Bb 71/98

REPUBLIC OF SOUTH AFRICA

Case No 223/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

REALTY HOMES (PROPRIETARY) LIMITED — Appellant

and

THE PREMIER OF THE PWV PROVINCE — First Respondent

THE TRANSITIONAL LOCAL COUNCIL OF KRUGERSDORP — Second Respondent

Coram: HOEXTER, HOWIE, SCOTT, STREICHER JJA et FARLAM AJA

Heard: 31 AUGUST 1998

Delivered: 18 SEPTEMBER 1998

JUDGMENT

SCOTT JA/...

SCOTT JA:

The appellant is a property developer. The first respondent is the successor to the former Administrator of the Transvaal. The second respondent is the successor to the former Kagiso City Council. As the events relevant to this appeal occurred prior to the change and in the context of legislation which has since been repealed, it is convenient to refer to the respondents individually as "the Administrator" and "the Council" and to them collectively as the respondents. The appellant instituted action in the Witwatersrand Local Division claiming payment of the amount of R12 850 338 from the respondents jointly and severally in respect of damage allegedly suffered in consequence of a breach of contract. In the alternative, it claimed payment of R5 201 846 from the Administrator, alternatively the Council, on the grounds of unjust enrichment. The respondents denied the existence of a valid contract and hence the breach. They denied, too, any unjust enrichment at the expense of the appellant. Notwithstanding the denial

it would seem that all three parties believed, at least for a time, that the Council and the appellant had concluded, with the requisite approval of the Administrator, a valid contract in terms of which the appellant was to install services for, and erect dwellings on, the erven of a township which was to be established in the Council's area of jurisdiction. The extent of the proposed township was 23,09 hectares. Some 20 hectares of that was covered by the so-called "Kagiso Hostel Complex". It provided single accommodation for approximately 5000 men and was described in evidence as "a village of dilapidated barracks". The commendable object of the proposed development was to replace the hostel complex with family homes. The appellant set to work on the vacant land. All went well until it became necessary to evict the occupants of the barracks so that the barracks could be demolished. Obstacles were encountered and a dispute arose between the parties which culminated in the appellant purporting to cancel the

contract and suing for damages. In its particulars of claim the appellant alleged that a contract had been entered into between it, the Administrator and the Council. In the alternative, it alleged the existence of a contract between it and the Council with terms containing obligations which the Administrator had undertaken to perform and by which, based on his approval of and consent to such terms, he undertook to be bound. As previously indicated, this was denied by the respondents. At the Council's instance the Court *a quo* (Cameron J) ordered that the issue of whether the alleged contracts had been validly concluded was in terms of Rule 33 (4) to be tried separately from the remaining issues. I shall refer in more detail later in this judgment to the terms of the Court *a quo*'s ruling on the separation of issues. Following the trial Cameron J gave judgment in favour of the respondents, dismissing the appellant's claim in contract. The question of costs, including the costs of the application in terms of Rule 33 (4) (which was

opposed), was reserved for determination by the Court adjudicating upon the enrichment claim. The present appeal is with the leave of this Court pursuant to a petition to the Chief Justice.

Before turning to the issues which arise in this appeal it is necessary to set out as briefly as the circumstances permit the events leading up to the dispute between the parties. The facts are largely common cause.

Towards the end of 1987 the appellant was approached by the Council with a view to becoming involved in the redevelopment of the hostel complex. The appellant engaged an architect to assist it and in February 1988 submitted a study of the proposed development to the Council. This was well received and on 8 February 1988 the Council's Executive Committee resolved to grant the appellant the exclusive right to develop the property. The Administrator was the registered owner of the land. It had previously been defined and set apart

as part of a development area as contemplated in s 33 of the Black Communities Development Act, 4 of 1984 ("the Act"). In December 1988 the Council, through its consultant town planners, Els van Straten and Partners, lodged an application for the establishment of a township in terms of The Township Establishment and Land Use Regulations ("the Land Use Regulations") issued under s 66 of the Act. In pursuance of the application and on 6 January 1990 the Administrator approved the "layout" plan in respect of the land.

