THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 20436/2014

In the matters between:

GREEN WILLOWS PROPERTIES 215 (PTY) LTD **APPELLANT**

and

ROGALLA VON BIBERSTEIN INVESTMENT COMPANY (PTY) LTD **RESPONDENT**

Neutral citation: *Green Willows Properties v Rogalla Investment Company* (20436/14) [2015] ZASCA133 (29 September 2015)

Coram: Mpati P, Cachalia, Tshiqi, Swain JJA and Gorven AJA

Heard: **11 September 2015**

Delivered: **29 September 2015**

Summary: Contract – sale of land – whether terms and conditions in written agreement fulfilled – recusal – trial judge refusing recusal application after dismissal of application of absolution from the instance – no basis for application for recusal of trial judge.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Pillay J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Tshiqi JA (Mpati P, Cachalia, Swain JJA and Govern AJA) CONCURRING

[1] The issue in this appeal is whether the terms of a written contract of sale of property concluded in June 2006 between the appellant (Green Willows) and the respondent (Rogalla) were fulfilled. In terms of the written contract Rogalla undertook to sell to Green Willows, a piece of undeveloped land: Portion 97 of the Farm Brakkloof, in the Plettenberg Bay Municipal area, now known as the Bitou Municipality, Western Cape Province (the Municipality) for R13 250 000. Green Willows intended to develop it by constructing 80 residential units, measuring a minimum of 9 000 square metres as well as onsite parking bays. In order for the development to take place, it was necessary to rezone the property – which at the time allowed for only one building – through an amendment allowing for the proposed development. The approval of the amendment had to be given by the Municipality.

[2] The written contract contained a clause which provided:

‘18.1 The Seller warrants written approval by the local authority for the development of property as set out in annexure B, for the construction of 80 residential units measuring a minimum of 9 000 square meters plus onsite parking bays (“the scheme”).

18.2 The Purchaser shall, pending the granting of final written approval of the scheme by all relevant authorities retain an amount of R3 250 000 (Three Million Two Hundred and Fifty Thousand Rand) of the purchase price, which amount shall be secured by a bank guarantee/s issued by a Bank or other recognised financial institution, acceptable to the Seller and shall be payable with interest thereon, calculated from date of registration of transfer at the rate of 5 per cent per annum, compounded monthly, on demand upon the granting of such final written approval as referred to herein, and which amount shall be forfeited to the Purchaser should final written approval of the scheme by all relevant authorities not be granted as provided for in this clause 18.

18.3 The Purchaser shall, at the Purchaser’s cost, do all things necessary and execute and produce all documents that may be reasonably required by all relevant authorities for the securing of final written approval of the scheme, including but not limited to the following: site layout plan, Road and storm water design, sewer design, water supply and services report.

18.4 The Purchaser undertakes to do all things as may be reasonably required by all relevant authorities for the securing of final written approval of the scheme within 90 days from the signature of this offer to purchase by the last party signing in time.

18.5 In the event that for whatsoever reason, any final written approval of the scheme, required by any relevant authority, is not secured within the period referred to in clause 18.4 above, the same shall automatically be extended for a further period of 90 days or by such period as the parties may agree in writing, and the Seller shall be entitled, at the Purchaser’s cost and acting as the Purchaser’s duly authorised attorney and in his place and stead, to secure fulfilment of all such things as maybe reasonably required by all relevant authorities of the scheme and to comply with such conditions as may be prescribed by any relevant authority for the submission of building plans for the purpose of the development of the property.’

The 90 day extension contemplated in clause 18.5 had the effect that the final written approval had to be obtained not later than 18 December 2006.

