

SOUTH AFRICA / JUDGMENT

Brooklyn Edge (Pty) Ltd and Another v City of Tshwane Metropolitan Municipality (37681/2012) [2019] ZAGPPHC 233 (26 June 2019) [2019] ZAGPPHC 233

COURT

North Gauteng High Court, Pretoria

BEFORE

Strijdom

CASE / FILE NUMBER

37681/2012

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IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

REPORTABLE:

YES
/ NO
OF
INTEREST TO OTHER JUDGES: YES/NO
REVISED.
CASE NO:37681/2012
26/6/2019

In the matter between:

BROOKLYN EDGE (PTY)
LTD
FIRST PLAINTIFF
PIVOT PROPERTY
DEVELOPMENT
SECOND PLAINTIFF
And
CITY OF TSHWANE
METROPOLITAN
DEFENDANT
MUNICIPALITY

JUDGMENT

STRIJDOM AJ

INTRODUCTION

[1] This is a contractual claim for specific performance (“the specific performance claim”) and, in the alternative, cancellation and damages to be determined later) (“the damages claim”).

[2] On or about 31 July 2003 and at Pretoria the first plaintiff (then known as Nieuw Pivot Investments (Pty)Ltd and the defendant, both duly represented entered into a written deed of sale, a copy of which is attached to the particulars of claim marked annexure “A1” (“the deed of sale”).[1]

[3] In the specific performance claim, the plaintiff’s claim that the defendant perform the remaining obligations in terms of the deed of sale concluded by the first plaintiff and the defendant, to enable transfer of certain properties to the first plaintiff, and the second plaintiff(the first plaintiffs’ nominee). In the damages

claim the plaintiffs claim cancellation of the deed of sale and the resultant damages (to be determined later).

[4] In this judgment, I will refer to the parties and other relevant bodies or matters, as follows:

4.1 the first plaintiff as “Brooklyn Edge”.[2]

4.2 the second plaintiff as “Pivot Property”.

4.3 the first and second plaintiffs’ collectively as “the plaintiffs”.

4.4 the defendant as “the City”.

4.5 the council of the municipality as “the Council”.

4.6 the MEC of Economic Development, Gauteng Province as “the MEC”.

4.7 Adriaan Venter as “Venter” and Roestoff Venter and Kruse attorneys as “RVK”.

4.8 Metric Marketing Group trading as ‘acceleration’ as “MMG”.

4.9 the sale agreement which is the subject of the action as “the deed of sale”.

4.10 the properties which were sold in terms of the deed of sale to Brooklyn Edge as “the properties” and the portion of those properties which are nominated to be transferred to Pivot Property as “the nominated properties”.

4.11 Local Government Ordinance 17 of 1939 as “the 1939 Ordinance”.

4.12 Gauteng Removal of Restrictions Act 3 of 1996 as the “GRRA”.

4.13 Local Governmental: Municipality Finance Management Act 56 of 2003 as “the MFMA”

4.14 the Institution of Legal Proceedings Against Organs of State Act 40 of 2002 as “ILPOSA”.

COMMON CAUSE FACTS

[5] The following are the material facts which are not in dispute (in terms of the pleadings or pursuant to the evidence in court),

5.1 the citation of the parties;

5.2 on 26 June 2003, the Council resolved that the City shall dispose of the properties, in terms of section 79(18) of the 1939 Ordinance (“the 2003 resolution”);

5.3 the conclusion of the deed of sale by Brooklyn Edge and the City on 31 July 2013 and that annexure A1” to the particulars of claim is a copy of the deed of sale;

5.4 the City commenced the process in terms of section 63,67 and 68 of the 1939 Ordinance to close the properties as public open space (“closure”);

5.5 the objections which were raised to the closure of the properties were withdrawn and accordingly there are no public objections to the park closure;

5.6 the City has not provided notice to the Surveyor General and the Registrar of Deeds to confirm that the closure has been properly effected (“closure certificate”) as contemplated in section 67(9) (a) and 68 of the 1939 Ordinance, and the closure has therefore not taken effect;

5.7 the City accepted and processed Brooklyn Edge’s application for rezoning and to remove title conditions (“the rezoning application”) in order to amend the Pretoria Town Planning Scheme, 1974, in accordance with annexure C to the deed of sale (clause 7.3 of the deed of sale) (“the amendment scheme”). However, the city failed to decide the application;

