the service station”), at a property situated on the corner of Mooki Street and Soweto Highway, public roads in Orlando East, Soweto. The second plaintiff, Mr Radebe is the only member of the first plaintiff.
- [3] It is common cause that the Bus Rapid System (“the BRT”), also referred to as the Rea Vaya, was constructed and implemented on Mooki Street (in both directions), during the latter half of 2008 and beginning of 2009. The construction resulted in the creation of designated bus lanes for the exclusive use of buses, separating them from the rest of the traffic. As part of the construction a median (constructed island) was erected in the middle of Mooki Street, with rumbling blocks on both sides of the constructed island, as well as various crash barriers and varying levels for certain of the lanes.
- [4] The first plaintiff alleges that the construction of the BRT resulted in the permanent closure and/or diversion of Mooki Street (s 67), which led to a loss of profit. The defendants denied this in their plea and pleaded that section 67 has no application in the present circumstances. The defendants contend that the BRT constituted a remarking of Mooki Street in order to accommodate a class of traffic as contemplated in section 66 of the Ordinance, which resulted in the alteration of traffic flow on Mooki Street.
- [5] Merits and quantum have been separated. At the commencement of the trial an inspection in loco was held at the service station. The plaintiffs played a video which was eight minutes in duration which confirmed what was verified by the parties during the inspection in loco. The findings made at the inspection in loco are common cause and are incorporated in the judgment.

- [6] The parties agreed at the onset that the crisp issue for determination is whether or not the construction of the BRT resulted in the permanent closure and/or diversion of Mooki Street, as contemplated in section 67 of the Ordinance. The defendants admit that they did not comply with the conditions prescribed by sections 67(2) and (3) of the Ordinance and no objections were therefore made by any affected party in accordance with the section.

BACKGROUND

- [7] The development of the BRT was addressed in the City of Johannesburg's Integrated Transport Plan ("ITP") 2003-2008. The focus of the ITP was to shift from the historic emphasis on improving mobility for cars, to an emphasis on improving

mobility and accessibility for people, chiefly through improvements to the public transport system. The major recommendation of the ITP was that the City creates a SPTN. The SPTN was both a network and also a concept of operation. As a network plan, the overall aim of the SPTN was to identify the major public transport connections that needed to be made.

- [8] The City took a decision in November 2006, following a brief scoping study (Rea Vaya BRT Scoping Study, November 2006 which looked at where passenger demand warranted full BRT), to plan and build a BRT system to be called Rea Vaya in Johannesburg. It also adopted this as the city's choice of mode in corridors requiring a mass transit solution, and the solution to the ever-growing problems of growing car use, congestion and poor mobility and accessibility between the different parts of the city.

THE EVIDENCE

- [9] During the course of the trial the following facts became common cause:

[9.1] The service station is situated on the corner of Mooki Street and Soweto Highway, Orland East, Soweto. The only entrance and access to the service station is via Mooki Street.

[9.2] Prior to the construction of the BRT it was possible for vehicles that entered Mooki Street from the Soweto Highway or straight across from Main, to frequent the service station by executing a right turn right opposite the service station without any hindrance. Post construction, the same traffic is unable to execute a right turn as there are barriers along Mooki Street.

[9.3] Prior to the construction it was possible for vehicles from the side streets on the south and south-western part of Mooki Street, to either cross Mooki Street (from the shopping centre and informal taxi rank across the street) or execute a right turn into Mooki Street and then a left turn into the service station. Post construction, the traffic in these side streets can only turn left into Mooki Street and thereby making it difficult to access the service station.

[9.4] The road markings in the middle of Mooki Street, prior to commencement of the BRT, did not prohibit vehicles from executing a right turn into the service station or from exiting the service station by executing a right turn into Mooki Street.

[9.5] Post construction, vehicular traffic entering Mooki street from Soweto Highway or Main, or from any of the side streets joining Mooki Street, who wants to access the service station, have to travel an additional 500 m in Mooki Street to a traffic circle, go around the circle, and travel back on Mooki Street for another 500 m to the service station.

