**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case no: 311/2011
**Reportable**

In the matter between

**RINALDO INVESTMENTS (PTY) LTD** **Appellant**

and

**GIANT CONCERTS CC** **First Respondent**

**THE MINISTER FOR LOCAL GOVERNMENT, HOUSING AND TRADITIONAL AFFAIRS FOR THE PROVINCE OF KWAZULU-NATAL** **Second Respondent**

**ETHEKWINI MUNICIPALITY** **Third Respondent**

**THE MINISTER OF PUBLIC WORKS** **Fourth Respondent**

**THE MINISTER OF DEFENCE** **Fifth Respondent**

**Neutral citation:** *Rinaldo Investments (Pty) Ltd v Giant Concerts CC* (311/2011) [2012] ZASCA 34 (29 March 2012)

**Coram:** **MTHIYANE DP, CLOETE, CACHALIA, MALAN JJA and PLASKET AJA**

**Heard:** **27 February 2012**

**Delivered:** **29 March 2012**

**Summary: Local Authorities Ordinance 25 of 1974 (KZN) – sale by municipality of land by private bargain – standing of objector.**

**ORDER**

**On appeal from:** KwaZulu-Natal High Court, Pietermaritzburg (Mnguni J sitting as court of first instance)

1. The appeal is upheld with costs, including the costs of two counsel.

2. Paragraphs (a) to (d) of the order of the court below are set aside and replaced with the following order:

'(a) The application is dismissed.

(b) The applicant is directed to pay the third respondent's costs, including the costs of two counsel.'

**JUDGMENT**

PLASKET AJA (MTHIYANE DP, CLOETE, CACHALIA and MALAN JJA concurring)

[1] This appeal concerns the validity of a contract of sale of land by private bargain concluded by the third respondent, the eThekwini Municipality, and the appellant, Rinaldo Investments (Pty) Ltd, with the consent of the second respondent, the Minister (more correctly, the MEC) for Local Government, Housing and Traditional Affairs for the Province of KwaZulu-Natal. The court below, the KwaZulu-Natal High Court, Pietermaritzburg (Mnguni J) had set aside the sale at the instance of the present first respondent, Giant Concerts CC. This appeal is before us with the leave of this court, Mnguni J having refused leave to appeal.

The facts

[2] The land with which this case is concerned is situated on the Durban beachfront. It consists of land upon which the headquarters of the Natal Command of the South African National Defence Force is situated as well as adjoining land that is owned by the municipality. The land upon which the Natal Command is situated makes up the bulk of the land in issue in this matter. It was acquired by the municipality in 1855 but was transferred to the central government in 1937 for military purposes, subject to a condition that if it was no

longer required for those purposes it would revert to the municipality. By 2003 a decision had been taken to relocate the military to Salisbury Island with the result that the property would revert to the municipality. (I shall, for the sake of convenience, refer to all of the land in issue in this appeal as 'the Natal Command site'.)

[3] When it became known that the military was going to move from the beachfront and that the land it occupied there would revert to the municipality, Videovision Entertainment (Pty) Ltd, a film production company, proposed to the municipality that it purchase the Natal Command site for the purpose of establishing a modern film studio in Durban. Rinaldo Investments is the property holding entity of Videovision Entertainment and both companies have the same shareholders and directors. The dominant figure in both is Mr Anant Singh, a film producer with an international reputation.

[4] The proposal struck a chord with the municipality because it had earlier established a film office with a view to promoting Durban as a destination for the production of what it termed professional and reputable films. This plan had, in turn, been included into its Integrated Development Plan, which recognised the potential of the film industry for economic development, and it had entered into a partnership with the KwaZulu-Natal provincial government to promote the film industry in Durban.

[5] The proposal was considered internally and approved in principle by the municipality's executive committee. Protracted negotiations followed and eventually the terms of a contract of sale were agreed to. The executive committee then took a decision to sell the land to Rinaldo Investments by private treaty at a price of R15 million. As the land had been valued during the negotiations at R71 million, if it was rezoned for its optimal use, the purchase price was made subject to conditions. They were that the land had to be used for the core activities of the development of a film studio and associated infrastructure and if it was not, a 'claw back' provision provided that the purchase price would increase in accordance with a prescribed formula. The effect of this was that Rinaldo Investments was required, in return for a reduced

purchase price, to develop the land at its own expense in accordance with the municipality's vision.