5.8 an appeal by Brooklyn Edge in terms of section 7 of the GRRA against the unreasonable delay of the City in the rezoning application, was successful and the MEC has approved the rezoning application;

5.9 the amendment scheme was approved on appeal by the MEC but has not been published in terms of section 7(16) of the GRRA and has therefore not taken effect;

5.10 the plaintiff has not pursued relief in terms of a review application relating to the issuing of the closure certificate or the publication of an amendment scheme;

5.11 the process contemplated in section 14(2) of the MFMA has not been implemented in respect of the properties;

5.12 ILPOSA applies to claim 5 in the particulars of claim;

5.13 the plaintiffs did not deliver a section 3(1) notice within the 6 months period contemplated in section 3(2)(a) of ILPOSA;

5.14 tax invoices (annexures “B1 to B56” of the replication) were issued monthly by the defendant to the first plaintiff.

THE EVIDENCE

Plaintiffs’ witnesses

Ronel van Coller

- [6] Van Coller testified that she was employed as legal advisor in the City’s legal division in 2003. She was involved with the applications for the purchase of the City land.
- [7] Venter acting on behalf of Brooklyn Edge made application for the purchase of the properties and in doing so made representations to Van Coller. Based on this application, Van Coller prepared a report to the Council, which recommended the sale of the properties to Brooklyn Edge. The Council accepted the report at a public meeting, which report then become the 2003 Resolution.
- [8] Van Coller further testified that she had no direct interaction with the foreign investor referred to in the 2003 resolution but was informed about the foreign investor via Venters’ representations and the documents he presented relating to the foreign investor. Van Collers’ understanding was that MMG will hold the majority shareholding in Brooklyn Edge and that such shareholding would materialize at the latest upon transfer of the properties to Brooklyn Edge.
- [9] No representations were made by Venter directly to the Council. She testified that in respect of the closure of the properties as public open space, objections were made to the proposed closure which were later withdrawn.
- [10] RVK was appointed in terms of the deed of sale as the conveyancers to attend to the transfer. Van Coller believed that the rezoning of the property could reasonably be achieved within 18 months.
- [11] Once the 2003 resolution was issued and the deed of sale was signed, both documents were sent to the finance department to enable it to generate invoices in terms of which interest can be charged and against which payment can be made. No decision to cancel the deed of sale was taken while she was employed by the City.

Ben Espagh

- [12] Espagh testified that in 2003, he was employed by the City as specialist valuator in the department Corporate Services (Property Valuation). He was not directly involved in the valuation of the properties but served on the property committee which recommended to the City’s Legal Division the proposed value at which to sell the properties. He cannot confirm that a written evaluation report exists however, the name of the valuer was on the file. His own notes confirm that he had formed a view regarding the market value of the property.

Louis Van der Watt

- [13] Van der Watt testified that he is the chief executive officer of the Atterbury Group and the plaintiffs' are subsidiaries of those groups. He is also the chief executive officer of the plaintiffs.
- [14] He further testified that MMG is the foreign investor who wanted to headquarters its South African business in Pretoria. Van Der Watt had discussions with MMG's South African representative, Michael Roots, who requested Van Der Watt to assist MMG in identifying a property in Pretoria for MMG's South African head office.
- [15] Because the development envisaged on the properties was frustrated MMG decided to establish its headquarters in Cape Town. There was no formal joint venture agreement between Atterbury Group and MMG. What would have transpired is that a shareholders agreement would be concluded in due course, in terms of which the foreign investor and Atterbury would hold shareholding in Brooklyn Edge, which shareholding would be pro rata to the floor area it would occupy relevant to the total floor area of the development, which would result in a majority shareholding in MMG. The transfer of the majority shareholding to MMG would occur upon transfer of the properties.
- [16] Van der Watt was involved in the process of developing plans for the relocation of the sport facilities to the Trim Park properties as, envisaged by the deed of sale. Following onsite visits together with City officials and establishing what the City required, plans were prepared by Jaques Niemann Designers (architects). Van der Watt had engagements with Michelle Wheeler of the City.
- [17] The City indicated where on Trim Park it wanted the proposed sport facilities to be allocated and the plans presented were based on the City's input. The plans make provision for tennis courts, and a possible 5th, whereas the existing facilities on the properties make provisions for 6 tennis courts. The City indicated that the remaining 2 tennis courts should be constructed in Soshanguve but never identified the specific site.

