IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 20018/2010

DATE: 2012-01-20

In the matter between

MNANDI PROPERTY DEVELOPMENT(PTY)LTD Applicant

and

EKURHULENI LOCAL COUNCIL AND OTHERS Respondents

J U D G M E N T

WILLIS, J:

[1] The applicant has approached the court by way of motion proceedings for an order that the first respondent paid an amount of R6 158 925- in respect of external electrical services installed by the applicant allegedly

on behalf of the first respondent in the township known as Helderwyk Township registration IR Gauteng. The claim is based upon the provisions of Section 71 A of the Town Planning and Townships Ordinance, Number 25 of 1965. The applicant also claimed an amount of R425 527-in respect of the provision of water services installed by the applicant in the same township. There are additional claims for interest and costs.

[2] The matter first came before me on the 2 December 2010. In the founding affidavit it is clear that the applicant relies on a so-called agreement. In paragraph 30 of the founding affidavit the applicant alleges that the agreement:-

> "Was recorded in letter dated 8 February 2006 from the respective regional directors of Water and Electricity Services who had been duly authorised to enter into these undertakings on behalf of the municipality".

Copies of these letters were annexed to the affidavit. They were marked as annexures SB 4A and SB 4B.

[3] Annexure SB 4A was a letter addressed by the Regional Director of Water Services for the first respondent to Mr Van Rooyen of Development Planning. It bears no relevance whatsoever to the applicant's case. Annexure SB 4B is a letter directed by Mr De Villiers, the Regional Director of Electricity of the first respondent to Mr Brown, who was the representative of the applicant. In that letter it is said as follows:-

> "The installation of the external electrical services

> between the proposed township and Van Eck Park substation and all internal electricity services will be the responsibility of the developer to the specification of the Ekurhuleni Metropolitan Municipality: Municipal infrastructure: Electrical Division".

Clearly, that letter does not constitute an agreement.

[4] There was a dispute of fact on the papers before me. This was apparent when I heard the matter on the 2 December 2010. I now wonder whether it was wise to have made the order which I did on the 2 December 2010. It seemed to me at the time that it should surely be a simple matter to decide whether an agreement was entered into or not. After all, one would have expected there to be clarity on an issue such as this.

[5] It is common cause that the applicant bought the land on which the township is now extant while it was still farmland. The township was proclaimed in terms of Section 69 of the 1965 Ordinance. The applicant's claim is for a refund of expenditure which it occurred for certain services relating to the provision of water and electricity which were installed by the applicant when it developed the township.

[6] The detail of terms of the order which I made on the 2 December 2010 were settled ultimately between the representatives of the different parties. The issue referred to oral evidence was whether or not an agreement was concluded between the applicant and the first respondent

that the applicant would install external electrical services and external water services at the cost of the first respondent and whether or not the applicant's claim for payment under any such agreement had become prescribed. It also pertinently recorded in the order, made by agreement between the parties, that the applicant abandoned all other bases for its claim other than the existence of the agreement referred to above.

[7] In the order which I made it was also specified that the applicant would furnish the first respondent with particulars before the 14 January 2011 on the following:-

1. Whether or not the agreement was in writing or oral.
2. The identity of the persons who represented the parties in concluding the agreement.
3. The dates of conclusion of the agreement.

[8] These now were the replies to those further particulars:-

> Ad paragraph 4.1 The agreement was oral and is reflected in several documents and correspondence as recorded in the respective agreements.

The applicant is blowing hot and cold. On the one hand, it said that the agreement was oral and on the other it said it is contained in documents. It is not alleged that the agreement which was concluded between the parties was partly oral and partly in writing.

> Ad paragraph 4.2 The identity of the persons who represented the parties at the relevant stages over the period of time are reflected

in the respective documents and correspondence.

This answer would have been excipiable for vagueness if it had been contained in a pleading in a trial action.

Next, Ad paragraph 4.3 The agreement to pay the applicant's claim for external services to the township was concluded over a protracted period of time from February 2006 to 2008 and took place at the premises of the municipality.

[9] Mr *Peter* who, together with Mr *Georgiades*, appears for the applicant, objected when the court convened to hear the oral evidence on 7 February 2011. Mr *Peter* protested that he really did not know what case he had to meet. It is reasonable that I should be chastised for having adopted, once again, a benevolent attitude to the applicant. I took the approach that if the particulars provided were vague we should first hear what the applicant's case is and thereafter, if necessary, the court could grant a postponement in order to enable the first respondent to investigate into the matter.

[10] Testimony was given by Mr Cronje, a consulting engineer who, in effect, represented the applicant at all material times on the issues relating to the provision of the engineering services namely the water and electricity. Mr Cronje's own evidence, confirmed by numerous documents provided by the applicant, and which Mr Cronje himself confirmed, reflected the position between the parties as having been the following: although there may have been protracted negotiations between the

applicant and the first respondent, although there may have been innumerable attempts to reach an amicable settlement in the matter and to agree on the amount to be paid to the applicant, no agreement was, in fact, ever reached. I repeat for emphasis: no agreement was ever reached between the parties on the issues that give rise the applicant's claim. None of the documents upon which Mr Cronje relies to show that there was, indeedt, an agreement support his case in any way whatsoever.

[11] I agree with Mr *Peter* that this whole unfortunate debacle arises from the fact that the parties failed to comply with the provisions of the relevant ordinance which require that the agreement as to who was liable to pay for what should have been concluded before the proclamation of the township. The proclamation of the township occurred without there having been any such agreement. The moral of this saga is that those persons who wish to contract for the development of properties with municipalities must make sure that all i's are dotted and t's crossed before they embark on providing services. Any other route is likely to end in tears - as has happened in this matter. The parties are not the only ones to have shed tears. The court too has engaged in much weeping, wailing and gnashing of teeth, over a protracted period of time.