[10] The second plaintiff, Mr Radebe, testified that the construction of the BRT resulted in the permanent closure and/or diversion of Mooki Street. The first plaintiff was adversely affected by the construction of the BRT, in that it resulted in a reduction of traffic accessing the service station, which in turn affected the first plaintiff's turnover. Neither he nor the first plaintiff received any notification pertaining to the BRT construction with regard to streets to be effected, before or during the construction of the BRT.

[11] Mr Horak was the plaintiffs' second witness. He is an industrial and systems engineer, registered with the relevant association as candidate engineer. He testified as to the flow of traffic and access to the service station prior and subsequent to construction, as well as the reduced capacity of Mooki Street subsequent to the construction of the BRT. He testified that simultaneous with the construction of the BRT, there was a reduction in turnover at the service station. He attributed this to the

construction of the BRT negatively affecting access to the service station. That concluded the evidence on behalf of the plaintiff.

[12] Mr Brislin is a professional engineer who testified on behalf of the defendants. He is a traffic/transportation engineer with 28 years of experience. He stated that the service station opposite the first plaintiff's business could well explain why there was a drop in revenue because patrons were turning left into this service station, rather than right to the first plaintiff's business. In cross-examination he however conceded that in light of the fact that the service station across the road had already been in existence when the BRT construction commenced and concluded, it could not be the reason for a drop in revenue. He is however of the opinion that the constructed BRT system does not constitute a diversion or a closure of Mooki Street.

[13] Ms. Schmidt also testified on behalf of the defendants. She is employed by the third defendant who is the custodian of all the road markings in the jurisdiction of the first defendant. She conceded during cross examination that the markings on Mooki Street prior to the construction of the BRT did not prohibit traffic to execute a right turn into the service station. She is of the opinion that the introduction of BRT did not result or cause the permanent closure and/or diversion of Mooki Street.

THE LEGAL PRINCIPLES

[14] Both Mooki Street and Soweto Highway are public streets in respect of which the members of the general public enjoy a right of way. The control and management of these streets vest in the local authority (the first defendant), by virtue of section 63 of the Ordinance.

- [15] There are two sections in the Ordinance that deal with the permanent closure of a street or a portion of a street, section 66 and section
67. Section 67 provides that “the council may permanently close or divert any street or portion of a street”, when certain conditions have been complied with. In terms of section 67(3) specific notice must be given (as published inter alia in the Provincial Gazette) and served on affected parties. Section 67(4)(a) provides that:
- “(4)
- (a) Any person who considers that his interests will be adversely affected by the proposed closing or diversion may at any time before the time for the lodging of objections and claims has expired, lodge with the council a claim, in writing, for any loss or damage which will be sustained by him if the proposed closing or diversion is carried out. If such closing or diversion is carried out the council shall pay compensation for the damage or loss sustained by such person, the amount of compensation in default of mutual agreement to be determined by arbitration ...”
- [16] Section 66 provides authority to a council after having given such notice as it might deem necessary to:
- “(b) close any street, road or thoroughfare vested in the council:
- (i) permanently or temporarily for any particular class of traffic, procession or gathering; or
- (ii) temporarily for all traffic; or
- (c) divert temporarily any street, road or thoroughfare contemplated in paragraph (b).”
- [17] Section 66 finds application only where a street or a portion thereof is to be closed “for any particular class of traffic”, and does not permit the closure of a street permanently for all traffic.[1] The plaintiffs contend that given the fact that the closures and/or diversions complained of relate to all classes of traffic and that it had an adverse financial effect on first plaintiff, it must follow that section 67 finds application.
- [18] The defendants submit that the provisions of section 66 are applicable in the circumstances of this case. In terms of section 66, the defendants were entitled to close any street, road or thoroughfare permanently or temporarily for any particular class of traffic. In the present matter the particular class of traffic is buses.
- [19] Determining whether there was a permanent diversion or closure of a road, is a question of fact.[2] In *Bellevue Motors CC v Johannesburg City Council*
- [3] the court dealt with an alleged diversion of a public road as contemplated in section 67. In this matter a portion of a street was changed from a one-way west to east, to a one-way east to west. Zulman J held that the indefinite reversal of the traffic flow did not constitute a permanent diversion of the street or portion thereof, as section 67 envisages a diversion of a street in the sense that it is the street, as opposed to the traffic that travels thereon, that is

