

SOUTH AFRICA / JUDGMENT

Granor Passi (Pty) Ltd v Polokwane Local Municipality and Another (62169/2015) [2017] ZAGPPHC 300 (29 June 2017) [2017] ZAGPPHC 300

COURT

North Gauteng High Court, Pretoria

BEFORE

Thobane

CASE / FILE NUMBER

62169/2015

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 62169/2015

Not reportable

Not of interest to other judges

Revised.

29/6/2017

GRANOR PASSI (PTY) LTD APPLICANT

AND

POLOKWANE LOCAL MUNICIPALITY FIRST RESPONDENT

REGISTRAR OF DEEDS SECOND RESPONDENT

JUDGMENT

THOBANE AJ,

- [1] The applicant, a company with limited liability and duly registered in terms of the company laws of the Republic of South Africa, has brought an application for an order in the following terms;

- "1. That the resolution of the Municipal Council of First Respondent taken on 26 February 2015, in terms of which it was decided not to consent to the transfer of Erf 5665, Pietersburg Extension 12 to Applicant, but to negotiate with Applicant in relation to a lease agreement relating the property, be reviewed and set aside;
2. That First Respondent must give transfer of Erf 5665 Pietersburg Extension 12 to Applicant, and must sign all necessary documentation and take all necessary steps to effect such transfer, at the cost of Applicant;
3. In the event of First Respondent failing to sign the necessary documentation and take the necessary steps to give transfer of Erf 5665 Pietersburg Extension 12 to Applicant within a period of 90 (Ninety) days of this order, that the Sheriff of the above Honourable Court within whose jurisdiction area Erf 5665 Pietersburg Extension 12 is situated be authorised to sign all such documents and to take all such steps as may be necessary to give transfer of Erf 5665 Pietersburg Extension 12 to Applicant;
4. In the alternative to prayers 2 and 3, and in the event of the Honourable Court finding that First Respondent did not comply with the procedures prescribed in Section 79 of the Local Government Ordinance, No. 17 of 1939, and with Section 14 of the Local Government: Municipal Finance Management Act, No. 56 of 2003, and/or with any other legislative requirements to give effect to the sale agreement entered into between the parties on 7 December 1988, an order that First Respondent must properly comply with all legislative requirements to enable First Respondent to give transfer of Erf 5665, Pietersburg Extension 12 to Applicant, within a period of 3 (three) months of the present order.
5. That First Respondent must pay Applicant's costs of the application....."
- [2] The first respondent, a local municipality duly established in terms of the laws of the Republic of South Africa opposes the application.
- [3] The second respondent, The Registrar of Deeds, is cited in compliance with section 97 of the Deeds Registries Act, No 47 of 1937. The second respondent has not filed any opposing papers.
- [5] A synopsis of the matter is as follows;
- 5.1 On or about 7 December 1988 the applicant together with the first respondent's predecessor, Die Staatraad van Pietersburg, entered into a written deed of sale of immovable property known as erf 5665, Pietersburg Extension 12 Township, Registration Division LS, Limpopo Province. The first respondent admits the agreement of sale;
- 5.2 It was one of the material terms of the agreement that the purchase price, the sum of R181 000-00, would be payable by means of a 20% deposit on the date of sale, and the balance over 60 equal installments, together with interest, on a monthly reducing balance of the purchase price. Payment of the purchase price by way of a deposit as well as 60 monthly installments is disputed by the first respondent;

5.3 The applicant took occupation of the property on signature of the agreement, as was provided for therein. Occupation of the premises by the applicant is not disputed by the first respondent;

5.4 The parties further agreed that the applicant was under obligation to build an industrial building with a minimum value of R100 000-00. It is not disputed that having taken transfer, the applicant effected significant improvements on the property which match what was initially intended by the parties;

5.5 In the agreement, the firm of attorneys, Niland and Pretorius were nominated to handle the transfer of the immovable property.

5.6 Over the years, discussions ensued which related to not only the registration of erf 5665 but also other adjoining properties. These discussions did not result in the registration of transfer of erf

5665. The applicant however relies on various instruments, amongst others, the financial statements reflecting ownership of the property as well as correspondence between the parties where the disputed property is referred to as belonging to the applicant;

5.7 In 2011 the Chief Executive Officer of the applicant states that he became aware that the property was still registered in the name of the applicant. He attempted to establish, through making contact with all those who were involved at the time, as well as going through available correspondence, why the property had not been transferred into the applicant's name.

