THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 303/2009

In the matter between:

MAJOMATIC 115 (PTY) LIMITED
Appellant

and

KOUGA MUNICIPALITY
First Respondent

JOHANNES RENIER FERREIRA
Second Respondent

FEDERATION OF KOUGA RATEPAYERS ASSOCIATION
Third Respondent

Neutral citation: *Majomatic Limited v Kouga Municipality* (303/09)[2010] ZASCA 17 (18 March 2010)

Coram: MTHIYANE, CACHALIA, LEACH JJA, MAJIEDT and SALDULKER AJJA

Heard: **23 February 2010**

Delivered: **18 March 2010**

Summary: Whether the procedures prescribed by ss 124(1) and (2) and 172 of Municipal Ordinance 20 of 1974 (Cape) for the alienation of municipal property were of force and

effect in November 2003 or whether they were impliedly repealed by Item 2 of Schedule 6 of the Constitution.

ORDER

On appeal from: Eastern Cape High Court (Port Elizabeth) (Schoeman J sitting as court of first instance):

1. The appeal is dismissed with costs.

2. The order of the court a quo is set aside and replaced with the following:
'The plaintiff's action is dismissed with costs.'

JUDGMENT

MTHIYANE JA (Cachalia, Leach JJA, Majiedt and Saldulker AJJA concurring)

[1] This is an appeal against the judgment and order of Schoeman J sitting in the Eastern Cape High Court, Port Elizabeth which is before us with her leave. It concerns her finding on a separated issue of whether or not the contract of sale by the first respondent, Kouga Municipality (the Municipality), of certain municipal property to the appellant during November 2003 was lawfully concluded; in particular whether compliance with the provisions of s 124 and s 172 of the Municipal Ordinance 20 of 1974 (Cape) (the Ordinance) was required for the conclusion of a valid contract. The learned judge held that the provisions of the Ordinance were of force and effect at the time of the conclusion of the contract and that compliance therewith was required.

[2] The contract of sale was preceded by an advertisement which was placed in a local newspaper inviting tenders for the purchase of several immovable properties including the property concerned in the present

matter. The advertisement appeared on 14 November and invited interested purchasers to submit applications on or before 28 November 2003. Contrary to the prescribed requirements it made no mention that objections to the proposed sale could be made nor to whom or where such objections could be made. The advertisement also required applications to be submitted to the Director: Planning and Development within two weeks instead of the period of 21 days as required by the Ordinance.

[3] Before discussing the prime issue on appeal it is necessary to refer to the relevant provisions of the Ordinance regulating the alienation of municipal property at the time. Section 124 provides:

'(1) Subject to the provisions of subsection (2) and such directions as the Administrator may from time to time determine, a council may ─

(a) alienate, let or permit to be built upon, occupied, enclosed or cultivated any immovable property owned by the municipality unless it is precluded from so doing by law or the conditions under which such property was acquired by the municipality, and

(b) with the consent of the owner thereof or for the purposes of section 127(1) let or permit to be built upon, occupied, enclosed or cultivated any immovable property under its control or management.

provided that the Administrator may, either specifically in respect of any particular action contemplated in paragraph (a) or (b) or generally in respect of a category of actions so contemplated, by notice in the *Official Gazette* determine that such action shall be subject to his prior approval.

(2) No council shall act in terms of subsection (1) unless it has ─

(a) advertised its intention so to act, and

(b) considered the objections (if any) lodged in accordance with the advertisement contemplated by paragraph (a);

provided that the foregoing provisions of this subsection shall not apply

where the proposed letting will be for a period not exceeding twelve months without an option to renew.'

[4] Section 172(1) and (2) of the Ordinance provides:

'(1) A council shall, by notice published in the press, invite tenders before entering into any contract which is for ─

(a) the execution of any work for or the supply or sale of any goods or materials to the council and which involves or is likely to involve an amount exceeding such amount as the Administrator may from time to time either generally or specially determine in respect of contracts entered into by such council, and

(b) the sale of any goods or materials by the council.

(2) The notice contemplated by subsection (1) shall specify ─

(a) the nature of the proposed contract;

(b) such particulars of such contract as the council may deem fit;

(c) that all tenders for such contract shall be submitted in a sealed envelope upon the outside whereof is clearly stated that such envelope contains a tender and the contract for which such tender is being submitted;

(d) a day, subsequent to the expiration of the period contemplated by paragraph (b)(iii) of the definition of 'publish in the press', and the hour on such day at or before which tenders must be received, and

(e) the place where and the hour and day when such tenders will be opened.'

