THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 541/10

In the matter between:

EEDENPROP (PTY) LTD **Appellant**

and

THE KOUGA MUNICIPALITY **Respondent**

Neutral citation: *Eedenprop v Kouga Municipality* (541/10) [2011] ZASCA 92 (31 May 2011)

Coram: CLOETE, HEHER, MAYA, SNYDERS JJA and PETSE AJA

Heard: **11 May 2011**
Delivered: **31 May 2011**

Summary: Land Use Planning Ordinance 15 of 1985(C) ─ whether the conditions of sub-division and re-zoning were waived ─ whether a contract for reimbursement to developer of cost of provision of essential services for a development, by a municipality from rates generated by that development, constitutes a sharing of rates which is unlawful and impermissible ─ whether there has been non-compliance with the provisions of ss 172 and 173 of the Municipal Ordinance 20 of 1974(C).

ORDER

On appeal from: Eastern Cape High Court (Port Elizabeth) (Sangoni J sitting as court of first instance):

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and in its place the following order is substituted:

'(a) The agreement concluded between the appellant and the Jeffreys Bay Transitional Local Council (the predecessor in title of the respondent) on 24 October 2000 is declared to be of full force and effect.

(b) The respondent is ordered to pay to the appellant all amounts due in terms of chapter VI of such agreement, including interest at the legal rate from the date upon which such amounts were due and payable, to the date of payment thereof.

(c) The respondent is ordered to pay the costs occasioned by this application, including interest on such costs at the legal rate calculated as from the date of taxation to the date of payment.'

JUDGMENT

PETSE AJA (CLOETE, HEHER, MAYA and SNYDERS JJA concurring)

[1] This appeal concerns the question whether an agreement concluded between the appellant and the Jeffreys Bay Transitional Local Council, the predecessor-in-title of the respondent, the Kouga Municipality, is valid and thus enforceable. On 24 October 2000 the appellant entered into

a written agreement (the agreement) with the Jeffreys Bay Transitional Local Council 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 land. It is common cause that the respondent is the successor-in-title to the rights and obligations arising from the said agreement. I shall, for the sake of convenience, as counsel have done in their heads of argument, refer to both the Jeffreys Bay Transitional Local Council and the Kouga Municipality as the respondent.

[2] The appellant was the registered owner of the land, being portion 13 (a portion of portion 8) of the farm Kabeljauws River No 328 (the farm) in the district of Humansdorp in the Eastern Cape Province, measuring 34,9201 hectares. The appellant desired to develop a portion of that land comprising 16,4797 hectares as a retirement village. To accomplish this objective the appellant made an application for re-zoning and sub-division of the land to the Western District Council, in whose jurisdiction the land fell at that stage, in terms of the Land Use Planning Ordinance 15 of 1985 (LUPO). The application was approved on 14 September 2000, subject to conditions to which I shall return. The retirement village would include in the first phase of the development 82 freehold stands, a sectional title scheme consisting of 161 units, a service centre comprising community and frail care facilities and an additional 100 freehold stands during the second phase of the development. The appellant undertook to construct 'internal services' which were to be transferred to the Homeowners Association, which the appellant was required to form in accordance with an associated tripartite written agreement entered into between the respondent and the Eedenglen Homeowners Association when such services were finalised and approved by the respondent. The appellant also undertook to erect bulk

water and electricity supply systems and to connect such infrastructure to the respondent's infrastructure at its own cost, in addition to payment of the sum of R406 244 as a bulk services contribution to the respondent. It was also agreed that both the internal services installation and internal reticulation would, upon completion to the satisfaction of the respondent, become the property of the respondent. It is not in dispute that the appellant fulfilled its contractual obligations in terms of the agreement and expended substantial costs in excess of R11 million in doing so.

[3] It is appropriate, at this point, to mention that the sub-divided portion of the land excised from portion 13 of the farm was incorporated into the area of jurisdiction under the control of the respondent with the consequence that the ownership of the infrastructure laid on the land by the appellant became vested in the respondent, as was envisaged in the parties' agreement.

[4] Chapter VI of the agreement provides:

'<u>VI. COST LIABILITY AND THE PROVISIONS OF SERVICES</u>

It is a basic principle of local government that any development such at (sic) this, should not in any way be to the detriment of the local rate payers but that it should rather be to the advantage of both the rate payer and the Developer. In view of the fact that the Developer personally carry the burden of all the development costs and interest thereon in order to provide the internal services and the connector services (external), the council undertakes to annually pay as from completion of the development as envisaged in par. VIII to the Developer 60% of the assessment rate income levied in respect of the development area as well as all the availability charges levied, provided that the payments thus to be made to the Developer shall in any one year not exceed 12.5% of the total cost of the scheme, which payments will in any event terminate 15 years from the date of completion of the construction work pertaining to the services envisaged herein or as soon as the cost of the services has been fully paid whichever is the earlier. The Developer shall on demand submit to the

Council's Town Treasurer, such as may be required documentary proof (certified by it's Engineer) of the total cost of the internal services i.e. roads, stormwater, water and electricity reticulation and sewerage, and the annual loan costs, before any of the payment contemplated in this paragraph shall be made. It is a condition hereof that the Developer shall not be entitled to cede or make over in any way monies thus payable by the Council to the Developer.'