5.8 The renewed interest in the registration of transfer of the immovable property by the CEO culminated in a meeting which took place on 26 November 2014. In this meeting the applicant submitted further documents.

5.9 On 31 March 2015 the applicant became aware that the first respondent took a resolution not to accept the proof of payment submitted by the applicant but to rather negotiate with the applicant a lease agreement in respect of the said property.

5.10 These proceedings in part, are aimed at reviewing and setting aside the first respondent's resolution to enter into a lease in the circumstances sketched above as well as an order directing registration of transfer of the immovable property in favour of the applicant.

[6] This matter turns on the question whether;

6.1 Was the sale of erf 5665 concluded and payment established;

6.2 If there was, should it follow that the resolution to enter into a lease agreement in respect of erf 5665 stands to be reviewed and set aside;

6.3 In the event the resolution is set aside, should the court direct the first respondent to take all reasonable steps to register transfer in favor of the applicant.

6.4 The defences raised by the first respondent are;

6.4.1. Payment has not been established;

6.4.2. Applicant's claim has prescribed and,

6.4.3. That there has not been any compliance with peremptory statutory requirements, namely, section 79(18) of the Local Government Ordinance 17 of 1939 and section 14 of the Municipal Finance Management Act 56 of 2003.

- [7] What is glaring in this matter is that there is paucity of direct proof evidencing the sale. This lack of evidence coupled with the lapse of time is what the first respondent, inter alia, relies upon in seeking to have the application dismissed. In this regard the first respondent has prepared a useful timeline showing that from 29/ 11/1988 being the date on which the agreement was concluded to the day on which the application was launched 04/08/2015, 27 years have lapsed.
- [8] I now deal with what the applicant relies on as evidencing proof of purchase of the immovable property.
- [9] It is clear and without equivocality, that the applicant and the respondent entered into an agreement of sale of erf 5665. That much is admitted by the first respondent in the opposing affidavit. The terms of the agreement are similarly not disputed. Purporting to be acting in terms of the agreement the applicant proceeded to build an industrial building on erf 5665 within three years. As at the date of launching the application the improvements on the property are said to be valued at approximately R22 754 384-00. These improvements are partially admitted by the first respondent who contends that the improvements are irrelevant for purposes of this application. The first respondent however admits that the improvements were effected with its consent and approval.
- [10] Having concluded the agreement the applicant took occupation of the property. The basis for taking occupation was the sale agreement. The parties do not contend that there is any other basis in law for the applicant taking occupation . The applicant as and when approval was sought from the first respondent for improvements of the property, would have derived rights to make such applications from the occupation of the premises that has its origins in the agreement of sale. This means that for the 27 years that the applicant has been in occupation of the property and during which time effected improvements thereon, the first respondent did not contest the basis of both the occupation as well as the improvements. Occupation and improvements of the property are but two of the terms of the agreement not contested by the first respondent.
- [11] The applicant further contends that the sale agreement placed on him the obligation to pay all taxes and levies on erf 5665. The taxes and levies, so it is contended, were levied until July 2010. This the applicant submits is because there was acceptance, on the part of the first respondent, that erf 5665, 5663 and 5662 were consolidated into one and under one account. They were billed under erf 5662. The applicant further contends that there could not have been such consolidation unless the first respondent knew that all three erwen, including erf

5665, were owned by the applicant. In this regard the first respondent limits its admission to the fact that there was an obligation placed by the agreement on the applicant to pay levies and taxes. It is therefore, contended by the first respondent, that nothing can be inferred from the applicant's payment of levies and taxes, particularly that it can not be inferred that the applicant is the "owner" of the immovable property.