Derick Griffiths

- [18] Griffiths testified that he is a professional property evaluator. He valued the properties by considering its highest and best use and by looking at comparable sales. The value he come to is approximately R40 million (R45 582 500.00-incorporating 50% of the sports club replacing costs Brooklyn Edge is obliged to pay in terms of clause 10.1 of the deed of sale.)

Daniel Conrad Koen

- [19] Koen testified that he is a qualified Quantity surveyor. He testified that his quantity surveying firm (GK Projects) in 2005 prepared a cost plan based on drawings of Jaques Niemann Designers (Architects) [core bundle p891-895] ("the drawings"), which provided for the construction of sport facilities on Trim Park. He further testified that the costs plans are reasonable estimates of the costs to construct the work envisaged by the drawings. He

testified that the drawings make provisions for tennis courts whereas the existing sport facilities on the properties make provisions for 6 tennis courts. He did not have regard to the plans of the existing sports facilities on the properties but that GK Projects simply prepare costings based on the drawings.

Peter John Dacomb

[20] Dacomb testified that he is a registered professional Town planner. He was appointed by Brooklyn Edge to conduct on its behalf the rezoning application Plan. Practice also conducted the appeal to the MEC against the City's' unreasonable delay in deciding the rezoning application. The appeal succeeded-the MEC found there was unreasonable delay on the side of the City and decided the merits of the rezoning application in the applicants' (Brooklyn Edge) favour. He also confirmed the contents of his report.

DEFENDANTS' WITNESSES

Andre Zybrand

[21] Zybrand testified that he is a qualified valuer. He has been a valuer for 43 years.

[22] He testified that he valued the said properties by considering its highest and best use and looked at comparable properties. He had regard to the properties set out in annexure C to his report and based thereon determined the properties to be the value of R69 000 000.00. In a later evaluation he increased his valuation to R72 million.

David Neil Pienaar

[23] Pienaar testified that he is a registered quantity surveyor. He testified that the drawings supplied to Koen does not mention that it represent the original buildings or drawings to say it is comparable with the original drawings. There is no indication that the new drawings represent the original buildings.

[24] He testified that the assumptions are made in the costs plans and that the drawings are not approved building plans. These are estimated costs to construct the project and may differ from actual costs.

Gaza Douglas Nagy

[25] Nagy testified that he is a registered professional Town planner and has been practising for 35 years. According to him 18 months to 3 years would be a reasonable period for the closure and rezoning of the properties.

Evaluation of the evidence

[26] This matter turns largely on various legal points relating to the interpretation of certain provisions of the deed of sale and relevant statutes. However, the court will take into consideration the evidence tendered by the parties.

- [27] The evidence of van Coller is clear that it was not represented to her that MMG was the current majority shareholder in Brooklyn Edge when Venter made representations to her, in the process of applying to acquire the properties, prior to the 2003 resolution and conclusions of the deed of sale. There is no contradiction between what was conveyed to van Coller about the foreign investor, what she understood and what was contained in her report to Council which became the 2003 resolution. Council made its decision to sell the properties to Brooklyn Edge purely based on Van Collers' report to Council.
- [28] Espagh cannot confirm that a written valuation report exists. However the fact that the valuation committee sat to consider the market value of the property establishes the probability that there was a valuation done. Espaghs' own notes confirm that he had formed a view regarding the market value of the property.
- [29] The 2003 resolution stands until it is set aside. There is no counterclaim to set the 2003 resolution aside.
- [30] Van der Watts' evidence is clear that there was to be a majority shareholding in favour of MMG in Brooklyn Edge, which would have been calculated proportionate to MMGs' area of occupation of the floor area of the envisaged development, and that such share transfer would occur upon transfer of the properties.
- [31] The evidence of the valuers has no bearing on whether the plaintiffs' have succeeded in proving their pleaded cause of action.
- [32] In the joint report of Griffiths and Zybrand, Zybrand conceded that two of the properties of annexure C are not comparable and that he would have to review his valuation.[3] During cross-examination Zybrand conceded that with the exclusion of the two non-comparable properties, his valuation of the properties (i.e the properties which are the subject of the deed of sale) would be in the region of R40 000.00.
- [33] The Quantity surveyors Koen and Pienaar testified that the estimate may be slightly lower or slightly higher than actual costs.
- [34] Dacomb (Town Planner) was involved in the rezoning application and the appeal to the MEC against the City's unreasonable delay. Nagy's (Town Planner) evidence were focussed on the reasonable period for the closure and rezoning of the properties (18 months to 3 years) according to him.

