REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 82462/14

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

25/04/2018
DATE

SIGNATURE

25/4/18

In the matter between:

EPHRAIM CHILOANE Applicant

and

EPHRAIM MOGALE LOCAL MUNICIPALITY Respondent

J U D G M E N T

SELLO, AJ:

[1] The applicant has instituted these proceedings seeking to make a settlement agreement concluded between the parties in respect of sale of certain land an

order of court. The applicant also seeks an order of specific performance to direct the respondent to transfer to the applicant the land in question.

[2] The respondent is a Municipality as contemplated in terms of section 2 of the Municipal Systems Act 32 of 2000. The respondent was previously known as the Greater Marble Hall Municipality and subsequently changed its name to the Ephraim Mogale Local Municipality.

[3] The applicant contends that he concluded a valid contract of sale with the respondent in terms of which he acquired the property from the respondent for the sale price of R2000.00 (two thousand rand), this being the value of the property as valuated in terms of the municipal valuation roll applicable at the time. The applicant seeks to enforce this contract.

[4] The applicant alleges as follows. On or about 7 June 2010, the respondent, under the hand of the then Municipal Manager, offered to sell a property described as Ref 41 Ward 7, Moganyaka Township for the price equivalent to the value of the property as appears on the Municipal Valuation Roll. The applicant accepted this offer in writing on 09 June 2010. The purchase price was payable against the transfer of the property into the applicant's name. The applicant contends that these letters constitute the sale agreement.

[5] Subsequent to the conclusion of the agreement, and notwithstanding repeated demands, the respondent failed to transfer the said property into the applicant's name. As a consequence of this failure, the applicant issued summons against the respondent on 4 June 2013 [under case number 33157/13] in which he sought an order directing the respondent to effect transfer within 3 months of

the order, failing which the sheriff of the district of Groblersdal be authorised to effect such transfer.

[6] This action was settled on 16 August 2013 when the respondent tendered party and party costs which were duly paid. The applicant relies on a series of letters attached to his application to support this contention. In a letter by the respondent's attorneys of record in that matter dated 9 July 2013 the respondent made a settlement proposal the terms of which were that the applicant would withdraw the action; the respondent would effect the transfer of the property, subject to the payment of the purchase price by the applicant, and the respondent would instruct its conveyancers to attend to the registration. In a further letter dated 14 August 2013, the Municipality confirmed that it had decided not to file a plea in this action and recorded that the matter had become settled in the terms stated and that the applicant was to withdraw the action. The letter further advised the applicant to report to the Municipality's offices where he would be advised as to the identity of the conveyancers to attend to the transfer of the property.

[7] From the correspondence exchanged between the parties and attached to the founding papers it appears that subsequent to the settlement the respondent's attorneys of record in the action, following on persistent reminders by the applicant's attorneys to effect the transfer, advised that the matter had been referred to the Municipal Council for further determination. The outcome of this referral has not been canvassed in the pleadings.

[8] The respondent filed an answering affidavit deposed to by the Acting Municipal Manager of the respondent (this is a not the same Municipal Manager who made an offer to the applicant as set out in paragraph [4] above). The respondent admits that the offer of sale of the property was made by the then Municipal Manager to the applicant in the terms pleaded and that the applicant accepted such offer. The respondent has however raised the following defences to resist the grant of the relief claimed by the applicant in the notice of motion:

8.1. The sale agreement was invalid as the was not contained in a deed of alienation signed by both parties (in terms of the Alienation of Land Act 68 of 1981);

8.2. The purported settlement is invalid as it pertains to a sale of land without a deed of alienation;

8.3. The property in question is not owned by the Municipality but is registered in the name of the Rathlagane Tribe and as such is incapable of transfer by the Municipality, alternatively, that the purported alienation is in contravention of the provisions of the Municipal Management Finance Act 56 of 2003.

