THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 458/2007

In the matter between:

SANDTON CIVIC PRECINCT (PTY) LTD

and

CITY OF JOHANNESBURG	First respondent
BOMBELA CONSORTIUM	Second respondent

Neutral citation: *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg* (458/2007) [2008] ZASCA 104 (22 September 2008)

BEFORE : **Farlam, Cameron, Jafta, Mlambo and Cachalia JJA**
HEARD : **Monday 1 September 2008**
DELIVERED : **Monday 22 September 2008**

SUMMARY : Legal standing – contract claimed to be awarded to consortium – consortium consisting of individuals and corporate members, with stated proportions – consortium not before court – instead, applicant company seeking to enforce rights of consortium – applicant company representing only two of four members of

consortium – others not before court – member of applicant company claiming to hold others' shares 'in trust' – no basis for claim – applicant company lacking legal standing

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ORDER

On appeal from the High Court, Johannesburg (Fevrier AJ sitting as a judge of first instance).

1. The application for leave to appeal is granted.
2. The appeal succeeds only to the following extent:
   (a) The costs order in the court below is set aside.
(b) In its place there is substituted
   'There is no order as to costs.'
3. Save for this, the appeal is dismissed.
4. There is no order as to costs.

JUDGMENT

CAMERON JA (FARLAM, JAFTA, MLAMBO and CACHALIA JJA CONCURRING):

[1] This is an application for leave to appeal. At issue is a proposal to develop a ten-acre publicly-owned piece of land in the heart of Sandton. The applicant company claims it acquired rights to undertake the development. The City of Johannesburg (first respondent), which owns the property,

disputes this. The applicant joined the second respondent, the Bombela Consortium (a joint venture comprising South African, United Kingdom and French companies responsible for the Gautrain project), because the City expressed an intention to develop the property in conjunction with it; but Bombela has not joined the fray and abides the outcome of the litigation.

[2] In the High Court in Johannesburg, Fevrier AJ dismissed the application with costs, including the costs of two counsel, and refused leave to appeal. The judges of this Court who considered the ensuing application for leave to appeal referred it for oral argument (including argument on the merits).[1]

[3] The applicant's case rests on a resolution the City's predecessor, the Eastern Metropolitan Local Council (whose acts the City accepts as its own), adopted on 14 November 2000. In this the council 'resolved to recommend' that (subject to statutory notice) the property 'be alienated to Sandton Civic Precinct Consortium at a selling price of R81.25 million', with provision for escalation and subject to further specified conditions to be included in the envisaged deed of sale.

[1] Supreme Court Act 59 of 1959, s 21(3)(c)(ii) provides that the judges considering a petition for leave to appeal may refer it 'to the appellate division for consideration, whether upon argument or otherwise'.

[4] Although by November 2001 a draft agreement of sale had been prepared, no final agreement was ever concluded. Instead, the City set up its own property-owning and development company. In time, this entity broke off negotiations with the Sandton Civic Precinct Consortium, since (it urged) the sale was 'not in the best interest of the City': the property company itself 'was established with the same objectives as that of the [Sandton Civic Precinct] Consortium, being to rezone, develop and lease the site'. It therefore recommended that the City rescind the November 2000 resolution. Eventually the City acted on this advice. On 22 September 2005, the council resolved by a majority that subject to legal advice the City 'does not proceed' with the alienation of the property to the Sandton Civic Precinct Consortium, but that instead it 'approve that the development potential and alienation of the property be re-investigated and be reported back to the Council'.

[5] It is this decision that the applicant attacks. It instituted these proceedings in April 2006, contending that it had acquired rights through the November 2000 resolution, which the City was not entitled to rescind. It sought a declarator that the first

resolution was binding on the City, and an order reviewing and setting aside the second, and scrapping the negotiations with Bombela. It also sought an order that the City 'take all necessary and appropriate steps to implement the terms' of the resolution, and 'use its best endeavours to seek the practical achievement of what the resolution provides'.

[6] In response, the City did not file affidavits disputing the applicant's exposition of the history of the two resolutions. Instead, it lodged a challenge under the rules of court[2] raising only questions of law. In essence, these put in issue (a) whether the applicant had, through proof of the requisite cessions, shown its title to assert whatever rights may have accrued to the 'Sandton Civic Precinct Consortium', and (b) whether any such rights had arisen at all. In response to (a), the applicant filed supplementary papers.