[3] On 5 May 2006 the Municipality had already passed a resolution ('the May resolution') imposing certain conditions in respect of the anticipated development. Only two of those conditions are relevant for the purposes of the dispute. The resolution containing the relevant conditions reads:

'That in terms of section 43(3) of the Land Use Planning Ordinance, 1985 (Ord. 15 of 1985) [LUPO] approval be granted for an amendment of the conditions of rezoning approval which were imposed by the Municipal Council on 29 May 1995 in respect of Portion 97 of the Farm Brakkloof No.443 in order to increase the number of residential "units", and to replace the building which currently accommodates the reception area, conference room and restaurant with additional residential "units", subject to the following conditions:

'(a) ...
(b) ...
(c) ...
(d) ...
(e) That the ownership status, management and maintenance responsibilities of the existing access road be addressed to the satisfaction of the Head: Public Works, and that this condition may require that the access road be subdivided as a separate erf.
(f) ...
(g) That, prior to building plan approval, a Site Development Plan which addresses all the above-mentioned conditions, be submitted for consideration and approval (and that no construction work of any nature occurs prior to building plan approval).'

The reference to Annexure B in Clause 18.1 of the contract is a reference to this resolution.

[4] Pursuant to the agreement the property was transferred to Green Willows on 18 September 2006. Green Willows paid an amount of R10 000 000 of the purchase price against registration of transfer and secured the balance of R3 250 000 plus retention interest through a bank guarantee. In the meantime, and in order to ensure compliance with the terms of the contract, Rogalla took steps to obtain the approval. On 18 December 2006 the Municipality passed a resolution to the following effect:

'That approval be granted for the Revised Site Development Plan No. 06/08-01, 02 and 04 dated 10 December 2006, as further revised on 15 December 2006 (which makes provision

for 80 residential units within a total floor area of 9 000m^2 and not less than 120 parking bays) in respect of Portion 97 of the Farm Brakkloof No.443, subject to the following conditions:

"(a) That the floor levels of all habitable rooms be above the 1:50 year floodline.
(b) That the ownership status, management and maintenance responsibilities of the existing access road be addressed to the satisfaction of the Head: Public Works prior to any building plan approval, and that this condition may require that the access road be subdivided as a separate erf.
(c) That an appropriate Services Agreement (which includes detail of the payment of augmentation and related fees) be finalised prior to building plan approval"'.

[5] It is this resolution, to which I shall refer as the December resolution, that is the subject matter of this dispute. The question to be answered is whether the resolution constitutes final written approval as contemplated by the contract. This requires an interpretation of clause 18, in particular, to ascertain the meaning of the words 'final written approval'.

[6] The resolution was received by Rogalla on 18 December 2006. On the same day Rogalla, through its attorneys, wrote a letter to Green Willows stating that the terms of clause 18.2 of the contract had been fulfilled and demanding payment of the outstanding amount of R3 250 000. No payment was forthcoming and further correspondence exchanged between the parties did not yield any result.

[7] Rogalla issued summons against Green Willows for the payment of this amount, plus retention and mora interest. Rogalla also claimed payment of an additional amount of R81 762, which it stated represented costs incurred during the second period of 90 days leading up to 19 December 2006 for securing fulfilment of all such things as were reasonably required by the relevant authorities, as contemplated by clause 18.5. Green Willows defended the action. It denied that it was liable to pay the amount claimed, and pleaded that final written approval had not been granted and the amount was thus forfeited in terms of clause 18.2 of the

contract. The proceedings in the high court culminated in a trial before Pillay J in the KwaZulu-Natal Division, Pietermaritzburg[1].

[8] At the trial, Rogalla led the evidence of several witnesses and after it had closed its case, Green Willows moved an application for absolution from the instance. After argument, the judge took some time to consider the application, after which she gave a ruling dismissing it. The ruling was in the form of a judgment in which the court made certain factual and legal findings. Before the trial could proceed further, a debate between the judge and counsel ensued, with the judge responding to questions by counsel for Green Willows on whether certain specific findings were final, to which she responded that they were final unless displaced by the leading of further evidence. After this interaction, counsel for Green Willows applied for the judge's recusal.

