THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 289/2018

In the matter between:

POLOKWANE LOCAL MUNICIPALITY **APPELLANT**

and

GRANOR PASSI (PTY) LTD **FIRST RESPONDENT**

REGISTRAR OF DEEDS **SECOND RESPONDENT**

Neutral citation: *Polokwane Local Municipality v Granor Passi (Pty) Ltd* (289/2018) [2019] ZASCA 5 (1 March 2019)

Coram: PONNAN, TSHIQI, WALLIS, ZONDI and DAMBUZA JJA

Heard: 19 February 2019

Delivered: 1 March 2019

Summary: Review – sale of land by municipality in 1988 – property not transferred to purchaser – municipality resolving that purchaser had provided insufficient proof that the purchase price had been paid – on that basis resolving not to transfer land to purchaser – decision reviewable on grounds of material error of fact – all evidence showed price had been paid – decision set aside and referred back to municipality – factors to be taken into account in deciding whether to proceed with transfer.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Thobane AJ, sitting as court of first instance):
The appeal is dismissed with costs.

JUDGMENT

Wallis JA (Ponnan, Tshiqi, Zondi and Dambuza JJA concurring)

[1] On 7 December 1988 the appellant's predecessor, the Pietersburg Municipality,[1] concluded an agreement with the respondent, Granor Passi (Pty) Ltd (Granor), for the sale to it of an immovable property described as lot 5665, Pietersburg Extension 12 (the property), for a purchase price of R181 000. A deposit of 20 per cent of the purchase price was payable in cash on the date of sale and the balance was payable thereafter in 60 equal monthly instalments, inclusive of interest. Possession of the property was given immediately and Granor was obliged, within three years of the date of conclusion of the agreement, to erect an industrial building on the site to a minimum value of R100 000. If it failed to do so the municipality would be entitled to take the property back.

[2] Granor claimed that it paid the purchase price in accordance with the agreement and that the final instalment was paid by 1994. It was common cause that it constructed industrial buildings on the site with the

[1] I refer to the appellant and its predecessor individually and collectively as 'the municipality'.

approval of the municipality. The current value of the improvements it has made over the years was assessed as some R22 million. The property and the buildings so constructed, together with two adjacent properties owned by it, are used for the purpose of its business of processing fruits into liquid concentrates. Since 1994 the municipality has demanded and Granor has paid rates on the property on the footing that it was the owner. From 2010 rates were not charged separately in respect of the property, which Granor attributed to the consolidation of this rates account with those of its other two properties. While the municipality denied this, it gave no explanation for the sudden cessation of rates accounts and its denial can safely be rejected. In approximately 2011, it was discovered that the property was still registered in the name of the appellant municipality, now the Polokwane Local Municipality. Granor's investigations suggested that the municipality had given instructions to two separate firms of attorneys to attend to the transaction but this was not done. Further investigation did not reveal why the property was not transferred to Granor.

[3] On 22 November 2013 a letter was written on behalf of Granor to the Municipal Manager of Polokwane asking that the municipality authorise transfer of the property to Granor. Matters proceeded slowly thereafter, and documents were furnished to the municipality with a view to establishing that the purchase price had been paid. The last item of correspondence was a letter dated 27 November 2014. Eventually on 26 February 2015 the council of Polokwane passed the following resolution:

'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. That negotiations be conducted with Granor Passi in relation to a lease agreement.
3. That the Municipal Manager be mandated to enter into negotiations with Granor Passi.'

The letter conveying this resolution to Granor concluded with the following sentence:

'Kindly advise Council within 7 days from date of this letter of your acceptance of the above listed conditions.'

[4] On 4 August 2015 Granor launched the present proceedings to set aside this resolution and for an order that the municipality transfer the property to Granor. Thobane AJ granted the first order and remitted the matter to the municipality for reconsideration in the light of the principles set out in the judgment. From his judgment it is apparent that he thought that the municipality needed to consider its constitutional obligations especially in the light of its dealings with Granor over the previous 27 years. The appeal is with his leave.

