

SUMMARY OF THE JUDGMENT

APPROVAL OF SDP CONSTITUTES DEVELOPMENT FINAL APPROVAL

Green Willows Properties v Rogalla Investment Company (20436/2014) [2015] ZASCA 133 (29 September 2015)

This judgment dealt with the question whether approval by a municipality of a Site Development Plan, a step in the overall development approval system, constituted final approval of the development as envisaged by parties in a sale agreement. The Court here answered in the affirmative, as far as procedure in the Western Cape is concerned, holding that such approval served as assurance that the proposed development would be permitted.

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

FACTS

In terms of a written sale agreement, Von Biberstein Investment Company (Pty) Ltd (Rogalla) sold a piece of undeveloped land in the Plettenberg Bay Municipal area to Green Willows Properties 215 (Pty) Ltd (Green Willows) for R13,25 million.

Green Willows intended to develop it by constructing 80 residential units, measuring a minimum of 9 000 square metres, as well as onsite parking bays thereon. In order for the development to take place, it was necessary to rezone the property.

The written contract contained a clause which provided that Rogalla warranted that the Municipality's written approval for the development would be obtained by 18 December 2008. The property would be transferred to Green Willows in the meanwhile and an amount of R3,25 million of the purchase price would be withheld until such time as approval was granted. If the approval was not obtained, Rogalla would forfeit the balance purchase price.

In May 2006 the Municipality passed a first resolution imposing certain conditions in respect of the anticipated development. Two of those conditions, relevant for this dispute, were that:

- (i) ownership status, management and maintenance responsibilities of the existing access road be addressed to the satisfaction of the Head: Public Works; and
- (ii) prior to building plan approval, a Site Development Plan (SDP) which addresses all the conditions, be submitted for consideration and approval.

On 18 December 2006 the Municipality passed a second resolution approving the revised SDP subject to the following conditions:

- a) that the floor levels of all habitable rooms be above the 1:50 year floodline;
- b) that the ownership status, management and maintenance responsibilities of the existing access road be addressed to the satisfaction of the Head: Public Works; and
- c) that an appropriate Services Agreement be put in place.

This December resolution was the subject matter of the dispute as afterwards, Rogella advised Green Willows that the condition had been fulfilled and that the balance purchase price was now payable. Green Willows however refused to pay, arguing that final written approval had not been granted and that the balance purchase price was thus forfeited.

The Pietermaritzburg High Court found in favour of Rogella. Leave to appeal was dismissed and Green Willows approached the Supreme Court of Appeal (SCA) for leave to appeal, which was granted. The present matter deals with this appeal. In the SCA, Green Willows persisted with the contention that the terms of the contract had not been met and submitted that the approval of the SDP in the December resolution did not constitute final written approval.

HELD:

Did the December resolution constitute final approval?

- The witnesses for Rogella, including the manager of the Municipality's town planning and development department, explained the process in considering rezoning applications in the Western Cape and explained the significance of a SDP. They stated that a rezoning application comprised four stages, the approval of a SDP being the completion of the third stage in the process. According to both of them, a SDP, although not mentioned under the Land Use Planning Ordinance (LUPO), was a town planning technique that was commonly used to assist municipalities to understand the nature of a development in a schematic or conceptual form. It showed the layout, form and quantification of the development proposal in sufficient detail to make the proposal clear. When approved, it would serve as assurance that the proposed development would be permitted and the purchaser could with certainty go ahead and obtain valuations in respect of the property on the basis of that approval. The next step, once a SDP had been approved, was the submission of building plans that would also be approved, as long as they complied with the SDP. The fourth stage also entailed the approval of detailed engineering works drawings and associated administrative steps. Thereafter construction would be allowed to

proceed.

