IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO. EL 1613/11

ECD 2850/11

In the matter between

KING WILLIAM'S TOWN HOUSING

ASSOCIATION NO. 2000/014899/08 Applicant

and

THE MEMBER OF THE EXECUTIVE

COUNCIL OF THE EASTERN CAPE

DEPARTMENT OF HUMAN SETTLEMENTS,

SAFETY AND LIAISON First Respondent

BUFFALO CITY METROPOLITAN

MUNICIPALITY Second Respondent

THE REGISTRAR OF DEEDS,

KING WILLIAM'S TOWN Third Respondent

JUDGMENT

HARTLE J:

1. An earlier dispute between the applicant, a property developer, and the first respondent culminated in an arbitration award which was made an order of court in the Grahamstown High Court on 19 March 2009. The matter had its origin in four agreements pursuant to which the applicant undertook to develop housing projects under the institutional housing subsidies scheme in King William's Town Central, Breidbach Plateau, Ginsberg West and King William's Town Golf Course. It acquired the land on which the houses were to be constructed from the second respondent.

2. In terms of the agreements the applicant was *inter alia* obliged to develop and complete the projects according to certain specifications and to rent the units constructed to persons who potentially qualified as beneficiaries and who would in due course purchase them.

3. The first respondent was in turn obliged to pay certain institutional subsidies to the applicant in respect of the houses to be constructed by it, which it did.

4. During the course of the project the first respondent cancelled the agreements alleging a breach by the applicant and demanded repayment of the subsidies advanced to it. The applicant disputed both the validity

of the first respondent's cancellation and that it was liable to refund the subsidies to her. It ultimately referred these issues for arbitration as was provided for in the agreements.

5. In terms of the award – made by consent between the parties - the agreements were declared to be cancelled and the applicant was directed to repay to the first respondent the institutional subsidies she had advanced to it in the cumulative sum of R25 666 904.00, plus interest and costs. Further, control of the properties - the subject of the four agreements - was immediately vested in the first respondent with the obligation now, instead of the applicant, to collect all rentals and other amounts due to the second respondent for, *inter alia,* property rates and municipal taxes.

6. On 29 March 2010 a further agreement was concluded between the applicant and the first respondent in terms whereof the applicant agreed to transfer to it the properties forming the subject matter of the relevant agreements (specified in the annexure to the agreement) as "*part-payment of the judgment debt together with interest and costs*". These properties were valued in a sum of R25 952 790.00 against an acknowledgement of indebtedness by the applicant to the first respondent of the sum of R25 666 904.00 aforesaid. The parties agreed that a reconciliation would ultimately be effected and the first respondent reserved the right to take such further action to recover the balance of the judgment debt, interest and costs, if any. The costs, it appears, are the costs in the litigation to make the arbitration award an order of court.[1]

1 There is a dispute between the applicant and the first respondent as to the extent of its indebtedness to the first respondent's department but this is in my view not an issue I need concern myself with.

7. The first respondent further undertook to pay all monies due to the second respondent, the *Buffalo City Metropolitan Municipality*, in respect of arrear rates and taxes pertaining to the affected properties so that rates clearance certificates could be obtained and transfer of the relevant properties to the first respondent be given effect to.

8. The first respondent promptly instructed a conveyancer to attend to the transfer of the properties and on 30 April 2010 the applicant signed the necessary combined power of attorney to enable transfer. To date the properties have not been transferred, however, since the rates and taxes due to the second respondent in respect thereof remain unpaid. According to the applicant the necessary transfer documents were lodged in the deeds office in King William's Town, but were rejected. Self evidently transfer is precluded by virtue of section 118 (1) (b) of the Local Government : Municipal Systems Act, No. 32 of 2000, which provides that a registrar of deeds may not register the transfer of property except on production to that registrar of a prescribed certificate "*which certifies that all amounts that became due in connection with* (the property concerned) *for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two year period preceding the date of application for the certificate have been duly paid.*"