diverted. The learned Judge held a diversion would take place where, for example, there was a detour, 'as one often finds on national roads which are undergoing repair or in a situation where one has to deviate or depart from a road, travel on another road alongside the road or in its immediate vicinity and rejoin the street at another part'.

[20] In the matter of Engen Petroleum Limited v City of Johannesburg Metropolitan 2007

[4] the court dealt with both an alleged diversion and a closure of a road as envisaged in section 67. In this matter the central four lanes of Grayston Drive, Johannesburg (two in each direction) were raised above the intersection with Katherine Street to create a flyover above it. One lane on the southern side and two on the northern side of the flyover remained on the same plane as previously. Once on the flyover it was no longer possible for traffic to move between the lanes accommodated on the flyover and the southern-most lane of Grayston Drive. Boruchowitz J held that there was no closure of Grayston Drive for the following

reasons:

"...a permanent closure of a portion of Grayston Drive has not occurred because it cannot be said that a portion of the street is no longer available for the passage of traffic or that it is no longer possible for the public to move between one part of it to another. Road users have a choice whether to use the flyover or not. The reconstruction makes specific provision, by means of on- and off-ramps for members of the public using Katherine Street and Grayston Drive to reach those parts of both, and the properties abutting thereon, which would otherwise be rendered inaccessible by the grade separation. Traffic users who wish to access the second plaintiff's garage or the Katherine Street intersection can do so by utilising the on- and off-ramps. The road reserve in respect of Grayston Drive has never changed. To the extent that there are changes caused by the elevation of certain of the lanes does not mean that there has been a closure of Grayston Drive. The position in that regard is no different from that which would have occurred had a particular lane in Grayston Drive been indicated for the use of left- or right-turning vehicles only. The public is still able to use Grayston Drive as a public street albeit that access to the Katherine Street intersection is now gained from a different level by means of the on- and off-ramps".

[21] The court in Engen was however satisfied that there was a diversion of the road because the physical location and direction of the two lanes had changed.

Instead of going through the Katherine Street intersection, vehicles now go over it. The two lanes of Grayston Drive that are now

accommodated on the flyover have in effect been diverted away from the intersection with Katherine Street. On appeal [5] Lewis JA confirmed the lower court's finding and held as follows:

"I consider that meaning must be given to 'diversion' by examining the purpose of s 67 (read of course in the light of the entire Ordinance). I deal here only with a diversion since closure is not in issue: but the principles applicable would of course be the same. Section 67 requires notice to be given to persons affected by a permanent diversion, who may in turn object to the proposed change and claim

compensation for any loss sustained as a result of the diversion. The purpose of the provision is clearly to compensate for pecuniary loss sustained as a result of a change to the road that has an adverse financial effect on owners, lessees or occupiers whose property abuts the road. The question to be considered, then, is whether the change to the road itself has such an effect. If raising the elevation of the two lanes of Grayston Drive in issue has that effect then the change must fall within the ambit of the section.”

[16] It is clear that the elevation of the lanes on Grayston Drive has had a material impact on the ability of drivers to gain access to the service station.“

[21] Both Bellevue Motors and Engen matters did not deal with section 66 of the Ordinance. In both these cases the plaintiffs relied on section 67. Although these cases are helpful to determine what constitutes a permanent diversion and/or closure of a road, they are distinguishable from the present matter because the roads in those instances were not closed for a particular class of traffic.

