

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 7440/ 2007

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

DATE: 22/05/24

SIGNATURE

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Applicant

and

MANDELA DEVELOPMENT CORPORATION First Respondent
(PTY) LTD

INVESTEC BANK LIMITED Second Respondent

PRETORIA EDUCATIONAL CENTRE CC Third Respondent

In re:

MANDELA DEVELOPMENT CORPORATION (PTY) LTD Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY First Respondent

INVESTEC BANK LIMITED Second Respondent

JUDGMENT

Tuchten J:

1 By notice of motion dated 13 September 2023, the applicant seeks to set aside completely an order granted in this court by Du Plessis J on 28 August 2007 (the Order) and condonation for the late filing to the extent necessary of the present application. I shall call the present application the rescission.

2 The rescission is brought under the common law. The applicant must therefore proffer a reasonable and acceptable explanation for the delay and good cause for the rescission.

3 The rescission is opposed by the first and third respondents, both of which submitted heads of argument and appeared through counsel to oppose the application. The first respondent did not deliver an answering affidavit but raised legal issues in a notice in terms of rule 6(5)(d)(iii). The third respondent however delivered answering papers, to which the applicant replied.

4 Before I quote the Order, I must give some context.

5 The applicant (the City) is the owner of certain immovable properties within its jurisdiction (the properties). On 26 October 2005, the City concluded a written mandate agreement (the mandate) with the first respondent (MDC) in terms of which MDC was given an exclusive mandate to market the properties. The City was obliged, in giving effect to the mandate, to comply with the law and its own policy. The mandate created a structure by which purchase prices were to be calculated. If the City's valuer found that the purchase price was not market related, a structure was created by which a fair price would ultimately be determined. Ultimately, transfer of the properties from the City to purchasers procured by MDC would be effected by the City's conveyancer.

6 On 7 July 2006, the City and PEC entered into an "interim lease agreement", to operate pending the conclusion of a sale agreement and the transfer to PEC of some of the properties, namely Remainder of erf 9[...] A[...], Remainder of portion 1 of erf 5[...] A[...], Portion 2 of erf 5[...] A[...], Portion 30 of the farm Prinshof and Portion 9 of the farm Prinshof (the Parcel). The rental for the Parcel was based on the valuation of the Parcel by the City of R4,2 million.

7 A draft agreement of sale was prepared in terms of which the third respondent (PEC) offered to buy the Parcel from the City for the sum of R2,5 million plus R500 000 for infrastructure upgrading costs. I shall for convenience refer to the sum of these two amounts as the Offered Purchase Price. A minute of a meeting held on 2 October 2006 between the then chief operating officer of the City and representatives of MDC records that the COO and the municipal manager had signed off on the transaction and awaited approval of the member of the City's mayoral committee for the inner city.

8 The draft was not signed by the City. The City refused to transfer the properties to PEC and to other prospective buyers whom MDC had introduced to the City pursuant to the mandate. As a result, in 2007, MDC brought an application in this court under case no. 7440/07 to compel the City to perform in terms of the draft agreements of sale with PEC and other prospective buyers. The second respondent, Investec, was the second respondent in the application so brought.

9 The City opposed the application to compel it to transfer the Properties. At that stage, its only defence of substance was that it required the properties for social housing purposes.

10 It appears that MDC sought to amend its prayers for relief in its notice of motion under case no. 7440/07. This amendment sought to have the prayers read:

1 That [the City] be ordered to sign all documentation required by [MDC] to effect registration required by [the City] to effect registration of transfer of the properties in annexure "C" to the notice of motion and that such

documentation be signed by [the City] within 10 days of date of service of this order on [the City].

2 That in respect of the sale of the properties listed in annexures 'B', 'D' and 'E' to the notice of motion on the terms and conditions as contained in the deeds of sale which [MDC] has submitted to [the City], [the City] be ordered to take all such steps by not later than 30 November 2007, as may be necessary –

2.1 to comply with the provisions of section 79(18) of the Local Government Ordinance 17 of 1939; and

2.2 to comply with the provisions of the Municipal Finance Management Act 56 of 2003.

3 That [the City] be ordered to sign all documentation required by [MDC] to effect registration of transfer of the properties listed in annexures 'B', 'D' and 'E' to the notice of motion within 10 days after compliance by [the City] with the provisions of paragraph 2 of this order.

4 That [the City] be ordered to sign the infrastructure cost management fund agreement drafted on 7 November 2006 and as is referred to in paragraph 10.55.5 of the founding affidavit and in paragraph 3 of annexure 'HCB52' to the application, and thereafter to deliver the signed document to the applicant by 30 September 2007.

5 That in the event of [the City] failing and/or refusing to sign any of the documents referred to in paragraphs 1, 3 and 4 of this order, the Sheriff of the High Court for Pretoria Central be authorised to sign such documents on behalf of the first respondent.

11 The papers before me show that on 28 August 2007, the notice of amendment (with a minor amendment which is not presently germane) was made an order of

court by Shongwe J. Counsel are agreed, however, that the reference to Shongwe J is a typographical error and that the Order was made by Du Plessis J.

12 In effect, by agreeing to the Order, the City abandoned its defence that certain of the Properties were needed for social housing but raised the need for compliance with the statutory measures mentioned in paragraphs 2.1 and 2.2 of the Order. The terms of the Order indicate strongly that the need to comply with the two statutory measures was not an impediment to the transaction but merely a formality which might delay its completion.

13 After 13 years of what can only be described as bureaucratic dithering, the City brought the rescission to set aside the Order.

