

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 30768/09

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
29/11/2013	
DATE	SIGNATURE

In the matter between:

ALCRON PROPERTIES (PTY) LTD

Plaintiff

And

MEC FOR HOUSING, GAUTENG

First Defendant

**DEPARTMENT OF HOUSING OF THE
GAUTENG PROVINCIAL GOVERNMENT**

Second Defendant

J U D G M E N T

MATHOPO J

Introduction

- [1] On the 10th December 2012, after hearing argument, I upheld the special plea and indicated that I will give my reasons later. These are my reasons.
- [2] The plaintiff instituted an action against the defendants for declaratory orders arising from an agreement for the development at Villa Liza, Boksburg.
- [3] In its particulars of claim, the essential averments made by the plaintiff were the following:

3.1 Claim 1: A declaratory order that an amount set out 3.3.1 **alternatively** 3.3.2 **further alternatively** 3.3.3 below will become due and payable to the Plaintiff by the Department of Housing of the Gauteng Provincial Government on transfer of any one of 1310 subsidised erven at Villa Liza (and completion of the top structure of such erven), and which amounts are calculated as follows:

3.3.1 The applicable individual subsidy policy or scheme of the Board, the First and/or Second Defendant, less the amount of R2 300,00 per erf;

3.3.2 **Alternatively**, the amount of R9 500,00 or R5000,00 (as the case may be) less R2 300,00 per erf, which amount in each instance is to escalate at a rate of 12% per annum, alternatively, a rate equal to the annual

Consumer Price Index for the building industry,
further alternatively a rate equal to the annual
 Consumer Price Index;

3.3 Further alternatively, the amount of R9 500,00 or
 R5 000,00 per erf (as the case may be) less R2 300,00

3.2 Claim 2: A declaratory order that an amounts set out in 3.2.1
 alternatively 3.2.2 below will become due and payable to the
 Plaintiff by the Department of Housing of the Gauteng
 Provincial Government on transfer of any one of 189
 subsidised erven at Villa Liza (and completion of the top
 structure of such erven), and which amounts are calculated
 as follows:

3.2.1 An amount per erf equal to the applicable individual
 subsidy policy or scheme of the Board the First and/or
 Second Defendant.

3.3.2 Alternatively the amount of R9 5000,00 or R5 000,00
 (as the case may be) per erf.

3.3 Claim 3: A declaratory order that an amount set out in 3.3.1
 alternatively 3.3.2 below will become due and payable to the

plaintiff by the Department of Housing of the Gauteng Provincial Government on approval of the subsidy in respect of any of 3246 at Villa Liza, and which amounts are calculated as follows:

3.3.1 R2 300,00 per erf, plus escalation of 12% per annum thereon alternatively a rate equal to the annual Consumer Price Index for the building industry, further alternatively a rate equal to the annual Consumer Price Index;

3.3.2 Alternatively R2 300,00 per erf.

3.4 Claim 4: (in the alternatively to claim 3 and in the event that prayer 2 is not granted): A declaratory order that the amounts set out in 3.4.1 alternatively 3.4.2 below will become due and payable to the plaintiff by the Department of Housing of the Gauteng Provincial Government on approval of the subsidy in respect of any one 3435, which amounts are calculated as follows:

3.4.1 R2 300,00 per erf, plus escalation of 12% per annum thereon alternatively a rate equal to equal to the annual Consumer Price Index for the building

industry, further alternatively a rate equal to the annual Consumer Price Index;

3.4.2 Alternatively R2 300,00 per erf (the underlining is ours).

- [4] The defendant filed a plea on the merits and later delivered a special plea contending that as a result the cancellation of the agreement by the plaintiff and its subsequent institution of a damages claim order, case number 19734/2012, the declaratory relief sought by the plaintiff has become abstract, hypothetical and academic.
- [5] It is common cause and not in dispute between the parties that the agreement was agreement was cancelled. On the plaintiff's version the cancellation was on the 25th July 2007 and the defendant contends that the cancellation was on the 28th March 2011. Nothing much turns on the date of the cancellation.
- [6] At issue and the focus of the argument was whether the plaintiff is entitled to a declaratory order notwithstanding the cancellation of the agreement.
- [7] In essence, the defendant's contention is that the cancellation of the agreement has prevented the fulfilment of the conditions that should have been fulfilled before the plaintiff would be entitled to any payment.