[22] In *Mwenzi Service Station v Rustenburg Local Municipality*

[6] the court dealt with both sections 66 and 67 of the Ordinance. The facts in *Mwenzi* are similar to the present matter in that it involved the implementation of the Rustenburg Rapid Transport Network (“the

RRT”). The specific issue for determination in *Mwenzi* was whether section 67 was applicable to the construction and implementation of dedicated bus lanes on two public roads in the CBD of Rustenburg. It was contended on behalf of the applicant that the dedication of certain road lanes to buses as part of the Municipality’s planned RRT project constituted the permanent closure of those streets as contemplated in section 67. It was contended that the RRT project will directly affect the applicant’s service station, and as such the applicant was entitled to compensation in terms of section 67(4).

[23] On appeal [7] Ponnann JA held that in enacting sections 66 and 67 the legislature intended to cater for two distinctly different scenarios. Accordingly, different provisions apply to the closing of any street permanently for any particular class of traffic, (s 66), and the closing of any street or a portion of a street permanently for all classes of traffic (s 67). It is accordingly necessary to enquire whether the RRT project will result in the closing of any street permanently for all classes of traffic as contemplated by s 67. The learned Judge held as follows:

“[12] On its plain meaning the words 'permanently close or divert any street or portion of a street' can hardly find application in circumstances where all that is hoped to be achieved is the simple alteration of traffic flows on a street. Nor, in my view, does it apply to a situation such as this, where the establishment of dedicated bus lanes will result in the reserving of no more than just a portion (not the whole) of those streets for the exclusive use of buses, notwithstanding how adversely that may affect a particular party such as Mwenzi in this case. As other vehicular traffic will continue to have unrestricted access to the remaining portions of those streets, the reserving of dedicated bus lanes for the exclusive use of buses, will not amount to a closing of streets (or even a portion of those streets)

permanently to all classes of traffic as contemplated by s 67. On the contrary that is the very situation contemplated by s 66(1) (b) (i), namely the permanent closure of a part of a street for a particular class of traffic. It must thus follow that s 67 of the Ordinance does not find application”.

CONCLUSION

[24] Sections 66 and 67 of the Ordinance both deal with the permanent closure of a public street. Section 66 empowers a local

authority, after having given such notice as it deems necessary, to permanently or temporarily close any street or portion of a street for any particular class of traffic. Section 67 empowers a local authority to permanently close or divert any street, or portion of a street, for all traffic when certain conditions are met. What distinguishes section 66 from section 67 is that the permanent closure in terms of section 66 is for a circumscribed purpose,

namely, for a specific class of traffic.

[25] The BRT in Mooki Street reserved two lanes (one in each direction) for Rea Vaya buses. The remaining lanes in Mooki Street remain open to all other traffic. Because of the construction of the BRT it is no longer possible for vehicles entering Mooki Street from the Soweto Highway or for vehicles entering Mooki Street from the side streets on the south and south-western side to access the service station by executing a right turn.

[26] Vehicles who now want to frequent the service station have to travel in a westerly direction for approximately 500 metres, enter into a traffic circle, and then travel back in Mooki Street in an easterly direction for another 500 metres. The evidence of the plaintiff is, at best, that the trip to the service station is slightly delayed. It is clearly an inconvenience but the service station is still accessible to potential customers.

[27] The construction of the BRT however clearly changed the traffic flows of vehicles travelling in Mooki Street. In *Bellevue Motors* the court held, in my view correctly, that section 67 deals with a diversion of a street and not the diversion of traffic that travels thereon. A road is diverted when it is deflected from its proper course or where one has to deviate or depart from the road, travel on another road alongside the road or in its immediate vicinity and rejoin the street at another part.[8] This is exactly what occurred in the *Engen*[9] matter where two lanes of traffic in Grayston Drive were accommodated on a flyover, only to rejoin the other lanes after the end of the flyover.