- [12] The applicant further relies on financial reports from their then auditors for the financial years 1991, 1992, 1993 and 1994. In terms of these financial statements, the amount owing by the applicant to the first respondent is reflected as a long term obligation

initially. The 1994 records, however, reflect that the obligation has been met and that erf 5665 was an immovable asset of the applicant. The applicant further alleges that its business dealings were arranged in line with ownership of erf 5665 in that the business activities were conducted across all three erwen. Further than this the applicant states that there was a batter agreement involving erf 5664. In terms of this batter agreement, so the applicant contends, a portion of 5665 was to be transferred to the first respondent. This batter agreement involved the participation of professionals such as Land Surveyors. The nub of the applicant's contention is that there was acceptance even on the part of the first respondent at the time, that the applicant was the registered owner of erf 5665 from whom first respondent had to seek involvement for the transfer of a portion of erf 5665. All this is disputed by the first respondent particularly in so far as it seeks to prove ownership or evidences payment of the purchase price.

- [13] Inevitably, the question arises, what becomes of a transaction of sale of immovable property, and how is one to treat a purchaser of immovable property, where the purchaser purchased the property in circumstances where payment of the purchase price is disputed, took occupation, assumed that transfer has been registered or was oblivious to its registration, developed the property to the tune of R22 million, then more than 27 years later realizes that transfer has not been registered in its name.
- [14] What is also significant is that the first respondent admits that a copy of a cheque through which the 20% deposit was paid, was available at a meeting held on 7 January 2013, and was in its possession. Accordingly and as a start, it can be taken as established that the 20% deposit of the purchase price was paid and that a copy of the cheque evidencing such payment was available as at 7 January 2013.
- [15] The agreement provided that the balance of the purchase price would be settled through 60 installments. The applicant contends that these installments were paid and in saying so relies on the audited financial records and an affidavit of their then auditor who swears positively to the fact that the financial records, which inter alia reflect the diminishing balance, are correct. The first respondent denies that. the installments were paid or that the financial records evidences payment of the balance of the purchase price.
- [16] In summary, the applicant's case" in relation to the purchase of the immovable property, rests on the following main pillars;

- 16.1 The written agreement,
- 16.2 A copy of the 20% deposit cheque,
- 16.3 Payment of consolidated rates and taxes,
- 16.4 The batter agreement,
- 16.5 The financial statements,
- 16.6 Reference by the first respondent of the property as owned by the applicant,
- 16.7 Improvements to the property in the amount of R22.7 million.

[17] When all the aforementioned pillars are evaluated individually and cumulatively, the picture that emerges points to the fact that the applicant indeed paid the purchase price. I am mindful of the fact that the first respondent accentuates the absence of any amortization schedule to support the contention that the purchase price was not paid. That in my view is an unhelpful and over simplistic approach which ignores the fact that evidence is to be accounted for in total and not in a piecemeal fashion. For when all the evidence is accounted for, the finding that proof of payment has been established, must eventuate.

[18] To find as I have above is however not to suggest that the applicant is entitled to the order sought, regard being had to the defenses raised by the first applicant. In seeking to explain the lapse of time and to shine a spotlight on the reasons why there was such a lapse of time, the first respondent states as follows in the founding papers,

"..... until my discovery that Erf 5665 had not been registered in the name of Applicant, all the parties involved, and I may add also the general public, presumed that Applicant was the registered owner not only of Erf 5662 and 5663, but also of Erf 5665. This includes the Respondent." (Page 14 para 7.2.).

The applicant then asserts that there was a legitimate expectation to be acknowledged by the first respondent as the owner of erf 5665, and that the applicant was in actual fact so acknowledged. In making such an assertion the applicant relies on the municipal taxes charged in erf 5665, the assessment rates, tax invoices dispatched and the evaluation roll, all of which, according to the applicant, provide evidence that the first respondent considered the applicant the owner of erf 5665. I deal with the legitimate expectation doctrine below.

[19] With the exception of what is contained above, none of the parties ventures to explain and none advances reasons for the lull that followed earlier attempts, which are not disputed by any of the parties, to register transfer of the immovable property. The fact that all and sundry "presumed" that the property was registered in the name of the applicant, on the version of the applicant, does not necessarily thwart the defense of prescription raised by the first respondent. The first respondent has pleaded that in the event the court finds that the applicant has complied with its payment obligations, as I have above, then in that event the first respondent contends that the applicant's claim has prescribed (Page 100 para 3.5.).