9. This and other developments, including the threat of litigation against the applicant by the second respondent for arrear rates and taxes in a sum of R303 087,87 which the first respondent failed to collect from the

beneficiaries of the projects (the units given over to the control of the first respondent pursuant to the arbitration award attracted arrears for the applicant since they were still recognized by the second respondent as the responsible developer), prompted the issue of the present application on 22 September 2011 in which the applicant originally sought an order for *inter alia* specific performance of the first respondent's obligations which it undertook in terms of the 29 March 2010 agreement. The first respondent contended - without saying that it was unprepared to meet its obligation in this regard - that it was initially thought that since it was a government entity it was not required to pay rates and taxes and to that end it requested the second respondent to condone payment thereof. Such request could, however, obviously not be acceded to due to the strict application of the provisions of section 118 (1) (b) of the Municipal Systems Act aforesaid. Further, due to a delay in the calculation of the amount due to the second respondent, estimated then to be in a sum of approximately R5 million, the payments were not catered for in the 2011/12 budget allocation says the first respondent, hence it could not advance the monies due to obtain the prescribed certificates.

10. The first respondent's supposed defence of impossibility of performance – albeit only temporary - has since become moot because when the matter was argued before me both Mr *Buchanan* SC (who appeared for the first respondent together with Mr *Sishuba*) and Mr *Swartbooi* (who appeared for the second respondent) gave the undertaking that - as amongst the first and second respondents - the obligation to advance whatever is payable in respect of the relevant properties to secure the issue of the prescribed certificate(s) (even beyond the estimated amount of R5 million which the first respondent undertook after the issue of the

present application to pay to the second respondent)[2] - will be met by the first respondent when it can in April 2012. The first respondent will strictly comply with the provisions of section 118 (1) (b) of the Municipal Systems Act in this regard. In addition the second respondent says that it will no longer look to the applicant for the payment of any of the arrears, regardless of when the outstanding payments will be made to it by the first respondent. The applicant's need for substantive relief in this regard (prayers B8 – 10) accordingly falls away, says the first respondent, save for the ancillary prayer for costs.

11. In respect of the latter, I am satisfied that the applicant has made out a case for these based not only on the recent indemnity of the first respondent to the second respondent, but given the circumstances which compelled it to issue the application in the first place. The first respondent never paid when she said it would. She caused a real threat of litigation against it for the payment of arrears the applicant was still liable to the second respondent for. The applicant's request to attempt to resolve the matter informally after receipt of the second respondent's "*section 129 demand*" (Sic) was ignored by her. Further and in any event she never pertinently denied her department's failure in this regard or put up any defence to its committed obligation to pay.

12. A further issue which became academic by the time of the hearing of the matter was the interdictory relief sought and granted *pendente lite* in

2 The second respondent attached to its answering affidavit an undertaking given by the first respondent to it dated 26 October 2011 to pay "*a sum up to a maximum of R 5 000 000.00*" to be effected in the 2012/2013 financial year. This undertaking was to be "*honoured*" only on 1 April 2012. The first respondent explains in the covering letter that the present application proceedings "*have necessitated that we issue the attached letter of undertaking in relation to the payment of rates and taxes … so as to pave way for transfer of the properties*". The applicant was understandably reluctant to accept this undertaking at first since it was capped at a maximum of R5 million.

prayer A1 of the applicant's Notice of Motion. In this regard this court on 18 October 2010 granted an order by consent between the parties that:

"*... in relation to the Tender calling for expression of interest from suitable professional companies or teams to develop a plan to transfer 4 (four) projects from the Applicant to the First Respondent as advertised in the Dispatch advertisement dated 4th August 2011 (hereinafter referred to as "the tender"), the First Respondent be and is hereby interdicted and restrained from awarding the tender and/or from concluding an agreement with any third party pending finalisation of the application referred to in part B of the Notice of Motion."*

13. It was alleged that on 4 August 2011 the first respondent published a tender advertisement in the Daily Dispatch newspaper calling for an expression of interest from suitable professional companies or teams to undertake the following:

"

- *Develop a plan to transfer the projects from KWTHA (*the present applicant*) to the Department of Human Settlements taking into consideration an outstanding amount of approximately R3,8 million owing towards rates.*
- *Conduct tenant audit and in consultation with the Department and develop solution for the various tenants.*
- *There are approximately 1664 remaining serviced sites in the area, develop a plan for development of sites taking into consideration, tenants who were evicted from the projects."* (Sic).

