

Ex parte: LEXSHELL 44 GENERAL TRADING (PTY) LIMITED
(VICTORIA & ALFRED WATERFRONT)

In re: NATIONAL ENVIRONMENTAL MANAGEMENT:
INTEGRATED COASTAL MANAGEMENT BILL B-40 2007

**MEMORANDUM OF SUBMISSIONS TO PARLIAMENTARY PORTFOLIO
COMMITTEE FOR ENVIRONMENTAL AFFAIRS**

EXECUTIVE SUMMARY

- These submissions are made by Lexshell 44 General Trading (Pty) Limited, the company which owns and operates the Victoria & Alfred Waterfront development in Cape Town.
- Lexshell obtained the rights to the V&A Waterfront in 2006 from Transnet and the Transnet Pension Funds.
- Since 1959, the rights of Transnet and its predecessors (the South African Transport Services and the earlier Railways and Harbours Administration) in relation to ports and harbours have prevailed over the Sea-Shore Act 21 of 1935.
- In 1989, Transnet was statutorily vested with ownership of all the land and sea within designated harbours. This included the current area of the V&A Waterfront and the adjacent sea and sea-bed. Transnet later transferred the V&A Waterfront to the Transnet Pension Fund.

- In 2001, as part of the disposal of the V&A Waterfront to V&A Waterfront Properties (Pty) Limited, Transnet undertook contractually to procure the transfer to that company of certain harbour land still to be reclaimed from the sea.
 - In 2006, Transnet and the pension funds sold their interest in the V&A Waterfront to Lexshell for R7 billion. Lexshell has acquired the Waterfront land and also the right against Transnet to obtain ownership of the reclaimed land.
 - The Bill before Parliament, in dealing with environmental matters, would, if passed in its present form, have the effect of divesting Transnet of ownership of the areas which are to be reclaimed, and prohibiting the transfer of such land to Lexshell once reclaimed. This would preclude Transnet (as an organ of State) from complying with its lawfully undertaken obligations towards Lexshell in relation to the reclaimed land.
 - We propose a minor amendment to the Bill to avoid these presumably unintended consequences, and thus to allow the State (in the form of Transnet) to comply with its obligations towards Lexshell.
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SUBMISSIONS

INTRODUCTION: THE V&A WATERFRONT

1. In 2006, Lexshell 44 General Trading (Pty) Limited ("*Lexshell*") purchased the Victoria & Alfred Waterfront development ("*the V&A Waterfront*") from Transnet and the Transnet Pension Funds for approximately R7 billion. The V&A Waterfront is South Africa's leading tourist destination. Some 26 million people visit it annually and spend R2,5 billion per year. The Waterfront employs approximately 800 people itself, in addition to the approximately 10 000 people employed by others within the development. The acquisition of the V&A Waterfront was the single largest foreign direct investment in South Africa. It was also the country's largest ever recorded property transaction.
2. Lexshell is predominantly (as to 75%) held by foreign investors. The remaining 25% of the shares in Lexshell are held by South African black economic empowerment (BEE) interests.
3. The purchase was effected by Lexshell acquiring 100% of the shares in V&A Waterfront Holdings (Pty) Limited ("*V&A Holdings*"). One of the subsidiaries of Holdings was V&A Waterfront Properties (Pty) Limited

(“*V&A Properties*”). At that time, V&A Properties held the Waterfront’s land and the property enterprises conducted on it.

4. In June 2007, V&A Properties sold its entire business to Lexshell as a going concern. This included all the property currently forming part of the Waterfront, as well as all contracts to which V&A Properties was a party. The land was duly transferred to Lexshell on 2 October 2007.
5. The V&A Waterfront is very much a development in progress. Apart from development on the pre-existing harbour property, land has already been reclaimed from the sea and developed. It has also for many years been envisaged (and the sale of shares by Transnet and the Transnet Pension Funds to Lexshell expressly records this) that further areas of land are to be reclaimed from the sea for development purposes. For example, it is envisaged that a new residential marina development (the Granger Bay Marina) will be undertaken on land to be reclaimed on the western side of the V&A Waterfront.

OBLIGATIONS REGARDING RECLAIMED LAND

6. The legal position in relation to land to be reclaimed was set out in the Governing Agreement entered into in October 2001, to which Transnet, its pension funds, V&A Properties and V&A Holdings were parties. The Governing Agreement regulated the transfer of the Waterfront to V&A Properties. In clause 2.3 of Appendix B1 to the Governing Agreement, it

was specifically recorded that, at the time, Transnet owed its pension funds certain "*remaining obligations*". One of these was recorded in clause 2.3.1 as follows:

"in its capacity as owner of the sea areas outside the Breakwater, to procure the necessary governmental approval/s for the construction of the shore protection works required in connection with the reclamation of all the areas constituting the Reclaimed Land, and upon completion of reclamation, (which will be done at the cost of TPF), to procure the grant of such land to Transnet and the transfer thereof by Transnet to [the pension funds]."