[9] In reply the applicant did not deny the ownership of the land as recorded in the Deed's Registry. He adopted the stance that there is no legal bar to the sale and transfer of a property by one who is not the legal owner thereof and as such, the question of ownership was not relevant to the enforcement of the settlement agreement. The applicant discounted the application of the MFMA on the basis that on the Municipality's own version the property does not belong to it and consequently does not fall within the purview of the MFMA.

[10] Section 2(1) of the Alienation Act provides that 'no alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority'. That the deed of alienation can be contained in one or more documents is contemplated in the definition of 'deed of alienation' which includes a document or documents under which land is alienated.

[11] There is no requirement therefore that the deed of alienation constitute one document signed by both parties. It may appear in multiple of complementary documents together have the same import (see s1(b) definition of contract in the Act).

[12] In ***Stalwo (Pty) Ltd V Wary Holdings (Pty) Ltd And Another*** 2008 (1) SA 654 (SCA) the SCA stated that the objective of section 2(1) is to "*achieve certainty in transactions involving the sale of fixed property regarding the terms agreed upon and limit disputes, requires an agreement for the sale of land to be in writing and signed by the parties. That means that the essential terms of the agreement, namely the parties, the price and the subject-matter, must be in writing and defined with sufficient precision to enable them to be identified. And so must the other material terms of the agreement*".

[13] The letters that constitute the sale agreement identify the parties, the price and the subject matter of the agreement with appropriate precision. Indeed, based on the very description of the property provided therein, the respondent was able to locate the registration thereof in the Deeds Registry.

[14] I accept that there was a sale agreement concluded by the Municipal Manager and the applicant for the sale of the property as alleged by the applicant. I also am persuaded that such sale agreement complied with the provisions of section 2(1) of the Alienation of Land Act 68 of 1981.

[15] The fact that the sale agreement complies with the Act however does not dispose of the issues between the parties. The primary relief sought by the applicant is for the out of court settlement to be made an order of court and the respondent to be directed to effect the transfer of the property into the applicant's name.

[16] In order to determine whether the settlement agreement can be made an order of court, it is necessary to consider the validity of the sale agreement itself which purported to dispose of the property to the applicant. The respondent has pertinently raised the invalidity of this agreement in its answering affidavit and this court must consider and decide the matter before it can give effect to the settlement agreement.

[17] It is common cause that the property is not owned by the respondent but the Rathlagane Tribe and is registered in the Tribe's name. The applicant contends however that the respondent sold him this property and subsequently concluded a settlement agreement in terms of which it undertook to effect the transfer of the property. It is the settlement agreement that the applicant approaches this court to have made an order of court.

[18] Leaving aside the question of ownership for a moment, this contention loses sight of one important fact. The Municipal Manager's own legal capacity to

contract in a manner that binds the respondent must be determined. This is done with reference to the provisions of the empowering statute.

[19] As a municipality established in terms of the Municipal Systems Act, the respondent is subject to the provisions of the MFMA.

[20] Section 14 of the MFMA prescribes that –

"(1) A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.

(2) A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public-

(a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and

(b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset".

[21] There is no evidence that the Council of the respondent resolved to dispose of the property as reflected in the Municipal Manager's letter to the applicant. The applicant has made no case in his founding affidavit for compliance with the provisions of section 14 and that the Municipal Manger was giving effect to the decision of council. In the answering affidavit, the deponent alleged that he had personally searched through the register of council resolutions dating back to 2008 and could not locate a resolution disposing of the property in question. In reply, the applicant does not challenge these contentions. He merely denies that the respondent was required to comply with the provisions of the MFMA.

[22] The statute expressly confers, in terms of section 14(2), sole power upon the council to dispose of the municipality's capital assets. This requires therefore that for a valid disposal to take place it is imperative that the municipal council take such a decision and in an open public meeting. Absent such a decision it cannot be said that the municipality has disposed, assuming it had the authority to do so, of the property in question.