14. The exercise anticipated in the tender was advertised to have commenced on 1 September 2011 and ended on 30 December 2011. The applicant, not being aware of the status of the tender - but yet responsible as developer especially in view of the escalating arrears - sought an explanation from the first respondent in this regard, but to no avail. It

was concerned that its rights in terms of the agreement might be prejudiced by the first respondent's actions in this regard. The extent of the envisaged prejudice to it is best explained with reference to correspondence addressed by its attorneys on its behalf to the first respondent on 18 August 2011 to the following effect:

"*We were about to address the aforesaid issue when our client provided us with a copy of a notice published by your Department on 4 August 2011 calling for tenders to develop a plan to transfer the projects from our client to the Department of Human Settlements, taking into consideration an outstanding amount of approximately R3.8 Million owing towards rates.*

Our client understandably is confused as to why the transfers were not finalised in terms of the Memorandum of Agreement concluded with them and why the Department is embarking on the aforesaid tender process.

Whilst on the face of it your actions appear to be a step closer to achieving the transfers, our client is concerned that the Memorandum of Agreement contains specific provisions in regard to the valuation of the units to be transferred, which sum is to constitute part payment of the judgment debt and costs and interest. Our client is concerned that a tenderer may submit a plan which is inconsistent with the terms of the Memorandum of Agreement or which does not take into account the rights and obligations of our client and the Department in terms of the Memorandum of Agreement.

Unless our client receives a satisfactory explanation for the Department's actions in putting out the aforesaid tender, then it shall be obliged to take steps to set aside the tender process and to obtain a Court Order directing the Department to comply with the terms of the Memorandum of Agreement and, failing compliance within a stipulated period of time, directing that the Sheriff be authorised to sign all transfer documents and take all steps necessary on behalf of the Department to effect the transfer and implement the Department's obligations and undertakings in terms of the Memorandum of Agreement.

We are instructed that our client has for a considerable period of time endeavoured to resolve the aforesaid issues in an amicable and non-litigious manner but is now concerned that the only way in which these issues will be resolved is by taking the appropriate legal action. However before doing so our client wishes to afford your Department an opportunity of forty-eight (48) hours within which to explain its actions and indicate its intentions in regard to the implementation of the terms of the agreement. If this is not forthcoming within the aforesaid period of time, our client shall be obliged to consider making urgent application to the High Court for an order setting aside and/or staying the tender process pending finalisation of an action to be instituted against the Department for an order compelling compliance by it with the terms of the said agreement."

15. It is unclear why the first respondent failed to reply to the correspondence, but for the first time in the answering affidavit deposed to on 3 November 2011 by her head of department, *Gaster Sharpley*, the purported excuse that the proposed tender was meant to "*facilitate the implementation of the relief sought in Part B of the Notice of Motion*" was proffered. It is not understood how this would lead to an earlier or speedy transfer of the affected properties to the first respondent, but *Sharpley* alleges as follows in this regard:

> "*so as to facilitate the speedy transfer of the properties such that the payment of the rates and taxes due to the second respondent need not await the next 2012/2013 budget allocation and also as to appoint another service provider to continue with the housing project the first respondent's department issued the tender referred to in the founding affidavit. The Department held the view that the response to the tender, and the ultimate award thereof, would, probably, result in sufficient funds being generated (whether directly or indirectly) to enable the outstanding amounts due to the Second Respondent, being paid;"* (Sic)

16. According to *Sharpley* the first respondent already received "*favourable responses*" to the tender - which would supposedly be delayed by the present application to its detriment - yet he never took the court into his confidence as to what these responses were or how the advertised tender might absolve the department from the obligation to pay the amounts due to the second respondent in respect of outstanding rates and taxes, or expedite transfer. It appears entirely improbable, however, that another service provider might agree to pay arrears in excess of R5 million on behalf of the first respondent.

17. In any event, since the application envisaged by part B of the Notice of Motion will be finalised contemporaneously with this judgment, no extended relief is necessary in this regard. The issue of the costs of the 18 October 2010 hearing were, however, reserved. The first respondent submitted in argument that the applicant had failed to make out a case for the grant of the relief sought in this paragraph because it did not set out any prejudice suffered or how the proposed tender would potentially prejudice it, but I fail to see how this might still be relevant in view of the fact that the interim order - really final in effect - was agreed to between the parties. The first respondent (who agreed that it - rather than the second respondent - should be liable for any costs order)[3] contends that it should not be mulct in costs because there was no basis in the first place for the applicant to have instituted these proceedings.

