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

CASE NO: A448/2017

A quo case no: 36706/14

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

17/10/2019
DATE

SIGNATURE

In the matter between:

VOSLOORUS SQUARE CC Appellant

and

TRAMORE PROPERTY GROUP (PTY)LTD Respondent

JUDGMENT

NEUKIRCHER J:

1. The gist of this appeal involves the enforcement of an exchange of land agreement between the Ekhuruleni Municipality (Ekhuruleni)[1] and the respondent (Tramore)[2].

THE FACTS

2. During late 1991, Ekhuruleni and Tramore entered into a written agreement (the first agreement) under which:

   2.1 the two would swop the following land:

   Ekhuruleni would swop erven no 21618 to 21708 in Vosloorus Extension 29 for erven 14258 to 14261 in Vosloorus Extension 30;

   2.2 there would be no exchange of money for any of the pieces of land;

   2.3 the transfers of land would take place simultaneously and the one would not be able to demand performance without it complying with its obligations *pari passu*; and

   2.4 a Service Agreement would be entered into between the parties[3].

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1 Previously known as the City Council of Vosloorus
2 Previously known as Permprop (pty) Ltd
3 To provide bulk services, which are engineering services and are the responsibility of the Local Municipality to provide. The bulk services include water reservoirs and

3. At the stage of conclusion of the first agreement, proclamation of the area as a Township was in progress – this proclamation only occurred on 19 September 2012. Despite this, Tramore handed over possession of its land to Ekhuruleni, which then proceeded to build a school on the land.[4] However, transfer was never effected of either parcels of land, each to the other.

4. During April 2000 the appellant entered into a written agreement of sale (the second agreement) with Tramore. Under this agreement:

   4.1 Tramore sold the proposed erven 21686 to 21708 in the Township of Vosloorus Extension 29, to the appellant;

   4.2 the appellant paid R100 877,00 for the properties;

   4.3 the appellant acknowledged that it would be obliged to conclude a service agreement with Ekhuruleni and pay any contributions levied by Ekhuruleni.

5. It is not disputed that appellant has paid this purchase price.

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distribution networks, electrical installations and distribution networks, sewerage treatment works and mains, roads and storm water.

[4] This, and the fact that the school presently stands vacant, is common cause

6. Subsequent to the second agreement, and without receiving transfer of the properties into its name, the appellant has agreed to sell Erf 21687 to Eskom[5] and Erf 21694 to a private developer[6].

7. Unfortunately for the appellant neither Ekhuruleni nor Tramore took any steps to give effect to the first agreement subsequent to the Proclamation of the Township in 2012.

8. As a result, appellant sued Tramore[7] in the court a quo for:

   8.1 the transfers to be effected between Ekhuruleni and Tramore; and

   8.2 costs of suit.

THE OPPOSITION

9. Although Ekhuruleni originally opposed the application and filed an answering affidavit, it subsequently withdrew its opposition and did not oppose the present appeal.

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5 To build a sub-station
6 For the improvement of an existing shopping centre
7 With Ekhuruleni as second respondent

10. Tramore raised several points *in limine*, which it persisted with on appeal:

10.1 that the appellant has neither alleged, nor tendered any proof of its compliance with its obligations under the first agreement as (a) there is no tender for the costs of the transfer of the properties, (b) it has failed to conclude the service agreement with Ekhuruleni, and (c) it has failed to provide the necessary guarantees required by Ekhuruleni pursuant to the Proclamation of the Township. This is despite being called upon to do so by Tramore;

10.2 Regulation 24(1) and 25(2)[8] are applicable to the properties and appellant has failed to comply with its responsibilities;

10.3 the appellant has no *locus standi* to enforce the agreement to which it was not a party;

10.4 in any event, Tramore has cancelled the agreement.

11. It thus argues that the appellant cannot succeed.

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8 As promulgated under s66(1) of the Black Committees Development Act 4 of 1984

THE A QUO ORDER

12. The court *a quo* dismissed the application upholding the point on *locus standi*.[9]

THIS APPEAL

13. Statutory impediment

Counsel for Tramore referred in his argument to the issue of the statutory and contractual impediments to the transfer of the properties from Ekhuruleni to the respondent and respondent to appellant. As part of this argument he relied on the Regulations regulating Township Establishment in Land Use published under GN 1897 of 12 September 1986 in terms of s66(1) of Act 4 of 1984.

15. However, Act 4 of 1984 was repealed by s 72(1)(a) of the Abolition of Racially Biased Land Measures[10]. This, perforce, means that any alleged statutory impediment no longer exists and thus this point is not good and is dismissed.

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9 Although the other points were also dealt with, the reason that the application was dismissed is because of the *locus standi* point

10 No 108 of 1991

17. Contractual impediment

As to the contractual issues, and this is also tied up with the *locus standi* issue, the argument is that appellant was obliged to *inter alia* provide guarantees for bulk and internal services - this was required by Ekhuruleni. It also had to conclude a services agreement with Ekhuruleni.