[6] Because the proposed sale involved a deviation from the usual way in which land owned by the municipality is sold, namely by public auction or public tender, s 234(1) of the Local Authorities Ordinance 25 of 1974 (KZN) required the proposed sale to be advertised prior to a final decision being taken. The municipality advertised the sale, the parties signed the contract and it lay for inspection as required by s 234(3) of the Ordinance.

[7] An objection to the proposed sale was received by the municipality from Giant Concerts. It was signed by Mr K M Gayadin who, although not a member of the close corporation, represented it throughout. The objection stated:

'Kindly take notice that the abovenamed close corporation hereby places on record its objection to the sale of the aforesaid property.

The close corporation furnishes inter alia its reasons for such objection, namely that it is involved in the entertainment business and has an interest in the development of a movie studio and other allied facilities on the site.

Further take notice that the close corporation's offer to purchase the aforesaid immovable property shall be greater than the present offer submitted to you, which offer I am given to understand is R15 million.

We trust you find the above in order and invite you to contact the writer should you require any further information.'

[8] Municipal officials met with Gayadin in order to allow him to explain and expand upon the contents of the letter. In particular, he was asked to outline his proposal for the development of the site but he refused to do so on the basis that this was confidential. He was also unable to show that he had any involvement in or knowledge of the film industry. Indeed, the letterhead of Giant Concerts indicates that its area of operation, as its name suggests, involves the organisation of large concerts – 'Mind Blowing Live Concerts' – and no mention is made of the film industry. (Singh, with his extensive knowledge of the film industry, both locally and internationally, stated in his affidavit that he had never heard of Gayadin or Giant Concerts in film industry circles.)

[9] A little over a month later, the municipality approved the sale to Rinaldo Investments. It was then referred to the MEC for approval in terms of s 235(1) of the Ordinance. That approval was duly given on 22 February 2005. Giant Concerts launched an application to review the decision a short while thereafter, on 3 May 2005, but then matters slowed down: the application was heard four years later, on 11 June 2009.

[10] In the court below it was contended on behalf of the municipality, the MEC and Rinaldo Investments that Giant Concerts had no standing to challenge the validity of the sale and that because Gayadin had been convicted of offences involving dishonesty he was disqualified by s 47 of the Close Corporations Act 69 of 1984 from taking part in the management of Giant Concerts. Both of these points failed. On behalf of Giant Concerts, it was argued that the decisions were invalid on a number of grounds that went to their lawfulness, procedural fairness and reasonableness. All of these arguments were upheld by the court below in a judgment that was delivered more than 15 months after the application was argued. This is clearly an unacceptably long delay. The judgment set aside the decision of the municipality to sell the Natal Command site to Rinaldo Investments by private bargain as well as the MEC's approval of the sale.

[11] In my view, a single issue is decisive of this appeal. That is the issue of Giant Concert's standing to review the decision of the municipality to sell the Natal Command site to Rinaldo Investments, and the related decision of the MEC to approve the sale. It is to that issue that I now turn.

Giant Concert's standing

[12] When, as in this case, the fundamental right to just administrative action is alleged to have been infringed, s 38 of the Constitution extends standing to five classes of litigants.[1] The section provides:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant

[1] *Freedom Under Law v Acting Chairperson: Judicial Service Commission & others* 2011 (3) SA 549 (SCA) paras 17-18; *SLC Property Group (Pty) Ltd & another v Minister of Environmental Affairs & Economic Development (Western Cape) & another* [2008] 1 All SA 627 (C) para 19. See too Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 494.

appropriate relief, including a declaration of rights. The persons who may approach a court are –

(*a*) anyone acting in their own interest;

(*b*) anyone acting on behalf of another person who cannot act in their own name;

(*c*) anyone acting as a member of, or in the interest of, a group or class of persons;

(*d*) anyone acting in the public interest; and

(*e*) an association acting in the interest of its members.'

[13] Giant Concerts does not claim to act in any capacity other than in its own interest, in terms of s 38(*a*). Furthermore, as its registered address is 468 Loop Street, Pietermaritzburg, it does not have 'ratepayer' standing in terms of the common law (saved by s 39(3) of the Constitution)[2] in respect of the eThekwini Municipality in Durban.[3]

[14] How is the question as to whether a person has an interest in particular litigation for purposes of s 38(*a*) to be determined? Even though s 38 has, generally speaking, widened the scope of standing beyond the common law rules that applied in the pre-1994 era,[4] that does not mean that everyone who alleges an infringement of a fundamental right has an unfettered right of access to court. In the words of Sir William Wade and Christopher Forsyth,[5] (albeit in a different context) a successful challenge to administrative action is only possible, as a starting point, if 'the right remedy is sought by the right person in the right proceedings'. (This statement was approved by this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*.[6]) The 'right person' is one who has what is regarded as a sufficient interest in the subject matter of the dispute.[7]

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[2] Section 39(3) provides: 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'

[3] *Dalrymple & others v Colonial Treasurer* 1910 TS 372 at 382; *Jacobs & 'n ander v Waks & andere* 1992 (1) SA 521 (A) at 536D-E; Lawrence Baxter *Administrative Law* (1984) at 658-659.