In the meantime, the issue of a formal agreement arose. Mr van Straten of Els van Straten and Partners prepared a draft based on a precedent he had been given by officials in the Provincial Administration. It was headed "Land Availability Agreement" and was tripartite in form, the parties being the Administrator, the Council and the appellant. The draft was signed by the appellant and by the town clerk on behalf of the Council on 28 and 29 September

1989. Thereafter it was sent to the Administrator for his signature. There was some delay while the draft was considered by the various departments of the Provincial Administration. Certain of its provisions did not meet with their approval and a meeting was held on 6 January 1990 to discuss proposed alternatives. Agreement was apparently reached and Van Straten undertook to revise the draft accordingly. On 6 February the document incorporating the agreed amendments was signed by the appellant and the Council. This document, too, was sent to the Administrator for signature. According to Van Straten, who gave evidence on behalf of the appellant, he was advised by officials in the Provincial Administration that before the Administrator could sign the document it would have to be scrutinized by the State Attorney and that this could result in a delay of weeks, if not months. Because both the Council and the appellant regarded the matter as urgent Van Straten spoke to a more senior official, a Mr du

Plessis, in an endeavour to have the matter hurried up. According to Van Straten, the solution suggested by Du Plessis was that the agreement be restructured so that the Administrator would no longer be a party but instead would merely give his approval to it; and that he, Du Plessis, would ensure that a report was sent to the Administrator-in-Executive Committee recommending that the Council be given permission to establish the township in its own name.

The solution which Du Plessis was said to have proposed was duly implemented. A memorandum dated 27 February 1990 was submitted by the Director General to the Administrator-in-Executive Committee recommending that the Council be granted permission to establish a residential township in its own name on the land in question. This recommendation was adopted by the Administrator-in-Executive Committee on 5 March 1990 and it was resolved accordingly. Mr Niehaus , a director of the appellant, thereupon consulted his

attorney who drafted an addendum to the written agreement signed on 6 February 1990. The addendum was signed on behalf of the Council and the appellant on 15 March 1990. It reads:

> "The signatories to the Agreement, Kagiso Town Council and Realty Homes (Pty) Ltd, hereby agree as follows:
>
> (1) By virtue of Resolution 298 of 5 March 1990 of [the] Administrator-in-Executive Committee, the inclusion of the Administrator of [the] Transvaal as a party to the Agreement be dispensed with and the signatories proceed to give effect to the Agreement, subject to the written consent to and approval of the terms of the Agreement by the Administrator.
>
> (2) The signatories forthwith apply to the Administrator, acting under Section 34 (9)(b) of the Black Communities Development Act No 4 of 1984, for the grant in writing of his approval of and consent to the terms of the Agreement."

On 29 March 1990 the agreement and addendum were forwarded to the Provincial Secretary with a request that they be approved by the Administrator. The Provincial Secretary responded by letter dated 17 April 1990. The relevant portion reads:

"Die Administrateur het die bogenoemde ooreenkoms/te ingevolge regulasie/s 4(b) en 26(2)(b) van die Dorpstigting- en Grondgebruiksregulasies, 1966 goedgekeur, op voorwaarde dat die ooreenkoms gewysig word soos daarop aangedui is, met uitsondering van paragraaf 8 waarop reeds ooreengekom is tydens samesprekings wat plaasgevind het.

'n Afskrif van die goedgekeurde ooreenkoms is aangeheg."

Certain pencilled alterations had been effected to the agreement (which was the agreement signed by the appellant and the Council on 6 February 1990). These included the deletion of the reference to the Administrator as one of the parties in the heading. Niehaus feared that the pencil alterations might be erased and at his insistence the document was retyped and the alterations effected in green ink. This document was referred to in evidence as "the green ink document" and when convenient I shall do the same.

Many of the pencilled alterations appear to have had their origin in a letter dated 21 March 1990 addressed by the State Attorney to the Transvaal

Provincial Administration. It was suggested in this letter that clause 8, which dealt with mediation and arbitration, should be deleted. According to Van Straten the provincial officials felt that the clause should remain and in subsequent discussions this had been agreed, hence the reference in the Provincial Secretary's letter of 17 April 1990 to the agreement in relation to clause 8.

The green ink document was signed by the Council and the appellant on 26 June 1990. It is unnecessary at this stage to do more than outline its provisions. In common with the draft of February it made provision for the land to be made available to the appellant so as to enable the latter to install services for the erven established in terms of the township lay-out plan and to erect houses thereon. An important alteration reflected in the green ink document related to the party making the land available. Clause 2.1 of the February draft provided that "the Administrator hereby makes available the land to [the appellant] as

contemplated in section 34(9) of [the Act]". In the green ink document the word "Administrator" was replaced with "Council".

Clause 2.1, as amended, is somewhat inconsistent with clause 5 which in the green ink document remained unaltered and reads "The Council and the Administrator shall grant [the appellant] access to the land for all purposes of the development". If the Council was the party obliged to make the land available to the appellant it is difficult to appreciate why both the Council and the Administrator should have been obliged to give the appellant access to it. It may well be that the failure to delete the reference to the Administrator in clause 5 of the green ink document was an error. More than one version of the February agreement as altered in pencil was placed before the Court *a quo*. One version shows the words "and the Administrator" in clause 5 to have been deleted. However, for reasons which shall become apparent the difference is of little

consequence.

