

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NUMBER: 91419 / 2015

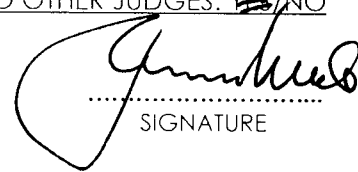
DATE OF HEARING: 27 OCTOBER 2016

DATE OF JUDGMENT: 11 NOVEMBER 2016

In the matter between:

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

11-11-2016
DATE


SIGNATURE

LYONS AND DAVIDSON CONSTRUCTION CC

Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY

First Respondent

GAUTENG DEPARTMENT OF HOUSING

Second Respondent

REGISTRAR OF DEEDS

Third Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

[1] The Applicant has applied for the upliftment of the caveat registered over Portion 1 130, Erf 21169, Tsakane Extension Township ("the property"). The Applicant claims to be the developer over the property.

[2] In August 2005, Circle Seven Trading 660 CC ("Circle Seven") entered into a written agreement with Dambou Eiendomontwikkelaars CC ("Dambou") in terms whereof Circle 7 purchased the rights to develop the property.

[3] The Applicant relies on a services agreement concluded between the then Town Committee of Tsakane and the owners of the property, being Dambou and Township Realtors SA (Pty) Limited ("Township Realtors").

[4] The First Respondent submitted that it is important to bear in mind that the service agreement applies to the entire Tsakane Township. Clause 5 thereof provides for the developer to install internal services. Clause 5.2 provides that:

"5.2 The Developer shall in addition at its own cost provide and install an internal road network and an internal storm water drainage system, on the basis that:

5.2.1 the Developer proposes development in phases as set out in 5.3 below. All roads in the first phase shall be bituminous (tar) surfaced and the storm water system shall consist of an underground system;

5.2.2 dependent on the affordability of erven and market demand the Developer shall as far possible (sic) during the following phases of development endeavour to bituminous surface all roads, it being recorded that not more than 40 % (Forty percent) of the total development of the township shall consist of gravel roads with bituminous surface bus routes as well as a surface drainage system.”

- [5] The service agreement is not relevant to the property in question. Erf 21669 ought to be distinguished from Tsakane Ext 11. The latter comprises the entire township whereas this application is only concerned with Erf 21669. This property constitutes private land.
- [6] Erf 21699 comprises of portions 1 to 131. Portion 132 is the road within the property. The Applicant claims that during 2006 Circle Seven and the Lesedi Partnership proceeded with the development of the property and employed a property management company to oversee the installation of services in terms of the services agreement. The Applicant submitted that some of the erven were sold to third parties during 1991. These were Erven 1 and 2, 51 to 60, 70 to 79, 89 to 104, 107 to 109 and 112. These erven were also registered in the names of third parties. These erven or portions are situated within the subject property and are to be differentiated from the entire Tsakane township.
- [7] The Applicant submitted that the installation of the water network and sewer network was completed during November 2006 and a certificate of completion was issued by CPMS, the property managers on 14 November 2006. The

Applicant relied on a copy of the certificate marked annexure "E" to the founding affidavit. The Applicant submitted that it came to its knowledge that the Second Respondent, the Gauteng Department of Housing, had registered a caveat over the remaining erven. As a result of the caveat the properties could not be registered to third parties. These are Portions 2, 4 to 7, 9 to 12, 14 to 49, 56 to 65, 67 to 69, 75 to 87, 93 to 104 and 113 to 130. The Third Respondent could not transfer these properties to the purchasers without confirmation that these portions had been fully serviced. The Applicant relies upon the confirmation of one Mrs Smith of the Department of Housing who confirmed that the caveat was registered over the properties.