In the view I take of the matter I do not consider it necessary to quote the section in its entirety. It suffices to refer merely to the above provisions and to indicate that s 172 provides for fair and transparent procedure for the disposal of municipality property. It also bears mention that Mr Beyleveld, for the appellant, conceded that if the appellant is unsuccessful in its contentions in relation to s 124(2) that would be the end of the matter and the appeal must fail.

[5] It is common cause that the procedures laid down in s 124 (1) and (2) of the Ordinance were not complied with. Mr Beyleveld, for the appellant, contended that there was no obligation to comply with these procedures as the Ordinance had at that stage been impliedly repealed by

the Constitution. This, he submitted, is apparent from the fact that s 124(1) confers the power on the Administrator (now the Premier) to give 'such directions as [he or she] may from time to time determine'. And, so the submission went, because the Premier, under the Constitution, has no authority over a Municipality, s 124 in its entirety was repealed when the Constitution came into force. According to Mr Beyleveld there is no scope for 'pruning' such oversight powers of the Premier so as to harmonise the Ordinance with the Constitution. The Ordinance as a whole, he submitted, is at odds with the Constitution and has thus failed to survive the new constitutional dispensation.

[6] In my view the appellant's contention flounders in the face of the plain wording of Item 2 of Schedule 6 to the Constitution. Item 2 of Schedule 6 provides:

'2 (1) All law that was in force when the new Constitution took effect, continues in force, subject to ─

(a) any amendment or repeal; and

(b) consistency with the new Constitution.

(2) Old order legislation that continues in force in terms of subitem (1) ─

(a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and

(b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.'

It is apparent that 'old order legislation' (as it is described here) remains in force save only where it has been repealed or amended or where it is inconsistent with the Constitution. It is also plain that Item 2 envisages some form of pruning exercise ─ a reading of a pre-constitution statute to conform with the new constitutional prescripts. In the context of the

present matter the acceptable approach, in my view, involves discarding the offensive portions of s 124(1) of the Ordinance and giving meaning and effect to the non-offensive ones. It seems to me that the basic test for the survival of a pre-constitution provision is whether it has been amended or impliedly repealed or is inconsistent with the Constitution, but only to the extent of such inconsistency.

[7] On a proper interpretation and application of Item 2 of schedule 6 of the Constitution to s 124(1) and (2) of the Ordinance the conclusion is unavoidable that s 124(2) and the non-offensive portions of s 124(1) have survived the Constitution and remain applicable. That, in my view, is the approach which was adopted by the majority in *CDA Boerdery (Edms) Bpk & others v Nelson Mandela Metropolitan Municipality & others* 2007 (4) SA 276 (SCA). In that case the old order subordination of the local authority's power to levy rates under s 82(1) of the Municipal Ordinance 20 of 1974 (Cape) to the Premier's approval was held to have been impliedly repealed by the Constitution. This is no authority for the submission advanced by Mr Beyleveld that the entire Ordinance was repealed, even to the extent that for the most part it is not inconsistent with Constitution.

[8] It follows that the proper approach to the matter, which is in line with Item 2 of Schedule 6 to the Constitution and the ruling in *CDA Boerdery* favours a construction that would disregard the oversight powers of the Administrator (now Premier) in s 124(1) of the Ordinance so as to ensure that the subsection remains of force and effect. If the construction contended for by the appellant is upheld it would mean that no legislative provision would be left to regulate the alienation of municipal property. Schoeman J found, correctly in my view, that at the

relevant time (November 2003) there were no other regulations or provisions under any other Act in place dealing with tenders or the sale of immovable property by a municipality, barring the Ordinance. Mr Beyleveld, for the appellant, sought to meet this finding by submitting that s 10G(5) and 11 of the Local Government Transition Act 209 of 1993 made provision for the alienation of municipal property and that compliance with ss 124 and 172 of the Ordinance was therefore not necessary.

[9] A brief discussion of the two subsections illustrates the fallacy of the argument. Section 10G(5) provides as follows:

'5(a) A municipality shall award contracts for goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(b) Notwithstanding paragraph (a), a municipality may, in accordance with a framework prescribed by national legislation, in awarding contracts give preference to the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination, and shall make the granting of such preferences public in the manner determined by the council.

(c) A municipality may dispense with the calling of tenders in the case of an emergency or of a sole supplier or within such limits as may be prescribed by a national law.'

It will be immediately apparent that all that subsection (5) does is to lay down a principle applicable to the award of contracts. It does not prescribe any procedures for awarding contracts and it makes no specific reference to the alienation of municipal property. s 10G(5) was not meant to apply to alienation of municipal property but to 'financial matters' relating to 'goods and services' as the heading of the section suggests. It follows that the appellant's reliance on s 10G(5) is misplaced and falls to be rejected.

