

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, PORT ELIZABETH

CASE NO.: 1774/2009

DATE HEARD: 25/02/2010

DATE DELIVERED: 22/06/2010

In the matter between:

EEDENPROP (PTY) LTD

APPLICANT

and

KOUGA MUNICIPALITY

RESPONDENT

JUDGMENT

SANGONI J:

[1] The applicant is Eedenprop (Pty) Ltd a company with limited liability duly registered and incorporated as such according to the laws of the Republic of South Africa with its principal place of business at Jeffreys Bay in the province of the Eastern Cape.

[2] The respondent is Kouga Municipality, a municipality established in terms of the Local Government : Municipal Systems Act, Act 32 of 2000 read with the Local Government: Municipal Structures

Act, Act 117 of 1998. The respondent is the successor in title to the Transitional Local Council of Jeffreys Bay (TLC) then established in terms of 30 September 1994.

- [3] The applicant company, acting both in its capacity as Developer and registered owner of a certain portion 13 (a portion of portion 8) of the farm Kabeljouws river no. 328 (the property), in the district of Humansdorp in the Eastern Cape Province, entered into a written agreement (Agreement) in October 2000 with the then TLC, and the said Agreement relates to the development of the said property.
- [4] It is common cause that the applicant company and the respondent's successor in title agreed that the applicant would develop, in phases, a portion of the said property into a retirement village (the village) which would be incorporated into the area of jurisdiction of the TLC.
- [5] The details of the obligations created in terms of the contract will be set out hereunder. Upon completion of the construction referred to in paragraph 4 above, in around October 2006, the respondent municipality was requested to comply with its contractual obligations, in particular, to pay the applicant company the amounts due in terms of the formula set out in the Agreement. This was done. Payments were made by the respondent as they became due. On 24 March 2009 Attorneys McWilliams and Elliott, acting on behalf of the respondent, addressed a letter to the applicant company, alleging the Agreement was of no force and effect for the reasons given and that no further payments would be

made in pursuant thereto. Indeed no payments were made thereafter.

- [6] The relief that is sought by the applicant in these proceedings is an order in the following terms:

“1. It is ordered that the Agreement concluded between the Applicant Company and the Jeffreys Bay Transitional Local Council, in October 2000, is of full force and effect.

2. The Respondent Municipality is ordered to comply fully with its obligations arising from the said Agreement including the obligations imposed upon it by virtue of the provisions of clause VI of such Agreement.

3. The Respondent Municipality is ordered to pay to the Applicant Company all amounts due to the Applicant Company arising from the said Agreement, including interest at the legal rate from the date upon which such amounts are due and payable, to the date of payment thereof.

4. The Respondent Municipality is ordered to pay the costs occasioned by this application, including interest on such costs at the legal rate calculated as from the date fourteen (14) days after the date of taxation to the date of payment.”

- [7] In terms of the grand scheme prepared by the applicant and agreed upon by the TLC the applicant’s fundamental obligations were to:

- 7.1 attend to the rezoning and subdivision of the property in terms of the Land Use Planning Ordinance (LUPO) No. 15 of 1985 and to apply for the proposed retirement development;
- 7.2 develop the retirement village in accordance with the subdivision and development plan;

- 7.3 provide at its own expense for a bulk water supply and bulk electricity supply and connect that infrastructure to the infrastructure of the Transitional Local Council.
- 7.4 establish a Home Owners' Association as envisaged by the provisions of section 29 of the Land Use Planning Ordinance No. 15 of 1985 with a constitution consistent with the scheme;
- 7.5 to design and construct at its own expense the internal reticulation services for the benefit of consumers within the development products.

[8] The contractual obligations of the TLC are recorded in the Agreement as follows:

“In view of the fact that the Developer personally carry the burden of all the development costs and interest thereon in order to provide the internal services and the connector services (external), the Council undertakes to annually pay as from completion of the development as envisaged in par. VIII to the Developer 60% of the assessment rate income levied in respect of the development area as well as all the availability charges levied, provided that the payments thus to be made to the Developer shall in any one year not exceed 12,5% of the total cost of the scheme, which payments will in any event terminate 15 years from the date of completion of the construction work pertaining to the services envisaged herein or as soon as the cost of the services has been fully paid whichever is the earlier.”