[7] Fevrier AJ dealt only with (b). He upheld the City's contention that the first resolution had not created enforceable rights capable of cession. He considered that the second resolution was in any event not administrative action subject to review,

[2] A party opposing the grant of an order sought in the notice of motion 'if he intends to raise any question of law only … shall deliver notice of his intention to do so … setting forth such question': Rule 6(5)(d)(iii).

since the council was not implementing any law or legislation: it was rather a determination and formulation of policy. He held, finally, that even if the second resolution was administrative action, it was immune to attack because in adopting it the council had acted carefully and fairly.

[8] These findings made it unnecessary for Fevrier AJ to consider whether the applicant company had legal standing or any interest in the claims it sought to assert. On appeal, the applicant in carefully-considered submissions attacked Fevrier AJ's conclusions regarding the two resolutions. Mr Kennedy urged us to find that the proposal process that the City initiated in 1998, and which culminated in the first resolution, was akin to a tender award, involving a similar exercise of public power, a similar invocation of statutory and constitutional authority, and a similar duty to observe the public and administrative law requirements of fair dealing and rationality.

[9] Tempting as it may be to decide the matter by starting with these large and important issues, I think the invitation must be declined. We must first establish whether the corporate entity before us has legal standing to assert the rights it says the resolution afforded. Only then would it be expedient to decide

the difficult and interesting question of what rights, if any, did arise; for if the wrong entity is before us, our characterisation of that issue will be indecisive of the case.

[10] I turn then to the applicant's legal standing. It is a private company incorporated in 2003. It has two shareholders: Mr Bart Dorrestein and JHI Development Management (Pty) Ltd (JHI). There are no other members. Dorrestein is the former chief executive of a group of companies, 'the Stocks Group'. In February 2000 Stocks & Stocks Ltd (a subsidiary of which submitted the original bid) ceded 'its rights, interests and obligations' in the development to him. In addition, he is the sole shareholder in one of the corporate participants in the original consortium.

[11] What interest has the applicant shown itself to have in the subject matter of the litigation? In its founding affidavit, it claims that the November 2000 resolution 'resolved to alienate' the property 'to the applicant'. But this is plainly wrong. The resolution resolved to alienate the property to the 'Sandton Civic Precinct Consortium'. That was not the corporate applicant before us, which did not then exist, but an unincorporated entity that consisted, according to the applicant,

of the following bodies:

(a) a company wholly owned by Dorrestein which under an agreement between Dorrestein and the Stocks Group on 8 June 1999 assumed the latter's development rights and obligations in the consortium (Dorrestein explains that this agreement was superseded by the February 2000 agreement in which the Stocks Group ceded its interests in the development to himself) (50%);

(b) Thebe Properties (Pty) Ltd, which later changed its name to JHI (25%);

(c) Ndodana Becker & Associates, whose sole proprietor was Mr Webster Ndodana (Ndodana) (17%);

(d) 'Sithembele (Pty) Ltd/Domestic Workers Association Investment Company (Pty) Ltd' (DWA) (8%).

[12] Neither (c) nor (d) are party to the litigation, whether as applicants or as respondents. Of Ndodana, the supplementary affidavit says that its sole proprietor 'has been compelled to forego his rights in the Consortium as he now works for [Bombela] and he has a conflict of interest'. Dorrestein claims that Ndodana's shares 'are therefore being held in trust by myself pending the acquisition of such interest

by a suitable black economic empowerment substitute'.

[13] Of the remaining participant, DWA, Dorrestein says that neither 'Sithembele (Pty) Ltd' nor 'Domestic Workers Association Investment Company (Pty) Ltd' was ever formed:

> 'After November 2000 the DWA ceased participating in the Consortium … and all efforts to involve the DWA in the Consortium have failed'.

He claims however that the 'DWA's 8% interest in the Consortium is held in trust by myself pending the acquisition of a suitable black economic empowerment substitute'. Dorrestein thus concludes that 'the current shareholders in the applicant company are myself and [JHI]',

> 'with 25% to be allocated to a suitable black economic empowerment substitute or substitutes subject to the reasonable approval of the first respondent'.