[10] Section 10G(11) also does not take the appellant's case any further.

It provides:

‘(11) A municipality shall ensure that ─

(i) the acquisition and disposal;
(ii) the utilisation and control; and
(iii) the maintenance,

of its assets are carried out in an economic, efficient and effective manner.’

It is clear that the subsection also sets out a policy without specifying any procedures regarding its implementation. It provides that a municipality must ensure that the acquisition and the disposal, utilisation and control and the maintenance of its ‘assets’ are carried out in an ‘economic, efficient and effective manner’. This provision, too, has no bearing on the alienation of municipal land.

[11] For the above reasons the appellant’s contention that the whole Ordinance has been impliedly repealed by the Constitution cannot be upheld. It flies in the face of the clear and unambiguous wording of Item 2 of Schedule 6 to the Constitution. Section 124(2) in imperative terms requires the municipality to advertise its intention to sell and to provide for and consider objections, if any, to the proposed alienation of municipal property. As Schoeman J correctly found, the appellant was obliged to comply with these provisions and the failure to do so rendered the sale invalid.

[12] I turn briefly to the submissions advanced by Mr Pretorius, for the second and third respondents. He approached the matter from a different and interesting angle. He argued that the oversight powers of the Administrator (now Premier) referred to in s 124(1) of the Ordinance were not impliedly repealed by the Constitution and that compliance therewith was obligatory. For this submission Mr Pretorius strongly relied on the judgment of Kroon AJ in *Wary Holdings (Pty) Ltd v Stalwo (Pty)*

Ltd & another.[1] At issue in that case was the validity of a written agreement in respect of land which was zoned as 'agricultural land'. The dispute revolved around whether the land sold was agricultural land or not. If it was, the Minister's consent to the subdivision of the land would have been necessary. The purchaser had intended to use the property for industrial purposes and for that reason had lodged an application with the relevant local authority for the rezoning and subdivision of the land. The subdivision was approved by the local authority concerned. A dispute however subsequently arose as to whether the sale was valid and enforceable as the Minister of Agriculture had not consented to the sale and subdivision of the land as required by s 3(a) and (e)(i) of the Subdivision of Agricultural Land Act 70 of 1970 (the Agricultural Land Act). Kroon AJ (who wrote for the majority) upheld the provision requiring ministerial consent and said that the enhanced status of present-day municipalities and the fact that municipal ordinances accorded them various powers, including those of planning, zoning and rezoning of land and approval of applications for subdivision, was not a ground for ascribing to the legislature the intention that national control over 'agricultural land' through the Agricultural Land Act, was effectively a thing of the past. He added that there was no reason why the two spheres of control could not co-exist even if they overlapped and even if, in respect of the approval of subdivision of 'agricultural land', the one may in effect veto the decision of the other (paras 79-80).

[13] The *Wary Holdings* case is clearly distinguishable from the present matter in that it dealt with 'agricultural land' as opposed to 'municipal property', in respect of which different considerations apply. It is clearly no authority for the proposition that the oversight power of the Premier

[1] 2009 (1) SA 337 (CC).

referred to in s 124(1) of the Ordinance survived the new Constitution. One is dealing here with municipal property where no such restrictions are applicable. In any event in the light of the conclusion to which I have come it is not necessary to explore the arguments advanced by Mr Pretorius any further.

[14] It remains to consider the appropriate order to be made in the present matter. All the parties were agreed that if it was found that s 124(2) of the Ordinance was of full force and effect and that compliance therewith was required for the conclusion of the valid agreement of sale between the appellant and the first respondent, the appropriate order would be one upholding the appeal with costs and replacing the order of the court a quo with one dismissing the plaintiff's claim with costs.

[15] For the above reasons the following order is made:

1. The appeal is dismissed with costs.

2. The order of the court a quo is set aside and replaced with the following:
'The plaintiff's action is dismissed with costs.'

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K K Mthiyane

Judge of Appeal

APPEARANCES

APPELLANTS:	A Beyleveld SC (with him T Zietsman) Instructed by Fredericks Inc, Port Elizabeth
McIntyre & Van der Post, Bloemfontein	
FIRST RESPONDENT:	PWA Scott Instructed by Roland Meyer & Co, Port Elizabeth
EG Cooper & Majiedt Inc, Bloemfontein	
SECOND and THIRD RESPONDENTS:	B Pretorius Instructed by Christo Swanepoel Attorneys, Jeffreys Bay
Honey Attorneys Inc, Bloemfontein	