18. Despite demand that it do so by the respondent[11], it has failed to, and as a result the argument is that the appellant is not entitled to claim performance until it has fulfilled its obligations or tendered performance:

"As stated in the title 'Contract' in 5(1) LAWSA 2ed para 210, in the case of reciprocal contracts, one party undertakes to perform specifically in exchange for a particular counter-performance by the other. In such cases, the principle of reciprocity applies: the first party is not entitled to demand counter-performance from the other party unless the first party has himself or herself performed, or is prepared to perform, as the case may be."[12]

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11 My emphasis

12 Smith v Van den Heever 2011 (3) SA 140 (SCA) par [14]

19. However, this allegation by Tramore is not correct:

19.1 pursuant to its desire to rezone the purchased erven from commercial land to residential, appellant was obliged to commission certain reports[13] and obtain approval from various departments[14] within Ekhuruleni;

19.2 all these reports were commissioned and were approved by Ekhuruleni;

19.3 during May 2013 Ekhuruleni had drawn a Services Agreement between it and Tramore and parallel to that Tramore drew an addendum in terms of which appellant would take over Tramore's obligations under the first agreement;[15]

19.4 Tramore and Ekhuruleni signed the Services Agreement and Tramore and appellant signed the addendum. Ekhuruleni unfortunately never signed the addendum. However, the trail of correspondence demonstrates that on 18 October 2013 Ekhuruleni confirmed that

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13 i.e the storm water report, the water and sewer report, the electricity reticulation report and the dolomite stability investigation report

14 Eg Roads & Storm Water Department; the Energy Department

15 The addendum was no more than a substitution agreement

"[A]s the agreement is already signed by the Council I do not have any objection that you arrange with Tramore for the signing of the contract on their part at the council's offices in Boksburg.";

20. It is very clear from all the correspondence that Ekhuruleni both knew of the onward sale of the erven and also had no objection to the appellant standing in for Tramore's obligations under the first agreement.

21. What is, to my mind, inconceivable is that Tramore expects appellant to lay out money to put in place services for a property in respect of which transfer has yet to see the light of day, nor in respect of which Ekhuruleni has not insisted that these services be provided.

22. In my view, clause 10.5 enforcement of the second agreement can only take place once the first transfer has taken place and, in any event, it is for Ekhuruleni to insist on enforcement. It is paradoxical to expect that, as owner, Ekhuruleni would demand anything of the non-owner (i.e. appellant) and it certainly cannot demand the service contributions from itself.

23. Here, the email from Susan Dowds of Ekhuruleni to Tramore dated 20 January 2014 is relevant. In this, she states:

"Please note that the properties in Vosloorus X29 will not be transferred to yourself in order for you to transfer the properties which you sold to Vusi Khumalo, until such time as the properties in Vosloorus X30 is (sic) transferred to the council."

24. It is thus quite clear that Ekhuruleni's failure to sign the addendum had nothing to do with the provision of services or guarantees, but everything to do with Tramore's failure to comply with its own obligations under the first agreement.

25. It is also quite clear from the correspondence that:

25.1 the appellant tendered to provide Ekhuruleni with an irrevocable bank guarantee in the amount demanded[16];

25.2 upon taking transfer appellant tendered to see to the process of re-zoning and thereafter

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16 Which is R450 000,00 per par 4 of the Services Agreement

"... our engineers will be ready to start the process of internal services to commence our developments."[17]

Cancellation

26. Given that the purported "cancellation" only reared its head on 19 June 2014, some 6 weeks after the application was served and 8 months after the appellant's tender in its letter of 16 October 2013, the cancellation is quite obviously simply a ploy to rid Tramore of the agreement it entered into with appellant in April 2000. The cancellation has no basis in light of the appellant's tender[18].

CONCLUSION

27. Thus from all the facts, it is clear that appellant is entitled to the amended relief sought as none of the points *in limine* are good and they are all dismissed.

28. Given the appellant's success in this appeal, the order *a quo* must be set aside and the costs must follow the result.

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17 Per appellant's letter dated 16 October 2013
18 Which is repeated in the application

ORDER

29. In the result, the following order is granted:

29.1 the appeal is upheld with costs;

29.2 the order of the court *a quo* is set aside and replaced with the following:

29.2.1 that the Ekhuruleni Municipality and the respondent are ordered to take all steps necessary to transfer to each other the land envisaged in the Exchange Agreement dated 1991 and that *pari passu* therewith the respondent shall pass transfer of the properties received from Ekhuruleni to applicant;

29.2.2 the Services Agreement signed by the Ekhuruleni Municipality and the respondent respectively on 29 May 2013 and 14 February 2014 remains *in esse* and is ceded and assigned from respondent to applicant;

29.2.3 the first respondent is ordered to pay the applicant's costs.

NEUKIRCHER J

I agree

TUCHTEN J

I agree

TEFFO J

Appellant's Attorneys: Venn & Muller Attorneys

Appellant's Counsel: Mr BG Savvas

Respondent's Attorneys: Van der Meer & Schoonbee Attorneys

Respondent's Counsel: Mr HP Wessels

Date of hearing: 11 September 2019

Date of judgment: 4 October 2019