- [8] The Applicant submitted that a meeting took place between the Municipality's officials and the Applicant's predecessors of the Lesedi Partnership in November 2008. At that meeting the Municipality's official, namely Mr Beetge, stated that the road should be paved instead of tarred. The reason for this was that the Municipality did not want to maintain the roads and that the owners should maintain the roads. The Applicant relies upon the services agreement which provides that 40% of the roads in the township have been tarred. According to the First Respondent the Applicant erroneously overlooks the fact that the services agreement applies to the whole Tsakane Township and not this property.
- [9] The Applicant relied on the letter purportedly issued by the Municipality on 7 February 2012 confirming that the caveat on the properties could be uplifted. The Municipality submitted in its answering affidavit that the property has not

been tarred, nor has it been paved. The developer has thus not installed the requisite services in order for the caveat to be uplifted. The developer has also failed to install a storm water drainage system. The caveat imposed by the Second Respondent, in order to protect the purchasers and potential owners of stands are on portions within the property, cannot accordingly be uplifted. The purpose of the caveat is that it serves as a “hold” over the developer to ensure that third parties are protected and that it is forced to install services over the property or township. From the annexures to the papers it appears that only certain properties have access to that public road, namely Ranyao Street.

- [10] The Municipality’s engineer for roads and storm water in the eastern region of the Municipality, Mr Beetge, confirmed that the road has not been developed within the property, nor has storm water drainage been installed. The GIS (Geographic Information System) has also reflected that the road has not been tarred or paved. These were shown to me on coloured aerial maps which are annexed to the Municipality’s answering affidavit. They assist to show the First Respondent’s version. The road appears not to have been tarred or paved. Accordingly the First Respondent submitted that transfer of the erven within the property cannot be effected.
- [11] The First Respondent submitted that the Applicant should not have applied to court whilst knowing that it hasn’t complied by not installing the required services. The Applicant’s predecessor, the Lesedi Partnership, was informed in writing on 20 April 2009 by the Province that the completion certificate that

it relied on (dated 14 November 2006) does not mention that roads and storm water were installed. The Applicant's predecessor, the Lesedi Partnership, also launched an application for identical relief in this court under case number 2009/20681 which application is still pending.

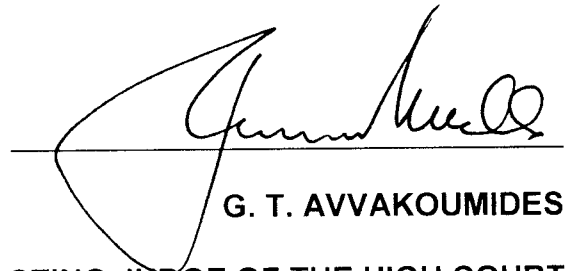
[12] Of most concern is the annexure "N" to the Applicant's founding papers which appears to be a letter written by one Mr A. A. Tshabalala from the First Respondent requesting that the caveat be uplifted. Mr Tshabalala deposed to a confirmatory affidavit which is attached to the First Respondent's answering affidavit in which he denies having signed such letter. Mr AA Tshabalala, the Municipality's senior building inspector disputes his signature as well and his signature is visibly from the letter marked annexure "N". Mr Tshabalala has also stated that he would also not have been authorized to have signed the sign annexure "N" as he is only authorised to verify building plans. This being the case I cannot see how this application can be decided on the papers before me.

[13] The Applicant cannot thus rely on annexure "N" to prove that it has installed the required services. The First Respondent submitted that best evidence is not the certificate submitted by the Applicant but the actual version of the Municipality, namely that the road has not been completed and neither has the drainage system been completed.

[14] The Applicant submitted that it is in possession of annexure "N" confirming the go ahead to uplift the caveat but could not make any submissions about the

allegations made by Mr Tshabalala. The Applicant concede thus that the application could not be decided on the papers as they stood before me and submitted that the appropriate order under the circumstances would be a referral to oral evidence. I do not agree. The dispute is material and the Plascon Evans rule must accordingly apply. The application had to be decided on the First Respondent's version.

[15] I accordingly make the following order: the application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'G. T. Avvakoumides', is written over a horizontal line. The signature is stylized with a large, sweeping initial 'G'.

G. T. AVVAKOUMIDES
ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE: 11 NOVEMBER 2016

Representation for Applicant:

Counsel: J. N. W Botha

Instructed by: Meyer & Mahuntsi Attorneys

Representation for First Respondent:

Counsel: C. Georgiades

Instructed by: Pravina Rughoo-Nandan Attorneys

Representation for Second and Third Respondents: No appearance