POINTS RAISED BY THE RESPONDENT

[9] It is not challenged by the respondent that the applicant complied with its contractual obligations. A number of points were raised in defence but at the hearing many were abandoned. Mr Beyleveld SC, representing the respondent together with Ms Laher, advised the Court that the respondent relied upon only four defences which relate to:

- conditions of subdivision and rezoning and the existence or otherwise of waiver in terms of section 42 of the Land Use Planning Ordinance;
- whether the payment to the applicant in the formula agreed on does or does not constitute a sharing of rates, which is inimical to the concept of good governance;
- non-compliance with sections 146, 172 and 173 of the Cape Ordinance;
- the authorisation of payments in the budgets.

CONDITIONS OF SUBDIVISION AND REZONING

[10] In the preamble of the Agreement it has been acknowledged that rezoning and sub divisional applications by the Developer in terms of the Land Use Planning Ordinance 15 of 1985 had been approved by the Western District Council within whose jurisdiction the property then fell. In its letter of approval the Western District Council referred to conditions applicable, one of them being that “services such as water reticulation, electricity, sewerage reticulation refuse removal, storm water disposal and any accesses to private thoroughfares from public roads shall be provided by the

developer at his cost”. As regards this specific condition, it is recorded that proof of compliance with the said condition has to be furnished to the Local Authority, before clearing the subdivided portion for registration. It is the respondent’s contention that such requirement was not given effect to as in effect the cost to do all that was not the Developer’s. The respondent argues that the formula for payment to the applicant in effect demonstrates that the cost is not entirely that of the Developer.

[11] This is based on the fact that though the infrastructure was provided by the Developer, the payments due to the Developer, in terms of the Agreement, are devised on a formula (referred to in paragraph 8 above) which has the effect that it is not the Developer responsible for such services at the end of the day, in that, as contended by the respondent, the Developer is able to recoup the payment he has made for the construction and installation of the services referred to.

[12] I record hereunder the relevant part of the conditions referred to, for purposes of a clearer insight:

“CONDITIONS OF SUBDIVISION

NB : The Transferor shall in terms of section 31 of Ordinance No 15 of 1985 furnish proof to the Local Authority that the undermentioned conditions, where applicable, have been complied with before the Local Authority will clear such subdivided portion for registration. Such proof is best furnished by the conveyancer simultaneously with the submission of diagrams and powers of attorney for endorsement in terms of the said section 31.

The following further conditions shall be applicable:

- (a) services such as water reticulation, electricity, sewerage reticulation refuse removal, storm water disposal and any accesses to private thoroughfares from public roads shall be provided by the developer at his cost"; (my underlining).

[13] The response of the applicant is to the effect that the condition referred to is just a standard condition. The parties to a contract have an option to do away with that condition. It may thus not apply to what has been agreed upon by the parties. The words 'where applicable' in the context are there to indicate that option. The use of the words in the context suggested does not appear to be the correct one. The words appear to qualify the furnishing of proof of compliance to the local authority. That refers to where it is possible that proof of compliance may be complied with prior to written authority in terms of section 31 of the Ordinance.

[14] It is further contended by Mr Buchanan SC, on behalf of the applicant, that the condition would in any event be a condition in favour of the Western District Council which was at the time the agreement was reached out of the picture. That submission that the condition is no longer relevant and applicable to the Agreement reached in the instant case appears at a glance to have merit. It however, loses sight of the fact that in the Agreement there is a clause recorded as follows:

"The Developer shall be obliged and undertakes to give effect to all the conditions upon which the subdivisional and

rezoning applications have been approved such as conditions laid down in terms of section 42 of Ordinance 15 of 1985”.

- [15] The rezoning and subdivision of the property were approved by the Western District Council before the Agreement was concluded. They did not come about as a consequence of the Agreement. It may perhaps be accurate to say they came about in anticipation of the Agreement. The legal entity that approved is a separate entity from the parties involved in the current case. Yet, in view of the clause I have just referred to, the applicant has a contractual obligation “to give effect to all the conditions”, such as those laid down in section 42 of Ordinance 15 of 1985.