[29] In the present instance there is no evidence to suggest that Mooki Street was deflected from its proper course or that there was a change of direction in the physical location of the street. I am satisfied that Mooki Street was not diverted by the construction of the BRT and the change in the road merely diverted the traffic by altering the direction in which traffic on the street was to travel.

- [30] Did the BRT however result in the permanent closure of Mooki Street as contemplated in section 67? Section 66 provides authority to the first respondent to exercise limited power to close a street, road or thoroughfare for a particular class or classes of traffic. First respondent clearly exercised its rights in terms of section 66 when it reserved dedicated lanes to buses to provide for municipal public transport. The plaintiffs submitted that their complaint does not relate to the bus lanes per se, but to inter alia the constructed median island, the various elevated lanes and the crash barriers, all of which constitute the closure of Mooki Street. It is submitted that the construction of the BRT has made it impossible for all classes of traffic to move between one part of Mooki Street to the other and clearly resulted in a portion of Mooki Street being no longer available for the passage of traffic and therefore section 67 is therefore applicable. The question that arises is the following: Did the closure of the road in terms of section 66 for a specified class of traffic result in the permanent closure of the road for all traffic as contemplated in section 67?
- [31] A street will be closed in terms of section 67 if a portion of the street is no longer available for the passage of traffic or that it is no longer possible for the public to move between one part of it to another. This is clearly not the case. The lanes with the exception of the bus lanes are still open to all traffic. The fact that certain movements within Mooki Street, are no longer possible, i.e. executing a right turn into the service station, over the width of Mooki Street do not, in my view, constitute a closure of Mooki Street as contemplated in section 67. In the same vein, the fact that it is no longer possible for any class of traffic who wants to enter Mooki Street from any of the side streets, to execute a right turn, does not constitute a closure of the road. The fact that motorists were able to turn right prior to the construction of the BRT is therefore of no consequence in determining whether or not there was a permanent closure or diversion. The construction of the BRT merely resulted in the alteration of traffic flows on Mooki Street. I am satisfied that there was no permanent closure of Mooki Street as envisaged in Section 67.
- [32] In any event, as stated by Lewis JA, it is important to explain the purpose of a section read in the light of the entire Ordinance. The first defendant is conferred with an express empowerment in terms of section 66 to close a street permanently for a particular class of traffic. The right of way is qualified. Accordingly, as stated above, a lane can be closed for the implementation of the BRT in terms of section 66. In the Rustenburg matter the court clearly stated that “the establishment of dedicated bus lanes will result in the reserving of no more than just a portion (not the whole) of those streets for the exclusive use of buses, notwithstanding how adversely that may affect a particular party”, and that the reserving of dedicated bus lanes for the exclusive use of buses, will not amount to a closing of streets (or even a portion of those streets) permanently to all classes of traffic as contemplated by section 67.
- [33] The construction relevant to the BRT does not constitute a permanent diversion and/or closure of a portion of Mooki Street as provided for in section 67. I am satisfied that section 67 of the Ordinance is not applicable in the present matter.

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

1. The plaintiffs' claim is dismissed with costs, including the costs occasioned by the employment of two counsel.

L WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Applicants: Adv JC Uys and Adv C De La Hunt

Instructed by: VK Attorneys

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Instructed by: Mchunu Attorneys

Date of Hearing: 9 June 2017

Date of Judgment: 15 September 2017

[1] Engen Petroleum Limited v City of Johannesburg Metropolitan 2007 JDR 1310 (W)

[2] City of Johannesburg v Engen Petroleum Ltd and Another 2009 (4) SA 412 (SCA)

[3] 1994 (4) SA 339 (W)

[4] 2007 JDR (W)

[5] Engen at [13]

[6] Case no 718/2013: Unreported judgment of Gutta J on 12 December 2013 in the Mafikeng High Court

[7] Rustenburg Local Municipality v Mwenzi Service Station [2015] All SA 315 SCA

[8] Rustenburg Local Municipality v Mwenzi Service Station

[2015] All SA 315 SCA

[9] Bellevue Motors at p 343 I-J.

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