The issues

[5] Counsel for the appellant submitted that there were three grounds upon which the appeal should be upheld. As set out in the answering affidavit and the heads of argument for the municipality, his starting point was the contention that the main cause of action was a claim for specific performance of the contract of sale. On this footing he advanced three propositions. First, the claim to transfer of the property had prescribed. Second, and in any event, the requirements for specific performance of the sale contract were not satisfied, in that Granor had not proved its contractual entitlement to specific performance. In particular he contended that there was insufficient proof that it had paid the purchase price in full. Third, he submitted that in the light of these problems the

resolution took the matter no further and was not relevant to the dispute between the parties. Setting it aside served no purpose.

[6] This approach inverted the proper enquiry, by ignoring the way in which the application was brought and dealt with in the high court. The municipality's resolution must be seen against the background that Granor had furnished it with documents in proof of its payment of the purchase price. In the light of that proof, it asked that the municipality transfer the property to it. Paragraph 1 of the resolution stated that the municipality's council considered the tendered proof of payment insufficient to satisfy it that the purchase price had been paid. For that reason, and for that reason alone, it was unwilling to consent to transfer of the property to Granor.

[7] The only issue under consideration at the council's meeting on 26 February 2015 was whether Granor had furnished adequate proof that it had paid the purchase price of the property. Granor asked that the documents it had furnished be accepted as such proof. The request for transfer of the property would, so it believed, flow automatically from such acceptance. Prior to the council meeting there was no indication that any other reason existed for not transferring the property in accordance with the sale agreement. In the entire period between 2011, when Granor first raised the issue, and February 2015 when the resolution was taken, the municipality had not advanced any other reason for not transferring the property to Granor.

[8] The application was expressly directed at reviewing and setting aside the council's resolution. The claim for transfer of the property flowed from that. It was incorrect to say that the cause of action was a

claim for specific performance founded in the law of contract. Not only did the prayer for relief start with an order for the review and setting aside of the resolution, but the founding affidavit, after setting out the facts of the case, proceeded under the heading "Reviewable Administrative Action'. It would be hard to find a clearer indication that the case was primarily based in public law and not the law of contract.

[9] That is how the high court understood the case before it. The order it made set aside the resolution, but did not order the municipality to transfer the property to Granor. The judge said that whether the municipality should be ordered to transfer the property to Granor was a question that would arise 'in the event that the resolution is set aside'. He then referred that question and any issues relating to it back to the municipality for reconsideration in the light of various other considerations set out in the judgment. The appeal is directed against the order upholding the review and setting aside the resolution. There was no cross appeal. Accordingly the question whether Granor is entitled to transfer of the property into its name was not an issue before us in this appeal. The only issue was whether the high court was correct to set aside the resolution.

Reviewing the resolution

[10] In a manner that has repeatedly been deplored by the courts, Granor's founding affidavit relied on a cornucopia of grounds under PAJA[2] for setting aside the resolution. Each of ss 6(2)(*a*)(iii), (*c*), (*d*), (*e*)(ii), (iii) and (vi), (*f*)(ii) and (*h*) was invoked, without any endeavour to identify which was truly relevant and on what factual basis it was being

[2] The Promotion of Administrative Justice Act 3 of 2000.

relied on. The judgment of the high court adopted a number of these in setting aside the resolution.

[11] In the high court the municipality contended that the resolution did not embody administrative action in terms of PAJA and accordingly could not be reviewed under that statute. It did not pursue the argument in its heads of argument, or before us, so the point can be disposed of quite simply. The resolution undoubtedly embodied a decision. Was it of an administrative nature? In my view a decision regarding the implementation of a contract to which the municipality is a party is an act of administration. It was taken by an organ of state, exercising a public power or function in relation to the enforcement of a contract concluded in terms of the empowering provisions governing transactions of this character.[3] It had a direct, external legal effect and adversely affected Granor's rights. It did not fall within any of the statutory exceptions. Accordingly, it was administrative action and reviewable under PAJA.[4]

[12] The municipality contended that Granor's review was fatally defective because it was not pursued in terms of rule 53 of the Uniform Rules of Court. There was no merit in the point. This court long ago held that this is 'sterile formalism' and that there is no obligation on a litigant to pursue a review in terms of rule 53.[5] The only impact of its not doing so is that it deprives itself of the procedural advantages offered by the rule.

