

IN THE HIGH COURT OF SOUTH AFRICA

NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No.: 939/10
Date heard: 5 August 2010
Date delivered: 17 August 2010

In the matter between:

MZINGISI DEVELOPMENT TRUST	First Applicant
DIETER HEINZ WERNER ROHRICH N O	Second Applicant
SINDISWA GLADYS JAWUKA N O	Third Applicant
SILAS NTUTUZELO NKANUNU N O	Fourth Applicant
MZIMKHULU GORDON DILIMA N O	Fifth Applicant
MCEDISI ORSMOND XUNDU N O	Sixth Applicant
NYANISILE MOSES BOYCE N O	Seventh Applicant
and	
NELSON MANDELA METROPOLITAN MUNICIPALITY	Respondent

JUDGMENT

EKSTEEN J:

[1] The first applicant is a Trust, established during 1992, as a community based Trust which has for its principle purpose community led development and large scale housing and other development projects in and around Port

Elizabeth. The second to seventh applicants are the trustees of the first applicant.

[2] The applicants launched this application against the respondent for a variety of relief all of which has its foundation in a Land Availability and Services Agreement concluded between the applicants and the respondent during on or about December 1997. The respondent did not attempt to raise any substantive defense to the relief claimed and conceded all the relief which the applicant sought. The only remaining issue relates to the costs occasioned by the application.

[3] The applicants rely on a written Agreement being the Land Availability and Services Agreement to which I have referred above. On 25 February 2010 the applicants were advised that the respondent council had decided to “disengage” from the development projects being undertaken by the applicants pursuant to the Land Availability and Services Agreement. On the same day the respondent took a resolution in terms of which it purported to rescind all agreements concluded with the first applicant. This resolution resulted in the respondent declining to give effect thereafter to any of its obligations in terms of the Agreement and in particular it declined to advertise or to further consider the application for the rezoning and subdivision of the remainder of Erf 590 Bethelsdorp, and the remainder of Erf 921 KwaDwesi, which had been submitted by the first applicant as a necessary prerequisite for the effective execution of its

development project undertaken under the Land Availability and Services Agreement. These events gave rise to the launching of the application.

[4] The relief, as I have stated above, was conceded, however, the respondent disavows any liability for the costs occasioned by the application. It relied on two grounds for this contention, firstly that the first applicant was obliged to refer the dispute between the parties to arbitration and, secondly, that the first applicant was not entitled to make application for rezoning and subdivision of the property by reason of the fact that it was not the owner of the property. By virtue of the conclusion to which I have come below it is not necessary to consider the second ground raised.

[5] The applicant relies on the written agreement as the foundation for the application. Paragraph 8 of the written Agreement is headed "BREACH AND ARBITRATION". Paragraph 8.4 provides as follows:

"8.4 In the event of any dispute between the parties as to any one of the following:-

8.4.1 the amounts to be paid as compensation in the event of the termination of this Agreement by reason of a default by any party, as per 8.3 above; and

8.4.2 any of the obligations of the parties in terms of or contemplated in or in relation to this Agreement or any agreement reached or to be reached between the parties as contemplated in this Agreement, or the interpretation of any of the provisions of this Agreement or of any agreement reached between the parties as contemplated in this Agreement

such dispute shall be referred to arbitration in terms of 8.5.1 and 8.5.2 below, and subject to the provisions thereof.”

[6] Paragraph 8.5 stipulates as follows:

“8.5 If a dispute arises between the parties in regard to any matters contemplated in this Agreement, or the rights or obligations of either party in terms hereof or arising herefrom, either party shall be entitled and obliged to require, on written notice to the other, that such dispute be submitted to arbitration and then such dispute shall be settled by arbitration
... “

[7] This obligation to submit to arbitration is reinforced in clause 8.13 of the Agreement which provides as follows:

“8.13 The provisions of this entire clause dealing with arbitration shall constitute the irrevocable consent by the parties to arbitration in terms hereof and neither party shall be entitled to withdraw from or claim at any such proceedings that he is not bound by these provisions or by any ruling or any procedure laid down in terms of such provision.”

[8] On consideration of the content of the arbitration clause set out in the Agreement it cannot be gainsaid that the parties had firmly bound themselves to arbitration. Section 3(1) of the Arbitration Act, 42 of 1965 provides that an arbitration agreement can be terminated only by consent by all the parties unless the arbitration agreement itself provides otherwise. The effect thereof is that the cancellation of the contract pursuant to a breach thereof does not terminate the operation of the arbitration clause. See **Gardens Hotel (Pty) Ltd and Others v Somadel Investments (Pty) Limited** 1981 (3) SA 911 (W). Indeed, in the present matter, clause 8.15 provides specifically that where either party purports to cancel the agreement the provisions of the agreement shall continue to be in

force as far as any dispute regarding any matter contemplated in the agreement or any other agreement between the parties contemplated or referred to in the main agreement is concerned for purposes of resolving such dispute by arbitration.

[9] It is plain from the relief sought in the Notice of Motion that a dispute had arisen in respect of the cancellation of the Land Availability and Services Agreement hence the applicants' sought a declarator that the resolution adopted by the council in terms of which it purported to rescind the agreement was unlawful and of no force or effect. This, it appears to me, is a matter covered by the arbitration agreement. Whilst it is so, as provided for in section 3(2) of the Arbitration Act, that a arbitration agreement does not deprive the court of its jurisdiction of the dispute, the courts are nevertheless loathed to intervene with the agreement entered into between the parties unless there are special circumstances justifying such an intervention. This approach, generally to respect the agreement between parties to bind themselves to private arbitration, has recently been endorsed in the Constitutional Court in the matter of **Lufuno Mphaphuli & Associates v Andrews** 2009 (4) SA 529 (CC) at 585 and following.

[10] In all the circumstances I am satisfied that the applicants had firmly and irrevocably bound themselves to have disputes of this nature decided on arbitration. No special circumstances emerge from the present case which would

justify deviation there from. In the circumstances I consider that it was inappropriate for the applicants to have brought this matter to court with all the cost implications associated therewith. The respondent, however, did not seek to defend its conduct and, upon a consideration of the application filed, saw the error of its ways and has conceded that it was wrong.

[11] In these circumstances it would be appropriate to make no order as to costs thus leaving each party to pay its own costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For the Applicants: Adv G Goosen, S C instructed by Silas Nkanunu & Van
Loggerenberg Attorneys, Port Elizabeth

For the Respondents: Adv R Buchanan S C and Adv T Booï instructed by Le
Roux Incorporated, Port Elizabeth