[23] The conduct of the Municipal Manager is one that the court in ***Hoisain v Town Clerk, Wynberg*** 1916 A.D. 236 deemed illegal. The court held (at 240) as follows:

> *"It is sought to compel the Town Clerk to place the applicant's name upon the statutory list; he can only do that upon the grant of a certificate by the Council, which that body has definitely refused to give. Such a certificate is not in truth in existence. So that the Court is asked to compel the Town Clerk to do something which the Statute does not allow him to do; in other words we are asked to force him to commit an illegality. There can be no question of estoppel as far as he is concerned. His negligence cannot be a substitute for the Council's approval, nor can he by virtue of his mistake be compelled to bring about a position which he has no power in law to create by his own free will".*

[24] As the council decision to dispose of the property to the applicant is not in existence, the applicant's contention that the council sold him the property is factually incorrect.

[25] In light of the fact that the disposal of a municipal capital asset is prohibited unless it is in compliance with section 14(2) of the MFMA, the validity of the agreement of sale itself must be determined before the respondent can be bound thereby. In ***Schierhout V Minister Of Justice*** 1926 AD 99, at 109 the court reiterated that -

"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. ..... So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act.

[26] The sale agreement, contravening section 14(2) as it does, must attract a declaration of invalidity. In ***City Of Tshwane Metropolitan Municipality V RPM Bricks (Pty) Ltd*** 2008 (3) SA 1 (SCA) the SCA considering the power of employees of the appellant to vary a contract held that as resolution by the defendant's council was prescribed by s 38(1) of the Gauteng Rationalisation of Local Government Affairs Act 10 of 1998 and as such was as a necessary prerequisite for amending or varying the supply contract, *"[A]bsent such a resolution, any purported amendment by employees of the defendant was plainly impermissible. ..... The statute expressly confers sole power upon a specified entity, to the exclusion of any other person or entity, to extend or vary an existing tender agreement. The linguistically plain meaning of the section severely restricts the power (vires) to enter into a transaction of that kind to the defendant's council"* . The court concluded that *"the amending of the supply contract was at the instance of the defendant's employees who were plainly not authorised to do so. The defendant had thus not acted in fact nor, for that matter, is it considered in law to have acted at all. No amendment of the supply contract had therefore occurred"*. (at paras 14 and 17).

[27] The principle espoused in RPM Bricks is of equal application in this matter. And similarly the consequence thereof must be to invalidate the sale agreement. The Municipal Manager's unlawful actions cannot bind the respondent as it is considered in law to not have acted at all. The assertions by the applicant

therefore that the parties concluded a valid contract of sale of the property falls to be rejected.

[28] The actual ownership of the property is irrelevant for purposes of determining the validity of the sale agreement, which is determinable with reference to section 14(2) of the MFMA and the actions of the respondent.

[29] The settlement agreement purports to compel the respondent to transfer the property to the applicant. Transfer is an incident of sale of the property. If the underlying sale is invalid, the obligation to transfer does not arise.

[30] In the circumstances I find that the sale agreement was concluded by the Municipal Manager in contravention of section 14(2) of the MFMA. In so doing, the Municipal Manager purported to usurp the powers of council, acted *ultra vires* and his action is null and void. A valid and enforceable sale agreement between the applicant and the respondent in respect of the sale of the property did not come into existence and is not enforceable against the respondent.

[31] The settlement agreement concluded in case number 33157/13 in terms of which the respondent ostensibly undertook to transfer the property to the applicant against the payment of the purchase price cannot be given effect to, for to do so would be to give validity to an illegal act.

[32] In the premises I make the following order:

The application is dismissed with costs.

M SELLO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR THE APPLICANT:	Adv JHA SAUNDERS
INSTRUCTED BY	W DE BEER INC
FOR THE RESPONDENT	Adv M GWALA
INSTRUCTED BY	RENQE KUNENE INC

DATE OF JUDGMENT