

SOUTH AFRICA / JUDGMENT

Matjhabeng Local Municipality v Isizwe Kuqala General Dealer CC and Others (489/2020)

[2020] ZAFSHC 206 (11 November 2020)

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COURT

Free State High Court, Bloemfontein

BEFORE

Mathebula

CASE / FILE NUMBER

489/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 489/2020

In

the matter between:

MATJHABENG
LOCAL
MUNICIPALITY
Applicant
and
ISIZWE
KUQALA GENERAL DEALER CC 1st
Respondent
THE
REGISTRAR OF DEEDS, BLOEMFONTEIN
2nd Respondent
ABSA
BANK
LIMITED
3rd Respondent
HEARD
ON: 20 AUGUST 2020

JUDGMENT

BY: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 11 November 2020. The date and time for hand-down is deemed to be 11 November 2020 at 12:00

Introduction

[1] The applicant, a local authority duly constituted and situated in the Goldfields applies for a relief primarily declaring the sale and subsequent transfer of an immovable property to wit erven 10534 - 10557 (now consolidated erven 10763 and 10764) to the first respondent, to be declared unlawful and void ab initio[1]. The effect of the order setting aside such registration will pave the way for the retransfer of the immovable property to the applicant (its original owner). Only the first respondent is opposing the application on various grounds and I will deal with those grounds in succeeding paragraphs. The second and third respondent are cited as interested parties and they are not opposing the application.

Material

facts

[2] In a letter dated 5 December 2003 Maree Gouws Attorneys purportedly acting on behalf of the first respondent dispatched a letter to the applicant enquiring whether the immovable property in dispute is available for sale and the price thereof. This matter served on the agendas of different committees of the applicant for decision but not the Council. On 24 May 2004 the Management Committee resolved to recommend the sale and set the selling price of R388 400.00 subject to conditions. The Mayoral Committee on 7 July 2004 resolved to sell as per recommendations of the Management Committee. The relevant stipulated conditions for the purpose of the judgement were stated as follows:-

"1. That at least 10% of the purchase price will be payable upon signature of the Deed of Sale by the purchaser.

2. The balance of the purchase price shall be guaranteed by means of an approved bank guarantee within 10 days from date of signature of the Deed of Sale and such guarantee shall be payable to the seller on date of registration of the property into the name of the purchaser.
3. That the costs regarding the construction of the sewerage network, additional water connection and electricity be recovered from the purchase price in order to make the erwen available to the developer.

4. That Erwen 10534 – 10557, Extension 38, Welkom be rezoned to “Residential Medium” by the applicant at his own cost.
 5. That Erwen 10534 – 10545 and Erwen 10546 – 10557, Extension 38, Welkom be consolidated by the applicant at his own cost.
 6. That Council supports the rezoning of Erwen 10534 – 10557, Extension 38, Welkom to “Residential Medium” and the consolidation of Erwen 10534 – 10557 and Erwen 10546 – 10557, Extension 38, Welkom.
 7. That the Council be indemnified against claims by the applicant in the event that the relevant application to the Free State Province not be approved.
 8. That proof of the rezoning to “Residential Medium” be handed in at the Council’s office after three months of approval by the Free State Province.”
- [3] The decision of the Mayoral Committee served before Council on 5 October 2004 for confirmation. On 27 July 2005 and 30 August 2005 respectively the first respondent (represented by AG Pretorius) and applicant (represented by S. Sesele) signed the offer to purchase. The startling factor is that the terms and conditions of the offer to purchase are markedly different to those stipulated by the Management and Mayoral Committees. The selling price was reduced, time lines amended and the applicant obliged to bear costs of rezoning and provisions of services. There is no record that these decisions deviating from the conditions were taken at any properly constituted meeting of the council or mandated committee. The undisputed condition drawn from these facts is that they were not authorised by any of these committees. Nevertheless, transfer of the immovable property was passed to the respondent on 16 January 2008. This is the transaction that the applicant seeks to rescind.
- [4] The first respondent has a different version regarding the acquisition of the immovable property in question. On the papers filed by the applicant the enquiry was initiated by the attorneys for the first respondent as stated in preceding paragraphs. The first respondent is narrating a different version. The immovable property was introduced to them by an estate agent one Jacques Kasselmann employed by Pam Golding, Welkom. His intervention led to the conclusion of the offer to purchase. Notably, no supporting affidavit was filed by the estate agent or reasons provided why it could not be filed.