[9] The main ground for the application was that, without hearing the case for the defendant and before the trial was concluded, the judge had made conclusive findings against her client. Pillay J dismissed the application for her recusal. She stated that it had not been demonstrated that the court would not be open to persuasion by further evidence and submissions of counsel. Green Willows then applied for a postponement in order to bring an application for leave to appeal against this order. This application too was refused. Thereafter Green Willows closed its case without tendering any evidence. The matter was argued and judgment given in due course.

[10] On the merits, the court a quo stated that it was impressed by the evidence of Mr Gericke and Mr Underwood, the two witnesses who testified at the instance of Rogalla. It found that the approval of the site development plan ('SDP'), through the December resolution finally removed any impediments that previously existed by way of conditions or restrictions. It further found that, even if it were accepted that the approval was invalid, it stood until set aside, in the light of the decision of this court in *Oudekraal*[2]. The court consequently granted an order in Rogalla's favour. A

[1] The Court has been renamed the KwaZulu-Natal Division of the High Court, Pietermaritzburg (KZP) since 23 August 2013 in terms of the Renaming of High Courts 2014(3) SA 319.
[2] *Ouderkraal Estates (Pty) Ltd v City of Cape Town & others* 2010 (1) SA 333 (SCA).

subsequent application for leave to appeal was dismissed. This appeal is with the leave of this court.

[11] In this court, Green Willows persisted with the contention that the terms of the contract had not been met. It submitted that the approval of the SDP by the December resolution did not constitute final written approval.

Did the December resolution constitute final approval?

[12] Among the witnesses who testified for Rogalla were Mr Gericke and Mr Underwood. In reaching the conclusion that the December resolution constituted final approval, the high court accepted their evidence. Mr Gericke was the manager of the Municipality's town planning and development department. He had been involved in the process leading to the approval of the SDP. He holds a BSc degree, a Master's degree in town and regional planning and an LLB degree. His career in town planning and municipalities goes back to 1989. In 2003 he joined the Bitou Municipality. He testified about his knowledge of the resolutions that were taken by the Municipality concerning this matter and other similar applications for the approval of development schemes. He stated that he had the delegated powers to sign off and finally approve all building plans for the Municipality.

[13] Mr Underwood testified as an expert witness in town and regional planning. Although he was not directly involved in the approval process pertaining to this dispute, he stated that he had extensive knowledge and experience of planning procedures and legislation in the Western Cape.

[14] Messrs Gericke and Underwood explained the process followed in considering rezoning applications in the Western Cape and explained the significance of a SDP. They stated that a rezoning application comprised four stages, the approval of a SDP being the completion of the third stage in the process. According to both of them, a SDP, although not mentioned under the LUPO, was a town planning technique that was commonly used to assist municipalities to understand the nature of a development in a schematic or conceptual form. It showed the layout, form and quantification of the development proposal in sufficient detail to make the proposal

clear. When approved, it would serve as assurance that the proposed development would be permitted and the purchaser could with certainty go ahead and obtain valuations in respect of the property on the basis of that approval. The next step, once a SDP had been approved, was the submission of building plans that would also be approved, as long as they complied with the SDP. The fourth stage also entailed the approval of detailed engineering works drawings and associated administrative steps. Thereafter construction would be allowed to proceed.

[15] Green Willows did not lead any evidence to dispute that of these two witnesses. It must thus be accepted that the SDP was a tool utilised in the Municipality to grant final approval of a rezoning application and that once approved, it constituted final written approval as envisaged by clause 18. That this is so is supported by the fact that the May resolution, is the resolution by which the Municipality imposed all conditions that needed to be fulfilled before it would approve the development. Significantly, sub-paragraph (g) of that resolution means that a SDP was required to address these conditions before building plans could be approved and construction could commence. The required SDP was submitted and approved. It can thus be inferred that the Municipality was satisfied that it had addressed all the conditions prescribed by it in clauses (a) to (f) of the May resolution, and Mr Gericke confirmed this. It thus follows that written approval, as contemplated in clause 18.1 of the contract, for the development of the property as set out in May resolution (the scheme) was obtained timeously.

