THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

31 May 2011

STATUS: Immediate

EEDENPROP (PTY) LTD V THE KOUGA MUNICIPALITY (541/10)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal

The Supreme Court of Appeal (the SCA) today upheld the appeal with costs.

The appellant entered into a written agreement with the Jeffreys Bay Transitional Council, the respondent's predecessor-in-title, in terms of which the appellant undertook, subject to the terms and conditions spelt out in the agreement, to develop a retirement village on a portion of the land. Upon completion of the construction of the development and its approval by the respondent, the appellant wrote to the respondent advising it of this fact and also submitting certificates by various consultants certifying that the construction work had been undertaken to their satisfaction. The respondent commenced with making payments to the appellant in accordance with the formula agreed upon until January 2009, when it questioned the lawfulness of the payments by contending that the agreement was 'unenforceable'.

The appellant instituted proceedings in the Eastern Cape High Court (Port Elizabeth) seeking first a declarator that its agreement with the respondent was of full force and effect and second, an order directing the respondent 'to comply fully with its obligations arising from the agreement including the obligations imposed upon it by virtue of the provisions of chapter VI. . .'. The appellant's application was dismissed by Sangoni J.

Before the SCA, the respondent relied on three principal grounds. It contended that there had been no compliance by the appellant with the conditions of sub-division and rezoning imposed by the Western District Council, nor had such conditions been waived; that the appellant was receiving a share in taxes collected by an organ of state, which was inimical to good governance; and that there had been non-

compliance with the provisions of ss 172 and 173 of the Cape Municipal Ordinance 20 of 1974. As to the first ground the SCA stated that there was a potential conflict with the conditions imposed by the Western Cape District and the contract. On the one hand there was an absolute obligation on the appellant to pay for costs of services, on the other there was an obligation on the respondent to do so. The SCA stated that the obvious way to resolve the potential conflict was to interpret the provisions as imposing a temporary obligation on the appellant to pay for the costs of the services in full and, once this has been completed to the satisfaction of the respondent, an obligation on the respondent to reimburse the appellant. The respondent's counsel submitted that such an interpretation would require a waiver or an amendment by the respondent of conditions imposed by the Western District Council, which would be void for want of compliance with ss 42(3) and 42(4) of the Land Use Planning Ordinance 15 of 1985 in as much as there had been no publication of an intention to waive the condition imposed by the Western District Council. The SCA held that the argument was without merit, as in terms of subsec (3), before a council may waive or amend a condition imposed under subsec (1), it must consider objections in terms of subsec (4) and consult with the owner of the land concerned. The owner of the land concerned was the appellant. The respondent obviously consulted with him and there was no other person who had any interest in land as contemplated in subsec (4), consequently there was no necessity to advertise. As to the respondent's second ground: the respondent contended that the real effect of the agreement was that the respondent's power to determine rates payable by the owners within the development was compromised, because a large portion of such rates was allocated to the appellant thereby advancing the appellant's commercial interests. The SCA held that this argument could not be upheld. The respondent alone determined the rates and collected them. The fact that the respondent employs funds generated through rates does not detract from this. The agreement benefits both parties. The appellant, although being obliged to lay out the expenditure necessary for the provision of essential services, will be reimbursed therefore and will be able to sell the units in the development. The respondent, although being obliged to make the reimbursement, became the owner of the infrastructure and received the benefit in perpetuity of the rates from the development, and payment for services used by the occupants of the units in the development. What the respondent sought to do was to renege on its obligation to make the reimbursement, which was an essential term of the agreement without which the appellant would not have undertaken the development, on the basis that rates should be employed for the benefit of all, when it would never have had the income from such rates had it not entered into the agreement in the first place. As to the respondent's third ground: the SCA held that the court a quo was incorrect in finding that s 172(1) was relevant to the determination of the dispute raised on the papers. The conclusion by the court a quo that the respondent was obliged to comply with s 173(4) was misconceived because the contract between the parties was not a contract as envisaged by s 173(4). For all the afore-going reasons, the SCA was satisfied that the belated attempt by the respondent to resile from the agreement, was untenable.