THE ISSUES TO BE DECIDED

IS THE DEED OF SALE INVALID?

- [35] The City's contention is that the deed of sale is invalid because of alleged non-compliance with the provisions of section 79(18)(b) and (d)(ii) relating to the publication and valuation processes preceding the 2003 resolution.

- [36] Section 79(18)(d)(ii) in peremptory terms provides that prior to defendants' causing a notice of the Council Resolution to be published for public comment, it shall first cause a valuer to evaluate both-
- (a) the immovable property it wishes to sell; and
 - (b) the substituting property to which the existing sport facilities are to be relocated and erected.
- [37] Section 79(18)(e)(ii) further provides that the Defendants Council shall not sell, alienate or dispose of immovable property or "at a lower amount than the amount at which it has been evaluated."
- [38] It was submitted by counsel for the defendant that the jurisdictional fact necessary to exercise the power conferred to Council in section 79(18)(a)(i) was absent in that the objections submitted in terms of Section 79(18)(c) as a result of a defective Section 79 (18)(b), would necessarily have been made without the benefit of mature consideration of all relevant information. It was submitted that this failure to comply with mandatory statutory provisions would result in "the absence of the necessary jurisdictional fact the Defendants' Council could not validly exercise the power, with the result that the agreement was ab initio invalid."
- [39] The 2003 resolution does not become a nullity in consequence of the mere assertion that there was non-compliance with the 1939 Ordinance.
- [40] The question whether a legality challenge by the City is permissible depends on whether a collateral challenge may be raised against the plaintiffs' enforcement of the deed of sale, to which the City is a party.
- [41] In *Oudekraal*[4] the SCA held as follows:
- "It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the real force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available in other words, only if the right remedy is sought by the right person in the right proceedings."*
- [42] The plaintiffs' are not public authorities. The conclusion of the deed of sale was not an exercise of public power, but a private treaty, preceded by the 2003 resolution passed by the Council.
- [43] The plaintiffs' are not taking coercive action in enforcing the deed of sale. Once the deed of sale was concluded, it is governed by contract law and not public law.[5]

- [44] The enforcement of a contract to which the City is a party does not constitute circumstances under which a collateral challenge can be raised, because the City is not “threatened by the public authority with coercive action”. To raise such a challenge in contractual proceedings are not the “right remedy...in the right proceedings.”
- [45] It was incumbent upon the City to bring a legality review of its own processes. The City has opted a supine approach in these proceedings and has failed to launch a challenge to the legality of its own perceived irregularities in concluding the contract with the plaintiffs’.[6]

IS THE DEED OF SALE VOID FOR VAGUENESS?

- [46] The City contends that the purchase price is vague because the replacement costs (which does not have a specified value) of the sport facilities has to be deducted from the purchase price.
- [47] It was submitted by counsel for the defendant that one of the essentialia of an agreement of sale is that the purchase price should be certain or ascertainable. This is also an express requirement in terms of the Alienation of Land Act, No 68 of 1981. It was further submitted that the evidence established that the actual costs of the relocation of the sports facilities have to date only been estimates and the actual costs have never been established.
- [48] In clause 1.1 of the deed of sale, the purchase price is determined as R9 500 000. The fact that an amount stands to be deducted from the purchase price (being the cost to replace the sport facilities) does not render the purchase price vague. It does not increase or decrease or make uncertain what the value of the purchase price is.
- [49] A contract of sale for a reasonable price is valid as the price can be determined with reference to objective tests. The reference to the “the same existing standards and sizes thereof” in clause 10.1 represent objective criteria. The cost to be incurred is the reasonable costs which is also objectively determinable.

IS THE DEED OF SALE SUBJECT TO A SUSPENSIVE CONDITION?

- [50] The City made the following submissions:

- 50.1 That the 2003 deed of sale was subject to positive suspensive conditions, that the closure and rezoning of the property had to be successfully finalised;
- 50.2 That these suspensive conditions suspended, in whole or in part, the operation of the obligations flowing from the contract pending the occurrence of the specified events (closure and rezoning);
- 50.3 That the 2003 deed of sale contained an implied alternatively tacit term that the closure and rezoning had to be successfully finalised within a reasonable time;

50.4 That clause 1.2.2 of the deed of sale expressly provided for the mutual cancellation of the “transaction” in the event of the non-occurrence of the specified events (closure and rezoning).

