IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 22109/10

H13/2010

In the matter between:

Municipality of Mossel Bay	**Applicant**
and	
The Evangelical Lutheran Church	**First Respondent**
The Registrar of Deeds	**Second Respondent**

JUDGMENT DELIVERED ON 23 SEPTEMBER 2011

Baartman, J

[1] The Evangelical Lutheran Church at Mossel Bay (**the first respondent**) is the owner of Erf 2002, held under Title Deed T4823/1941, and Erf 2003, held under Title Deed T8366/1938 (**the immoveable properties**). The title deeds of the immoveable properties contain restrictive conditions in favour of the Mossel Bay Municipality (**the applicant**). I deal below with the relevant clauses. In these proceedings the applicant sought transfer of the immoveable properties to it as provided for in the title deeds. The applicant cited

the Registrar of Deeds (**the second respondent**) but claimed no relief against the second respondent.

BACKGROUND

Mossel Bay Erf 2002

[2] On 9 October 1917, the applicant took transfer of Erf 2002. At the time, the title deed contained the following restrictive conditions:

> *"(A) AS BEING in favour of the Municipality of Mossel Bay: That this lot not be subdivided except with the consent in writing of the Municipality of Mossel Bay.*
>
> *(B) AS BEING in favour of the Council of the Municipality of Mossel Bay of the remainder held by said Deed of Grant dated 9th October, 1917:*
>
> *(1) The property in question shall be used solely for church or educational purposes, provided that in addition to any church or school buildings erected on the land, a parsonage or a caretaker's house may be erected;*
>
> *(2) The land shall be used solely for the purpose set out in (1) above. If at any time it ceases to be used for such purpose, or is no longer required for such purpose, it shall revert to the Council without payment of compensation of any improvement effected on or to the land; (my emphasis)*
>
> *(3) The property shall not be sold, sublet, or alienated in any way without the consent of the said Council."*

[3] On 27 May 1941, the first respondent took transfer of Erf 2002 subject to the above conditions. There are no buildings on the erf and it is also not bonded. It was common cause that the first respondent used Erf 2002 as a school ground to the school building on Erf 2003.

Mossel Bay Erf 2003

[4] On 9 October 1917, the applicant acquired ownership of Erf 2003 and, on 9 October 1917, transferred the property to the Berliner Missions Gesellschaft (**Berlin Missions Society**) subject to the restrictions described below. On 19 August 1938, the latter transferred Erf 2003 to the first respondent, subject to the same restrictions.

"Subject further to the following special conditions contained in the aforesaid Deed of Transfer dated 25th of April 1928, No. 3770, and imposed by the Council of the Municipality of Mossel Bay, viz :

(a) *In the event of the property not being used for Church purposes it shall revert to the Council, save and except that in addition to the Church one dwelling as a parsonage or a caretaker's house may be erected in respect of the property.*

(b) *The property shall not be sold, or alienated in any way without the consent of the said Council."*

[5] The first respondent erected a school and an outbuilding on Erf 2003. Until December 2005, the first respondent ran a school on the erf and used Erf 2002 as school grounds. Since January 2006, the immoveable properties have been vacant.

The immoveable properties are in a state of neglect

[6] The applicant alleged that the immoveable properties were in a state of neglect and that vagrants had taken them over. Despite their neglected state, the immoveable properties were valued at R240 000 and R215 000 respectively. Since August 2008, the applicant and the first respondent had attempted to resolve their dispute around the fate of the immoveable properties. The first respondent had, during those negotiations, repeatedly stated its intention to restore the immoveable properties to their former use and to extend their use

once it had overcome its financial difficulties. Those discussions ended when the applicant formed the view that the first respondent would not be able to overcome its financial difficulties; hence the application.

[7] In an additional affidavit filed with leave of the court, the first respondent indicated that it had obtained financial assistance from its Berlin branch with which it intended to effect repairs to the buildings; however, it had to use some of the Berlin funds to oppose this application.

Motion proceedings

[8] The test applicable in motion proceedings appears from the matter of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A). In accordance with the applicable test, I accept that:

(a) the buildings on Erf 2003 have been vandalised but that those buildings are capable of repair.

(b) the first respondent intends to effect the necessary repairs and to pursue activities in line with the title deed endorsements.

(c) the first respondent is attempting to resolve its current financial difficulties whereupon it will use the immoveable properties for church and educational purposes.

Restrictive Interpretation

[9] The applicant alleged that on a proper interpretation of the restrictive conditions, it was entitled to take transfer of the immoveable properties because the first respondent had ceased to use the immoveable properties for church or educational purposes. It is so that the grammatical and ordinary meaning of words must be used when interpreting the relevant conditions. (See **Crispette and Candy**

Co Ltd v Oscar Michaelis NO and Leopold Alexander NO 1947 (4) SA 521 (A)).

[10] Any interpretation must uphold the provisions of sections 25(1) and (2) of the Constitution of the Republic of South Africa, 1996, because the first respondent is the owner of the immoveable properties. The sections provide as follows:

"25. Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general applications –

(a) For a public purpose or in the public interest; and

(b) Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

[11] The phrase in both title deeds, "the property ... shall be used solely for church and education purposes..." refers to the use of the immoveable properties. Objectively, the properties are not in use. The applicant argued that that was the end of the matter and that it was entitled to take transfer of the immoveable properties. The first respondent, however, contended that it had not used the immoveable properties for a purpose other than provided for in the title deeds therefore the applicant must fail in its bid to take transfer. The title deed restrictions, so the argument went, were prohibitive and the first respondent had not breached the prohibitions. De Swardt AJ in the matter of **Waenhuiskrans Arniston Ratepayers Association &**

Another v Verreweide Eiendomsontwikkeling (Edms) Bpk & others [2009] JOL 24648(WCC) said at the following about land use:

"...However firm the owner's intention to use land for a particular purpose may be, one does not use land in the ordinary sense of the word, or for purposes of zoning regulations, if there is not some or other de facto use of it..., the enquiry is a factual one in order to determine the purpose for, and the manner in which, the land was actually being used...The Court further found that if land 'is not being used for any purpose and has not been and is not being improved, or if it is impossible to determine for what purpose it is being used or whether it has been or is being improved' one cannot make any rational determination as to which of the different available zonings would be applicable..."

