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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 824/2010

In the matter between

DIGGERS DEVELOPMENT (PTY) LTD **Appellant**

and

CITY OF MATLOSANA AND ANOTHER **First Respondent**
ISAGO @ N 12 (PTY) LTD **Second Respondent**

Neutral citation: *Diggers Development v City of Matlosana* (824/2010) [2011] ZASCA 247 (1 December 2011)

Coram: CLOETE, PONNAN, MAYA, MHLANTLA JJA and PETSE AJA

Heard: 1 November 2011

Delivered: 1 December 2011

Summary: Property – deed of sale of municipal land subject to suspensive condition – provisions of s 79(18) of Transvaal Local Government Ordinance 17 of 1939 complied with – agreement of sale concluded on 2 October 2007 valid – appeal dismissed.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Murphy J sitting as court of first instance):

1 The appeal is dismissed with costs.

2 The appellant is ordered to pay the respondents' costs including the costs of two counsel in each case.

JUDGMENT

CLOETE *et* MHLANTLA JJA (PONNAN, MAYA JJA, PETSE AJA concurring):

[1] This appeal is against a judgment of Murphy J sitting in the North Gauteng High Court, Pretoria in terms of which the learned judge dismissed an application launched by the appellant against the respondents.

[2] The appellant, Diggers Development (Pty) Ltd, is the registered owner of immovable property, Remaining Extent of Erf 2151, Klerksdorp Extension 33 situated within the boundaries of the first respondent, a municipal council as envisaged in the Transvaal Local Government Ordinance 17 of 1939 (the Ordinance). The appellant developed and operates a shopping centre known as Flamewood Walk. It had sought an

order reviewing and setting aside the first respondent's council resolution dated 5 February 2009 and an order declaring the deed of sale dated 2 October 2007 concluded by the first and second respondents invalid and unenforceable. Its interest in seeking this relief will appear later in this judgment. The first respondent is the City of Matlosana, a local authority in whose jurisdiction the appellant's centre is situated and owner of the immovable property referred to in the deed of sale. The second respondent is a special purpose vehicle and development company of a consortium of five original shareholders called Anglo Saxon Group 5.

[3] In order to appreciate the issues it is necessary to have regard to the factual background which we propose to set out in chronological order. During September 2006 the first respondent caused a notice to be published in various newspapers and invited proposals to enhance and promote development along the N12 corridor between Klerksdorp and Stilfontein on land of approximately 1172.65 hectares. This land comprised immovable properties which had been registered in the name of the first respondent. The request for proposals emphasized that the proposed development should ensure 'the maximum connectivity to the surrounding context in order to achieve the maximum economic benefits . . . , extend bulk services and the broadening of Council's tax base; . . . that the proposals should be made for the release of the Council-owned land in the marketplace'.

[4] A number of developers responded to the request and submitted proposals. One of these developers was the second respondent. The appellant did not respond to the invitation nor did it register its intention to make a presentation in regard to the development.

[5] On 23 March 2007, the first respondent resolved in terms of s 115 of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA) to appoint the consortium of the Anglo Saxon/Group 5 for the planning and development of the N12 corridor subject to an agreement to be entered into with the first respondent's council for the development of 1172 hectares of vacant land adjacent to the N12 corridor. This resolution was signed by the first respondent's municipal manager and the executive mayor.

[6] Subsequent to the appointment of the second respondent as the preferred provider, a written agreement for the sale of the land was concluded on 2 October 2007. The purchase price thereof was R20 million. The sale was subject to the following suspensive conditions:

'This agreement save for the provisions of clause 4 and clauses 11, 16, 18, 19, 20, 22 and 23 is subject to the suspensive conditions that the seller:

4.1.1 provides the purchaser with a certificate from either the head, legal department or the municipal manager of the seller that the sale of the land to the purchaser –

4.1.1.1 complies with s 79(18) of the Local Government Ordinance 17 of 1939 (the Ordinance);

4.1.1.2 has complied with s 84 of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act);

4.1.1.3 has complied with the provisions of the MFMA, in particular sections 14, 20, 33, 90, 110(3), 116 and 168 thereof;

4.1.2 the full council of the seller will, after performing all the requirements, as set out in the legislation applicable to local government in respect of the sale of the land as contemplated herein, adopt a final resolution to endorse the sale of the said land in terms of this agreement.

4.2 . . .

4.3 Unless the conditions in clause 4.1 are duly fulfilled on or before the first anniversary of the date of signature hereof, this agreement, save for the provisions of this clause 4 and clauses 11, 16, 18, 19, 20, 22 and 23 shall never become of force or

effect and neither party shall have any claim against the other arising from the entering into this agreement, the implementation thereof and/or the agreement never becoming of force or effect. The Purchaser shall be entitled to extend the period for the fulfilment of such conditions on one or more occasions and for a maximum period of one year on each such occasion by giving written notice to that effect to the Seller before the date for the fulfilment of such conditions.'

[7] Further terms of the sale agreement were the following:

(i) The land was sold to the second respondent for the purpose of the resolution taken on 23 March 2007.