[5] Upon completion of the construction of the development and its approval by the respondent, the appellant wrote to the respondent on 27 October 2006 advising it of this fact and also submitting certificates by various consultants certifying that the construction work had been undertaken to their satisfaction. Simultaneously the appellant advised the respondent of the total cost of the project and called upon the respondent to implement the terms of chapter VI of the agreement. The respondent commenced with making payments to the appellant in accordance with the formula agreed upon in terms of that chapter until January 2009 when it questioned the lawfulness of the payments by contending that the agreement was 'unenforceable'.

[6] When the appellant's best endeavours ─ following a futile exchange of correspondence ─ to resolve the impasse amicably, came to naught, it instituted proceedings in the Port Elizabeth High Court 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 and this appeal against his judgment is now before us with the leave of the court a quo.

[7] On appeal 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 proof that such conditions had been waived; that the formula provided for in the agreement in relation to the repayment of the amount expendable by the appellant in the provision of 'internal services' and infrastructure in terms of which the respondent was entitled to receive the rates collected from the development and was obliged to pay over 60 per cent thereof, to the appellant, in effect meant that the appellant was receiving a share in taxes collected by an organ of state, something that, it was submitted, is 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. I now turn to deal with each of the above contentions in turn.

Non-compliance with conditions of sub-division and rezoning

[8] In support of its contention that the conditions imposed by the Western District Council were neither complied with nor waived, the respondent argued that as such conditions were in extant at the time of the conclusion of the agreement the only remedy that the appellant had, if it were of the mind that such conditions were for whatever reason unacceptable to it, is that it should either have appealed against their imposition in terms of the Promotion of Administrative Justice Act 3 of 2000, or have had them judicially reviewed. As neither of these options was exercised by the appellant the administrative act of the Western District Council must perforce stand. The respondent relied on the judgment of this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at 242A-C. Whilst the respondent is correct on the principle it is, however, my view that its reliance on the

Oudekraal case is misplaced. The simple answer to it is that the appellant's case proceeds entirely from the premise that the respondent, in signing the agreement, in effect waived the condition under consideration in this appeal imposed by the Western District Council.

[9] When the Western District Council approved the appellant's subdivision and re-zoning application by letter dated 14 September 2000 it did so, as I have said, subject to certain conditions. The letter of approval expressly stipulated that 'this approval is subject to the conditions imposed in terms of section 42 as set out in the annexures hereto'. One of the annexures, annexure B, provides (in part):

'The following further conditions shall be applicable:

(a) services such as water reticulation, electricity, sewerage reticulation, refuse removal, storm water disposal and any accesses to private thoroughfares from public roads shall be provided by the developer at his cost . . . .'

[10] Section 42 of LUPO referred to in the letter just quoted provides, to the extent relevant, as follows:

'42 Conditions

(1) When . . . a council grants . . . an application . . . he may do so subject to such conditions as he may think fit.

(2) Such conditions may, having regard to ─

(a) the community needs and public expenditure which in its opinion may arise from the authorisation, exemption, application or appeal concerned and the public expenditure incurred in the past which in . . . its opinion facilitates the said . . . application . . . and

(b) the various rates and levies paid in the past or to be paid in the future by the owner of the land concerned,

include conditions in relation to . . . or the payment of money which is directly related to requirements resulting from the said . . . application in respect of the provision of necessary services to the land concerned.

(3) Subject to the provisions of the Removal of Restrictions Act, 1967 (Act 84 of 1967), . . . a council, . . .may in relation to a condition imposed under subsection (1), after consideration of objections received in consequence of an advertisement in terms of subsection (4) and after consultation with the owner of the land concerned . . .

(a) waive or amend any condition, . . .

(b) . . .

(4) The . . . town clerk or secretary, where a council may so act . . . shall, if he is of the opinion that the waiver or amendment of conditions under subsection (3) adversely affects the interest that any person has in land, advertise the proposed waiver or amendment of conditions . . .'.

[11] In addition to chapter VI, quoted above, the contract between the appellant and the respondent provided:

'1.5 The Developer shall be obliged and undertakes to give effect to all the conditions upon which the subdivisional and rezoning applications have been approved such as conditions laid down in terms of section 42 of Ordinance 15 of 1985.'

The letter from the Western District Council dated 14 September 2000 together with annexures comprises chapter VII of the agreement.

[12] There is a potential conflict between Clause 1.5 and chapter VII on the one hand and chapter VI on the other: The first two provisions contemplate an absolute obligation on the appellant as contemplated in s 42(2) of LUPO to pay for the cost of services, but the latter obliges the respondent to pay for this. The obvious way to resolve the potential conflict is to interpret the former 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 according to the provisions of chapter VI.

[13] 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 s 42(3) and (4) of LUPO in as much as there had been no publication of an intention to waive the condition imposed by the Western District Council. The argument is without merit. 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). There was therefore no necessity to advertise.