- Green Willows did not lead any witnesses to dispute this evidence. It therefore had to be accepted that the SDP was a tool utilised in the municipality to grant final approval of a rezoning application and that once approved, it constituted final written approval as envisaged by LUPO. This was supported too by the following considerations:
 - (i) the May resolution, by which the Municipality imposed the conditions, indicated that a SDP was required to address the conditions before building plans could be approved and construction could commence. The required SDP was submitted and approved. It could thus be inferred that the Municipality was satisfied that all the conditions had been met. It followed that written approval, as contemplated in the contract for the development of the property was obtained timeously.
 - (ii) In addition, in a letter dated 14 December 2006, Green Willows requested the municipal planning manager to “confirm in writing to ourselves if there is final confirmation of this site development plan” noting that “the final payment for the property is due pending the confirmation of the development”. This was a clear indication that, at the time, Green Willows itself saw the approval of the SDP as the final written approval which would make the balance of the purchase price payable.
 - (iii) Further, after the December resolution was passed and sent to it, Green Willows elected to submit another application for rezoning of the same property. After considering that subsequent application, the municipality passed a resolution granting approval on the strength of a revised SDP that provided for a reduced number of units. In that instance, Green Willows accepted the resolution as constituting final written approval and, on the strength of that, submitted building plans for approval.

The appeal accordingly had to fail on these grounds.

- Green Willows however persisted with an attack on the December resolution on the ground that the Municipality had failed to obtain a departure from the rezoning scheme (as required in terms of LUPO) and thus did not lawfully approve a floor area or bulk of 9 000 square metres. In the alternative, Green Willows contended that the resolution did not fulfill the May resolution condition relating to the ownership status, management and maintenance responsibilities of the existing access road which had to be addressed to the satisfaction of the Head: Public Works in terms of the original condition.

The departure in relation to bulk

- 'Bulk' refers to the maximum floor area of a building or buildings permissible on an erf in terms of the zoning scheme; it governs the density of the construction allowed on a property. The warranty contained in the sale agreement required an assurance that it was possible to get 9 000 square metres of bulk on the property.
- Rogella's witnesses testified that it appeared that there was a bulk shortage or a minor bulk overrun as compared to the size of the property but that the deviation could be fixed through a technique normally used in the Western Cape called 'departures'. They further testified that it could not be said that the plan proved that one could not get 9 000 square metres on the property concerned. The evidence from the municipality itself was that it approved the SDP on the basis that it would not exceed 9 000 square metres. Thus on a factual level, accordingly, there was no evidence that the bulk factor could not be achieved and that a departure was necessary.
- It was furthermore stated that, in the circumstances, a separate application for a departure was not required as the municipality determined the permissible bulk when the SDP was submitted and evaluated. If a SDP for instance indicated a different building line from that stipulated in the zoning scheme regulations, the Municipality would accept and approve it as an application for relaxation of that building line. As such, a SDP was a package of directions of what a developer could and could not do. Insofar as was necessary, therefore, the application for relaxation was made and granted. The contention that the Municipality failed to approve a departure from the rezoning scheme thus had no merit.

The condition relating to the access road

- The contention by Green Willows that this condition was not fulfilled, also had to fail. The Municipality advised that the condition was inserted for its own attention, as a reminder to attend thereto, and was not something the developer was required to do beforehand.

The appeal was dismissed with costs.

CONTACT US

■ CAPE TOWN
Tel: 021 406 9100

■ SOMERSET MALL
Tel: 021 850 6400

■ TYGER VALLEY
Tel: 021 943 3800

■ FOURWAYS
Tel: 010 001 2632

■ CLAREMONT
Tel: 021 673 4700

■ STELLENBOSCH
Tel: 021 001 1170

■ MENLYN
Tel: 012 348 1682

■ CENTURION
Tel: 012 001 1546

■ FISH HOEK
Tel: 021 784 1580

■ TABLE VIEW
Tel: 021 521 4000

■ ILLOVO
Tel: 011 219 6200

■ BEDFORDVIEW
Tel: 011 453 0577