[16] I am strengthened in my reasoning by two factors. First, by letter dated 14 December 2006 Green Willows requested Mr Gericke to ‘confirm in writing to ourselves if there is final confirmation of this site development plan’ noting that ‘the final payment for the property is due pending the confirmation of the development’. This is a clear indication that, at the time, Green Willows itself saw the approval of the SDP as the final written approval which would make the balance of the purchase price payable. Secondly, after the December resolution was passed and sent to it, Green Willows elected to submit another application for rezoning of the same property. After considering that subsequent application, the Municipality passed a resolution granting approval on the strength of a revised SDP that provided for a reduced number of units. In that instance Green Willows accepted the resolution as

constituting final written approval and on the strength of this, submitted building plans for approval. The manner in which this application was processed illustrates the cogency of the evidence of Messrs Gericke and Underwood that the approval of a SDP constituted final written approval.

[17] The above finding alone should dispose of this appeal. But counsel for Green Willows persisted with an attack on the December resolution on two further grounds. First, she submitted that the Municipality had failed to obtain a departure from the rezoning scheme as required in terms of s 15(1) of the LUPO and the Regulations promulgated in terms of s 47(1) thereof. The Municipality, so the argument proceeded, thus did not lawfully approve a floor area or bulk of 9 000 square metres. In the alternative, Green Willows contended that the resolution did not fulfil condition (e) of the May resolution. Condition (e) states:

'That the ownership status, management and maintenance responsibilities of the existing access road be addressed to the satisfaction of the Head: Public Works, and that this condition may require that the access road be subdivided as a separate erf.'

I will deal with both grounds in turn.

The Departure in relation to Bulk

[18] Bulk is defined as the factor, expressed as a ratio of one ie 1:00 prescribed for the calculation of the maximum floor area of a building or buildings permissible on an erf[3]. Bulk governs the density of the construction allowed on any property. The size of the floor area of a building on land is governed by the bulk limitation in the zoning scheme. The warranty required an assurance that it was possible to get 9 000 square metres of bulk on the property.

[19] The issue relating to a departure arose for the first time during Mr Underwood's cross-examination. He conceded that before he came to court, he did not do a bulk factor calculation to satisfy himself that 9 000 square metres would be achievable on the property. He was asked to perform a manual measurement of the floor area depicted in the SDP. He then stated that it appeared that there was a bulk

[3] The term is defined as such in the Plettenberg Bay Town Planning Scheme.

shortage or a minor bulk overrun as compared to the size of the property but that the deviation could be fixed through a technique normally used in the Western Cape called ‘departures’. He, however, testified that he could not say that the plan proved that one could not get 9 000 square metres on the property concerned. He also stated that, although it was ‘tight’, it could be achieved within the ambit of the rights conferred by the approval of the SDP.

[20] Mr Gericke was also questioned on the bulk factor. He testified that the Municipality approved the SDP on the basis that it would not exceed 9 000 square metres. During cross-examination he agreed that at the time of the approval he had not engaged in a calculation to fit the 9 000 square metres, but took the initiative to do so during the course of the trial to satisfy himself that it was indeed possible. After performing the exercise, he was satisfied that with minor ‘tweaking’ of the plan this was possible. On a factual level, accordingly, there is no evidence that the bulk factor could not be achieved and that a departure was necessary.

[21] Significantly, when questioned on whether it was necessary to submit a separate application for a departure, he stated that the permissible bulk is determined when the SDP is submitted and evaluated. He said that if a SDP for instance, indicates a different building line from that stipulated in the zoning scheme regulations, the municipality would accept and approve it as an application for relaxation of that building line. According to him, a SDP was a package of directions of what a developer could or could not do. Insofar as was necessary, therefore, the application for relaxation was made and granted. There is no basis to reject the evidence of Mr Gericke in this regard. The contention that the Municipality failed to approve a departure from the rezoning scheme thus has no merit.

