THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Sandton Civic Precinct (Pty) Ltd v City of Johannesburg & Bombela Consortium (458/2007) [2008] ZASCA 104 (September 2008)

In a judgment delivered today, the Supreme Court of Appeal has dismissed an appeal in which a company sought to assert the contested rights to develop the Sandton Civic Precinct, a valuable ten-acre publicly-owned piece of land in the heart of Sandton.
The appellant, a private company whose largest shareholder is Mr Bart Dorrestein, formerly chief executive officer of Stocks & Stocks Limited, relied on a resolution the Eastern Metropolitan Local Council (EMLC) adopted in November 2000. That resolution 'resolved to recommend' that (subject to certain conditions) the development rights be awarded to the Sandton Civic Precinct Consortium (the Consortium).
But the City of Johannesburg (the EMLC's successor) in 2005 adopted a further resolution, in which it resolved not to proceed with the previous award. Instead, it re-investigated the development

rights, and decided to go ahead with the Bombela Consortium (Bombela).

The Johannesburg high court dismissed the company's claim on the ground that the 2000 resolution was not legally enforceable, since it was only a recommendation, and did not create legal rights.

The SCA took a different approach to the high court. It left the question whether the 2000 resolution created enforceable legal rights open.

Instead, the SCA found that the company seeking to assert the legal rights did not have proper title (legal standing) to do so.

The crux of the SCA's decision is that the company did not represent, and had no title to represent, the two black economic empowerment entities who were an integral part of the Consortium the 2000 resolution envisaged.

At the time of the resolution, the Consortium consisted of Mr Dorrestein's interests (ceded to him by Stocks & Stocks), JHI Development Management (Pty) Ltd (a property-development company), and two black empowerment entities – Ndodana Becker & Associates, whose sole proprietor was Mr Webster Ndodana (Ndodana) and 'Sithembele (Pty) Ltd/Domestic Workers Association Investment Company (Pty) Ltd' (DWA).

But Mr Ndodana fell out of the picture because he joined Bombela.

And DWA was never incorporated at all.

Mr Dorrestein claimed that the interests of the two BEE partners were being 'held in trust by myself pending the acquisition of a suitable black economic empowerment substitute'.

But the SCA rejected this claim. The resolution expressly envisaged and named its BEE components. Mr Dorrestein had no title to hold their rights 'in trust'. Nor had he obtained those rights by cession or by any other means.

The SCA held that the appellant company had thus failed to establish the legal lineage between itself and the rights-acquiring entity the 2000 resolution mentioned.

This was not just a technical point, but a fundamental and substantive gap in the company's case. It had failed to show that it was the rights-bearing entity – or was acting on the authority of that entity, or had acquired its rights.

There was no suggestion in the 2000 resolution that the council regarded the consortium's black economic empowerment constituents as substitutable at will.

The SCA pointed out that the Consortium the resolution envisaged no longer exists at all – indeed, two of the entities (the BEE components) never came into existence at all. In these circumstances the appellant company had failed to show that it is entitled to assert the claim it invokes.

The appeal was therefore dismissed.

Unusually, however, the SCA refused to grant the successful City a costs award against the appellant company. The SCA held that there were singular features of this case which lead to the conclusion that the company should not pay the City's costs.

The City's behaviour toward the appellant company was consistently deplorable. Rightly or wrongly, the company believed itself to be the holder of valuable rights arising from an important resolution of the council, dealing with a major public venture. Despite the importance of the matter, the City lost the original minutes of the November 2000 meeting at which the resolution was adopted, and the company was obliged to reconstruct the resolution through painstaking collection of alternative evidence.

After it had done so, the City behaved with less than courtesy, and less than candour, in dealing with its claims. As early as 2003, the City's property-owning and development company resolved to stop dealing with the appellant company. Yet for two years more the company was kept on a string. Letters were not answered, inquiries were ignored and information was not supplied.

The SCA held that this was unacceptable behaviour for a public body, particularly one dealing with an entity which has incurred significant costs in relation to a public development project in which it believed, not unreasonably, that it was partnering the City.

In all these circumstances the SCA as a mark of its disapproval of the City's conduct deprived the City of its costs, in the SCA as well as in the high court.