[51] It was further submitted by counsel for the City that the matter of *Hanuscke Beleggings CC v Kungwini Local Municipality*[7] is on material respects on all fours with the present matter, even though the contract did not make provision of the mutual cancellation

of the deed of sale in the event of the non-fulfilment of the suspensive conditions.

[52] The question whether the deed of sale coming into force was subject to the fulfilment of suspensive conditions is not a question of contractual interpretation.

[53] Clause 1.2.1 of the deed of sale provides that should the closure and rezoning not be finalised successfully, the transaction shall be mutually cancelled by the parties, in which instance the City shall refund the payments made in terms of the deed of sale, save for the rates and services charges. Clause 1.2.2 does not use the language “subject to” or that the deed of sale would “lapse” or “be void” if the requirement in clause 1.2.2 is not met.

[54] Clause 1.2.1 provides that the purchase price deposit must be paid on signature of the deed of sale. Clause 1.2.2 provides that interest shall be payable at the latest after 18 months from conclusion of the deed of sale. The identification of the substituting property by the defendant shall be done within 30 days of conclusion of the deed of sale in terms of clause 1.2.2 none of these clauses provide that its provisions are suspended until the proviso of clause 1.2.2 of the deed of sale is achieved.

[55] The proviso in clause 1.2.2 is not construable as a suspensive condition.

[56] I am also of the view that an implied or tacit condition cannot be implied into the proviso in clause 1.2.2 to the effect that the closure and rezoning of the properties had to be achieved within a reasonable time. There is no room (given the express provisions of the deed of sale) for the importation of the tacit or implied condition contended for by the City.[8]

[57] The *Hanuscke* case can only be on all fours with this matter if the terms of the contract in *Hanuscke* was the same as the deed of sale. It was accepted in *Hanuscke* that the contract was subject to suspensive conditions that closure and rezoning had to be achieved. In *casu* the deed of sale is not subject to suspensive conditions.

[58] Even if one assumes that the deed of sale has a tacit condition which requires the closure and rezoning to be achieved within a specific period, the doctrine of fictional fulfilment of conditions has been extended to the situation where there has been a deliberate frustration of contractual performance.[9]

[59] It was contended by the City that fictional fulfilment is not applicable as per the *Hanuscke* case. It was further argued that the conditions are for the public benefit and is statutory of nature and cannot be deemed to be fulfilled.

[60] In my view the City, in breach of the deed of sale, has deliberately frustrated the processes of completion of the closure and rezoning of the properties in order to prevent transfer of the properties.

Is the deed of sale void for non-compliance with the ALA?

[61] The ALA requires that the material terms of a contract of sale of land must be in writing.

[62] The deed of sale indicates the contracting parties (Brooklyn Edge and the City) and the entity that may be nominated to take transfer of the nominated properties (Pivot Property) – see clause 7.4 of the deed of sale, the purchase price and a prescription of the properties which are the subject of the sale. The identities of the purchaser and seller, the purchase price and the merx are the material elements of an agreement of sale. The fact that Pivot Property is not a signatory to the deed of sale does not render it non-compliant with the deed of sale.

IS WRITTEN ACCEPTANCE BY PIVOT PROPERTY OF RIGHT TO TAKE TRANSFER OF THE NOMINATED PROPERTIES REQUIRED?

[63] It was contended by counsel for the City that the nomination of the second plaintiff (Pivot Property) is contrary to the express provisions of the 2003 deed of sale the mandatory provisions of the Land Alienation Act:

- (a) the first plaintiff has in accordance with clause 7.4 failed in writing to duly nominate the second plaintiff.
- (b) the second plaintiff has failed in writing to accept the provisions of the deed of sale, which written acceptance had to be addressed to the defendant.

[64] It was argued by counsel for the plaintiffs that the deed of sale sets no requirements that Pivot Properties acceptance of the deed of sale had to be in writing.

[65] I conclude that Pivot Property is not entitled in contract to claim the nominated properties because it did not accept the nomination in clause 7.4 of the deed of sale.

WAS THE DEED OF SALE INDUCED BY MISREPRESENTATION?