Share in local government taxes (rates)

[14] The case sought to be made out by the respondent on this score is predicated on the provisions of ss 151, 156, 217 and 229 of the Constitution of the Republic of South Africa, 1996 and a whole host of Acts all of which define the powers, functions and duties of municipalities in relation to the sphere of local government. (See Local Government: Municipal Finance Management Act 56 of 2003, Local Government: Municipal Systems Act 32 of 2000; Local Government Transition Act 209 of 1993 (since repealed by the Local Government Laws Amendment Act 19 of 2008)). It was argued that the fundamental theme manifest in all these legislative prescripts is that every municipality is enjoined: to conduct its affairs in an effective, economical and efficient manner to optimise one of its resources in addressing the needs of the community; to conduct its financial affairs in an accountable and transparent manner; and to structure and manage its budgeting and planning processes to give priority to the basic needs of the community. It

was therefore contended that the real effect of the agreement is that the respondent's power to determine rates payable by the owners within the development is compromised, because a large proportion of such rates is allocated to the appellant thereby advancing the appellant's commercial interests.

[15] This argument cannot be upheld. That it is the respondent alone that determines the rates and collects them (albeit through the agency of the Homeowners Association), is beyond doubt. The fact that the respondent employs funds generated through rates, which after all are a major source of revenue for a municipality, does not, in my view, 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 therefor 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 seeks to do is 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.

Applicability of ss 172 and 173 of the Municipal Ordinance 20 of 1974

[16] Section 172(1) reads as follows:

'(1) A council shall, by notice published in the press, invite tenders before entering into any contract which is for ─

(a) the execution of any work for or the supply or sale of any goods or materials to the council and which involves or is likely to involve an amount exceeding such amount as the Administrator may from time to time either generally or specially determine in respect of contracts entered into by such council, and

(b) the sale of any goods or materials by the council.'

[17] Thus s 172(1) enjoins a (municipal) council to invite tenders by notice published in the press before entering into any contract which is for the execution of any work for the supply or sale of any goods or material to the council which exceeds or is likely to exceed an amount as determined from time to time in respect of such contracts; and the sale of any goods or materials by the council. The court a quo found that these legislative prescripts were not complied with and consequently held that such non-compliance rendered the agreement unlawful and of no force and effect. In reaching this conclusion it relied on a host of judgments of, inter alia, this court. (See *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2008 (3) 1 (SCA); *Municipal Manager: Qaukeni Local Municipality v FV General Tracking CC* 2010 (1) SA 356 (SCA); *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA)).

[18] To my mind 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 terms of chapter VI of the agreement clearly fell outside the purview of s 172 as they were neither 'for the execution of any work' nor 'for the supply or sale of any goods or materials' to the council.' What in fact chapter VI plainly envisaged, in my view, was the provision of infrastructure and 'internal services' by the appellant at its own cost on

land not belonging to the respondent to the satisfaction of the respondent which, after completion thereof, would become the property of the respondent. In that event the respondent was contractually bound to re-imburse the appellant for such cost as it, upon becoming the owner of the infrastructure and internal services, and, as I have said, acquired an additional revenue base that it would, but for the agreement, not otherwise have had.

[19] The court a quo also found that the respondent was obliged to comply with s 173(4) of the Municipal Ordinance 20 of 1974 which reads:

'(1) . . .

(2) . . .

(3) . . .

(4) No contract contemplated by subsection (1) or (2) and no amendment to any such contract shall come into force until ─

(a) The council has by publication in the press given notice of its intention to enter into such contract or to make such amendment, and

(b) The Administrator has approved such contract or amendment.'

This conclusion by the court a quo was misconceived because the reference in s 173(4) to a 'contract' is, as was submitted by counsel for the appellant, a reference to contracts with other local authorities or with any other 'person for the exercise or performance, whether jointly or by any of the contracting parties, of any power, duty or function whatsoever which the council is from time to time by law authorised or required to exercise or perform.' The contract between the parties was not such a contract for the reasons already given in para 18 above.

[20] For all the aforegoing reasons I am satisfied that the belated attempt by the respondent to resile from the agreement, was untenable.

[21] In the result the following order is made.

1. The appeal is upheld with costs.

2. The order of the court a quo is set aside and in its place the following order is substituted:

'(a) The agreement concluded between the appellant and the Jeffreys Bay Transitional Local Council (the predecessor in title of the respondent) on 24 October 2000 is declared to be of full force and effect.

(b) The respondent is ordered to pay to the appellant all amounts due in terms of chapter VI of such agreement, including interest at the legal rate from the date upon which such amounts were due and payable, to the date of payment thereof.

(c) The respondent is ordered to pay the costs occasioned by this application, including interest on such costs at the legal rate calculated as from the date of taxation to the date of payment.'

XM Petse
Acting Judge of Appeal

APPEARANCES

APPELLANT:	RG Buchanan SC Instructed by Pagdens, Port Elizabeth; McIntyre & van der Post, Bloemfontein.
RESPONDENT:	A Beyleveld SC (Ms) M Beneke Instructed by McWilliams & Elliot, Port Elizabeth; Webbers, Bloemfontein