WAIVER IN TERMS OF SECTION 42

- [16] I proceed to consider whether the requirements of waiver in terms of section 42 of the Land Use Planning Ordinance (LUPO) were complied with. The Agreement records that “in view of the fact that the Developer personally carry the burden of all the development costs and interest thereon in order to provide the internal services and the connector services (external)”, the Council undertakes to annually pay a portion of the assessment rate income levied. It is therefore clear that the parties took an informed decision at the time. The respondent was aware on what the charges were based on and how they were determinable. I find nothing in the papers to support the view that the respondent was not aware of the facts. For that reason it is reasonable to infer that the parties consciously opted for what the Agreement records.

- [17] Section 42(3) provides that waiver or amendment of any condition by the Administrator or a council, as the case may be, will come after a consideration of objections received in consequence of an advertisement in terms of section 4 and after consultation with the owner of the land concerned or administration in the case of a local authority. Section 42(4) envisages advertisement of the proposed waiver in cases where the director or the town clerk or secretary, as the case may be, is of the opinion that the waiver adversely affects the interest that any person has in land. No such opinion has been canvassed herein. Instead, in annexure VE14 the Town Planner writes to say “the application was advertised and no objections were received”.
- [18] Subsection 4, however, stipulates that the relevant advertisement should be about the proposed waiver. It appears the advertisements to which there were no objections received relate to advertisements in terms of the prescribed procedures for rezoning and subdivision. It follows that technically no waiver could be valid without the said advertisement. It was argued on behalf of the applicant that because the parties carried on with the agreement without the conditions having been complied with and of course with the subdivision and rezoning having been concluded that the parties intended to waive compliance with the conditions. I endorse the view that waiver has to comply with the provisions of section 42(3) of LUPO in order to be valid.

SHARING OF RATES

- [19] The parties agreed that payment to the Developer should be worked out on the basis of “the assessment rate income levied in respect of the development area as well as all the availability charges levied”. The percentage agreed on was 60% with the proviso that payments made to the Developer “shall in any one year not exceed 12.5% of the total cost of the scheme”. The payments would in any event “terminate 15 years from the date of the construction work... or as soon as the cost of the services has been fully paid whichever is the earliest”.
- [20] The defence, as regards the sharing of rates, has been raised, as Mr Beyleveld so confirmed, in the context that the allocation of a portion of rates payments by inhabitants is unlawful, unconstitutional and against public policy. The respondent contends that this amounts to utilising funds emanating from taxation to advance a commercial development to the detriment of other members of the community.
- [21] On the reading of the applicant’s response to the allegation of sharing of rates, I observe no serious dispute as far as the facts are concerned. The applicant however disagrees that the agreed formula for the repayment to the applicant of a portion of rates is unlawful. The applicant contends that the infrastructure he brought about generated a substantial rate and other income for the respondent. That infrastructure or development that the applicant paid for is now owned by the respondent or the Home Owners Association. The question then seems to be what is unlawful in

them repaying, be it via rates, for what they have benefited from, more especially the respondent who continues to derive substantial income from the said infrastructure.

[22] There does not seem to be any issue with the principle that the sharing of rates is prohibited. The applicant further argues that the applicant is permitted to recover the balance of its costs of infrastructure in accordance with the agreed formula. There is no doubt that the formula, as it stands, entitles the applicant to a certain portion of rates levied in respect of the development area albeit restricted to a certain period. That is not compatible with the provisions of section 229(1)(a) of the Constitution which read “Subject to subsections (2), (3) and (4), a municipality may impose-

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality”.

[23] One of the defences taken by the respondent is that the applicant or both parties to the Agreement failed to comply with the requirements set out in sections 146, 172 and 173 of the Municipal Ordinance No. 20 of 1974 (Ordinance). Frankly, neither party would have been required to comply with the provisions of section 146. It has been referred to in these proceedings purely to illustrate circumstances where the council may assist the owner of immovable property.

[24] Section 172(1) reads:

“(1) A council shall, by notice published in the press, invite tenders before entering into any contract which is for –

- (a) the execution of any work for or the supply or sale of any goods or materials to the council and which involves or is likely to involve an amount exceeding such amount as the Administrator may from time to time either generally or specially determine in respect of contracts entered into by such council, and
- (b) the sale of any goods or materials by the council.