[4] *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC) paras 165-166 (dealing with s 7(4) of the interim Constitution, the equivalent of s 38 of the final Constitution); *Kruger v President of the Republic of South Africa & others* 2009 (1) SA 417 (CC) para 23.

[5] Sir William Wade and Christopher Forsyth *Administrative Law* 9 ed (2004) at 281.

[6] *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 28.

[7] Baxter (note 3) at 644, 650-658; Hoexter (note 1) at 494-499.

[15] In *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others*[8] O'Regan J held in relation to the interim Constitution's equivalent of s 38 of the final Constitution:

'Section 7(4) is a recognition too of the particular role played by the Courts in a constitutional democracy. As the arm of government which is entrusted primarily with the interpretation and enforcement of constitutional rights, it carries a particular democratic responsibility to ensure that those rights are honoured in our society. This role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.

However, standing remains a factual question. In each case, applicants must demonstrate that they have the necessary interest in an infringement or threatened infringement of a right. The facts necessary to establish standing should appear from the record before the Court . . .'

[16] The factual basis upon which a litigant claims standing is only part of the picture. In order to place those facts in their proper context, it is also necessary to consider the statutory scheme in issue, particularly its purpose. This is well illustrated by *Polikor Investments (Pty) Ltd v Chairman, Local Road Transportation Board, Cape Town & others.*[9] In determining whether a business competitor had a sufficient interest in the grant of private road transportation permits to its rival, Grosskopf J, after considering the legislation, held:

'In the present case I do not consider that the applicant had a sufficient interest to entitle it to notice of the application for a private road transportation permit to convey goods, or to a hearing before the Local Board when the application was considered. This conclusion seems to me to follow from the procedural provisions of the Act, the ambit of the enquiry which the Local Board had to conduct, and the nature of the interest of the present applicant.'

In other words, a litigant's interest must be assessed 'against all the factual and legal circumstances of the case'.[10]

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[8] Note 4 paras 230-231. See too *Jacobs & 'n ander v Waks & andere* (note 3) at 534C-E.

[9] *Polikor Investments (Pty) Ltd v Chairman, Local Road Transportation Board, Cape Town & others* 1981 (4) SA 782 (C) at 789A-B. See too *Rauties Transport (Edms) Bpk v Voorsitter, Plaaslike Padvervoerraad, Johannesburg & 'n ander* 1983 (4) SA 146 (W) at 163C-E.

[10] The Rt Hon the Lord Woolf, Jeffrey Jowell QC and Andrew Le Sueur *De Smith's Judicial Review* 6 ed (2007) para 2-025.

[17] I shall commence this enquiry by considering first the applicable legislation and then the facts. Sections 233, 234 and 235 of the Ordinance empower municipalities in the province of KwaZulu-Natal to alienate their immovable property and regulate how such alienations are to take place. It is to these sections that one must look in order to determine whether Giant Concerts has an interest that is sufficient to clothe it with standing to challenge the municipality's decision to sell the Natal Command site to Rinaldo Investments.

[18] Section 233(2) sets out the various modes by which a municipality may alienate or otherwise deal with its immovable property. These include sale by public auction or public tender, the granting, selling or letting of immovable property without reference to its actual value in defined circumstances, the exchange of a piece of its immovable property for 'other immovable property within the borough', the letting of its immovable property by public auction or public tender on defined terms and the sale or letting by public auction or public tender of 'the trading rights in respect of any portion of the town lands of the borough'.

[19] Section 233(8) allows for a deviation from the norm of selling or letting immovable property by public auction or public tender. It provides:

'Notwithstanding anything contained in subsection (2), the council may sell or lease any immovable property by private bargain if the council is satisfied that the interests of the borough will be better served than by a sale or lease by public auction or public tender, or that other circumstances connected with the proposed transaction, justify such a course.'