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[3] The disposal of publicly owned land by a municipality has always been regulated by legislation and it is not disputed in this case that provisions of the Local Government Ordinance 17 of 1939 had governed the initial sale and that post-democracy legislation governing such transactions may have been applicable to the actual transfer that Granor desired.

[4] *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 33.

[5] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 660D - 663D.

[13] The high court's judgment dealt with several different grounds of review. It said that the characterisation of Granor's payments as 'loan repayments' was clearly wrong. It held that the rejection of Granor's financial statements as proof of payment of the price was factually incorrect and as a result irrelevant considerations were taken into account or the action was not rationally connected to the facts before the decision maker. Finally, it held that because the price had been paid; extensive improvements had been constructed on the site with the municipality's approval; and Granor had been in occupation for over 25 years and had paid rates and taxes, 'the siren of irrationality rings loud'.

Factual error

[14] It is only necessary to have regard to the ground of review that the decision was based on clear factual error on the part of the municipality. In *Pepcor*,[6] factual error was recognised as a ground of review under the common law, read in the light of s 33 of the Constitution. That was before PAJA was enacted. It was, however, suggested in an *obiter dictum* that this could fall within s 6(2)(*e*)(iii), on the basis that such factual errors meant that irrelevant considerations were taken into account in taking the decision. The approach has been endorsed in subsequent decisions of this court and certain other provisions of PAJA have been identified as supporting this ground of review.[7] The scope of such review was

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[6] *Pepcor Retirement Fund and Another v Financial Services Board and Another* [2003] ZASCA 56; 2003 (6) SA 38 (SCA); [2003] 3 All SA 21 (SCA) paras 46 - 48.

[7] *Chairpersons' Association v Minister of Arts and Culture and Others* [2007] ZASCA 44; 2007 (5) SA 236 (SCA); [2007] 2 All SA 582 (SCA) para 48; *Government Employees Pension Fund and Another v Buitendag and Others* [2006] ZASCA 166; 2007 (4) SA 2 (SCA); [2007] 1 All SA 445 (SCA) para 12; *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and Others* [2011] ZASCA 202; 2012 (2) SA 16 (SCA); [2012] 2 All SA 111 (SCA) para 34; *Minister of Home Affairs and Another v Public Protector* [2018] ZASCA 15; 2018 (3) SA 380 (SCA); [2018] 2 All SA 311 (SCA) para 53.

explained in *Dumani*,[8] which held that factual error by a decision maker vested with the power to determine the facts would only constitute reviewable error if the error were one in regard to a material fact, where the facts were uncontentious and objectively verifiable. Uncontentious in this context does not restrict the enquiry to instances where the decision maker has overlooked something and exclude cases where the decision maker's view of the facts is erroneous. It must be understood in conjunction with the requirement that the facts be objectively verifiable. If, on objective verification, there is no room for debate or argument about the correct facts, they will be uncontentious.

[15] The factual basis for the council's decision was that there was no adequate proof that Granor had paid the full purchase price. The high court held this to be a material error of fact. I agree. The evidence before the council pointed only in one direction, namely, that the price was fully paid in accordance with the provisions of the contract of sale. The cumulative effect of that evidence was irresistible.

[16] The starting point was the obligation to pay twenty percent of the purchase price (R36 200) as a deposit. At a meeting between representatives of Granor on the one hand, and Mr Maleka and Ms Muller from the municipality on the other, the latter said that they had a copy of the cheque with which the deposit was paid. There was no dispute that the deposit was paid.

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[8] *Dumani v Nair and Another* [2012] ZASCA 196; 2013 (2) SA 274 (SCA); [2013] 2 All SA 125 (SCA) paras 32 and 33.