Section 173(4) reads:

- “(4) No contract contemplated by subsection (1) or (2) and no amendment to any such contract shall come into force until –
- (a) the council has by publication in the press given notice of its intention to enter into such contract or to make such amendment, and
- (b) the Administrator has approved such contract or amendment”.

[25] In the context of this case, that would mean the attack is that there has been no publication in terms of those sections, inviting tenders and or publishing a notice in the press of intention to enter into the Agreement. The response by the applicant is that it would not be possible in the circumstances of this case to comply with the relevant requirements. In the first instance, the piece of land in, question was owned by the applicant and was at the time the Agreement was reached falling outside the jurisdiction of the respondent. Secondly, the nature of the agreement concluded was not for the “execution of any work or the supply of any goods or material”. Thirdly, the respondent contends that the publications it made comply with what would be required in terms of section 173 (4).

[26] As regards the first two points there is merit in the contention that the provisions of section 139 of the Ordinance apply. Section 139 provides that “a council may, within or outside its municipal area provide, establish and maintain municipal services”. The issue of the piece of land falling outside the jurisdiction of the respondent is thus not relevant.

[27] As regards the alleged non-compliance with section 173, the facts are as follows. The publication which came out in the press during the week ending on 18 February 2000. It is headed “Proposed incorporation of a portion of portion 13 (a portion of portion 8) of the farm Kabeljouwsriver no 328”. Another publication was almost similar. It appeared in the provincial gazette on 21 February 2000. The subject matter highlighted in that publication is rezoning and subdivision. The applicant contends that those who had an interest in the matter, could have come to the office of the Town Planner to get ‘further particulars’ and consequently lodged objections if they saw fit. Both publications indeed had nothing to do with the Agreement entered into on 24 October 2000. They relate to incorporation of the land in question within the jurisdiction of the applicant, rezoning and subdivision and not the proposal referred to in the Agreement which would be capable of inspection.

[28] The Agreement was signed by the parties on 24 October 2000. It is expressly stated therein that the Agreement is subject to the incorporation of the land within the boundaries of the Jeffrey’s Bay Municipality, to establish and confirm the jurisdiction of the TLC.

[29] In my view the provisions of both section 172 and 173 have been violated. What remains for consideration is whether such non-compliance renders the Agreement unlawful and of no force and effect. In my previous decision in *Casalinga Investments CC*¹, after having considered the dicta in case law², I stated that “the transgression of the Constitutional imperatives, the violations of statutory provisions and supply chain management policies and manuals, are material. At the end of it all it cannot be said the processes complied with section 217 (1) of the Constitution”. In that case I had found that there were violations of statutory provisions relating to procurement of services which undermine the values set out in section 217 of the Constitution. Section 173 of the Ordinance expressly provides that “no contract ... shall come into force until...” there has been the prescribed publication.

[30] Section 217 (1) of the Constitution provides that “When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective”. In a long list of cases³ it has been held that non-compliance with the provisions prescribed by the Legislature for the validity of the transaction must render the transaction invalid.

¹ *Casalinga Investments CC t/a Waste Rite v Buffalo City Municipality* case no ECD 2359/08 (unreported).

² *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) 1 (SCA) : Nelson Mandela Bay Municipality v Afrisec Strategic Solutions (Pty) Ltd & Others, not reported yet, registered under case no. 865/07 in SACLO.

³ *Qaukeni Local Municipality & Another v F V General Trading CC* (324/08) [2009] ZASCA 66 (29 May 2009); *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA).

AUTHORISATION IN THE BUDGETS

[31] A provision in the now repealed Local Government Transitional Act 209 of 1993, which was in operation at the time the Agreement was concluded, prescribed that there had to be an approval budget for operating an income and capital expenditure. Under this heading the attack by the respondent was that there was no such provision in the budget for the scheme agreed on. Whether there was or not would need oral evidence. In view of my findings in the previous paragraphs it is not necessary to pursue this challenge.

[32] For the reasons given above I come to the conclusion that the agreement signed by the parties on 24 October 2006 is invalid and of no force and effect.

In the result the application is dismissed with costs.

C T SANGONI
JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv R G Buchana SC
Attorneys for the applicant	:	Pagdens Attorneys Port Elizabeth
Counsel for the respondent	:	Adv A Beyleveld SC
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