[66] The only representations made to Counsel was the report of Van Coller which became the 2003 resolution. The evidence of Van Coller is that it was not represented to her that MMG was the current majority shareholders in Brooklyn Edge when Venter made representations to her in the process of applying to acquire the properties prior to the 2003 resolution.

[67] The City has not proven that the conclusion of the deed of sale was induced by misrepresentation. The evidence does not establish that the representations in Van Collers' report were factually inaccurate when the report served before Council. Council made its decision to sell the properties to Brooklyn Edge purely based on Van Collers' report to Council.

COMPLIANCE WITH ILPOSA

[68] Section 3(2) of ILPOSA provides that a notice to an organ of state of the intention to institute legal proceedings for damages must be served within 6 months from the date the debt become due.

[69] Claim 4 is predicated on this Court exercising its discretion against the ordering of specific performance and declaring that the deed of sale has been cancelled. Alternatively, it is based on the City's failure to give effect to an order for specific performance. The claim for damages (to be postponed in terms of claim 4) flows from the cancellation of the deed of sale. That debt will only arise when the deed of sale is cancelled, which

will only follow if the court exercises its discretion against the ordering of specific performance or when the City fails to comply

with an order for specific performance.

[70] In my view there is no late notice in terms of section 3 of ILPOSA concerning the debt which is the subject of claim 4.

[71] It was conceded by the plaintiffs' that ILPOSA applies to claim 5 in the particulars of claim. It does not apply to claims 1 to 3 because those are specific performance claims and the Act applies only to claims for damages.

[72] Even if one assumes that ILPOSA is applicable to claim 4 and 5, the Court may grant condonation if the debt has not been extinguished by prescription, good cause exists for the failure by the creditors, and the organ of state has not been unreasonably prejudiced by the failure.

[73] The section 3 notice was served in May 2012. The MECs' decision in the rezoning appeal was delivered in March 2010 but only finally corrected in November 2011. The City has not asserted any prejudice in consequence of not receiving the section 3 notice earlier than what it did. The plaintiffs have a cause of action in terms of the deed of sale which in my view has not prescribed. In these circumstances the failure to comply with section 3(2)(a) of ILPOSA is condoned.

MFMA

[74] Section 14 (2) of the MFMA requires of the City to take certain steps prior to disposing of its capital assets. It reads as follows:

"(2) A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public-

- (a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and

- (b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.”
- [75] The MFMA came into force subsequent to the 2003 resolution and the conclusion of the deed of sale. The question is whether it retrospectively affected the rights and obligations acquired in terms of the deed of sale.
- [76] Section 12(2)(c) of the Interpretation Act 33 of 1957 provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not affect any right acquired or accrued under any law so repealed.
- [77] It was contended by the City that defendant is approving the transfer of ownership of a capital asset as contemplated in Section 14(2) of the MFMA it does not give retrospective effect to the MFMA. In such circumstances the defendant is merely giving effect to the limitations imposed upon it by the MFMA. It was further submitted that the provisions of the MFMA are prospective rather than retrospective. In other words the MFMA prescribe the manner in which approvals of all transfer of ownership of capital assets are managed.
- [78] The City’s decision to dispose of the properties was taken in terms of the legislation to the disposition of its assets at such time (the 1939 Ordinance). The conclusion of the deed of sale was authorised in terms of the City’s’ resolution pursuant to it following that legislative process. The MFMA’s’ promulgation thereafter does not undo the rights which were procured in terms of the aforesaid processes. The question is whether rights to procure transfer vested before the MFMA.
- [79] Prior to promulgation of the MFMA a statutory process providing for public interest to be considered for purposes of disposing of the properties was followed. (in terms of the 1939 Ordinance) and the City resolved to sell the properties to the plaintiff.
- [80] The MFMA does not operate retrospectively and does not impose a new statutory public participation process and a new requirement to resolve to dispose of the properties, where those processes were implemented prior to the promulgation of the MFMA in terms of the legislative regime that operate at the time.

TACIT TERM PERTAINING TO INTEREST

- [81] Clause 1.2.2 of the deed of sale provides for the payment of interest by Brooklyn Edge after the earliest of the closure and rezoning of the properties or 18 months.
- [82] The City’s frustrating of the closure and rezoning delays the transfer of the properties to the plaintiffs’ which results in a prolonging of the period of interest payments on the purchase price.
- [83] It was decided in *Mac Duff E Co Ltd (in Liquidation v Johannesburg Consolidated Investment Co) Ltd* 1924 AD 573 at 611 that:

“a branch of the broad equitable rule of law that no one can take advantage of his own wrong, for it is unjust and contrary to good faith that he should do so.”