[14] The applicant's difficulty is this. On its own case the development was awarded not to individual entities, in separable portions, but to a consortium, in proportions allocated between its constituent members. Counsel urged us to find that we can enforce Dorrestein's and JHI's rights arising from the resolution proportionately (pro tanto). But that cannot be. The resolution permits of no interpretation other than that the council resolved to alienate the property to a consortium,

and not to any one or more of its separate constituents. The resolution does not even mention the members and their proportions. The consortium, which it does mention, is not before us; and the applicant does not allege – indeed, cannot allege – that the consortium has empowered it to act for it in the litigation. All we have instead is a corporate applicant whose two members hold the rights of or represent two out of the four constituents in the consortium. The remaining two entities are nowhere in sight.

[15] Authority to represent them, or the consortium, could derive from a cession (transferring any rights acquired to the applicant or its members); or from direct authority evidenced by individual affidavit or corporate resolution. But counsel was obliged to concede, rightly, that no cession of rights to the applicant, nor any other authority, has been alleged or proved.

[16] If, as Dorrestein appears to claim in his supplementary affidavit, Ndodana and DWA have abandoned such rights as they acquired, the applicant must still explain by what process of law it became vested with those rights. Counsel was unable to explain how.

[17] The applicant does not purport to be vindicating only the

rights of Dorrestein and JHI. It seeks to assert the rights it claims the consortium itself acquired from the resolution. Yet its counsel was able to point to no principle by which the applicant can claim that it is entitled to assert the rights of the consortium; and I can think of none.

[18] Dorrestein's claim that he is holding the shares of Ndodana and DWA 'in trust' for substitutable black economic empowerment partners is incoherent. It is well-established in our law that persons cannot by unilateral act divest themselves of title to their own property by constituting a trust of it.[3] Here, Dorrestein claims to have constituted unilaterally a trust not of his own property, but of another's. That cannot be. He is not a trustee in any sense known to our law and cannot invoke standing in that capacity.

[19] As Harms JA has pointed out,[4] while the question of legal standing is in a sense procedural, it also bears on substance. It concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted. This case illustrates the point. The applicant

[3] *Ex parte Kelly* 1942 OPD 265, per Van den Heever J, applied in *Vereins- und Westbank AG v Veren Investments and others* 2002 (4) SA 421 (SCA) para 14.

[4] *Gross v Pentz* 1996 (4) SA 617 (A) 632B-C, dissenting on grounds not material to the point at issue.

must establish the legal lineage between itself and the rights-acquiring entity the resolution mentions. That it has not done. While in a sense this is technical, and procedural, it also goes to the substance of the applicant's entitlement to come to court. It has failed to show that it is the rights-bearing entity, or is acting on the authority of the entity, or has acquired its rights.

[20] There is no suggestion in the resolution that the council regarded the consortium's black economic empowerment constituents as substitutable at will, whether or not subject to its reasonable approval. The consortium the resolution envisaged no longer exists; indeed, two of the corporate entities the applicant claims are part of it never came into existence at all. In these circumstances the applicant has failed to show that it is entitled to assert the claim it invokes.

[21] It is therefore unnecessary to consider the nature of the rights, if any, that arose from the resolution.

COSTS

[22] This conclusion entails that the appeal must fail. Fevrier AJ awarded costs against the applicant, and, in the usual course, the costs of the proceedings in this Court would also be

awarded against it. However, there are singular features of this case which lead to the conclusion that the applicant should not be mulcted in the City's costs.

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

[24] After it had done so, the City behaved with less than courtesy, and less than candour, in dealing with the applicant's claims. As early as 2003, the City's property-owning and development company resolved to cease dealing with the applicant. Yet for two years more the applicant was kept on a string. Letters were not answered, inquiries were ignored and information was not supplied. This is unacceptable behaviour for a public body, particularly one dealing with an entity which has incurred significant costs in relation to a public

development project in which it believed, not unreasonably, that it was partnering the City.

[25] In all these circumstances this Court should as a mark of its disapproval of the City's conduct deprive it of its costs, in this Court and in the court below.

[26] There is accordingly an order in the following terms:

1. The application for leave to appeal is granted.
2. The appeal succeeds only to the following extent:

(a) The costs order in the court below is set aside.
(b) In its place there is substituted

'There is no order as to costs.'

3. Save for this, the appeal is dismissed.
4. There is no order as to costs.

E CAMERON
JUDGE OF APPEAL

APPEARANCES:

For applicant: PM Kennedy SC and Heidi Barnes
Instructed by: Strauss Scher Inc, Sandton
Webbers, Bloemfontein

For first respondent: SJ du Plessis SC and CF van der Merwe

Instructed by: Van der Merwe Attorneys, Pretoria
Kramer Weihmann & Joubert Inc,
Bloemfontein