7. In terms of a "*Land Reclamation and Boundary Adjustment Agreement*" entered into in October 2001, to which Transnet, V&A Properties and Holdings were parties, Transnet undertook as follows (clause 8.2):

"Transnet undertakes to co-operate to procure that such land [the reclaimed land], which will have the status of State-owned land, is thereafter granted to Transnet as the appropriate authority having jurisdiction over the water area concerned in terms of the Sea-Shore Act, 1935 (Act No. 21 of 1935), and immediately thereafter transferred to V&A Properties, for no further consideration to V&A Properties."

8. The above undertaking was competent and lawful by virtue of the following:

- 8.1. Section 2 of the Sea-Shore Act 21 of 1935 vests the ownership of the sea shore and the sea (which was not already alienated

before the coming into operation of that Act) in the State President.

- 8.2. However, section 13(b) of the Sea-Shore Act provides for a special dispensation for land and sea forming part of a port or harbour. This provides as follows:

“nothing contained in this Act shall affect –

- (b) any rights or powers conferred upon the Administration by or under any law relating to ports and harbours in respect of any portion of the sea-shore or the sea [defined to include the bed of the sea below the low-water mark] and in the event of any conflict between the provisions of this Act and any such law, the rights and powers of the said Administration shall be determined by the provisions of such law, and not by the provisions of this Act.”**

- 8.3. When section 13(b) was introduced in 1959, it was provided that the “*Administration*” meant the Railways and Harbours Administration of the Union. The legislature thus recognised that the sea and sea-shore within ports and harbours was to be governed by the statutes pertaining to ports and harbours.

- 8.4. The relevant statutes relating to ports and harbours were as follows:

- 8.4.1. the Railways and Harbours Control and Management Act 70 of 1957. Section 2(4) thereof empowered the Administration *inter alia* to “*control, manage and superintend all harbours, docks or other similar works within the Administration’s jurisdiction*”. The Cape Town harbour was listed as falling within this jurisdiction;
- 8.4.2. the South African Transport Services Act 65 of 1981. This defined the jurisdiction of SATS to mean “*all immovable property ... and in particular ... includes the areas defined in the First Schedule to this Act*”. This included the Cape Town harbour, which incorporated the area of the V&A Waterfront and adjacent sea areas;
- 8.4.3. the Legal Succession to the South African Transport Services Act 9 of 1989 (“*the Legal Succession Act*”). This Act transferred most of the business of the Administration to a new company (i.e. Transnet).
- 8.5. Section 3(2) of the Legal Succession Act dealt with the transfer of the business of SATS (including all assets) to Transnet. Section 3(3) provided that:

“Arising out of the transfer of the commercial enterprise in terms of sub-section (2) and without in any way derogating from the generality of the preceding provision –

- (a) the Company shall become the owner of all movable and immovable property ... that immediately prior to [the date of succession] –**
 - (i) was registered in the asset registers of the South African Transport Services; or**
 - (ii) fell under the control or jurisdiction of the South African Transport Services...”**

8.6. By virtue of the above provisions, from the date of succession Transnet became the owner of such land and such portions of the sea (including the sea bed) as constituted the Cape Town harbour. As set out above, this included the V&A Waterfront (as currently situated) and the adjacent sea and sea bed.

8.7. Any land reclaimed from the sea would therefore also vest in Transnet, which would be entitled to have the land granted to it upon it being properly surveyed.

THE PRESENT BILL

9. In terms of the National Environmental Management: Integrated Coastal Management Bill which now serves before Parliament, all land which is submerged by the coastal waters is regarded as “*coastal public property*”. This includes the submerged land earmarked for reclamation

and transfer to V&A Properties (and now Lexshell) in terms of the Governing Agreement.

10. Clause 11(1) of the Bill provides that the ownership of coastal public property vests in the citizens of the Republic and must be held in trust by the State on behalf of the citizens of the Republic. Clause 11(2) provides that coastal public property is inalienable and cannot be sold, attached or acquired by prescription.
11. There are no proposed exceptions in the Bill equivalent to section 13(b) of the Sea-Shore Act.
12. The plain effect of the Bill is to divest Transnet of ownership of the land to be reclaimed (notwithstanding the fact that it still falls within its area of jurisdiction as part of the port of Cape Town). It also prevents Transnet from complying with its contractual obligation towards Lexshell to ensure the grant and transfer of such reclaimed land to Lexshell without the payment of any further consideration.
13. Transnet is an organ of State (Transnet Ltd v Goodman Brothers 1998 (4) SA 989 (W)).
14. The passing of this environmental Act in its present form, without exceptions, will effectively mean that the State (in the form of Parliament) will render it impossible for itself (in the form of Transnet) to comply with

its existing and vested contractual obligations towards Lexshell in regard to the reclaimed land. This would have serious implications for one of the most significant direct foreign investments ever in South Africa. The enhanced development rights associated with the reclaimed land were a major factor enticing the present investors to bid for the V&A Waterfront and to pay the price they did. The ability to obtain ownership of the reclaimed land and to develop and dispose of it was an essential driver of the transaction. The significant further development required on the reclaimed land is dependent upon Lexshell's ability to obtain and transfer title. The potential impact of the Bill on this flagship sale would be a matter of considerable national embarrassment and damage the image of the country as a destination for foreign investment.