Preliminary

Issues

- [5] Before advancing to the merits, there are preliminary issues which must be dealt with and should not detain us for long. The most straightforward one is the application for condonation by the first respondent for failure to file the heads of argument and practice note timeously in compliance with the practice rules of the court. There is no opposition and the reasons stated in the affidavit are convincing enough to grant it.
- [6] The next issue raised by the respondent is the undue delay in applying for the relief claimed in the notice of motion. The contention is that the applicant had been aware of the current state affairs since the latter part of 2005 and only actively took steps about it twelve years later. Therefore, in order to achieve justice and equity, the applicant should be precluded from applying for the relief to set the illegal decisions aside. The phrase “illegal decisions” is used cautiously in the event such a finding is made. Pointedly, it was argued, that it was untrue that only after June 2019 did the applicant take steps to restore the status quo ante. Lastly that reviews under PAJA (Promotion of Administrative Justice Act 3 of 2000) must be brought within 180 days after the administrative decision was taken or been aware of it. Turning to legality reviews these must be brought within a reasonable time. In this case the application does not qualify on any and amounts to an abuse of the process.
- [7] In opposition, the applicant averred that the discovery of the sale of the immovable property arose when a new Municipal Manager namely Thabiso Tsoaeli was appointed. In his quest to streamline revenue collection he undertook an audit of properties under the jurisdiction of the applicant. I pause to mention that the Council of the applicant appointed an ad-hoc committee to investigate issues around the illegal sale of land. The enormity of the task, shortage of skills internally and lack of resources

necessitated the appointment of external service providers which took a long time to complete. It was only around May 2019 that this particular matter was discovered. Further delay ensued as opinion from counsel was sought. Another delay was caused by Tsoaeli becoming ill and his subsequent death. The Council appointed the deponent of the founding affidavit as the acting municipal manager.

- [8] Although this is not a typical application for condonation, the principles applicable to such matters are trite. The court is endowed with discretion which must be exercised judicially in consideration of all the facts. It is unclear exactly when was the applicant to be appraised of the full facts for the purpose of deciding the degree of the delay. The explanation advanced from the beginning to this point is based on sound and lucid reasons. This is interrelated to good prospects of success that permeate throughout the case for the applicant. The point raised pertaining to condonation I deem it not so pivotal to the adjudication of this matter. As pointed out by the Constitutional Court, condonation should be granted if it is the interest of justice.[2] The inescapable conclusion is that the argument that there is an inordinate delay tantamount to abuse of process is untenable.

Evaluation

- [9] It is apposite to determine which version is more probable leading to the acquisition of the immovable property by the first respondent. The version of the applicant is supported by extracts of the minutes of various committees that had a hand in this matter. It will be noted that the process occurred over a period of approximately two
- (2) years before transfer was passed over to the respondent. On the other hand, the first respondent denies that the purported sale traversed the route alleged by the applicant. The involvement of Jacques Kasselmann is demonstrated by the copy of the letter dated 12 August 2005 from Ben Montshioa Member of the Mayoral Committee: Economic Development and Spatial Planning of the applicant. In it he informs the first respondent about the progress of the sale of the immovable properties. The averment that he introduced the immovable property to the first respondent is not supported by any evidence. It remains unexplained that as an estate agent who was his principal in this transaction.
- [10] It is my considered opinion that the version of the respondent is untenable and farfetched. The offer to purchase and the addendum describe the immovable property as erven 10534 – 10557. The parties to it are litigants before court. The date of the signing of the offer to purchase is stated in the addendum as 30 August 2005. There can be no talk that the applicant sold the immovable properties to a person/entity other than the first respondent after an approach by Maree Gouws Attorneys.

The allegations about the sale concluded pursuant to the resolution(s) taken in 2005 is unsupported by evidence. There is simply no minutes or any form of record of such meeting(s) having taken place pertinently discussing this matter.

Applicability of the legal principles

- [11] This brings me to the crux of the matter whether there was a valid resolution for the sale and subsequent transfer of the immovable property (land). The applicant is a body created by statute with rights and duties clearly defined in the governing act. At the heart of the exercise of any power bestowed such must clearly be sourced in law. Power must be exercised in the manner stipulated by the law and no function should be performed beyond that conferred by the law.[3] My understanding is that the exercise of public power or performance of a public function can only be competent when authorised by legislation.
- [12] The disposal of a capital asset of the municipality either by sale or any other manner is governed by section 14 of the Local Government Municipal Finance Act 56 of 2003. Section 14(2) stipulate that only the Council may do so in a public meeting after certain considerations. These as stated are that on reasonable grounds the Council has decided that the asset is not needed to provide the minimum level of basic services. The other is that

there must be consideration of the fair market value of the asset and the economic value to be received in exchange for the asset.

[13] There are no minutes of the meeting Council of the held in public to consider this matter. The most fatal, as I perceive it, is that at no stage did the Council convene to consider this matter on reasonable grounds as required by the law. The purported sale did not comply with the provisions of section 14(2) as well. The net result is that the purported sale and subsequent transfer is a nullity. The reason that it is not authorised by the highest decision making body ie. Council, therefore it is prohibited by law. I agree with the submission of the counsel for the applicant that in circumstances that the transaction amounts to a nullity, it cannot prescribe. There can be no further deliberations on this issue.