The green ink document further provided for the Council to obtain approval of the proposed township as required by Regulation 16 of the Land Use Regulations. The appellant was to be responsible for the disposal of the serviced erven, both improved and unimproved, at prices which would cover all amounts due to the Administrator and the Council as well as the appellant's own expenses and profit. In order to enable the appellant to give transfer to the individual purchasers of the erven in the township (or grant "leasehold" to lessees) the Administrator was in terms of clause 7.1.7 to grant the appellant "such power of attorney as may be required by the relevant Registrar of Deeds."

In the meantime and on 22 March 1990 the Council's township application was approved by the Administrator.

Following the signing of the green ink document and the approval of

the township, the appellant, as previously mentioned, set about installing services and erecting houses on the vacant area of the township land. On 27 June the appellant wrote to the Director General of the Provincial Administration requesting the power of attorney which in terms of clause 7.1.7 of the agreement the Administrator had purportedly undertaken to give to the appellant so as to enable it to give transfer of or grant leasehold in respect of the erven in the township. In response to this request a power of attorney in favour of the appellant was executed on behalf of the Administrator on 24 July 1990. Prior to the dispute between the parties and the appellant's termination of the contract on which it relies, it had provided services for some 180 erven and sold and transferred 130 houses to individual purchasers.

Against this background, it becomes necessary to look more closely at the appellant's claim in contract and the ambit of the issues upon which the

Court *a quo* was ultimately required to adjudicate in terms of its order made under Rule 33(4).

The basis on which the appellant founded its claim in contract appears from the following paragraphs of its particulars of claim:

"9. By reason of the facts set out in paragraphs 5, 6, 7 and 8 and upon a proper construction of Annexures 'A' [the agreement of 6 February 1990], 'A1' [the green ink document], 'B' [the addendum of 15 March 1990], 'C' [the Provincial Secretary's letter of 17 April 1990], 'D' [the State Attorney's letter of 21 April 1990], 'I' [Resolution 298 of 5 March 1990] and 'J' [the Director General's memorandum of 27 February 1990] hereto, an agreement between the Plaintiff, the First Defendant and the Second Defendant came into being, *inter alia*, the material express, alternatively tacit or implied terms whereof were the following:

9.1 the First Defendant agreed to make available the land described in Clause 1.1 of annexure 'A' (being the land referred to in paragraph 5 above) to the Second Defendant and the Plaintiff for the purpose of the establishment and development of a township thereof;

9.2 the First Defendant and the Second Defendant agreed to grant the Plaintiff access to the land for all purposes of the development of the township thereon as envisaged in the

agreement;

9.3 the Plaintiff would proceed to carry the development of the township on the whole of the land according to the aforesaid Plan;

9.4 the Plaintiff would be responsible for the disposal of residential erven as provided in the agreement.

9A Alternatively to paragraph 9

9A1 The agreement between the Plaintiff and the Second Defendant purported to impose obligations on the First Defendant, inter alia, those contained in Clauses 3.2, 5, 7.1.2.1, and 7.1.7.

9A2 It was the intention of the parties that the First Defendant, by his approval of and consent to the terms of the agreement should bind himself to the obligations imposed on him in terms thereof.

9A3 By his approval of and consent to the terms of the agreement the First Defendant undertook to perform the obligations imposed on him in terms thereof including the obligation to make available to the Plaintiff the land described in Clause 1.1 of annexure 'A' and annexure 'A1' for the purpose of the establishment and development of a township thereon.

10. The agreement was concluded in the contemplation and upon the basis that should the Defendants fail to afford the Plaintiff access to any part of the land for the purpose of developing the same the Plaintiff would probably suffer damages thereby.

11. Save as is set out below, the parties carried out the terms of the

agreement.

12. In breach of the terms of the agreement the Defendants failed and/or refused to make available the land in its totality to the Plaintiff and failed to grant access to the land to the Plaintiff for all purposes of development."

The relief sought in pursuance of the claim in contract was stated to be "(a)s against the defendants jointly and severally, the one paying the other to be absolved". Unlike the claim based on unjust enrichment, there was no separate claim against each of the respondents in the alternative.

The respondents denied not only having purported to enter into the contracts alleged by the appellant but also their own competence to do so in terms of their statutory authority. It is convenient at this stage to quote s 34(9)(a) and (b) of the Act, being the statutory provisions on which the appellant relied to establish that the respondents had the necessary authority. (In terms of Government Notice 21 of 2 January 1987 the State President, acting in terms of s 15 of the Provincial

Government Act 69 of 1986, determined that the reference in the Act to the Minister of Constitutional Development and Planning was to be construed, subject to an exception in relation to s 34(9)(c), as a reference to the Administrator of a province. What follows is in conformity with this substitution.)