18. I cannot agree with this submission. The applicant had an abiding concern as developer that its role in the transfers not be impeded by any subsequent tenders impacting on the finalisation of the processes in this regard which it seemingly has little control over. Clarification was sought from the first respondent that it would not impose in this regard but these assurances, reasonably requested, were not forthcoming. Even in the answering affidavit the first respondent failed to take the court into her confidence in this regard.

19. That leaves one further aspect. The applicant seeks interdictory relief premised upon the issue of "*directives*" by the first respondent to the second respondent not to sign powers of attorney or to issue rates

3 The second respondent consistently maintained that the *lis* was between the applicant and the first respondent. It ultimately undertook to abide the court's decision on the merits as long as no costs order was sought against it.

clearance certificates in respect of the transfer of six specified units in the applicant's development known as Clubview Development Housing Project and from in any way interfering, other than by due process, with its rights to obtain signed powers of attorney and issued rates clearance certificates from the second respondent. The project concerning these six transfers is a completely separate and independent development to the properties which were the subject matter of the arbitration proceedings. An interim interdict was granted to the applicant on this basis on 18 October 2010 pending finalisation of the remainder of the application and it presently persists with a final order in this regard.

20. The applicant alleges in this regard that it had "*good reason*" to believe that the first respondent had directed the second respondent (some time after June 2011) not to sign any further powers of attorney or to issue any rates clearance certificates in respect of any transfers being dealt with by the applicant; this gleaned from information personally conveyed to the applicant's chief executive officer by an official of the second respondent.

21. As a result the applicant finds itself in a situation where it is unable to give transfer to the six prospective homeowners, some of whom have already taken occupation of their units. The delay has placed the granting of these purchaser's mortgage loans in jeopardy with some of the financial institutions having advised that they are considering withdrawing their approvals. It submits that the second respondent has no lawful basis to withhold the processes involving the issue of powers of attorney or rates clearance certificates. Plainly the first respondent's interference in this regard is also unlawful.

22. In this regard *Sharpley* concedes that there was an "*informal understanding*" between the first and second respondent that the latter would not issue rates clearance certificates in respect of properties owned by the applicant, but hastened to add that such "*understanding*" has "*no legal effect and has fallen away*". This notwithstanding, he submits that the six properties in question were judicially attached by the first respondent in pursuit of the settlement of the applicant's debt to the department, still in the sum of just under R15 million. In his view this "*renders the properties not capable of transfer*" although he fails to explain how this precludes the issue of the prescribed section 118 (1) (b) certificates by the second respondent.

23. It was brought to my attention during argument that such judicial attachment had not been effected as at the date of *Sharpley* deposing to his affidavit (3 November 2011), but that the first respondent had purported to execute a writ of execution in respect of immovable property against the six properties *inter alia* only after - on 15 November 2011 - a day before the matter was argued before me. As an aside I mention too that that applicant produced *Windeed* search reports in respect of the properties which show them to be owned by the second respondent. The sheriff's return of service was not produced, but it appears from the face of the writ which was furnished to me from the Bar that the sheriff was instructed to attach the applicant's "*right totle and interest in the immobavle property*" (Sic), which includes the six affected properties as well as certain other properties alleged to be owned by it.

24. The second respondent was somewhat coy about the alleged direction given by the first respondent not to issue the rates clearance certificate's concerning the six properties, but did not pertinently deny it. *Andile Fani*, its then acting municipal manager, alleges in this regard that:

> *"... I do not fully understand what the first respondent refers to as an informal understanding between the first and second respondent that the second respondent will not issue rates clearance certificates in respect of the properties owned by the applicant. I have been advised that there was no legal basis for the second respondent's officials to refuse to sign powers of attorney and to issue further rates clearance certificates in respect of the six properties."*

25. If *Fani* realised that there was no legal basis for the refusal it begs the question why the issue of the prescribed certificate did not receive the attention of the second respondent in the first place. He added that if the applicant had brought this to his attention before litigating, as accounting officer he might have investigated the matter sooner. His suggestion that this should attract an adverse costs implication for the applicant is rather mischievous, however, in the light of correspondence dated 18 August 2011 pertinently addressed by the applicant to him in respect of the very six properties in which a complaint concerning the second respondent's failure to sign off on the clearance certificates is raised. *Fani* personally replied to him on the same date as follows: "*I now get the contents of the matter – I will discuss this with the relevant officials and revert back to you*". This was either an empty promise; he forgot his undertaking to revert to the applicant on the issue; or deliberately sought to mislead the court in this regard.