The first respondent argues that in terms of the agreement of sale, the applicant would have paid the final installment by 1993, being five years after the conclusion of the agreement. Further that on the applicant's own version the final installment was paid during the 1994 financial year. This means the applicant had three years from that date to enforce its claim and that in 1997 the claim became prescribed.

[20] It has come to be accepted that a right to claim transfer of immovable property constitutes a debt. Both applicant and second

respondent are agreed on this aspect. The applicant further points out that the first respondent being a state organ, and in view of the parties' reciprocal obligations, prescription would have begun to run after 15 years. The relevant portion of the Prescription Act 68 of 1969 read as follows;

"11 Periods of prescription of debts

The periods of prescription of debts shall be the following:

(a) thirty years in respect of-

(i) any debt secured by mortgage bond;

(ii) any judgment debt;

(iii) any debt in respect of any taxation imposed or levied by or under any law;

(iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

[21] The logic of the applicant's contention, mentioned above, is that if you purchase land from the state or a state organ, you have the comfort of 15 years within which to register transfer of the property before prescription takes hold. A purposive reading of section 11(b) of the Prescription Act however shows that the applicant can not rely on the provisions thereof for the simple reason that in this case the "debt" is not owed to the state .and (my emphasis), does not arise out of an advance or loan of money, or a sale or a lease of land by the state to the debtor. If the applicant had met all the obligations and had fulfilled all its obligations in terms of the agreement as far back as December 1993, after which time applicant was

entitled to claim transfer, then surely the fact that the applicant simply failed to claim transfer of the property, makes its claim susceptible to prescription. The applicant knew the identity of the debtor as well as the facts giving rise the debt. Through the exercise of reasonable care applicant could have established the true state of affairs around registration of transfer of the immovable property. No reasons have been advanced by the applicant why transfer was not demanded in December 1993, when the last installment was paid. It is no sufficient explanation that the applicant simply assumed that transfer had been effected.

[22] Applicant makes the point that it was presumed by itself, the public and the first respondent that it was the registered owner of erf

5665. It must be accepted , so the argument goes, that all legislative requirements for "disposal" of the immovable property were complied with. The applicant therefore had a legitimate expectation to be acknowledged by the first respondent as the owner of erf 5665. Cameron JA, as he then was in *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) had occasion to consider the various requirements for legitimate expectation and said the following;

"[19] The requirements relating to the legitimacy of the expectation upon which an applicant may seek to rely have been most pertinently drawn together by Heher J in *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) para 28. He said:

The law does not protect every expectation but only those which are 'legitimate'. The requirements for legitimacy of the expectation, include the following:

(i) The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification': De Smith, Woolf and Jowell (op cit [Judicial Review of Administrative Action 5th ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

(ii) The expectation must be reasonable: *Administrator, Transvaal v Traub* (supra [1989] ZASCA 90; [1989 (4) SA 731 (A)] at 7561 - 7578); De Smith, Woolf and Jowell (supra at 417 para 8-037).

(iii) The representation must have been induced by the decision- maker: De Smith, Woolf and Jowell (op cit at 422 para 8-050); *Attorney- General of Hong Kong v Ng Yuen Shiu* [1983] UKPC 2; [1983] 2 All ER 346 (PC) at 350h -j.

(iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (CJ at 59E - G,"

[23] It seems to me to be a far fetched proposition that since the first respondent in the municipal invoices rendered to the applicant

referred to the applicant as "property owner", coupled with what appeared to be consolidated amounts, together with microfiche

records in which the applicant is reflected as the current owner and the first respondent the previous owner, is a clear representation

that the applicant was the owner of erf 5665. One of the requirements of legitimate expectation is that the representation must be "clear, unambiguous and devoid of relevant qualification". Could this be a question of "unwitting statements" by a public official which created an expectation? Could the applicant not have asked for clarification before relying on the statement made and thus acting to its peril? If municipal invoices are issued in the name of the person that occupies the property, clearly that would amount to a relevant qualification which has nothing to do with ownership. It is not reasonable, and this is one of the requirements, that since a person is referred to as a "property owner" in a municipal invoice he expects to be recognized as such or even more apt, that such referral entitles the person so referred to claim registration of transfer.