[12] The matter at hand is distinguishable because in the present matter zoning is not in issue. The second distinction appears from the Erf 2002 title deed that provides for:

"...or is no longer required for such purpose..."

[13] In my view, one cannot determine whether the property is required for a particular purpose without having regard to the intention of the relevant party. I have accepted that the first respondent intends to use the immoveable properties in accordance with the title deed restrictions. It must follow, on the grammatical and ordinary meaning of words, that the conditions for transfer at least in respect of Erf 2002 have not been breached. The "required purpose" must refer to the use of the erf for church or educational purposes. As indicated above, the first respondent had at all times relevant to this application used Erf 2002 as school premises for the school carried on at Erf 2003. The applicant in its founding papers said that:

"Soos blyk...was erwe 2002 en 2003 nog altyd, ten minste van 1928, geoogmerk vir kerklike of opvoedkundige doeleindes (church or

educational purposes)...Erf 2002 is egter altyd aangewend as 'n skoolterein, en was dus bloot 'n uitbreiding van die skoolgebou en skoolbedrywighede wat op Erf 2003 bedryf is."

[14] It follows that since 1928, the immoveable properties have functioned as a single entity. I, therefore, accept that the first respondent's intention must be relevant in respect of Erf 2003. As indicated above, the right at risk in this application is not the use of land but the ownership thereof, which right is protected in the Constitution. Therefore, I am inclined to an interpretation that protects the first respondent's ownership.

Critical shortage of education premises

[15] Even if I am wrong, the applicant indicated in its founding papers that there was a critical shortage of premises suitable for educational purposes. The applicant indicated that the immoveable properties had been zoned for educational use and therefore it could not allow the much needed space to remain vacant. The first respondent had in its answering papers denied that the applicant could use the immoveable properties for educational purposes because education did not form part of the applicant's mandate. In reply, the applicant did not deny that allegation.

[16] The first respondent further invited the applicant to provide it with the details of any institution that was able to use the immoveable properties for educational purposes and tendered to co-operate with such institution. The applicant did not respond to that tender thereby frustrating the sections in the title deeds which provide for:

"...The property shall not be sold, sublet or alienated in any way without the consent of the said Council."

[17] It was open to the applicant to agree to a sublet and so allow the immoveable properties to be utilised for educational purposes (See **Similanie v Kuswayo** (631/201) [2011] ZASCA 79 (27 May 2011).

Although the applicant's legal representative repeatedly stated that the applicant would and had tried to accommodate the first respondent, its failure to have met this challenge belies its expressed intentions.

[18] The first respondent's counsel submitted that the applicant had failed to show that it required the immoveable properties for "public purpose or in the public interest". I agree.

The applicant has a demolition option

[19] The first respondent readily conceded that the buildings were in a state of neglect; however, it denied that the situation was as grim as alleged by the applicant. The first respondent suggested that the applicant's appropriate course of action, assuming that the applicant was correct in its view of the state of the buildings, would have been to act in terms of section 12 of the National Building Regulations and Building Standards Act 103 of 1977 (**the Act**).

*"**12. Demolition or alteration of certain buildings.** –*

(1) If the local authority in question is of the opinion that –

(a) any building is dilapidated or in a state of disrepair or shows signs thereof;

(b) any building or the land on which a building was or is being or is to be erected or any earthwork is dangerous or is showing signs of becoming dangerous to life or property;

it may by notice in writing, served by post or delivered, order the owner of such building, land or earthwork, within the period specified in such notice to demolish such building or to alter or secure it in such manner that it will no longer be dilapidated or in a state of disrepair or show signs thereof or be dangerous or show signs of becoming dangerous to life or property or to alter or secure such land or earthwork in such manner that it will no

longer be dangerous or show signs of becoming dangerous to life or property: Provided that if such local authority is of the opinion that the condition of any building, land or earthwork is such that steps should forthwith be taken to protect life or property, it may take such steps without serving or delivering such notice on or to the owner of such building, land or earthwork and may recover the costs of such steps from such owner."

[20] In response to that challenge, the applicant indicated that action in terms of section 12 was premature and that it would only consider such steps if successful in this application. That statement is at odds with the case the applicant made out in its founding papers.

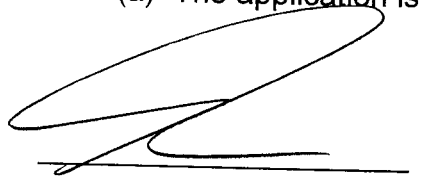
ALTERNATIVE RELIEF

[21] At the hearing, the applicant's legal representative requested that I order the first respondent to submit building plans for the intended buildings within 6 months. The first respondent's counsel objected to that relief. The applicant had not, on these papers, made out a case for such relief, neither had the first respondent had an opportunity to consider or respond to such relief. (See **Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd** 2003 (1) SA 265 (CPD))

CONCLUSION

[22] I, for the reasons stated above, make the following order.

(a) The application is dismissed with costs.



Baartman,J