- [84] In my view the deed of sale contains a tacit or implied term that in the event of the defendant delaying the closure and rezoning of the properties, the period of delay would be disregarded in calculating the 18 months period contemplated in clause 1.2.2 of the deed of sale.

PAYMENT OF DEPOSIT

- [85] Clause 1.2 of the deed of sale provides that payment of the deposit must be made to the City's' chief financial officer. The evidence presented established that Brooklyn Edge paid the deposit of R950 000.00 to the conveyancers upon instruction of the City's' representative (Bekink). The deposit was paid to the account nominated by the City.
- [86] If the City wants to assert that Brooklyn Edge must pay the deposit to the chief financial officer and is in breach for not doing so, it must afford Brooklyn Edge 30 days' notice to remedy such breach in terms of clause 11 of the deed of sale.

SUMMONS PREMATURE

- [87] The issues are whether, prior to closure rezoning and fulfilment by the plaintiff of all its obligations in terms of the deed of sale, the claim for transfer of the properties is premature. On the one hand the City argues that the right to claim transfer of the properties has not arisen, and on the other that the right to transfer of the properties has prescribed.
- [88] The plaintiff acknowledge that the claim for transfer follows the closure and rezoning of the properties. Transfer is claimed consequent to the closure(for issuing of the closure certificate) and rezoning (by publication of the amendment scheme) of the properties.
- [89] The City is obligated in term of section 67(9)(a) and 68 of the 1939 Ordinance to submit the closure certificate to the Surveyor General and the Registrar of Deeds.
- [90] The appeal in the rezoning application was upheld and section 7(16) provides that the registrar appointed by the MEC is the incumbent person that must publish the approved amendment scheme. In my view the claim for transfer is not premature.

ADMINISTRATIVE ACTION

- [91] The issue is whether the plaintiffs must take on review the failure of the City to submit the closure certificate to the Surveyor-General and the Registrar of Deeds and may not in contract claim that the City submit the closure certificate.
- [92] The steps (following the decision to close the properties as public open space) are not administrative action.[10]

[93] A PAJ review is not required in response to the City's failure to take these steps. Clause 7.1 of the deed of sale provides that City must follow the provisions of section 67 of the 1939 Ordinance for purposes of the closure of the properties. The issuing of the closure certificate flows from its obligation to implement the section 67 process. The City is not shielded because it is a organ of state that performs administrative functions against the enforcement of obligations its contracted to perform by private treaty.[11]

PRESCRIPTION

[94] The defendant has pleaded that the following debts have in terms of the provisions of section 11 of the Prescription Act 68 of 1969 prescribed:

94.1 close the property in terms of the provisions of the 1939 Ordinance;

94.2 the right of second plaintiff to exercise the right to accept benefit as provided for in the deed of sale concluded between first plaintiff and defendant;

94.3 claim for transfer of the property alternatively claim for cancellation of contract and damages; alternatively damages equal to amount of interest on the balance purchase price from 15 January 2007 until date of registration calculated in terms of clause 1.2.2 of the 2003 deed of sale.

94.4 condonation in terms of section 3(4) of the Legal Proceedings Act;

94.5 claim based on the provisions of clause 10.1.1 of the 2003 deed of sale;

94.6 claim to compel defendant to comply with its statutory or contractual obligation to close the property;

94.7 claim for breach of statutory obligation to close the property, and

94.8 claim for breach of statutory obligation to rezone the property

[95] Plaintiffs allege that the right to claim transfer against payment of purchase price has not prescribed in terms of section 11 of the Prescribed Act on the basis of the following:

95.1 that the defendants' issuance of monthly statements to the first plaintiff constituted an acknowledgement of debt, which acknowledgement interrupted prescription in terms of section 14(1) of the Prescription Act, in that prescription ran afresh from the date of each of the aforesaid tax invoices; and

95.2 that the defendants' obligation in terms of the 2003 deed of sale to close the property and publish the amendment scheme are obligations reciprocal to the plaintiffs' obligation to take transfer and make payment of the purchase price in terms of the 2003 deed of sale which reciprocal debts have yet to become prescribed.

