

SOUTH AFRICA / JUDGMENT

Tembu Convenience Centre CC and Another v City of Johannesburg and Others (270/2018) [2018] ZASCA 160; 2019 (4) SA 194 (SCA) (28 November 2018)

[2018] ZASCA 160

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Tshiqi, Saldulker, Mokgohloa, Rogers

CASE / FILE NUMBER

270/2018

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 270/2018

In the matter between TEMBU CONVENIENCE CENTRE CC FIRST APPELLANT JOHN ZAKHELE RADEBE SECOND APPELLANT and CITY OF JOHANNESBURG FIRST RESPONDENT JOHANNESBURG DEVELOPMENT AGENCY (PTY) LTD SECOND RESPONDENT JOHANNESBURG ROAD AGENCY (PTY) LTD THIRD RESPONDENT

Neutral citation: Tembu Convenience Centre CC v City of Johannesburg (270/2018)

[2018] ZASCA 160 (28 November 2018)

Coram: Ponnan, Tshiqi and Saldulker JJA and Mokgohloa and Rogers AJJA

Heard: 20 November 2018

Delivered: 28 November 2018

Summary: Roads – Local Government Ordinance 17 of 1939 (T) – creation of dedicated bus lane separated by median island and physical barriers – prior to creation, broken barrier line permitted vehicles to cross median line – such no longer possible – dedicated bus lane and attendant works not amounting to permanent closure of part of street within the meaning of s 67 – such constituting permanent closure of part of street for particular classes of traffic within the meaning of s 66.

ORDER

On appeal from: The High Court of South Africa, Gauteng Local Division, Johannesburg (Windell J sitting as court of first instance):

The appeal is dismissed with costs, including those attendant on the employment of two counsel.

Rogers AJA (Ponnan, Tshiqi and Saldulker JJA and Mokgohloa AJA concurring

- [1] The question in this appeal is whether the creation of dedicated bus lanes and their appurtenant structures in Mooki Street, Orlando East, Soweto, has resulted in a permanent closure or diversion of a part of that street within the meaning of s 67 of the Local Government Ordinance 17 of 1939 (Gauteng).
- [2] The appellants, contending this to be so, instituted an action for damages against the first and second respondents in which they alleged that the creation of the bus lanes and their appurtenant structures, which occurred in 2008 – 2009, caused the first appellant to suffer a loss of custom. The first appellant is Tembu Convenience Centre CC which conducts the service station business mentioned below. The second appellant, Mr J Z Radebe, is the first appellant's sole member. The first and second respondents are the City of Johannesburg and Johannesburg Development Agency (Pty) Ltd. Third respondent, Johannesburg Road Agency (Pty) Ltd, was cited by virtue of any interest it might have but no relief was sought against it.
- [3] The action was opposed. The parties agreed to separate 'merits and quantum'. No separation order was made but the case was conducted on the basis that the 'merits' depended solely on the question stated above. The court a quo answered it against the appellants and dismissed the action with costs. The appeal to this court is with the leave of the court a quo.
- [4] Mooki Street, whose orientation is east-west, is intersected by the Soweto Highway (M70), whose orientation is south-north. To the east of the intersection, Mooki Street becomes Main Road. The first appellant operates an Engen garage and convenience shop on the north-west corner of the intersection. Its only entrance and exit are off and onto Mooki Street.
- [5] Before the creation of the bus lanes Mooki Street carried two lanes of traffic in each direction. Although opposing traffic flows were separated by a solid painted island, the island was broken adjacent to the entrance to the garage, thus allowing vehicles travelling in a westerly direction to enter the garage by making a right turn across the eastbound lanes. To the west of the entrance, the painted island line was again broken for side-road traffic entering Mooki Street from the south. This meant that such vehicles could cross the westbound lanes, turn right into Mooki Street and left into the garage.
- [6] The bus lanes were created as part of the City of Johannesburg's Rea Vaya bus rapid system. In Mooki Street the Rea Vaya bus lane running in a westerly direction has taken the place of the inner lane previously open to all westbound traffic. The bus lane is separated from the eastbound lanes by a raised median island. In the vicinity of the first appellant's garage the westbound bus lane is separated from the outer westbound lane by rumbling blocks.