[12] The practice in this division for the last few years has been that if a matter is referred by a judge for the hearing of oral evidence, the judge making the referral is expected to hear the oral evidence. That judge must

make time available in court recess or on a spare afternoon or over a weekend to hear the matter. I have, accordingly, specifically had to make sacrifices to find time to try to resolve the matter.

[13] We heard oral evidence on the 7 February 2011. After Mr Cronje had given evidence, Mr *Peter*, acting on behalf of the first respondent, asked for a postponement. As this was reasonably requested in the circumstances, I granted the postponement. We have tried in vain, over a long period of time, to find a date that suits all the parties as well as the court for the hearing of oral evidence. Finally, we were able to agree on yesterday and today. It is presently court recess. Yesterday, for various reasons, the matter did not proceed. We proceeded today. Mr Cronje concluded his evidence. Mr *Putte*r, who appears for the applicant, informed the court that he wished to call Mr Brown (who was the deponent to the founding affidavit) to testify on behalf of the applicant.

[14] I then raised the point, *mero motu*, as to whether any useful purpose would be served by continuing the agony in this matter and by hearing Mr Brown. I may point out that today is Friday afternoon. We are in court recess. I do not have further time to make available for the hearing of this matter in court recess. I certainly do not have time in the first term to hear this matter and, in the second term, I shall be away on sabbatical oversea. Therefore, if we were to try to continue this matter we would be looking at a very long adjournment. The most important factor that weighs with me has been set out in Herbstein and Van Winsen's *The Civil Practice of the*

High Courts and the Supreme Court of Appeal of South Africa, Volume 1, 5th Edition by Cilliers, Loots and Nel at p465:-

> The object of Rule 16(5)(g) (the rule under which I referred the matter to oral evidence) is manifestly to restrict the scope and the ambit of the inquiry and the number of witnesses to limits defined by the court, and in so to inhibit abuse of the procedure that the sub rule provides by attempts to convert the application into a full-dress trial, while at the same time enabling the court to inquire fully into the 'specified issues' on which there is a dispute of fact. It has been said that the ordering of oral evidence does not give either party the right to a roving commission and to put before the court any facts which that party thinks it would like the court to be aware of. The issues must be defined and the inquiry must be limited to its proper scope.

[15] In the case of *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) it was held that it is open to a court to which a matter has been referred for oral evidence to hold that it is unnecessary to hear oral evidence and to decide the matter on the papers. *A fortiori,* I consider that it is within my power (and indeed appropriate in circumstances such as this) for me to decide, after a witness who was clearly critical to the whole case has finished his evidence, that no useful purpose will be served by continuing with the matter.

[16] As was said in the case of *Combrinck* v *Rautenbach* 1951 (4) SA 357 (T) at 359G to H, even if evidence is allowed under Rule 6 (5) (*g*), the proceedings remain motion proceedings and do not become a *rauw actie*. It should further be born in mind that the witness whom Mr *Putter* proposed to call, Mr Brown, deposed to the founding affidavit. I have already referred to certain critical defects in that founding affidavit: the

documents upon which both Mr Brown and Mr Cronje relied to show that there was an agreement do not support this contention at all. Such evidence as Mr Brown may give relating to an agreement having been concluded is entirely contradicted by the evidence of Mr Cronje. Mr Cronje's evidence is clearly to the effect that, at all relevant times, the parties were attempting to reach an agreement, but did not succeed in doing so. An attempt at reaching an agreement cannot be made by a court into an agreement. There either is an agreement or there is not. Accordingly, it seems to me that it is appropriate to call a halt to these oral evidence proceedings. This I now do. I have had the benefit of hearing counsel for the parties on the issues raised be me, *mero motu*. It is appropriate that the application should, at this juncture, be dismissed with costs.

[17] Mr *Peter* has asked that the costs should include two counsel. I think this is appropriate. The amount claimed is around R6 million. Even today, this is a relatively large amount of money. Furthermore, the reputation of the municipality is at stake. One would expect municipalities to pay in terms of their obligations. If it is alleged that they do not pay, it is a serious matter indeed. It is a matter in which the public has an interest. I therefore have no difficulty with the question of costs for two counsel. I also see no reason why all the reserved costs should not also be included in the order. Mr *Peter* asked that I include in the costs order a qualification which would allow the costs relating to the necessary attendances of a certain Mr Smith, who is now in Cape Town. From the correspondence, exchanged

between the parties, it is clear that Mr Smith represented the municipality on certain key issues. It so happens, that after cross-examination of Mr Cronje today, which referred to various documents, Mr Smith would no longer be a necessary witness. Until today it would have been necessary for the applicant to consult with him and to prepare with him.

[17] The following is the order of the court:-

1. The application is dismissed with costs, which costs are to include the costs of two counsel.
2. The costs to be allowed include all costs reserved to date and the costs of the necessary attendance of Mr Smith.

Counsel for the Applicant: Advocate L G F *Putter*.

Counsel for the First Respondent: Advocate J R *Peter*, SC (with him, Advocate C *Georgiades*).

Attorneys for the Applicant: AJ Van Rensburg Inc.

Attorneys for the First Respondent: Nozuko Nxusani Inc.

Dates of hearing: 2 December 2010, 7 February 2011, 20 January 2012.

Date of Judgment: 20 January 2012.