26. Leaving aside the validity of the attachment of the applicant's alleged right, title and interest in property owned by the second respondent for debts allegedly owing by the applicant to the first respondent,[4] the applicant was and clearly remains entitled to the issue of rates clearance certificates in respect of the six properties. There was no legal basis to withhold these in the first place as has been correctly conceded by both respondents. The applicant has a clear right as developer to implement the agreements concluded with the six purchasers and to prevent the first respondent from influencing the second respondent against carrying out its statutory obligations in respect of this process.

27. No disputes of fact relevant to this relief sought by the applicant appear from the papers. Similarly I find nothing to gainsay that no alternative remedy exists and that the applicant will be prejudiced by its inability to secure transfer of the properties by the second respondent to the purchasers and to discharge its contractual obligations to those persons without the intervention of this court by the grant of the relief sought. Whist the issue of the purported attachments may well present a hurdle in the registration of transfer ultimately, this presents no lawful excuse against the issue by the second respondent of the prescribed certificates once the applicant has paid what is due in accordance with section 118 (1) (b) of the Municipal Systems Act. The second respondent is obliged to comply with its statutory obligations in this regard.

28. Inasmuch as the applicant seeks no more than an interdict against the first and second respondent's from acting unlawfully, it has in my view made

4 In my view this is not an issue which I need decide. Neither need I concern myself with the allegation as to the extent of the applicant's indebtedness still or the absence of a reconciliation as agreed between them.

out a proper case for the confirmation of the order sought in paragraph 2 of this court's interim order dated 18 October 2011.

29. Notwithstanding the first respondent's submission that no substantive relief is necessary concerning its obligation to pay what is necessary to ensure the issue by the second respondent of the prescribed section 118 (1) (b) certificates arising from the 29 March 2010 agreement and its recent indemnity given in this regard, it appears yet necessary to issue such directive given that the first respondent purported to persuade the second respondent not to issue certificates for the six unrelated properties, seemingly as leverage for the applicant's remaining indebtedness to it.

30. In the result I issue the following order:

1. The first respondent is interdicted from issuing directives or influencing the second respondent against signing powers of attorney or issuing the necessary rates clearance certificates in respect of the following six units in the applicant's development known as Clubview Development Housing Project and from in any way interfering with the applicant's rights to obtain signed powers of attorney and issued rates clearance certificates from the second respondent:

   Erf 10577 Clubview, King Williams Town

   Erf 10580 Clubview, King Williams Town

   Erf 10584 Clubview, King Williams Town

   Erf 10586 Clubview, King Williams Town

Erf 10589 Clubview, King Williams Town

Erf 10591 Clubview, King Williams Town;

2. The second respondent is directed to comply with its statutory obligations pursuant to the provisions of section 118 (1) (b) of the Local Government : Municipal Systems Act, No. 32 of 2000, regarding the applicant's application(s) to it for the issue of the prescribed certificates pertaining to the six properties referred to in paragraph 1 above;

3. The first respondent is directed to comply with the terms of the memorandum of agreement concluded between the applicant and the first respondent at East London on 29 March 2010 (hereinafter referred to as "the agreement") by :

3.1 paying to the second respondent forthwith after 1 April 2012 all monies due to the second respondent in respect of rates and taxes relating to and in order to obtain a rates clearance certificate(s) in respect of the fixed properties listed in Annexure "A" to the agreement;

3.2 taking all steps necessary and signing all documentation necessary to procure the transfer to the first respondent by the applicant of all of the fixed properties referred to in Annexure "A" to the agreement within a period of six (6) weeks of the granting of this order.

4. The first respondent is directed to pay the costs of the application, including the reserved costs of 18 October 2011.

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B C HARTLE

JUDGE OF THE HIGH COURT

Date of hearing : 15 November 2011

Date judgment delivered : 4 April 2012

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