"(9) Any land in a development area -

(a) which vests in or is owned by the State, shall be subject to the control of the Administrator, who may make any such land available or transfer such land, subject to such conditions as he may determine -

(i) to a board or local authority for the exercise of its powers under a provision of this Act or any other law;

(ii) to a township developer for the establishment of a township or the development of the land;

(b) which is owned by or vests in a board or local authority, shall be subject to the control of such board or local authority, as the case may be, which may make any such land available, subject to such conditions as may be determined by that board or local authority, as the case may be, and approved by the Administrator, to a township developer for the establishment of a township or the development of the land; ..."

I pause to observe that the subsections deal with two situations regarding the

making available of land in a development area for the establishment of a township. The first, provided for in subsection (a), is where the land is owned by or vests in the State, in which event the Administrator may make it available or transfer it to a local authority for the exercise of its powers under the Act or to a township developer. The second, provided for in subsection (b), is where the land is owned by or vests in a local authority, in which event the latter may, subject to the approval of the Administrator, make the land available to a township developer for the establishment of a township. In neither event is provision made in the section for an agreement between the party making the land available and the recipient of the land. The section would appear to contemplate a unilateral act on the part of the former.

Regulation 4 of the Land Use Regulations, however, requires that the terms and conditions on which land is made available in terms of s 34(9) are to be

contained in a land availability agreement concluded in writing between the party making the land available and the recipient. Both in this Court and in the Court below much of the argument advanced on behalf of the appellant centred upon the proper construction of this regulation. For the sake of completeness I quote it in full.

> "4. The terms and conditions on which land has been made available to any person or body in terms of section 34 (9) of the Act shall be contained in a land availability agreement concluded in writing between the body making available the land and the person or body to whom the land is made available, and which-
>
> (a) complies substantially with the guide-lines set out in Annexure A, or such other or additional guide-lines as may be issued generally by the authorised officer from time to time, or determined by him in any particular case; and
>
> (b) has been submitted to and approved by the Minister."

(The reference to the Minister must be read as a reference to the Administrator.)

Returning to the Court *a quo*'s order in terms of Rule 33(4), the issues to be decided were formulated as follows:

> "... whether there was an agreement between the plaintiff, the [Administrator] and the [Council], as alleged in paragraph 9 of the particulars of claim, or between the plaintiff and the [Council], in terms of which the [Administrator], as alleged in paragraph 9A of the particulars of the plaintiff's claim, undertook to perform the obligations imposed upon him, including the obligation to make available to the plaintiff the land described in clause 1.1 of Annexures 'A' [the February 1990 agreement] and 'A1' [the green ink document], for the purposes of the establishment and development of a township thereon".

What is immediately apparent is that, in accordance with the appellant's claim as pleaded, the above formulation does not include the further issues whether the appellant and the Council purported to enter into a contract *simpliciter*, ie one to which the Administrator was not a party (in the sense that the contract did not contain terms by which the Administrator was bound, including the obligation to make the land available to the plaintiff); and whether it would have been competent for the Council to conclude such a contract *simpliciter* between it and the appellant having regard to the provisions of s 34 (9)(b) of the Act. This

notwithstanding, the Court *a quo* concluded that as the land had not vested in the Council as contemplated in s 34(9)(b) it was not competent to enter into an agreement with the appellant in terms of which the former made the land available to the latter. On this basis Cameron J dismissed the appellant's claim in contract in its entirety.

In this Court *Mr van Blerk* on behalf of the Council submitted that the only issues properly before the Court *a quo* and this Court were those formulated in the ruling made in terms of Rule 33(4). I agree. Admittedly the issue whether the township land was vested in the Council would seem at first blush to involve no more than the interpretation of s 34 (9)(b) of the Act in the light of facts which were largely common cause. On reflection, however, I am not sure that this is necessarily so. One aspect that comes to mind is the reference, in the memorandum of 27 February 1990 prepared by the Director General, to the

Minister's having approved the transfer on 2 July 1986 of the land in question to the Council in terms of s 34 (7) of the Act prior to its amendment by Act 74 of 1986. (The amendment came into effect on 15 September 1986.) While evidence as to what actually transpired may ultimately not prove to be decisive, it may well have a bearing on the arguments advanced in this Court which were founded upon s 34 (7) in its amended form. The same considerations apply to a further argument advanced for the first time in this Court - much of it by the appellant's counsel in reply. This was to the effect that the land was made available to the Council in terms of s 34 (9)(a) of the Act without a land availability agreement which (so the argument went), on a proper construction of Regulation 4, was unnecessary when land was made available under s 34 (9)(a); and that therefore the green ink document was in substance no more than an ordinary contract between the Council, as township applicant, and the appellant, as engineering and building

contractor. While this contention, too, essentially involves questions of interpretation they are questions which to my mind may well have to be answered against a background of a factual matrix not placed before the trial court by reason of its irrelevance to the formulated issues.