- [96] It is trite that prescription commences to run as soon as the debt becomes due, meaning that from the date it becomes immediately claimable by the creditor and immediately payable by the debtor.
- [97] The City's contention is essentially that everything in the deed of sale that has not been implemented has prescribed. Not every performance contemplated by the deed of sale constitutes a debt. The right to accept the nomination to take transfer of the nominated properties, the right to the issuing of the closure certificate and the right to the identification of the substituting property by the City are not debts because they are not obligations to pay money, deliver goods or render services.
- [98] The debt (as meant in the Prescription Act) in terms of the deed of sale is the right to take transfer of the properties. That debt will only become due (as meant in section 12(1) of the Prescription Act) when it is immediately claimable.[12]
- [99] Transfer of the properties is only immediately claimable in terms of the deed of sale when the closure and rezoning of the properties have been affected –clause 7 of the deed of sale.
- [100] The debt (transfer of the properties) is not yet due and prescription of that debt has not commenced.
- [101] Monthly tax invoices were issued by the defendant to the first plaintiff in the period 13 October 2003-25 January 2013 pertaining to the outstanding purchase price and interest thereon arising from the purchase of the properties. It is not in dispute that these tax invoices were rendered by the City.
- [102] Each of the aforesaid monthly statements individually constitutes an express or tacit acknowledgment by the defendant of the liability due in terms of the deed of sale dated 31 July 2013.[13]
- [103] Section 14 of the Prescription Act 68 of 1969 provides that:
- “(1) The running of the prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.*
- (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.”
- [104] The summons was issued on 29 June 2012. By rendering the tax invoices (continuously for a period of 10 years) the City's conduct objectively created the impression that the City admitted the rights and obligations that arise from the deed of sale.
- [105] A prescription period of 3 years could not have completed in respect of any claim in terms of the deed of sale prior to judicial interruption of prescription by service of summons in January 2012.

CONCLUSION

[106] The evidence establishes that the City is the cause of the non- implementation of the deed of sale. The process of closure was started, objections were withdrawn, and the City ought then to have issued the closure certificate, but did not. The rezoning application was launched and supported by the City Planning Committee. The City ought to have made a decision but did not.

[107] Brooklyn Edge appealed successfully against the unreasonable delay and procured approval of the rezoning from the MEC in November 2011. The City ought then to provide to the registrar the necessary documents and information to enable the publication of the amendment scheme in the provincial gazette. The evidence shows Brooklyn Edge's readiness to implement the deed of sale and the City's recalcitrance.

ORDER

[108] In my view the plaintiffs' are entitled to claim specific performance.

[109] In the result;

The Draft order marked X as amended is made an order of court.

JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

Matter heard on:

13 May 2019

Judgment

delivered: 26 June 2019

Counsel for Plaintiff:

ADV EC LABUSCHAGNE SC

AND HP PRETORIUS

Attorneys for Plaintiff: ADAMS & ADAMS

Counsel for Defendant: ADV T STRYDOM SC

AND T MKHWANAZI

Attorneys for Defendant: MPONYANA LEDWABA INC

[1] See Deed of sale p 31 Annexure "A1"

[2] Brooklyn Edge was formerly named Nieuw Pivot-the name appearing as purchaser in the deed of sale."

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- [3] See expert bundle p 200
- [4] 2004(6) SA 222(SCA) at par35
- [5] Government of the Republic of South Africa v Thabiso Chemicals PIL 2009(1)SA 163 SCA at par 18
- [6] See also Merafong City Local Municipality v Anglo Gold Ashanti Limited (2016) ZA CC 35 at para 41
- [7] 2012 JDR 1654(SCA)
- [8] Wilken NO v Voges 1994(3) SA 130 (A)
- [9] Du Plessis No and Another v Galdco Motor Cycle Supplies (Pty) Ltd 2009(6) SA 617(SCA).
- [10] LAWSA 3rd ed Vol 2 par 29 referring to Kuzwayo v Representative of the Executor Estate late Mailela 2011(2) ALLSA 599 (SCA) par 28
- [11] Cape metropolitan Council v Metro Inspection Services (Western Cape) 2001 (3) SA 1013 at par 20-22 SCA at 1025G
- [12] Benson v QWalter 1984 (1) SA 73 (A) 82
- [13] See Cape Town Municipality v Allie 1981(2) SA 1(C)
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