[24] The said representation although it emanates from the first respondent is easily explained away. All tenants and occupiers of property it would seem and this much is explained by the first respondent, are referred to as "property owners" in

municipal invoices. I do not believe that the intention was to equate or recognize them as property owners. The applicant therefore can not legitimately rely on the fact that it was referred to as property owner in municipal invoices in invoking the doctrine of legitimate expectation.

[25] In so far as a transparent and fair administrative action is concerned, the applicant contends that it is entitled to a transparent and fair administrative action. Applicant contends further that firstly it entered into a sale agreement with the first respondent, secondly occupied the property, thirdly paid all rates and taxes and fourthly effected substantial improvements on the property with the consent of the first respondent therefore is entitled to fair administrative action. The decision of the municipality, not to pass transfer to the applicant but instead to enter into negotiations on a possible lease agreement, was administrative action that is unfair. The resolution which the applicant seeks to have set aside was contained in a letter from the first respondent addressed to the applicant which letter read as follows;

"Council meeting of 26 February 2015 resolved:

1. That Messrs Granor Passi's audited financial statements as proof of Erf 5665 Pietersburg Ext 12's loan repayment and further consents to transfer Erf 5665 Pietersburg Ext 12 to Messrs Granor Passi not be accepted.
2. The negotiations be conducted with Granor Passi in relation to lease agreement.

3. That the Municipal Manager be mandated to enter into negotiations with Granor Passi."

[26] The first respondent is taking issue with the applicant's approach. In the opposing papers the first respondent contends that the dispute between the parties is a purely contractual one and that the outcome thereof is not dependent on the council resolution, therefore the applicant can not utilize the avenue of review. That the resolution amounts to "administrative action" as contemplated in the Promotion of Administrative Justice Act, 3 of 2000, PAJA, is seriously disputed by the first respondent. Nugent J in *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) para 21 consolidated and abbreviated what is meant by "administrative action" in the following terms:

"Administrative action means any decision of an administrative nature made ... under an empowering _ provision [and] taken ... by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect ..."

[27] The Constitutional Court cited *Grey's Marine*, (supra), with approval in *Minister of Defence and Military Veterans v Motau & others* 2014 (5) SA 69 (CC) para 33, and went further to break down the definition into the following segments;

".....there must be,

- (a) a decision of an administrative nature,'
- (b) by an organ of State or a natural or juristic person,'
- (c) exercising a public power or performing a public function,-
- (d) in terms of any legislation or an empowering provision,'
- (e) that adversely affects rights,'
- (f) that has a direct, external legal effect; and
- (g) that does not fall under any of the listed exclusions. "

[28] Since it is not common cause between the parties that the decision that the first respondent took amounts to administrative action, one must look more closely at it with reference to the history of the matter as well as applicable case law. It is with the backdrop of section 33 of the Constitution that PAJA is to be interpreted. Justice O'Regan in *Sato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 25. Expressed a view that because the purpose of the PAJA was to give effect to s 33, 'matters relating to the interpretation and application of PAJA will of course be constitutional matters'. This suggests that formalism should be avoided. The Act should therefore be interpreted

generously and purposively. This overarching constitutional approach seems to have been in the mind of Wallis J in *Sokhela & others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) & others* 2010 (5) SA 574 (KZP) para 82 when he articulated the approach as follows ;

"In my view, the intention of the Constitution was to draw together the disparate threads of our administrative law, and the circumstances in which the power of judicial review was available, under the umbrella of a single, broad concept of administrative action. In accordance with the generous construction to be afforded constitutionally guaranteed rights, conduct that attracted the power of judicial review under our previous dispensation will ordinarily be regarded as constituting administrative action under the present constitutional dispensation. There will of course be exceptions arising from differences in the structure of government and the status of differing levels of government . . . but, in general, it seems to me that, where the power of judicial review was available under our previous dispensation, the courts will be slow to construe that conduct as falling outside the ambit of administrative action under the Constitution and PAJA ."