[17] Granor provided the municipality with extracts from its audited annual financial statements reflecting its accounts from 1990 to 1994, together with an affidavit from the auditor stating that payment for the property was done by way of monthly instalments of R3 444.78 to "Pietersburg Stadsraad' and that these were reflected in the annual financial statements. He said that the final instalment was paid during the 1994 financial year and that the debt to the municipality was reflected as being fully paid during that year.

[18] The audited annual financial statements bore out what the auditor said in his affidavit. In 1990 they reflected the property as a fixed asset at a cost of R181 000. The municipality was shown as a creditor for an amount repayable in equal monthly payments of R3 444.78. The outstanding balance at the end of the 1990 year, namely 28 February 1990, was R118 012. Accepting that by that stage fourteen instalments had been paid, totalling R47 626.92, it is clear that a substantial portion of these payments – some R21 000 – was attributable to interest on the amount outstanding. In other words, as would occur with a loan secured by a mortgage bond, the repayments were applied in the first instance to interest and then to the reduction of capital. It is not surprising in those circumstances that the notes to the annual financial statements erroneously described the amount owing to the municipality as being secured by a first mortgage bond over the property. That accorded with their accounting treatment.

[19] In each of the following financial years the same picture emerged from the annual financial statements. The property was shown as an asset at cost and the indebtedness to the municipality diminished year by year to R92 681 in 1991, R60 626 in 1992, R29 151 in 1993 and zero in 1994.

Although the point was not mentioned in the affidavits and therefore no explanation for any perceived anomaly had been required from Granor, counsel tried in argument to suggest that there was a problem with these amounts as the decline in the capital owing from 1991 to 1992 was marginally greater than the decline in the corresponding period from 1992 to 1993. He sought to suggest that for this reason and in the absence of an amortisation schedule no reliance could be placed on the accounts. The argument was a factual one, impermissibly raised in oral argument. Granor had been afforded no opportunity to respond to it. It was, accordingly, not open to the municipality to raise it. In any event, whatever the explanation, which may have been nothing more than an adjustment in the books of account of Granor, or the correction of an error of calculation, it did nothing to undermine the unequivocal record of monthly payments of R3 444.78.

[20] Those payments were what the sale agreement required. The relevant clause said that the balance of the purchase price, after payment of the deposit, was to be made in no more than sixty equal monthly instalments together with interest calculated on the monthly reducing balance, from the date of sale, at the same rate of interest applicable to the municipality on the date of purchase on its 'GLF'.[9] Two points of importance emerged from this. The first was that the monthly payments were to be equal and calculated on the reducing monthly balance owing. The second, contrary to counsel's argument, was that the interest rate was fixed at the outset and did not fluctuate from time to time during the

[9] The agreement was couched in the Afrikaans language and the relevant clause read:
'Die balans van die koopprys in hoogstens 60 gelyke maandelikse paaiemente tesame met rente bereken op die maandelikse verminderende saldo, vanaf die koopdatum teen dieselfde rentekoers as wat op die koopdatum op die Raad se GLF van toepassing is.'
The acronym GLF was not explained and an inaccurate translation furnished to the members of the court said CLF.

payment period. That is what enabled the monthly payments to be calculated accurately in advance. There is no reason to doubt that the monthly repayments were calculated at the outset as being R3 444.78.

[21] The directors of Granor at the relevant times prepared the annual financial statements. They did so long before any dispute arose and at a stage when there was no reason for them to misrepresent the situation. The auditor's responsibility was to consider the statements, test the entries, establish that the assets reflected in the assets register existed, and check that the accounts did not contain any material errors or misstatements. Having done that, which in a conventional audit is done by testing the accuracy of the entries in the accounts against the internal records of the company, the auditor certified that the annual financial statements were a reasonable reflection of the financial position of the company for the years in question in accordance with the requirements of the Companies Act.[10] The purchase of the property was a major transaction, giving rise to a substantial indebtedness. It would necessarily have been checked as part of the audit process. When the auditor deposed to an affidavit confirming that the monthly payments were made and the full purchase price discharged, there was no reason to disbelieve him.

