



IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO 334/03

In the matter between

MA MPAKATHI

Appellant

and

KGOTSO DEVELOPMENT CC

SDP DU TOIT

HC DU TOIT

SEDIBENG DISTRICT MUNICIPALITY

MIDVAAL LOCAL MUNICIPALITY

REGISTRAR OF DEEDS, PRETORIA

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

CORAM: HARMS, STREICHER JJA, ERASMUS, JAFTA et PONNAN
AJJA

Date Heard: 3 September 2004

Delivered: 20 September 2004

Local authority – Councillors – Purchase of property at a sale in execution where municipality the judgment creditor – According to agreed facts, magistrate acquired certain ‘rights’ in terms of conditions of sale – Such ‘rights’ all to benefit of municipality – Such ‘rights’ entail rights already vesting in municipality in terms of statute or part of functions of sheriff under Magistrates’ Courts rule 43 – Sale not null and void under s 40 of Gauteng Local Government Ordinance 17 of 1939

J U D G M E N T

ERASMUS AJA

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[1] At issue in this appeal is the validity of an agreement of sale of immovable property concluded at a sale in execution held on a magistrate's judgment obtained by a local authority against the registered owner of the property. Transfer was effected. The previous owner thereafter instituted action in the court *a quo* for an order declaring the purchase to be null and void. She cited: as first defendant, the close corporation that had purchased the property; as second and third defendants, the two members of the close corporation; as fourth and fifth defendants, two municipalities (to whom I refer collectively as either 'the municipality', 'the judgment creditor' or 'the execution creditor' depending upon what is appropriate to the context); and, as sixth defendant, the registrar of deeds.

[2] It was plaintiff's case that the sale fell foul of s 40 of the Gauteng Local Government Ordinance 17 of 1939 (T) ('the ordinance') which is current in Gauteng and which provides, in ss (1) thereof, that a municipal councillor shall not (except in certain specified circumstances not relevant here) 'enter into a contract with the council in which he or she has a pecuniary interest'. Subsection (3) declares that such a contract 'shall be null and void'. At the time of the sale in execution, the second defendant was a

councillor in the municipality. His member's interest in the close corporation was sufficient to bring the contract of sale within the purview of s 40.

[3] The court dismissed the action on the basis of the stated case presented to it for adjudication in terms of rule 33 of the Uniform Rules. The judgment is reported as *Mpakathi v Kghotso Development CC and others* 2003 (3) SA 429 (W). Cloete J therein set out fully the relevant facts and dealt extensively with a number of questions of law arising in the matter. The learned judge granted the unsuccessful plaintiff leave to appeal.

[4] The agreement that comes into being at a judicial sale is one between the purchaser and the sheriff acting as the executive of the law. This proposition was accepted as correct by appellant's counsel, who therefore did not contend that the execution creditor automatically becomes party to that contract. He contended instead that in the present matter a contractual relationship was established between the municipality and the purchaser by virtue of certain provisions contained in the conditions of sale; which conditions, upon the fall of the hammer, became terms of the contract of sale. The relevant conditions are identified in the statement of agreed facts:

'26. The Conditions of sale vested various rights in the Eastern Gauteng Services Council, *inter alia*, the following:

- 26.1 Clause 5 obliged the purchaser, at the instance of the attorney of the Eastern Gauteng Services Council, to pay all the costs relating to the transfer of the property and the sale in execution.^(a)
- 26.2 In terms of clause 6, the purchaser assumed liability for all outstanding debts owed to the Eastern Gauteng Services Council in respect of taxes, levies and service fees relating to the property.^(b)
- 26.3 In terms of clause 7, the purchaser had to furnish a guarantee approved by the attorney of the Eastern Gauteng Services Council for payment of the balance of the purchase price.^(c)
- 26.4 In terms of clause 9, the Eastern Gauteng Services Council appointed the conveyancer to effect the transfer of the property.^(d)
- 26.5 In terms of clause 10, the Eastern Gauteng Services Council was exempted from liability for any latent defects in the property.^(e)

I comment as follows on the cross-references inserted in the above paragraph. ^(a)Section 3 of the Transfer Duty Act 40 of 1949 declares that the duty shall be payable by the person who has acquired the property. ^(b)Section 50 of the ordinance provides that no transfer of land shall be registered unless all amounts for a period of three years in regard to municipal rates and services have been paid.¹ ^(c)Rule 43(13) of the Magistrates' Courts rules provides that the sheriff shall give transfer to the purchaser against payment

¹ The section is fully set out in footnote 8 p 437 of the reported judgment of the court *a quo* above para [3].

of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer.

^(d)Rule 43(8) provides that the creditor may appoint the conveyancer for the purposes of transfer. ^(e)Clause 10 purports to exempt the municipality from a liability which, for it, does not exist.

[5] It seems therefore that the conditions of sale upon which appellant would rely, entail rights already vested in the municipality in terms of statutory provisions or the rules; or prescribe how the sheriff shall perform his executive functions in giving effect to the terms of the agreement of sale in a process which is mandatory for the sheriff and therefore beyond the control of the execution creditor.

[6] Counsel for the appellant submitted that clauses 5 to 9 of the conditions of sale involve the municipality in a tripartite agreement, as in the case of *Sedibe and another v United Building Society and another* 1993 (3) SA 671(T). This aspect was the subject of the judgment of the court *a quo*. However, in view of the developments described hereinafter, it has become unnecessary for us to come to a finding on the issue.