[20] A decision to sell or let immovable property in this way, or to grant it, is in terms of s 233(12) valid for a period of either three or two years, depending on the purpose of the alienation, 'calculated from the date of such decision or, where the approval of the Administrator in terms of section 235 is required, from the date of such approval and no such grant, sale or letting shall be finalised after the expiration of any such period unless the council, after compliance with the provisions of section 234, so resolves'.

[21] Section 234(1) requires that prior to taking a final decision to alienate immovable property in circumstances such as those in this case, a municipality

'shall advertise its intention so to . . . sell . . . and, after consideration of the objections, if any, lodged in accordance with the advertisement' comply with the provisions of s 235(1). The advertisement is required, in terms of s 234(2), to: specify the period, which may not be less than 14 days, during which objections may be lodged; include the lot number or similar description of the property; state that the terms and conditions of the sale or other alienation shall be available for inspection 'during office hours at the town office'; and where the proposed alienation is to be by way of private bargain, the name of the purchaser and the price are to be disclosed. In terms of s 234(3), in every case, a copy of the terms and conditions of the alienation, 'in both official languages', must be kept 'at the town office and be available for inspection by the public during office hours'.

[22] Finally, s 235(1) provides that a municipality may not proceed with a proposed alienation where objections have been received 'without the prior approval of the Administrator'. In terms of s 235(1A), an application for approval must be accompanied by 'certified copies of the relevant resolutions of the council, a certificate by the town clerk that the relevant provisions of this ordinance have been complied with and a certified copy of the proposed conditions of grant, sale or letting' and must 'set forth any objections which may have been lodged, together with the council's comments thereon and a statement of the market value of the property concerned . . .'.

[23] From this statutory scheme the following is clear: first, that alienating municipal immovable property by means of public auction or public tender is the usual mode of alienation; secondly, those modes of alienation, by their nature, have inbuilt safeguards as to achieving a market-related price and for openness and accountability on the part of the municipality; and thirdly, they may be departed from but, where this is to occur, it is necessary to ensure that openness and accountability on the part of the municipality is maintained and that the interests that are to be served by the alienation of public immovable property are not compromised.

[24] Sections 233, 234 and 235 put in place mechanisms to achieve these safeguards. They do so by providing for the advertising of any proposed sale by

private bargain, by requiring the proposed contract to lie for inspection, by allowing for objections and by requiring the approval of the Administrator – now the Premier of the province – in order to ensure that the interests of objectors are not disregarded.

[25] In order to answer the question as to who has standing to object, in terms of s 234(1), it is necessary to determine the prior issue of whose interests the provisions of ss 233, 234 and 235 are designed to protect. The answer, in my view, lies in s 233(8). In order to sell its property by private bargain, a municipality must be satisfied that 'the interests of the borough will be better served than by a sale . . . by public auction or public tender, or that other circumstances connected with the proposed transaction justify such a course'.

[26] The advertising requirement envisages advertising, not for the world at large, but for members of the local community, so that they are informed of proposed action by their local government that may have a detrimental impact on 'the interests of the borough' – and by necessary implication on their interests. In other words, an advertisement in accordance with s 234(1) is not an invitation to the world at large to object to a proposed sale of immovable property.

[27] The case of *Ninian & Lester (Pty) Ltd v Crouse NO & others*[11] was relied on by counsel for Rinaldo Investments in support of an argument that even if anyone may object, it does not follow that every objector has standing to challenge an adverse decision. This decision is distinguishable. Unlike in this case, a notice to objectors to the proposed registration, by the Registrar of Labour Relations, of an amalgamated bargaining council was expressly aimed at the 'general public'[12] and the statute expressly provided that a more limited class of persons – '[a]ny person who is aggrieved by a decision of the registrar' – had standing to appeal against the registrar's decision to the Labour Court.[13]

[28] The case relied upon by counsel for Giant Concerts to establish that anyone had the right to object and to challenge the municipality's decision is

[11] *Ninian & Lester (Pty) Ltd v Crouse NO & others* (2009) 30 ILJ 2889 (LAC).
[12] Labour Relations Act 66 of 1995, s 29(3).
[13] Labour Relations Act, s 111(3).

also distinguishable. *Doctors for Life International v Speaker of the National Assembly*[14] concerned the constitutional requirement of 'public involvement' in the processes of the National Council of Provinces (the NCOP) and the provincial legislatures (which mandate their delegations to the NCOP) in the enactment of national legislation in terms of s 76 of the Constitution.[15] The constitutional requirements of 'public involvement' in the making of legislation, as an aspect of participatory democracy, differ in scope from the notice and comment procedure, as part of the operational decision-making of municipalities, envisaged by s 234 of the Ordinance. Furthermore, being concerned with national legislation, the 'public involvement' in *Doctors for Life International* is understandably aimed much wider than the local application of the Ordinance. Even so, the court observed that the purpose of the specific provisions with which it was concerned was to give 'the people in the provinces the opportunity to participate in their respective legislative processes'.[16] This case simply illustrates, once more, the importance of context.