[22] Apart from this financial material, Granor also provided the municipality with a letter from its then town clerk – the equivalent of the modern municipal manager – dated 1 December 1993 and recording a council decision taken on 29 November 1993. The relevance of these dates is that they correspond exactly with the date on which the final payment in terms of the sale agreement was due. The letter dealt with a

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[10] At the time the Companies Act 63 of 1973.

proposal to consolidate the property together with two other properties, one owned by the municipality and one by Granor, as well as a portion of Kelsie Street, the cul-de-sac giving access to all three properties. In exchange a portion of another property owned by Granor and abutting on the proposed consolidated lot would be transferred to the municipality. The letter is instructive. First, it referred to the consolidation of the property (erf 5665) with the other erven forming the proposed consolidated lot to be owned by Granor. Only if Granor owned all three properties could that occur. In turn, that would only be the case if Granor had paid the purchase price of the property. Given the date of this letter there can be no doubt that it had done so. Second, the letter said expressly that the municipality had disposed of all three properties to Granor. Third, it described the property as being owned by Granor. Fourth, it recorded that the municipality's attorneys were to attend to the relevant conveyancing at Granor's expense.

[23] It is inconceivable that the decision by the council could have been taken, or the letter written, if Granor had not paid the purchase price of the property. Negotiations in regard to the exchange agreement appeared to have progressed slowly because there was some later correspondence in 1994 about the issue. One letter dated 14 October 1994 from the municipality's conveyancers was significant because it referred to the exchange agreement ('die verdere ooreenkoms') and said that it would be dealt with simultaneously with the other transaction ('gelyktydig met die ander transaksie'). In context that could only be a reference to the transfer of erf 5665 (the property) to Granor.

[24] When the municipality passed the challenged resolution there is nothing to indicate that it had any information before it to controvert

Granor's contention that the purchase price had been paid. Certainly none has been identified. The information it had been given was clearly the best available from Granor's side, as the original cheque stubs or other records of payment would long since have been destroyed. If it consulted its own records, which is uncertain because there is no reference to its officials doing so, that did not produce any evidence refuting Granor's claim to have paid in full. As matters stood at that stage therefore, everything available to the council pointed to the conclusion that Granor had indeed paid the purchase price in full. Its conclusion to the contrary was manifestly erroneous on the information before the council.

[25] As the ground of review is material factual error, I accept in favour of the municipality that, even if, on the material then available to the decision maker, the decision appeared to be erroneous, if it later transpired on the basis of subsequently discovered information that the factual position was otherwise, or at least open to some doubt, the requirement of the facts being objectively verifiable and uncontentious would not be satisfied. In this case, however, not only has no such further information been discovered, but there is also no indication that the municipality has looked for it.

[26] The acting municipal manager deposed to the answering affidavit. She said that in regard to legal submissions she acted on the legal advice received and accepted by the municipality. I assume, in mitigation of her and the municipality's response to Granor's application, that the legal advisers guided the municipality in the approach it adopted in resisting the review. If so they were ill advised for the reasons that follow.

[27] I have already adverted in para 8 to the misconception that the application was one for specific performance as opposed to a review of the council's decision. On that erroneous footing the person who drafted the answering affidavit thought that it was permissible to do so with a minimum of factual enquiry and a minimum of facts from the council. Instead, like a poorly drafted pleading, the affidavit contented itself with bare denials of virtually everything, as if it were open to the municipality simply to put Granor to the proof of everything. To this were added some technical defences and the defence of prescription.

[28] Confining myself for the present to the question of payment, the answering affidavit denied:

- Receipt of payment of the deposit;
- Receipt of payment of the sixty instalments of R3 444.78;
- Receipt of the final instalment during 1994;
- That Granor had established 'due compliance with its payment obligation'.