Further to the west the rumbling blocks are superseded by a crash barrier with guardrails. The result is that, in order to enter the garage, vehicles travelling in a westerly direction, or entering Mooki Street from the south, must travel about 500 metres further west along Mooki Street, turn around at a traffic circle and continue back up Mooki Street in an easterly direction.

- [7] There is an eastbound bus lane, again the inner lane. Since it is the westbound bus lane and its attendant structures that impede the access to the garage formerly enjoyed by vehicles travelling in a westerly direction or joining Mooki Street from the south, I shall not discuss the eastbound lane further. If the establishment of the westbound bus lane did not constitute a closure of part of Mooki Street, the same would be true in respect of the eastbound bus lane.
- [8] Section 67 of the Ordinance finds application where the local authority exercises its power to 'permanently close or divert any street or portion of a street'. Where this power is exercised, the section requires the local authority to publish a notice of its intention. Any person who considers that his or her interests will be adversely affected may lodge a claim for compensation. The respondents did not comply with the section's requirements.
- [9] The respondents deny that there has been a permanent closure or diversion as contemplated in s 67. They say that the City permanently closed a part of the street (the inner westbound lane) for a particular class of traffic, namely vehicles other than Rea Vaya buses. They contend that this falls under s 66(1) of the Ordinance which provides in relevant part that a local authority may 'close any street, road or thoroughfare ... permanently ... for any particular class of traffic...'
- [10] Mooki Street is a street within the meaning of these provisions. Although s 66, unlike s 67, does not expressly refer to a 'portion of the street', the lesser is included in the greater. If the local authority may permanently close the whole of a street to particular classes of traffic (as permitted by s 66), it may lawfully so close only part of the street.
- [11] In *Bellvue Motors CC v Johannesburg City Council* 1994
- (4) SA 339 (W) the court held that a street was not 'diverted' within the meaning of s 67(1) where only the flow of traffic was affected. In that case the traffic flow was changed from a one-way flow west to east to a one-way flow east to west. Zulman J said that 'divert' in s 67 qualifies the words 'any street or portion of the street'. A change in traffic flow on an unaltered street did not amount to a 'diversion' of the street. Although the applicant in that case did not argue that the change in traffic flow was an exercise of the power to 'close' the street, the same reasoning would apply. The verb 'close' applies to the street, not to particular traffic flows. In *Bellvue* the fact that nobody was henceforth permitted to use the street for purposes of driving west to east did not mean that a part of the street had been closed, since it remained open for use by traffic travelling east to west.

[12] This interpretation was confirmed by this court in *Rustenburg Local Municipality v Mwenzi Service Station CC* [2014] ZASCA 207; [2015] 1 All SA 315 (SCA) where Ponnann JA said, in regard to closure, that s 67 applied only where the street or part of the street was permanently closed to all traffic (para 10). That case, like the present one, concerned a municipality's rapid transport system. Certain lanes were reserved for exclusive use by municipal buses. In one of the relevant roads the bus lanes were elevated above the level of mixed traffic lanes. Elsewhere the bus lanes were at the same level as the other lanes but separated by lane delineators which precluded mixed traffic from entering the dedicated bus lanes. This court concluded (para 12):

'On its plain meaning the words "permanently close or divert any street or portion of the 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 in 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 the street for a particular class of traffic.'

[13] The appellants' counsel did not ask us to find that Bellvue Motors and Mwenzi were wrongly decided. His argument was that here there was not merely the creation of a bus-only lane as a matter of traffic flow. The creation of physical barriers meant that vehicles travelling in a westerly direction or entering Mooki Street from the south could no longer use the part of Mooki Street by which they had previously been able to turn across, or into, the eastbound lanes.