- [8] The case advanced for the defendant is that since the declaratory relief is premised on the basis that both parties will complete their obligations in terms of the agreement, the agreement having been cancelled by both parties, such a relief is unsustainable because the plaintiff will not be able to fulfil the conditions that had to be fulfilled before it will be entitled to any payments.
- [9] The defendant further attack the plaintiff's action on the basis that it lacks the necessary averments in the particulars of claim that certain rights have vested. The submission made on behalf of the defendant is that when the agreement was cancelled no rights had vested on the plaintiff because the conditions for the entitlement to payment had not been fulfilled. What the defendant contends is that as a result of the cancellation of the agreement, there is no existing, future or contingent right or obligation.
- [10] The declaratory relief sought by the plaintiff is governed by Common Law and Section 9 (a)(iii) of the Supreme Court Act 59 of 1959, which reads as follows:
- “...in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.”
- [11] This section requires a two stage approach firstly, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation and secondly if the court is satisfied that such an interest exist it must be considered whether or not the

order should be granted. The granting of a discretionary order is thus discretionary power and cannot be granted where the issue has become abstract, hypothetical and academic. See: *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012(2) SA 598(CC) at 609 [32]; *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) at par [15]. and *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) 205 (SCA).

- [12] The nubs of the plaintiff's case is that the contract purportedly cancelled in terms of the letter dated 25th July 2006 is not one of the contracts referred to the particulars of claim. Properly construed, this argument puts a different construction to the letter of the cancellation. What the plaintiff is contending for is that the agreement cancelled is annexure POC1 to the particulars of claim and the other agreements or contracts are not affected and are accordingly stand alone contracts capable of being interpreted to the exclusion of POC1.

- [13] The case advanced for the plaintiff is that of a declaration of title of the right to claim specific performances of rights which according to the plaintiff vested during the period prior to the cancellation of the contract on the 28 March 2011.

- [14] It was submitted on behalf of the plaintiff that the only agreement which has been cancelled was POC1 and not POC2 (which deals with the subsidy) and the POC4 (which deals with the development and marketing agreement) and that the rights flowing from such

agreements are alive and vested in the plaintiff prior to the cancellation of the agreement on the 28 March 2011.

[15] This argument is misconceived because in the letter dated 28 March 2011, the plaintiff states that the defendant's conduct constitutes a repudiation of the terms and provisions of POC1 read with POC4. I invited counsel for the plaintiff to indicate to me to any provision of the agreements which support his submission that the two agreements can exist independently of each other. Despite persistent urging by the court, counsel was unable to direct my attention to any provision supporting his argument. I have not been able to find any support to construe POC1 as excluding POC4 or POC2.

[16] Counsel for the defendant in reply submitted further that the argument of the plaintiff is ill-conceived because according to the pleadings, the main contract is POC1, this agreement gives the plaintiff the right to develop at Villa Liza. POC2 gives them the right to subsidies on stands they will develop at Villa Liza. POC3 is an addition to POC4 in that to add to the stands and POC4 is a replacement of POC2 and POC4. Counsel thus submitted that this was one composite contract and argued further that if POC1 is cancelled, as in the present case, nothing else or further will happen. Crisply put, it was contended that it is unsustainable for the plaintiff to have the subsidy and interim progress payments when the right to develop (POC1) no longer exist. I fully agree with this submission. It is my view that once the agreement is cancelled, the declaratory relief is unsustainable. The remedy available to the plaintiff is one of damages.

- [17] In my view the agreement between the parties having been cancelled on the 25th July 2006 and 28 March 2011 (on either version) it follows that the plaintiff will not be able to meet its obligations in terms of the agreement. Thus quite clearly the plaintiff will not be able to fulfil its conditions that had to be fulfilled before it can be entitled to any payment.
- [18] The claim of the plaintiff for a declaratory order depends upon the transfer and completion of the top structure of such erven as stated in claims 1 and 2 and also on the approval of the subsidy in respect of the erven as stated in claims 3 and 4. It is thus necessary that both parties should complete their obligations in terms of the agreement before claims 1 to 4 kicks in. I agree with counsel for the defendant that such a position is now untenable because having cancelled the agreement, no obligation exist on either party to complete their side of the agreement.
- [19] It is clear that there is only one development agreement concluded between the parties and it is the POC1. It is evident that the other agreement deals with subsidy and replacement. It follows that upon cancellation of the POC1 agreement, the entitlement to claim subsidies and replacement falls away. The plaintiff's remedy in the circumstances lie in its damages claim instituted under case number 19734/2012.
- [20] Another factor militating against the granting of the relief sought by the plaintiff is the lack of the necessary averments in the particulars of claim that certain rights have vested. There is also no

allegations that the conditions for the entitlement to payment have been fulfilled. Absent any allegation that the transfer and completion of the top structure of such erven and the approval of the subsidy, it cannot be said that the plaintiff is entitled to the relief sought because in my view that fact should exist before it is entitled to payment.

[21] Consequently I am not persuaded that the plaintiff is entitled to a declaratory order and I would uphold the special plea.

[22] I therefore make the following order:

1. The special plea is upheld with costs, such costs to include the costs of two counsel.



R MATHOPO J

Judge of the South Gauteng
High Court, Johannesburg

Appearances:

For the Plaintiff	:	Adv CAC Korf
instructed by	:	VFV Mseleku Attorneys
For the Defendant	:	Adv VS Notshe SC
		Adv T Nyandeni
instructed by	:	The State Attorney

Date of hearing : 10 December 2012

Date of Judgment : 28 January 2013