[29] Not a word was said of any search undertaken by municipal officials in the records of the municipality to ascertain what payments had been made. There was no suggestion that such records were not available. Council minutes reflecting the dealings with the property would have been relevant. The absence of any record of non-payment by Granor in such minutes would have been a strong indication that payment had been made. The municipality's financial records and audited accounts should have been examined for details of this transaction. It appears to have undertaken the development of Pietersburg Extension 12 for business and industrial purposes. There should in the ordinary course have been files

dealing with this, reports to council and references in council minutes, and audited accounts in this regard.

[30] A municipality is not like private persons or entities, which are only obliged to retain records for limited periods in terms of legislation governing income tax and other obligations to the fiscus. Bank accounts for the period may have been available either in municipal records or from its bankers. There is reference in the correspondence to two files dealing with this matter in the possession of the municipality. They were not produced, nor was there a suggestion that an attempt had been made to find them and look at their contents. If the records had been sought and could not be found for any reason, one would have expected this to be explained.

[31] The denial that the deposit was paid was extraordinary. The municipality admitted Granor's allegation that their representatives attended a meeting with Mr Maleka and Ms Muller, where they were told that the municipality was in possession of a copy of the cheque with which the deposit was paid. How could they then deny payment? If they had a cheque showing that payment was made in 1988, why did they not look in their records for proof of payment of the instalments from that date until 1993? The inevitable inference is that had they done so it would have demonstrated that Granor was correct in saying that it had paid the price.

[32] There appeared to be no appreciation that, in denying receipt of payment of the instalments, the municipality was accusing the auditor, Mr Ferreira, of lying in his affidavit and of having falsely certified Granor's annual financial statements for the relevant years as being a true

reflection of the financial position of the company. Those are serious charges for which no factual foundation was laid.

[33] Denials of this character were part of a pattern that recurred throughout the affidavit. For example, the final letter written before the council meeting where the resolution was taken was addressed to Councillor Sello and referred to a meeting with him on 26 November 2014. The answering affidavit first said that the deponent did not know who attended the meeting or what was discussed and therefore denied that such a meeting took place. It then complained that the letter should have been addressed to the deponent 'as Municipal Manager'. The deponent was not the incumbent of that post at the time. Although the letter confirmed that Councillor Sello was in possession of all the documents previously furnished to the municipality in proof of payment, the affidavit complained that it did not contain any 'source documents' proving payment of the price and suggested that without them the council could not be persuaded that the price had been paid.

[34] This was wholly obstructive. Councillor Sello, as a simple internet search revealed,[11] was at the time the member of the mayoral committee responsible for Spatial Planning and Development. He was accordingly the correct person for Granor to have approached in regard to this matter. The deponent does not indicate whether she approached councillor Sello for information before deposing to her affidavit. Nor did any member of the council depose to an affidavit to explain on what basis they arrived at their conclusion. Assuming that by 'source documents' she meant paid cheques or deposit slips that was an impossible demand more than twenty

[11] http://www.polokwanecity.co.za/driven-desire-serve-people/ accessed 23 February 2019.

years after the event. No attempt was made to identify any problems in regard to the accuracy of the annual financial statements.

[35] This obstructive approach merely reinforced the conclusion that the purchase price had been paid and that the municipality was not in a position to say otherwise. Instead it resorted to bare denials in the hope that it could succeed in resisting the review on a question of onus. It is to my mind inconceivable that this approach would have been adopted if the municipality had any factual basis for denying receipt of the purchase price. Against that background the endeavour to exploit difficulties of proof occasioned by the passage of time verged on the dishonest.[12]

[36] Furthermore, there were at least three things wrong with that approach. First, it meant that the municipality produced no evidence in support of its denials, even though these necessarily had as their corollary positive statements that the price had not been paid. So there was no evidence in support of its case and its denials, couched, as they were, in the form of positive statements that the price had not been paid, alleged dishonesty without a grain of proof.