14 The basis of the City's resistance to complying with the Order appears to be purely financial: the City asserts that when the Order was made, no assessment had been made of what a fair market value of the Parcel would be but that a market value of R9,511 million would be acceptable to it. The basis for the figure of R9,511 million is a calculation contained in a letter dated 4 March 2020 addressed by the City's revenue management section to the City's Divisional Head: Property Services. This figure is the market value of the Parcel as at 2020 and thus irrelevant to the value of the Parcel in 2007, when the Order was made.

15 The legal basis, however, was that compliance with the Order would force the City into noncompliance with s 79(18) of the Ordinance on Local Authority 17 of 1939, which requires valuation and advertisement of an intention to dispose of municipal property and s 14 of the Local Government: Municipal Finance Management Act, 56 of 2003, which prescribes certain processes before property can be sold or transferred by a municipality such as the City.

16 The minutes of the City's mayoral committee meeting on 28 November 2007 show that the transaction which led to the Order was discussed, as was the question of compliance with the two statutory measures. It was pointed out that money would have to be spent by the purchaser of the Parcel to rectify a situation in which the then existing buildings on the Parcel were constructed over municipal services. The

"Property Valuations" officials reported to the meeting that the market value of the Parcel was R5,1 million, excluding VAT. The committee resolved to recommend that the Parcel be sold for the amount so valued.

17 But the facts are clear: the Offered Purchase Price of the Parcel was settled between the parties with due regard to the market value of the Parcel. The draft deed of sale was the product of negotiation. It demonstrates¹ that the City had valued the Parcel not at R5,1 Million but at R4,2 million and that its valuation was made using the highest and best use of the Parcel. To meet that difficulty, the clause records, the purchaser, PEC, undertook to use the Parcel primarily for educational purposes and would be obliged to pay an additional amount to the City if it ever wished to use the Parcel for any other purpose. The additional amount would be calculated using a formula set out in paragraph 22.3.3.

18 It is therefore established that the purchase price of R2,5 million plus R500 000, the Offered Purchase Price, was arrived at with due regard to the expense of solving the problem of the services which ran under the existing buildings and to PEC's undertaking to use the Parcel for educational purposes. Given these facts, it is clear that the figure of R3 million was the market value of the Parcel (ie a price agreed at arms' length between a willing buyer and a willing seller), because the City was relieved of its obligation to remedy the services problem and was getting the benefit, at no extra cost to the City, of educational facilities to be provided on the properties to its residents.

19 The Order was made by consent. It recites that it was made after counsel had been heard. MDC and the City were represented by senior counsel and that the City was represented at the hearing pursuant to which the Order was made. Had the City's position in the rescission informed its stance in the application for the Order which ultimately came before Du Plessis J, it would have been incomprehensible how senior counsel could have moved for the Order by consent when, on the City's present version, the City could never comply with the Order.

¹ Para 22.3

20 But that was not the City's position before Du Plessis J. The references to the two statutory measures were in relation to purely formal requirements which, given the facts I have found established, provided no bar to the implementation of the Order.

21 The City does not explain why it consented to the Order if it had not satisfied itself that R3 million would provide adequate compensation for the Parcel. Nor does it explain why, on the City's own version, it took seventeen years for the City to bring the present application. There is no explanation for the delay in taking any significant action to address what appears to me to be a breach of the City's obligations to cooperate in the transfer of the Parcel to PEC, by attacking or seeking to vary the Order, which was the legal basis for such obligations, or otherwise. The City does not appear to have asked itself at any time after it consented to the Order: We have a problem; something has gone wrong. What should we do to fix it?

22 The basis upon which the City seeks rescission is that complying with the Order would force it to act contrary to law. I am satisfied that this is not so. The structure of the Order implies that on the date it was granted, the City was satisfied with the amount of R3 million offered in the draft and that this amount was market related. Otherwise there would have been no point in consenting to the Order, because no amount of administrative activity could ever have led to compliance with s 79(18).

23 Moreover, PEC has leased the Parcel from the City at a substantial monthly rental pending the conclusion of a sale agreement and transfer away from the City, amounting to more than R16 million..

24 When these simple facts are conjoined to the extraordinary delays in bringing the application for rescission, even after the City on its own version had determined a market value for the Parcel, I am driven to the conclusion that no good cause for the delay has been shown. The rescission was precipitated by an application brought recently against the City in this court under case no. 8172/2022 to compel transfer of the properties for which it had introduced purchasers to the City. I conclude that the City only brought the rescission in response to commercial pressure placed on it to

implement the Order and that but for this pressure, the City would have continued to let things slide.

25 To summarise: the City had to show good cause for the rescission it seeks. This would require it demonstrating that it had a basis in law for its refusal to comply with the Order and an acceptable explanation for its delay in bringing the application for rescission. The City has shown neither. The application cannot succeed.

26 The respondents have asked for punitive costs. I have found that the application for rescission was misconceived and inadequately thought through. The fundamental flaw in the application for rescission, from a costs perspective, is that no consideration appears to have been given to establishing a basis for the assertion that the Proposed Purchase Price of R3 million would not, at the relevant time, have constituted fair market value for the proposed sale properties. Although these considerations would justify a punitive costs order, I am persuaded by counsel for the City that the City was motivated by a desire to obtain clarity from a court regarding a situation which its officials found confusing and to uphold, rather than break, the law. I have therefore decided not to impose a punitive costs order on the City. Should the City persist in its determination not to comply with the Order, it might not be so fortunate the next time this matter comes before the court.

27 I make the following order:

The application is dismissed with costs and will include the costs of senior counsel, where such have been incurred. Costs will be taxed on Scale C, where applicable.

NB Tuchten
Judge of the High Court
20 May 2024

For the applicant:

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