15. Lexshell believes that it cannot be Parliament's intention, through environmental legislation of this nature, to frustrate Transnet's ability to comply with its contractual obligations towards Lexshell, and thereby also to interfere with Lexshell's vested rights. The need to deal in the Bill with coastal environmental matters does not require a blunt negation of ownership procured pursuant to the 2001 agreement.

THE PROPOSED REMEDY

16. The appropriate remedy, it is submitted, is to include in the Bill a provision (possibly to be inserted as section 11(3)) to the effect that nothing in the statute will preclude Transnet and/or its successor-in-title

from complying with its obligations towards V&A Waterfront Properties (Pty) Limited or its successors-in-title in terms of the Governing Agreement, and that the land earmarked for reclamation in terms of that Agreement will accordingly not be subject to the provisions of sections 11(1) and 11(2).

17. Such an exemption will of course not preclude the application of the environmental aspects of the Bill to the land and sea in question. Lexshell accepts that in conducting development in this area, it will be obliged to comply with applicable environmental statutes. The exemption will merely allow the formal acquisition of title to the reclaimed land by Lexshell in accordance with the original intention and obligations of the State (in the form of Transnet).

CONSEQUENCES IF NO AMENDMENT

18. If the above simple expedient is not adopted, passing the Bill into law will amount at least to an unconstitutional deprivation of property, and quite possibly also an unlawful expropriation without compensation. Sections 25(1) and (2) of the Constitution provide as follows:

- “(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.**
- (2) Property may be expropriated only in terms of law of general application –**
 - (a) for a public purpose or in the public interest; and**

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

19. “*Property*” for purposes of section 25 of the Constitution is to be broadly interpreted, including not only land or immovable property as such, but also enforceable personal rights (of which the *ius in personam ad rem acquirendam* which Lexshell has against Transnet under the Governing Agreement is a powerful example) (see e.g. Hewlett v Minister of Finance 1982 (1) SA 490 (ZS) at 494D-E, 497F-H, 503D-E), Government of Namibia v Mwandighi 1992 (2) SA 355 (NmS) at 367-8)
20. The effective nullification of Lexshell’s right to claim transfer of the reclaimed land from Transnet amounts, at the very least, to a deprivation of Lexshell’s property. Whether the right is thereby extinguished entirely or merely rendered unenforceable is of no consequence: it is so denuded as to be worthless in the hands of Lexshell. Applying the rationality and proportionality approach in First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service 2002 (4) SA 768 (CC) and Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (2) BCLR 150 (CC), it is further clear that this particular deprivation would be arbitrary and therefore unconstitutional. Depriving Lexshell of vested rights to claim ownership of reclaimed land, which rights were lawfully granted to it as part of the overall development vision of the V&A Waterfront area and which were expressly approved of by Government,

serves no environmental purpose protected by the Bill. It is unreasonable and unjustifiable in its effect.

21. It is furthermore submitted that the effect of the Bill would be, in essence, to take property from Lexshell and re-vest it in the State. Lexshell has effectively paid for the reclaimed land; once it comes into existence, it has a claim to receive transfer of that land without the payment of further compensation. Hence for all practical purposes, its rights *vis-à-vis* Transnet are rights to the land in question. The taking away of that right amounts to the compulsory acquisition of rights in property by a public authority (Harksen v Lane N.O. 1998 (1) SA 300 (CC) at paras [32] to [34]), i.e. to an expropriation. Since no provision is made for compensation, the passing into law of the Bill would also contravene section 25(2) of the Constitution.

CONCLUSIONS

22. In summary:

- 22.1. the Bill has what appears to be an unintended consequence of the State frustrating its own organ's ability to comply with its lawful contractual obligations to Lexshell, thus frustrating the achievement of a key component of the development plan for the V&A Waterfront and removing one of the very foundations

of the massive foreign investment by which Lexshell acquired ownership of the V&A Waterfront;

22.2. the passing of the Bill would also constitute an infringement of Lexshell's constitutional right to property in that it would cause the arbitrary deprivation of property, and could quite possibly also amount to expropriation without compensation;

22.3. it is therefore essential that a mechanism be built into the Bill to enable Transnet to give effect to its contractual obligations. Since the position of the V&A Waterfront appears to be unique, the appropriate mechanism would be for a specific exemption to be included in the Bill to take account of this situation.

DATED AT CAPE TOWN THIS 27th DAY OF FEBRUARY 2008.



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