[37] The second point was that much of the relevant evidence was within its exclusive knowledge. An obvious illustration of this was the attempted reliance on non-compliance with s 79(18) of the Local Government Ordinance 17 of 1939. All records in that regard would have been under its control and if there had been non-compliance it would have known of it. The approach adopted was to say that Granor had failed

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[12] See the comments by Meer J in regard to similar conduct in litigation by an organ of state in *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Land Reform and Others* [2010] ZALLC 14; 2010 (4) SA 308 (LCC) para 34.

to establish that there had been compliance with the requirements of this section and 'In the premises, such compliance is denied.' That amounted to an unfounded accusation that previous council officials and councillors had acted unlawfully in concluding the original deed of sale.

[38] Granor was entitled to invoke the maxim *omnia praesumuntur rite esse acta* in favour of compliance. Furthermore, where a matter is within the exclusive knowledge of one of the litigants, less evidence will be required from the other party to discharge the onus of proof.[13] That is particularly the case where the party possessed of the relevant knowledge does not produce it. And if the evidence provided by the party on whom the burden of proof lies calls for an answer, as was undoubtedly the case here, the failure to produce countervailing evidence strengthens the case for the party bearing the onus.[14]

[39] The third point, and most importantly in our constitutional democracy, is that this approach ignored the obligations resting on the municipality to deal openly, fairly, and in an accountable way with its citizens, including its corporate citizens. One of the founding values of our democracy is that government should be accountable, responsive and open.[15] The municipality's approach was that this was simply a matter of contract. That ignored authority in this court that, even when dealing with matters arising in a contractual context, a municipality may be burdened with obligations of procedural fairness.[16] In *Joseph* the Constitutional

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[13] *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-4
[14] *Ex parte the Minister of Justice: in re Rex v Jacobson & Levy* 1931 AD 466 at 479; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 39G-H; *Malan v City of Cape Town* [2014] ZACC 25; 2014 (6) SA 315 (CC); 2014 (11) BCLR 1265 (CC) para 73.
[15] Constitution s 1(*d*) and s 41(1)(*c*). In regard to local government see s 152(1)(*a*).
[16] *Logbro Properties CC v Bedderson NO and Others* [2002] ZASCA 135; 2003 (2) SA 460 (SCA); [2003] 1 All SA 424 (SCA) para 10.

Court endorsed the need for administrative law to 'regulate administrative decisions which affect the enjoyment of rights, properly understood, at least for the purposes of procedural fairness'. This demanded of organs of state that they act in a manner that is responsive, respectful and fair when fulfilling constitutional and statutory obligations.[17]

[40] Most recently, this court, in *Sanparks*[18] returned to the topic of when administrative law principles intrude into contractual relationships. The following passages from the judgment of Navsa JA and Davis AJA seem apposite to the present case:[19]

'[37] There is no bright-line test for determining whether administrative principles intrude in relation to a contract involving an organ of state and a private party. However, there are indicators. One might rightly ask whether coercive state power can be brought to bear by a state organ on the private party. Further, one will be constrained to consider whether the public interest is affected by the exercise of the contractual right … The contractual terms, seen contextually, will also be scrutinised to determine how the parties envisaged disputes in relation to their agreement being dealt with prospectively.

[38] Having regard to the authorities referred to by Dambuza JA[20] … a court should be concerned with whether, in the circumstances of the case, the state can be said to be acting fairly, which includes, but is not limited to, questions of procedural propriety. It does not necessarily follow, where there is an equality of arms in relation to the conclusion of a contract and where the public interest is not directly involved, that the private party will be able to resort to administrative-law principles. Each case has to be decided on its own merits and courts will exercise a value judgment.

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[17] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC) paras 44-45

[18] *South African National Parks v MTO Forestry (Pty) Ltd and Another* [2018] ZASCA 59; 2018 (5) SA 177 (SCA) paras 24 to 27.

[19] Paras 37 to 39.

[20] The majority judgment in relation to which this was a concurrence.

[39] Proportionality is a constitutional watchword, the exercise of which can be employed in adjudicating whether to import administrative-law principles into cases involving an organ of state and a private party.'