[29] It follows from what I have said above that those who have an interest in the 'interests of the borough' constitute the class of persons who may object to a sale by private bargain. (For present purposes I exclude from consideration representative litigants such as organisations acting in the public interest or on behalf of their members, as this case is concerned with a litigant claiming to litigate in its own interest only.) I cannot imagine that a ratepayer in Johannesburg or a businessman in Cape Town has any interest in whether the eThekwini Municipality sells the Natal Command site by private bargain: they have no connection to Durban, no relationship with the municipality and no stake in the social and economic development of the city.

[30] Giant Concerts is in the same position as the hypothetical ratepayer from Johannesburg or businessman from Cape Town. It is not a ratepayer in Durban or a member of the local community, if an artificial person could be said to be a member of a community, and it has no interest in the 'interests of the borough'. Furthermore, its objection was not aimed at the 'interests of the borough'. It accepted that the land should be sold by private bargain for the purposes

[14] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).
[15] Constitution, ss 72 and 118.
[16] Para 151.

proposed but to it, rather than to Rinaldo Investments. It has no interest in *who* the municipality chooses to contract with, once it has decided to sell immovable property by private bargain, because by definition one is not dealing with a public tender.

[31] It is, by now, trite that legislation must be interpreted consistently with the Constitution, wherever this is possible, in recognition of the supremacy of the Constitution and in order to give effect to the Constitution and its values. The Ordinance is no exception. The conclusions that I have reached, that the Ordinance concerns itself with local interests and that only those with an interest in the 'interests of the borough' have standing, are strengthened by s 152(1)(*a*) of the Constitution which states that among the objects of local government is the duty 'to provide democratic and accountable government for local communities'.

[32] Giant Concerts does not have a sufficient interest in the validity of the sale of the Natal Command site by the municipality to Rinaldo Investments. It accordingly lacks standing to challenge the validity of that sale. That is not to say that if the sale is tainted by unlawfulness, procedural unfairness or unreasonableness, the municipality is above the law and its wrong is unreviewable. All that this judgment concludes is that Giant Concerts is not able to mount such a challenge in terms of s 38(*a*) of the Constitution. It is not the right person in the right proceedings.

Costs

[33] It was argued by counsel for Giant Concerts that if the appeal was to succeed, it should not be ordered to pay the costs of Rinaldo Investments in either the court below or in this court. Reliance was placed on the judgment of the Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources & others*,[17] to the effect that in litigation between 'the government and a private entity seeking to assert a constitutional right', the general rule is that 'if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs'.[18]

[17] *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC).
[18] Para 22.

[34] I cannot see the basis upon which the *Biowatch* principle can apply in this case. First, Rinaldo Investments is a private entity. It is entitled to its costs in both the court below and in this court. Secondly, even though Giant Concerts relies on the fundamental right to just administrative action as the basis of its challenge to the validity of the contract between Rinaldo Investments and the municipality, it is in fact seeking to further its business interests, and the vindication of fundamental rights is secondary to those interests. Thirdly, no governmental bodies opposed the appeal and Giant Concerts has a costs order in its favour against the municipality and the MEC in the court below. That has not been appealed against and it consequently stands.

The order

[35] For the reasons set out above, the following order is made.

1. The appeal is upheld with costs, including the costs of two counsel.

2. Paragraphs (a) to (d) of the order of the court below are set aside and replaced with the following order:

‘(a) The application is dismissed with costs.

(b) The applicant is directed to pay the costs of the third respondent, including the costs of two counsel.’

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C Plasket

Acting Judge of Appeal

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|---|---|
| APPELLANT: | PJ Olsen SC and AA Gabriel SC<br>Instructed by:<br>JH Nicolson Stiller and Geshen, Durban<br>Honey Attorneys Inc, Bloemfontein |
| RESPONDENT: | GJ Marcus SC and HS Gani<br>Instructed by:<br>Vather Attorneys, Pietermaritzburg<br>Lovius-Block, Bloemfontein |