[14] This is not a sound distinction. The physical barriers are features which enforce or render safe the exclusion of traffic other than Rea Vaya buses from the bus lane. What prevents traffic on the south side of Mooki Road from crossing over to the garage is that the local authority has reserved the bus lane for exclusive use by Rea Vaya buses. Because vehicles to the south of the bus lane may not enter the bus lane for any purpose, they cannot get to the other side of the road. This exclusion could be achieved without physical barriers, simply by reserved-use signs and solid painted barrier lines.

[15] The appellants' argument, if correct, would mean that part of a street is 'closed' when a broken median line is changed to a solid median line, since the solid median line would preclude traffic in either direction from crossing the line for any purpose, eg to overtake or make a right turn. All vehicles would be precluded from using the oncoming part of the street in a way they had previously been able to do. This could also be said to occur if, for example, a local authority were, at an intersection, to erect a traffic sign prohibiting a right turn or a U-turn.

- [16] The appellants' counsel conceded that there would have been no street closure if the municipality had, at the intersections between Mooki Street and the side roads to the south, erected signs prohibiting a right turn. He was driven to contend, however, that the same result achieved by a solid painted barrier line across the intersections would indeed have amounted to a partial street closure because no traffic at all could traverse the part of the street on which the barrier line was painted. When asked whether the same would be true if for safety reasons a solid painted barrier line were extended, thus preventing overtaking, he said no – there would only be a partial closure if traversing the street in order to reach a destination were no longer possible.
- [17] The distinctions which counsel sought to draw are untenable. Restrictions of this kind – whether achieved by traffic signs or painted barrier lines – are matters of traffic flow and do not constitute a closure of the street to all traffic. No part of the street ceases to be available for any traffic. And the position is no different, in my view, where the regulation of traffic flow takes the form of, or is reinforced by, physical barriers. The barriers simply prevent traffic from doing that which is in any event prohibited by painted road markings and traffic signs.
- [18] The appellants' counsel submitted that in *Woodburne Service Station (Pty) Ltd v Pietermaritzburg Corporation* 1966
- (4) SA 40 (N) the court accepted, without specifically deciding, that the closing of median gaps in islands amounted to closing part of the

street as contemplated in s 153(2) of Ordinance 21 of 1942 (N). This overstates the matter. Burne J expressed considerable doubt as to whether the municipality had 'closed' part of the street within the meaning of the section (40H). He was, however, prepared to assume the point in the applicant's favour because he found that the municipality's act was in any event authorised by s 151(1) which empowered the municipality to 'alter' and perform other work 'for the general improvement' of streets.

- [19] The appellants' counsel referred us to the decisions of this court in *S J & M M Hilcove (Pty) Ltd t/a Kentucky Fried Chicken & another v Pietermaritzburg City Council* 1988 (3) SA 319 (A) and *City of Johannesburg v Engen Petroleum Ltd & another* [2009] ZASCA 5; 2009 (4) SA 412 (SCA). In the former case a majority of this court decided that part of Church Street in Pietermaritzburg had been permanently closed when a stretch of an outer lane was replaced by an exit ramp from an underground tunnel which was for exclusive use by municipal buses and which was inaccessible to all traffic in Church Street. In the latter case the court held that part of a street had been permanently diverted in its vertical plane when certain lanes of Grayston Drive in Sandton were elevated so as to create a partial

flyover in relation to Katherine Street, the elevated lanes no longer being adjacent to commercial premises at ground level. Both decisions are self-evidently distinguishable from the present case.

- [20] The court a quo thus reached the right conclusion. The following order is made:

The appeal is dismissed with costs, including those attendant on the employment of two counsel.

O L Rogers

Acting Judge of Appeal

APPEARANCES

For Appellants J C Uys (with him C de la Hunt) Instructed by VK Attorneys, Pretoria McIntyre van der Post, Bloemfontein For Respondents M Sikhakhane SC (with him N C Motsepe) Instructed by Mchunu Attorneys, Rosebank Bezuidenhout Attorneys, Bloemfontein

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