[29] When regard is had to the seven requirements listed in *Minister of Defence and Military Veterans v Motau & others*, above, self evidently the first respondent, which is an organ of State, took a decision not to accept proof evidencing payment of the purchase price in respect of erf 5665. The municipality is by law empowered to enter into agreements of sale or lease in respect of its properties. In casu the decision taken, after the first respondent had elected not to accept proof of payment, is to mandate the Municipal Manager to enter into negotiations with the applicant with the view of concluding a lease agreement. The effect of the decision taken is that the applicant, who has occupied erf 5665, over which the Municipal Manager was now mandated to conclude a lease agreement , for over 27 years, will have his rights to property affected adversely. There does not appear to be any exclusion, as per PAJA and the impact of the decision will manifest itself externally. On the aforementioned exposition, the decision taken by the first respondent is nothing but administrative action.

[30] There is another reason why the decision or resolution to enter into a lease agreement stands to be categorized as administrative action. Such a reason draws its existence from the history of the matter. It is common cause between the parties that the applicant developed the property extensively. The development, which was a condition in the agreement of sale of immovable property initially, was further bolstered by the clearly conscious decision of the first respondent to permit further extensive development as and when building plans were submitted by the applicant to the first respondent for approval. The development is valued at over R22 million. I pause to indicate that the approval of building plans was found by the Supreme Court of Appeal to be administrative action. See *JDJ Properties CC and Another v Umngeni Local Municipality and Another* 2013 (2) SA 395 (SCA) where the following is said in para [22];

"In conclusion on the administrative action point, it has always been the case that decisions of local authorities to approve building plans are subject to administrative law review and nothing in the structures of government under either the interim Constitution of 1993 or the final Constitution of 1996, the status of local governments or the powers of local governments compels a difference in this regard. 13 Both pre- and post-1994 cases have regarded it as trite that administrative law review applies to decisions to either approve or refuse to approve building plans, whether under the common law, the Constitution directly prior to 2000 (when the PAJA came into effect) or under the PAJA thereafter. This is perhaps the reason why Jafta AJ, in *Walele v City of Cape Town & others*[2008] ZACC 11; , 2008 (6) SA 129 (CC) para 27 could assert with no resort to authority that '[t]here can be no doubt that when approving building plans, a local authority or its delegate exercises a public power constituting administrative action'. That puts paid to the first issue."

It follows by parity of reasoning, that having undertaken an administrative action by approving business plans to now take a decision or resolution that impacts on such approval does amount to administrative action and therefore susceptible to review.

[31] A further and last reason why I am of the view that the decision of the first respondent is reviewable administrative action. The first respondent in communicating the impugned decision or resolution stated in the letter addressed to the applicant dated 31 March 2014 (sic), as follows;

"1. That Messrs. Granor Passi's audited financial statements as proof of Erf 5665 Pietersburg Ext 12's loan repayment and further consents to transfer Erf 5665 Pietersburg Ext 12 to Messrs. Granor Passi not be accepted....." (Underlining my emphasis).

On the facts of this case the payments made by the applicant as evidenced by the financial statements were not in respect of a loan

but monthly down payments of the purchase price. Characterization of the payments as "loan repayments" is clearly wrong. If the financial statements are rejected on the basis that they do not evidence loan repayments then in taking the decision or resolution "irrelevant considerations were taken into account or relevant considerations were not considered" as contemplated in section 6 (2) (e) (iii) of PAJA or 6 (2) (f) (ij) in that the action taken is not rationally connected to "the information before the administrator; or the reasons given for it by the administrator;" as per subsections (cc) and (dd).

[32] Lastly, the decision or resolution of the first respondent does not escape scrutiny when evaluated under the prism of legality and rationality, moving from the premise that the applicant has proven that the purchase price has been paid and that the applicant has proven (this is not disputed), that extensive improvements have been effected on Erf 5665. The question that begs the answer is whether the applicant having occupied erf 5665 for over 25 years, gone through the process of evaluation, paid rates and taxes and effected improvements with the first respondent's approval to the tune of R22 million, is it fair and rational for the first respondent having been oblivious or aware and condoned the above, to

now resolve to rather negotiate a lease agreement. In my mind the siren of irrationality rings loud.