[7] Appellant's counsel advanced the further submission that the validity and status of the so-called tripartite agreement is not open to challenge by the respondents, in virtue of the fact that in the stated case it is expressly and

therefore incontrovertibly agreed that clauses 5 to 9 of the conditions of sale vested various ‘rights’ in the council.² He contended that the court is not entitled to go behind the admission. I shall accordingly for purposes of this judgment accept (without deciding) that on the agreed facts, we have here a contract of the kind that was found to exist in *Sedibe* 678 A-C, viz a special type of situation where the execution creditor, the sheriff and the purchaser are all parties to what is in effect a tripartite agreement in terms of which the municipal council acquired a contractual bond with the purchaser, and therefore indirectly with a councillor.

[8] That contract is impugnable under s 40(1) of the ordinance only if a councillor thereunder acquires ‘any direct or indirect pecuniary interest’. That concept was received from England³ into our legislation regulating relationships between local authorities and the members of their governing councils⁴. It is employed in three areas: councillors attending and voting at meetings concerning matters in which they have a direct or indirect pecuniary interest; the disqualification from office of councillors who enter into contracts with the council in which they have such interest, and the ineligibility of candidates for office who have such contracts with the

² See para [4].

³ See *Halsbury’s Laws of England* 4th ed. Vol 29(1) under para 170 ‘**Pecuniary interest.**’

council; and, as in the present case, the invalidity of contracts in which a councillor has such interest.

[9] The words ‘direct or indirect pecuniary interest’ are capable of bearing a wide meaning. However, inasmuch as s 40 restricts the right of freedom of contract, limitation of that extensive meaning through contextual interpretation, seems called for. Dönges and Van Winsen, *Municipal Law* 2ed 128 state that ‘(t)hese words are nowhere defined and the courts have been called upon to treat each set of facts on its merits. In order to do this the courts have looked to the object which the Legislature desired to attain.’ Apart from avoiding conflict of interest⁵, s 40 obviously has the purpose of protecting municipal councils from fraud and corruption by councillors; the prevention of misuse of insider knowledge of municipal business by councillors; and their abuse of their position in dealing with municipal employees and administrators in the performance of contracts with the municipality.

[10] In *R v Garb* 1934 CPD 66, 69, Gardiner JP remarked that ‘(w)here the councillor’s interest is simply one which is common to every ratepayer in the municipality, then he is not regarded as coming within the section’. In

⁴ See, for example : s 46 and s 103 Ordinance 10 of 1912 (Cape); s 30 Municipal Ordinance 20 of 1974 (Cape); s 50 Local Government Ordinance 8 of 1962 (Free State).

the present matter the contract was entered into at a public auction open to all ratepayers and other interested parties. The municipality had no part in or control over the auction in that the sheriff is obliged to sell the property to the highest bidder (Magistrates' Courts rule 43(10)). These circumstances greatly reduce the risk of impropriety on the part of the councillor in the purchasing of the property.

[11] The risk of chicanery is further reduced by the fact that the benefits which redound to the municipality in terms of clauses 5 to 9 involve statutory rights which it already possesses, or to executive actions by the sheriff prescribed by the rules of court.⁶

[12] Importantly, the contractual provisions upon which the appellant would rely are all to the benefit of the municipality. In *Burger v Dummer and another* 1913 CPD 765, 770, Gardiner AJ declared that 'wherever "contract" is mentioned in the (municipal) Ordinance, a contract ... whereby the Council is to do or give something in return for something done or given by the other party, is contemplated'. The court held that the undertaking by a candidate councillor to donate an amount of money towards defraying the costs of an appeal instituted by the council, did not constitute a pecuniary

⁵ See *McIlhwaith v Fowler* 1920 EDL 215 at 222; *Stellenbosch Farmers' Winery v Distillers Corporation (SA) Ltd and another* 1962 (1) SA 458 (A) 470B.

interest disqualifying him from office. This decision might not give rise to a general rule that a donation or a promise without return, made by a councillor to the council, can never constitute a pecuniary interest; it does however reflect the common sense view that the words ‘pecuniary interest’ generally connote a right or claim vesting in the councillor as against the council.

[13] The purpose of execution is the enforcement of the court’s judgment; to which end the proceedings are driven throughout by the judgment creditor for its exclusive benefit (subject to the rights of preferent creditors), through the sheriff acting in his or her executive capacity. The execution creditor has the right to prepare the conditions of sale (Magistrates’ Courts rule 43 (7)(a)) and may include therein provisions to its benefit. The municipality, in its capacity of execution creditor, stipulated the benefits which it required out of the sale. The purchaser, in accepting the conditions of sale, was instrumental in the municipality obtaining its objectives. What is more, the purchaser’s bid, being the highest bid, constituted for the municipality the best bargain possible at the particular sale in execution. The purchaser’s obligation to fulfil that bargain can hardly afford scope for corruption, fraud or insider trading.

⁶ See para [4].

[14] In short, for the above reasons, I find that the beneficial statutory ‘rights’ of the kind ‘acquired’ by the municipality at the public judicial sale did not constitute a pecuniary interest, direct or indirect, as contemplated in Local Government Ordinance 17 of 1939 (T).

[15] I should mention perhaps that in the appellant’s heads of argument reliance is placed also on s 10H(3) of the Local Government Transition Act 209 of 1993, but that aspect was not pursued at the appeal. I need not burden this judgment with my reasons for regarding counsel’s decision to be correct and proper.

[16] In the result, I would dismiss the appeal with costs.

AR ERASMUS
ACTING JUDGE OF APPEAL

CONCUR:

Harms JA
Streicher JA
Jafta AJA
Ponnan AJA