

“GUARANTEE AS REQUIRED BY LOCAL AUTHORITY” REALLY MEANS ONLY THAT**Tramore Property Group (Pty) Ltd v Vosloorus Square CC (235/2020) [2021] ZASCA 41 (13 April 2021)**

This judgment teaches a valuable lesson. The seller of land to be developed cancelled the agreement due to the alleged non-compliance by the purchaser with the requirement to provide a guarantee relating to internal services and bulk provisions to the development. But the fact was that a proliferation of delays and emails created a nuance in respect of the guarantee requirements which were at odds with the actual wording in the agreement. The seller's cancellation of the sale based on non-compliance with the nuanced interpretation of the guarantee clause was accordingly set aside.

The Judgment can be viewed [here](#).

FACTS

In September 1991, the City Council of Vosloorus (which is now the Ekurhuleni Metropolitan Municipality, hereinafter “the Council”) and Permprop (Pty) Ltd (“Permprop”, which has subsequently changed its name to Tramore) concluded a written agreement for the exchange of properties between them. The agreement was that the exchange transfers should be effected simultaneously and no money would change hands.

The Council took occupation of the Tramore properties pursuant to the agreement. It erected a large school on these properties. No transfers of any of the properties concerned had taken place (yet).

In April 2000, Tramore and Vosloorus Square CC (“Vosloorus Square”) concluded an agreement in terms of which the Council properties were sold to Vosloorus Square. Negotiations between Vosloorus Square and the Council followed in respect of declaring a township on the land. At all times, the Council was aware of the sale agreement and that it was Vosloorus Square, and not Tramore, that would develop the Council properties.

In September 2012, the Gauteng Department of Housing proclaimed a township which included the Council properties. In the proclamation, certain properties were made subject to special conditions including that internal roads on the properties had to be constructed and maintained by the registered owner to the satisfaction of the Council.

In October 2012, the Council listed its requirements for the services to be provided by Vosloorus Square when it developed the Council properties. Vosloorus Square obtained and submitted the required reports (at a cost of some R 1,1 million) and these were approved. Then, in May 2013, the Council signed the Services Agreement which (still) reflected Tramore as the other party (as the properties had not been transferred yet). Therein it fixed a guarantee amount for ‘all defects occurring in the roads and storm-water’ at R485,000. Although the services agreement requires many other services from the developer, no further guarantees were fixed in it concerning those other services. At this stage only the Council had signed the services agreement.

Thereafter, in May 2013, Vosloorus Square sent an email to Tramore in which it indicated that it was prepared to issue an irrevocable guarantee. In July 2013, Tramore sent an email to Vosloorus Square stating that the consulting engineers of Vosloorus Square should ‘now establish the cost of the internal services and council should agree to the services and the cost thereof and the amount of the guarantee they require’ (“the July 2013 email”). It went on to say that it required a letter from the Council confirming this. Vosloorus Square responded and confirmed that the consulting engineers were engaged in the suggested process. In October 2013, Vosloorus Square emailed to the Council and copied in Tramore and confirmed that they have established the cost of the internal services and that

they were prepared to issue the required irrevocable bank guarantees to Council as stipulated on the service agreement. There was no further mention of the guarantee that Tramore mentioned in its July 2013 email.

In response, Tramore and Vosloorus Square drafted and signed an addendum to the services agreement in which they sought to substitute Vosloorus Square as the developer.

During the middle of 2014, Tramore proceeded with steps to cancel the sale agreement with Vosloorus Square. It sent a letter of demand based on the fact that Vosloorus Square had allegedly breached clause 10.3 of their agreement by failing 'to furnish guarantees for the internal services and bulk contributions within 14 days of being called upon by the seller to do so' and called on it to remedy the breach and furnish the required guarantees within 7 days. Then, in July 2014 Tramore's attorneys delivered a letter to Vosloorus Square purporting to cancel the sale agreement on the basis that Vosloorus Square had 'failed to furnish the guarantees for the internal services and bulk contributions within the specified 7 days as demanded.'

Vosloorus Square applied to court for an order obliging Tramore to transfer the Council properties to it. The Court of first instance dismissed the application, reasoning that Vosloorus Square lacked the requisite *locus standi* to obtain the relief sought. On appeal to the full court of the Gauteng Division, Pretoria the appeal was upheld. That Court ordered the municipality and Tramore to do the necessary to transfer the land in the Exchange Agreement (dated 1991) and that, at the same time, Tramore shall pass transfer of the properties to Vosloorus Square.

Tramore appealed against this latter order. It maintained that its cancellation of the agreement was correct in law because of the breach by Vosloorus Square of its obligations under the sale agreement in not furnishing guarantees in respect of 'internal services and bulk contributions as may be required by the local authority pursuant to proclamation of the township' as provided for in clause 10.3 of the sale agreement.

HELD

- That which was required of Vosloorus Square by clause 10.3 of the agreement was to 'provide guarantees ... as may be required by the local authority'. This meant that, until the municipality required guarantees, Vosloorus Square was not obliged to provide them. The necessary corollary hereof is that Tramore was not entitled to call upon Vosloorus Square to do so.
- Tramore submitted that the services agreement showed that the Council had fixed the amount of the guarantee for 'defects occurring in the roads and storm-water' at R485,000. This, it said, showed that the municipality had 'required' the guarantees. But this clearly did not call for them to be furnished at this stage. During argument, Tramore was constrained to concede that there is no evidence that the municipality had called for any guarantees. As such, it cannot be said that it had 'required' the guarantees at the time Tramore purported to call for the guarantees and, based on the failure of Vosloorus Square to provide them, to cancel the sale agreement.
- Tramore then submitted that the amount of the guarantee had been fixed. But Tramore did not itself treat the services agreement as determinative of the amount or amounts. In the email of July 2013, after signature by the municipality of the services agreement, Tramore had emailed Vosloorus Square and the municipality stating that, after the consulting engineers of Vosloorus Square had established the cost of the internal services, 'council should agree to the services and the cost thereof and the amount of the guarantee they require'. This was at the time that Tramore claimed that it had demanded that Vosloorus Square furnish the guarantees: There could clearly have been no breach based on the amount of the guarantees having been clarified.
- Tramore did not show that the municipality had requested that the guarantees be furnished. It did not show

that the amount had been finally specified. It was therefore not competent for Tramore to have demanded guarantees under clause 10.3 because there is no indication that the guarantees were 'required by the local authority'.

CONCLUSION

There was thus no basis on which Tramore was entitled to cancel the sale agreement. Vosloorus Square correctly regarded the purported cancellation as a repudiation of the sale agreement and elected to enforce it.