[14] Clearly the applicant did not comply with the requirements of section 14(2). In *Waenhuiskrans Arniston Ratepayers Association and another v Verreweide Eiendomontwikkeling (Edms) Bpk and Others*[4] said the following:-

“In terms of subsection 14(2), a municipality is constrained, before it may transfer a capital asset, to do at least three things: firstly, it must hold a meeting of its council which is open to the public; secondly, at such meeting the council must decide, on reasonable grounds, that the asset is not required to provide the minimum level of municipal services; and thirdly, at the said meeting, the council must consider the fair market value of the asset, as well as the economic and community value which will be received in exchange for the asset. Section 14(5) imposes the additional requirement that the process which the municipality adopts in transferring a capital asset must be fair, equitable, transparent and competitive and consistent with the supply chain management policy referred to in section 111 of the MFMA (Inasmuch as section 111 of the MFMA only came into operation 1 December 2004, the reference to the supply chain management policy would clearly not apply to the instant case).”

[15] In *Emalahleni Local Municipality and another v Propark Association and another*[5] the Supreme Court of Appeal weighed in on the issue and held that:-

“There is no evidence that the first appellant complied with the abovementioned provisions of s 14 of the MFMA or s 79(18) of the LGO at any stage (the first appellant admits that it did not comply with s 79(18)). Although the first appellant alleged that it complied with s14 of the MFMA and the first appellant's Supply Chain Management Policy before it alienated the property, the first appellant's deponent did not provide the facts for this conclusion. There is no allegation that, at a meeting open to the public, the first appellant decided that the stand was not needed to provide the minimum level of basic municipal services and he did not set out the reasonable grounds for such a decision. There was also no allegation that, at a meeting open to the public, the council considered the economic and community value to be received in exchange for the stand. The first appellant's deponent only referred to a valuation obtained for the stand (R570 000) and the tender price offered (R1 076 000) but said nothing about the 'community value' that would be received in exchange for the stand.”

[16] There is no evidence on record that the purported sale took place under the conditions that are fair, equitable competitive and transparent. If anything, they were lopsided in favour of the first respondent. The then municipal manager concluded the offer to purchase on terms and conditions different to those that were approved by the Management and Mayoral Committees respectively.

In so doing, he exceeded his powers because he was acting outside the parameters set by the committees. This does not detract from the fact that even the committees concerned had no powers to alienate the immovable property. It is unclear on what basis Sesele acted in changing or adjusting the purchase price and other terms of the offer to purchase. Significantly it is worth nothing that the very terms and conditions of the written document were not adhere to and no action was instituted at all. This conduct demonstrates how the level of flouting the requirements of the law was ingrained in this matter.

[17] It was argued on behalf of the first respondent that the prejudice to be suffered by the first respondent and the absence of prejudice to the applicant should sway the application in favour of the first respondent. The important part of adjudication is the consideration of justice and equity. An argument was advanced on behalf of the first respondent that the applicant is piloting a backdoor review. I do not agree with this submission purely because there are no minutes of the Council that took the decision to sell the immovable property. I cannot emphasise it more that the transaction is a nullity.

[18] The first respondent contends that quite substantial amount of money has been expended over a period of time most probably to maintain and develop the immovable property. Regrettably no proof of such fees, charges and disbursement were provided. It is understandable that such costs which the applicant tenders to pay still has to be determined cannot be easily calculated at this stage. The reasonable costs are tendered by the applicant which must still be determined by the parties. In that case this will alleviate the burden on the first respondent. Certainly these will exclude any agent's commission for the sole reason that the applicant did not appoint any. This aspect is also dealt with in preceding paragraphs. There is still some money owed to the third respondent which the applicant tenders to pay. It is fair and equitable that this be limited to the purchase price of R350 000.00. On the issue of costs, I take note that the first respondent is the innocent party in this

regard. It will be fair that each party pays its own costs.

[19] I make the following order.

19.1 The resolutions of the Mayoral Committee and Council on 7 July 2004 and 5 August 2005 respectively are declared invalid and null and void.

19.2 The offer to purchase concluded on 30 August 2005 is declared invalid and null and void.

19.3 The registration of the transfer of erven 10763 and 10764; Extension 38, Welkom (previously 10538 -10557) from the applicant to the first respondent is rescinded, set aside and cancelled.

19.4 The second respondent is ordered to cancel under the provisions of section 6 of the Deeds Registry Act 47 of 1937 upon the request of the applicant and written consent of the third respondent the cancellation of Bond number B6268/2008.

19.5 The applicant is ordered to pay the outstanding balance to the third respondent in respect of the bond limited to the amount of R350 000.00

19.6 The applicant is ordered to pay the first respondent all bond repayments made to the third respondent limited to the amount of R350 000.00

19.7 Each party pays its own costs.

--_____

M. A. MATHEBULA, J

On behalf of applicant:

Adv. M. C. Louw

Instructed by:

Hill, McHardy & Herbst

BLOEMFONTEIN

On behalf of first respondent:

Adv. S. Rautenbach

Instructed by:

Symington & De Kok

[1] Section 12 of the Local Government Municipal Structures Act 117 of 1998

[2] Brummer v Gorfil Brothers Investments (Pty) Ltd [2000] ZACC 3; 2000 (2) SA 837 (CC) at para 3

[3] Fedsure Life Assurance Ltd and Others v South African Rugby Football Union and Others 1999 (1) SA 374 (CC)

[4] 2011

(3) SA 434 (WCC) at para 105

[5] (2013) 1 All SA 277 (SCA) at para 27

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