Yet another issue raised for the first time in this Court was an argument advanced by counsel for the Administrator to the effect that the appellant's claim was in effect excipiable for want of an allegation that the township had been declared an approved township by notice in the Gazette in terms of Regulation 23. The need for such an allegation, so it was submitted, was that until the approval was gazetted the erven of the township could not be sold or transferred. It is unnecessary to say more than that the point raised is wholly beyond the scope of the issues which the Court *a quo* was required to determine.

I come finally to the question posed in the order made by the Court

a quo in terms of Rule 33 (4), *viz*, whether there came into existence one or other of the contracts referred to therein. As to the existence of the first contract mentioned the answer, I think, must clearly be in the negative. Quite apart from any considerations relating to the statutory competence of the Administrator or the Council to enter into such a contract it is clear on the evidence that no such contract was ever concluded. The contract alleged in paragraph 9 coincided largely, but not entirely, with what I have referred to as the February 1990 agreement which was tripartite in form. It is common cause that the Council and the appellant abandoned that agreement in favour of a bilateral agreement which came to be embodied in the green ink document.

As far as the existence of the second contract is concerned, much of the argument on the issue revolved around the statutory authority of the respondents to conclude such a contract and in particular that of the Administrator

to incur liability in relation to the undertakings on his part referred to in paragraph 9 A of the particulars of claim. In my view, however, the simple answer to the question is that the appellant failed to establish that the Administrator intended to be contractually bound by the undertakings relied upon. The original intention of the appellant and the Council was to enter into a tripartite agreement to which the Administrator was to be a party. When it became clear that the Administrator would not enter into a contract unless it had been scrutinized and approved by the State Attorney, which was likely to result in further delays, the appellant and the Council adopted a different course and purported to enter into a bilateral contract to which only they were parties and for which they sought the approval of the Administrator. Indeed, in terms of the "addendum" signed on behalf of the Council and the appellant on 15 March 1990 it was expressly agreed that "the inclusion of the Administrator of [the] Transvaal as a party to the Agreement be

dispensed with". In these circumstances, the approval of the bilateral agreement by the Administrator was not given with the necessary *animus contrahendi* (Cf *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 189 and 237); nor could the appellant have understood the position to be otherwise. It follows that the question posed by the Court *a quo* in relation to the existence of either contract must be answered in the negative.

This in effect is the conclusion to which the Court *a quo* came. However, having ventured beyond the issues which fell to be determined the learned judge proceeded to make an order that "the plaintiff's claim in contract is dismissed". To this extent he erred and the order must be altered accordingly. In its present form the order would preclude the appellant from seeking to amend its particulars of claim so as to rely on some alternative basis in contract.

There remains the question of the costs of the appeal. The appellant

did not attack the finding of the Court *a quo* on the basis that it had gone beyond the ambit of the questions set in terms of Rule 33 (4). Instead, it argued that the Court below had erred in not finding that it had established a claim in contract against the respondents. In this it has been unsuccessful. On behalf of the Council, on the other hand, no objection was raised to the variation by this Court of the order appealed against so as to reflect a decision on the questions the Court *a quo* was called upon to decide. As far as the position of the Administrator is concerned it is difficult to conceive of any amended claim in contract which could be introduced in the action against him. It was accordingly of little consequence to the Administrator whether the order was varied or not. In the circumstances it seems to me that, notwithstanding the limited success achieved by the appellant in having the order varied, it should nonetheless bear the costs of the appeal.

In the result the following order is made:

1. The appeal succeeds to the limited extent that the following order is substituted for that of the Court *a quo*.

   "a. The questions posed in the order made in terms of Rule 33 (4) are answered in the negative.

   b. The question of the costs of the proceedings, including the costs of the application in terms of Rule 33 (4), is reserved for decision by the Court which determines the remaining issues in the action against the defendants."

2. The appellant is to pay the respondents' costs of appeal, such costs to include those occasioned by the employment of two counsel by each respondent.

D G SCOTT

HOEXTER JA)
HOWIE JA) - Concur
STREICHER JA)
FARLAM AJA)