The condition relating to the access road

[22] The contention by Green Willows that condition (e) of the May resolution had not been fulfilled was influenced by a misunderstanding of Mr Gericke’s evidence when he stated that there was a long standing disagreement between the Municipality and the roads agency in relation to the ownership and responsibility of ‘the road’. Mr Gericke’s evidence related to a road depicted as the ‘Divisional Road

Piesang Valley'. That road is depicted on the SDP to the East of the property and there were no outstanding issues pertaining to it. Condition (e), according to Mr Gericke, related to a different road depicted on the SDP as a tarred road to the North of the property. It serviced the property in question and two other properties. According to him, it transpired in October 2006, after the condition had been inserted in the May resolution, that the condition had in fact been fulfilled. The road already formed part of an approved subdivision and already vested in the Municipality. The condition was, nonetheless retained as condition (b) in the December resolution because it served as a reminder to the Municipality that it needed to have it formally transferred into its name. He stated that it was not for the developer to do so, but for the Municipality. Mr Gericke's evidence in that regard was also not disputed.

[23] It thus follows that the further attacks on the December resolution are also without merit.

The recusal application

[24] Green Willows persisted on appeal with the contention that the judge should have recused herself after refusing the application, because she had made conclusive findings before the end of the trial.

[25] The test for recusal is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not brought or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel.[4]

[26] In *R v Silber*[5] an application for recusal of the magistrate was, as in this matter, made when the matter was well on its way. There too the application was

[4] *President of the RSA & others V South African Rugby Football Union* & others 1999 (4) SA 147 (CC) para 48.

[5] *R v Silber* 1952 (2) SA 475 (A) at 481G-H.

grounded on certain utterances and rulings made by the magistrate during the course of the trial. Of the recusal application this court said:

'It unavoidably happens sometimes that, as the trial proceeds, the court gains a provisional impression favourable to one side or the other, and, although normally it is not desirable to give such an impression outward manifestation, no suggestion of bias could ordinarily be based thereon. Indeed a court may in a proper case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours the other party, but no reasonable person, least of all a person trained in law, would think of ascribing this provisional attitude to, or identifying it with, bias.'

[27] In *Take and Save Trading v Standard Bank of SA Limited* [6] the defendants' legal team withdrew from the trial without proffering any reason during the course of the plaintiff's case. The defendants represented by one of them then applied for a postponement of the trial. During the course of the debate, the judge intimated that there was little merit in two aspects of the defendants' case and that the postponement would have amounted to an exercise in futility, that the other defences depended on the evidence of one of the witnesses, which, the judge suggested, could be given without the benefit of counsel. Eventually the judge granted a postponement. When the matter was again enrolled, the defendants, represented by another counsel, applied for the judge to recuse himself. The judge refused the application and leave to appeal. On appeal this court, in addressing the allegations of bias stated that the 'possibly injudicious remarks by the judge' and the fact that he had 'evinced a strongly held belief' on the merits was 'fully justified and would never found a well-informed reasonable apprehension of bias'.

[28] In this matter it is true that the judge did make certain findings in her judgment on the application for absolution from the instance. But, during the debate with counsel she explained that she could change her findings if evidence was led that could persuade her otherwise. That to me suggests that the judge was still open to persuasion despite expressing preliminary views on the issues. However, despite the assurance from the judge, Green Willows decided not to lead evidence but

[6] *Take and Save Trading CC & others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) para 16-18.

instead closed its case, well aware of the preliminary findings of the judge and the intimation by her that she could change her views on the issues. There is, in the circumstances, no basis to find that there was a reasonable apprehension of bias.

[29] In the result I make the following order:

The appeal is dismissed with costs.

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Z L L TSHIQI

JUDGE OF APPEAL

APPEARANCES

For Appellants:	D C Fisher SC
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