[41] The net effect of the absence of countervailing evidence from the municipality was to strengthen the conclusion that the council's decision was fatally infected by the material factual error that the purchase price had not been paid. On the evidence before it the price had been paid and it had to take any decision as to the fate of the sale on that basis. It did not do so. Accordingly, the resolution embodying its decision was fatally flawed and fell to be set aside. The decision of the high court to do so cannot be faulted.

The remittal

[42] There was no suggestion by the municipality that the order for remittal was incorrect or inappropriate. It would, however, be of assistance to explain, in the light of this judgment, what considerations should underpin the municipality's reconsideration of Granor's request that it implement the sale agreement and transfer the property to Granor.

[43] Firstly, the issue of payment of the purchase price has been determined. The reconsideration must take place on the basis that Granor paid the price in full as reflected in its annual financial statements. Secondly, and as I trust is apparent from paras 37 and 38 above, unless, after investigation in the records of the municipality, it appears that there is a proper factual basis for the suggestion that there was non-compliance with s 79(18) of the Local Government Ordinance 17 of 1939, or any other statutory provision that applied to this sale when it was concluded,

the reconsideration should be on the basis that all requirements of law for the validity of the sale were satisfied.

[44] Thirdly, in regard to the alleged non-compliance with s 14 of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA), this is not a ground for deciding not to implement the transaction and transfer the property. That is a question that must be determined separately and at the outset. If the municipality concludes that it should perform in terms of the agreement, it will then be obliged to determine whether there are any legal requirements to be satisfied in order for performance to occur. If there are, it must then take all the steps necessary to perform. I make no finding on whether performance would require compliance with s 14(2) of the MFMA and whether it is open to rely on this legislation to disturb an existing sale of property (c/f s 14(3)).

[45] Fourthly, in regard to prescription, I point out that there is no obligation on the municipality to invoke this to resist the claim for transfer. In the circumstances of this case, it is not a defence that can be raised simply by legal advisers or officials, without proper consideration by the council of the municipality in the light of the municipality's constitutional obligations dealt with earlier in this judgment. The Constitutional Court has suggested, admittedly in a different context,[21] that there may be circumstances in which prescription is not available as a mechanism for avoiding constitutional obligations. Whether this is such a case warrants careful consideration by the municipality. The consequences of seeking to upset a transaction that both sides believed

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[21] *Njongi v MEC, Department of Welfare, Eastern Cape* [2008] ZACC 4; 2008 (4) SA 237 (CC); 2008 (6) BCLR 571 (CC) paras 41 and 42.

for over 25 years had been implemented, so as to constitute Granor the owner of the property, must be carefully weighed. This is a substantial business that has made large contributions to municipal coffers for many years by way of rates and payment for services. It is no doubt a significant employer, both directly and indirectly. What would be the consequences of the municipality evicting it and having to pay compensation for improvements? All this must go into the decision-making mix.

[46] These remarks should not be read as expressing a view as to the merits of the defence of prescription. All that was required in order to establish Granor's ownership was that the formality of registration be undertaken in the Deeds Registry. Until now the municipality has recognised Granor as the owner of the property. In similar circumstances dealing with the need to register the plaintiff's ownership of shares in the share register of a company, it was held that the ongoing recognition of the plaintiff's ownership constituted an ongoing acknowledgement of the debt and an interruption of the running of prescription.[22] Again, I express no settled view on this, but mention it to make it clear that the contention that the right to claim transfer of the property had prescribed is by no means as unimpeachable as counsel for the municipality contended.

[47] The judge in the high court contemplated that these issues needed to be considered by the municipality before it took a decision in response to Granor's request. He was also mindful of the need for that decision to

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[22] *Lindhorst and others v Andersen and Others* [2006] ZAECHC 70 (7 December 2006) per Leach J at p 43.

be rational. That is why he remitted it to the municipality. He was correct to do so.

Result

[48] The appeal is dismissed with costs.

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M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant: A Liversage SC
Instructed by: A M Carrim Attorneys, Polokwane;
Rossouws Attorneys, Bloemfontein

For first respondent: J G Bergenthuin SC
Instructed by: Bernard van der Hoven Attorneys, Pretoria;
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