IN THE HIGH COURT OF SWAZILAND

a:GolfCourse

The Mbabane Club

vs

City Council of Mbabane

Coram S.W. Sapire A C J

S Maphalala A J

For Applicant Mr. Perry

For Respondent Mr. L. Khumalo

Judgment

(2/2/98)

The Mbabane Club, the applicant in this matter, has applied for an order setting aside the decision of the City Council Mbabane dated 5th August, 1997 in terms of which it refused a full exemption from the payment of rates in respect of portion 114 of farm 2. The facts are largely not in dispute and are these:-

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The applicant is a voluntary association which operates in terms of a constitution and in terms of which it has powers to sue and be sued through its trustees.

The respondent is the City Council of Mbabane established under the Urban Government Act No. 8 of 1969 with powers to levy rates on land and buildings situate within the urban area of Mbabane.

The property on which the Golf Course is situated lies within the urban area of Mbabane, is leased from the Government of Swaziland for a period of 60 years expiring on the 28th March, 2013. The terms on which the Applicant has the right to use the property as a golf course are sat forth in a notarial deed of lease registered in the Deeds Registry as Crown lease no. 1 of 1959. A copy of the lease is annexed to the founding affidavit Whether this is a true lease is open to some doubt, and may in fact be a servitude of usus. The point was not raised by either of the parties and I do not find myself called upon to decide this question in view of the decision to which I have come.

The rent payable by this applicant to the Government in terms of the lease is a nominal sum of one shilling per annum, (since decimalisation this is now 10 cents) and the total rental for the full period of the lease is three pounds sterling.

In terms of clause 3 of the lease the applicant is at its own cost to maintain the leased area as a Golf Course and shall not use it for any other purpose.

Clause 4 of the lease obliges the applicant to allow the public to continue to enjoy all rights to which they may be entitled under the Urban Area

regulations. It is not clear from the papers what these rights are. The applicant maintains that it has honoured and continues to honour the obligations imposed on it in terms of clause 3 and 4.

In terms of clause 5 the applicant is obliged to provide gates and turnstiles in any fences it erects on the boundaries of the property, to promote access to and egress from the Golf Course and to enable animals to be driven across the Golf Course. This obligation too, has been complied with by the applicant. A further obligation imposed on the applicant is that to allow the Government to build roads across the Golf Course and to use any portion thereof as a landing ground for light aircraft. Although no roads have been built across the Golf Course, one fairway was for a long period used as a landing ground for aircraft. This obligation still exists but aircraft no longer land there because conditions now make it unsafe to do so.

The applicant points out that members of the public who are not members of the Mbabane Club have without charge continually and on daily basis traversed the whole extent of the Golf Course on foot, not only when golf is being played but even during golf competitions. The pedestrian traffic has steadily increased and many school children attending school in the vicinity of Veni cross the Golf Course twice every week day during school terms. These children seem to enjoy a right of passage recognised by golfers engaged in a round of golf

Non-members are also permitted to play golf on the Golf Course but a fee is requested of them. This fee is regarded as a contribution to the upkeep of the Golf Course. It is well known that the Golf Course is used without charge by the public for other activities such as walking, the exercising of dogs and from time to time horse-riding. It is not unknown according to the deponent to the founding affidavit for cattle to graze on the Golf Course although the keeping of cattle in the urban area of Mbabane has now been prohibited.

The respondent is obliged and has been obliged in terms of the Rating Acts applicable from time to time, to prepare a list of exempted properties, on which rated may not be levied. The deponent to the founding affidavit claims that no such list exists and it is therefore impossible to say whether the land on which the Golf Course has been built is exempt from rates. This allegation has not been denied and no list has in fact been produced. It is safe to assume that the Respondent has not complied with its obligation in this respect.

As the lease is for a period of over 50 years the Mbabane Club, as a lessee, is by definition the owner of the property for the purposes of the Rating Act as set out in Section 2 thereof and if the property is rateable it is the applicant which has to pay any rates properly levied.

The respondent has levied rates on the Golf Course for the years 1994-1995, 1995-1996, 1996-1997 and also for 1997-1998. A substantial amount is claimed by the respondent in respect of arrear rates

The present application is in effect for a declaration that the property in question is non-ratable and for an order setting aside the imposition of the rates. Such an application is brought in terms of the rights afforded the applicant in terms of Section 9 (6) of the Rating Act No. 4 of 1995.

On the evidence which has been placed before the Court there can be little doubt that the property in question is a public place in terms of the definition in Section 2 and in terms of Section 7(1) of the Rating Act. The property is a park, recreation ground or open space in the area of an urban authority to which the public has a right of use without charge. Any one may enter upon the property in question and use it for any purpose without charge. As far as the playing of golf is concerned there is nothing to show that the

fee paid by

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members and visitors is a charge for access to the property. Indeed on the evidence available, if any individual wished to go upon the property and strike golf balls, he would not necessarily incur a charge for so doing. The fees charged by the club are voluntarily paid by the members and visitors as contributions to the up keeping of the course and for use of the facilities of the club. There is nothing to show that either members or visitors would not be allowed to play if they did not pay the charge. It is true mat other facilities of the club may be barred to them and such persons would not find themselves in any scheduled times for tee off, nor would they be able to enjoy the conviviality of the nineteenth whole (really the tenth hole as it is a nine hole course). The crucial point is that the applicant is not entitled to exclude anyone from access to the property.

The Respondent does not seriously contend that the property as a whole is not a public place as defined, but bases its justification for the imposition of rates on the argument that it is not an exemptible public place because it not used exclusively throughout the year for public purposes I must confess that I have difficulty in understanding this contention. The evidence clearly shows that the public have access free of charge, to the property at all times.. This applies to the applicants members (who are part of the public in general) and to non members alike

The fees paid by golfers, members and non members alike, must be seen not as a charge for access to the property, but as an obligation voluntarily accepted by those who use the course to contribute to the costs of maintaining the course for the benefit of all who wish to have the facility of a golf course

The "green fee" is not for the profit of any member, and does indeed not cover the cost of maintaining the course. There is nothing to show that the green fee is anything other than a contribution to the defraying of the maintenance cost.

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For these reasons I have come to the conclusion that the property is not on the evidence before the court, rateable. I would therefore grant an order in terms of prayers 2, 4, and 5, of the Notice of motion

S W Sapire

Acting Chief Justice

I agree

S Maphalala A J

An order is therefor made it terms of prayers 4 and 5 of the Notice of Motion,