- [33] One of the defenses that the first respondent raises is that there has not been any compliance with certain pieces of legislation

particularly section 79(18) of the Local Government Ordinance 17 of 1939 as well as section 14 of the Municipal Finance Management Act 56 of 2003. Both laws prescribe peremptory steps that must be taken when immovable property is alienated. The provision relied upon in the Ordinance is applicable at the point when a municipality expresses its intention to sell immovable property. It provided that public notice must be given on the public notice board as well as publication in a newspaper and that the property is to be valued. The Ordinance further makes reference to section 91 of the Republic of South African Constitution Act 1983. Apart from the fact that the Ordinance is clearly old order legislation, the provisions relied upon by the first respondent became peremptory when the decision to sell the property was taken. The fact that the property was sold and was on the verge of being transferred into the name of the applicant is a pointer to the fact that the peremptory requirements were not an impediment.

- [34] Section 14 of the MFMA deals with disposal of a capital assets of a municipality which is "needed to provide the minimum level of basic municipal services". The MFMA is new order legislation. I express no opinion about whether it would apply retrospectively. What stands out is that the first respondent is silent on the papers as to whether the asset sought to be transferred is a capital asset needed to provide minimum basic municipal services as contemplated in the MFMA. On the face of it, it is not. Erf 5665 has been occupied by the applicant since the date of signature of the agreement of sale being 7 December 1988. Since one of the conditions of the agreement was that the applicant build an "industrial plant", it follows that the property is situated at an industrial area. I can not reconcile the location of the property with the provision of "minimum level of basic municipal services". I am accordingly of the view that both defenses, namely, non-compliance with the Ordinance as well as the MFMA are opportunistic and without merit.

- [35] I have deliberately refrained from dealing with issues raised by the applicant in the replying papers as well as in the supplementary heads of argument to the extent that new matter is contained therein. There is therefore no basis to deal with new matter raised therein.

- [36] I must in conclusion state that our Constitution places a duty on all organs of state to be just in their interaction with members of the public and to act with integrity and fairness. Justice Skweyiya in *Joseph and Others v City of Johannesburg and Others* 2010 (3) BCLR 212 (CC) ; 2010

- (4) SA 55 (CC) put it thus in relation to the duty to provide municipal services with reference to section 195(1) of the Constitution;

"44. The right to administrative justice is fundamental to the realisation of these constitutional values, and is at the heart of our transition to a constitutional democracy. The scope of the section 33 right to just administrative action and the associated constitutional values, as given effect to under PAJA, must cover the field of public administration and bureaucratic practice in order properly to instrumentalise principles of good governance. It is plain that the reach of administrative law would be unjustifiably curtailed if it did not regulate administrative decisions which affect the enjoyment of rights, properly understood, at least for the purposes of procedural fairness.

45. Taken together, the values and principles described above require government to act in a manner that is responsive, respectful and fair when fulfilling its constitutional and statutory obligations. This is of particular importance in the delivery of public services at the level of local government. Municipalities are, after all, at the forefront of government interaction with citizens. Compliance by local government with its procedural fairness obligations is crucial therefore, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy."

[37] In circumstances where the applicant places all relevant information at its disposal before the first respondent for purposes of proving that it had entered into an agreement to purchase land, paid the agreed upon deposit, and paid the monthly instalments as shown in the applicant's financial statement, improved or developed the property in line with the terms of the agreement, for which improvements the first respondent consented, the first respondent would be acting irrationally had it to simply decide that instead of facilitating transfer of the immovable property, albeit belatedly and I add at the expense of the applicant, an agreement of lease need be entered into in the stead. Such a stance would, in my view, not be in line with the duty placed on the first respondent to act with fairness.

[38] While noting that an inordinate period of time has lapsed since the payment of the last instalment of the purchase price, I see no reason why the first respondent in an endeavour to be fair, act with integrity and to be just, but most importantly where it stands to suffer no prejudice, would not facilitate transfer of the property into the name of the applicant.

[39] I therefore make the following order;

1. The resolution of the Municipal Council of First Respondent taken on 26 February 2015, in terms of which it was decided not to consent to the transfer of Erf 5665, Pietersburg Extension 12 to Applicant, but to negotiate with Applicant in relation to a lease agreement relating the property, is reviewed and set aside;
2. The matter is remitted to the first respondent for reconsideration in accordance with the principles set out in this judgment;
3. The first respondent is directed to pay the costs of the application.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

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Prepared on 12 October 2026 · Esheria