(ii) It was stipulated in clause 9 that the first respondent would at all times support the second respondent in causing townships to be established and proclaimed, and in so doing would comply in all material respects with all laws, government approvals, applicable consents and legal requirement thereto, including, without limitation, consents and legal requirements relating to environmental matters.

(iii) Occupation of the land or portions thereof was in terms of clause 11 granted to the second respondent prior to transfer, to enable the second respondent to commence construction of improvements and the installation of services. It was further recorded that the second respondent would from the time of occupation enjoy all rights and be liable for all obligations arising out of ownership of the land or portions thereof.

(iv) The first respondent undertook in terms of Clause 16 to use its endeavours to assist the second respondent and grant authority to it to expedite the cancellation or disposal of any surface rights, undermining rights or permits or restrictive conditions which are required to be cancelled by the mining authorities.

(v) Clause 18 dealt with the parties' rights on breach; clause 19 with dispute resolution and clause 22 with the parties' *domicilia*. None is

relevant for present purposes and we mention them only because their provisions were not subject to the suspensive conditions in clause 4.

(vi) Clause 22 contained, amongst other provisions, a recordal wherein the parties undertook to do all things as may be necessary, incidental or conducive to the implementation of the terms, conditions and import of the agreement. The reason for our emphasis that it was the parties to the agreement that gave the undertaking will become apparent towards the end of this judgment.

[8] The first respondent in its endeavour to comply with the legislative requirements, published a notice in terms of s 33(1)(*a*)(i)(*bb*) of the MFMA read with s 21A of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) on 21 May 2008. It gave notice of its intention to conclude a contract which would impose financial obligations on the municipality beyond the three-year period covered in the annual budget for that financial year and invited the local community and other interested persons to submit comments or representations in respect of the proposed contract by no later than 4 August 2008. This notice was again published on two further occasions, on 5 June 2008 and 21 November 2008 respectively. The first respondent also published a notice in terms of s 79(18)(b)(ii) of the Ordinance on 21 November 2008.

[9] On 12 June 2008, the office of the municipal manager instructed Mr de Waal, a professional valuer, to conduct an evaluation of the properties and provide a market value thereof. A valuation report was submitted six days later in terms of which the properties were valued at R19 167 500.

[10] On 29 July 2008, the appellant's attorney objected to the sale as advertised in terms of s 33 of the MFMA on the basis that the agreement had been concluded without compliance with the provisions of the MFMA or the Systems Act and as a result that the entire process followed by the first respondent was ultra vires. Various objections from interested parties were received and considered by the first respondent. It further sought advice from the relevant government departments with regard to compliance with the statutory requirements. The appellant's attorneys subsequently expressed its wish to make comments and representations and sought certain information.

[11] On 30 January 2009, the first respondent's municipal manager signed a certificate referred to in clause 4.1.1 of the agreement of sale to the effect that the sale of land complied with the statutory provisions. On 4 February 2009, a report called 'Item to Council' was submitted to council for its consideration. This was a 60-page document which dealt with the steps taken to comply with statutory requirements governing the contract of sale. As this was a voluminous document a workshop for the benefit of the councillors was held on the same day. The contents of the document were explained to the councillors and they were afforded an opportunity to raise their concerns.

[12] On 5 February 2009, the first respondent's council held a public meeting and considered the report. It adopted a resolution approving the entire written agreement of sale entered into between the first and the second respondents on 2 October 2007 'exactly as it should be executed'.

[13] After the adoption of the resolution, the respondents proceeded to implement the terms of the agreement. On 19 May 2009, the properties in

extent of 1124.4501 hectares were transferred into the name of the second respondent, which thereafter caused a mortgage bond to be registered over the property. It further established a township known as Klerksdorp Extension 38 on a portion of land totalling approximately 61 hectares which comprised six erven and three parks. On 22 July 2009, the first respondent's attorneys provided a copy of the council's resolution to the appellant's attorneys. The purchase price of the immovable property was settled in two tranches, to wit, R3 million was paid on registration of transfer and the balance of R17 million was paid on 27 July 2009.

[14] On 4 August 2009, the appellant launched an application in the court below wherein it sought an order reviewing and setting aside the council's resolution and an order declaring the agreement of sale invalid and unenforceable. The application was opposed by the respondents on the basis that all the statutory requirements had been complied with and that the suspensive conditions had been fulfilled. The respondents further contended that the motives of the appellant for launching the application were mala fide; that it had done so almost six months after the resolution of council, after its application for the extension of its shopping mall had not been approved by the first respondent and after it had discovered that another developer was purchasing the property from the second respondent to develop a regional mall next to the N12.

[15] The respondents continued with the implementation of the sale agreement despite the pending application. On 8 September 2009, the second respondent sold 22.1203 hectares of land to West Ridge Shopping Centre, which became known as Matlosana Mall. The process of

registration of transfer is pending. It was intended that a regional shopping mall would be constructed and developed on the property and that mall would compete for business with the mall operated by the appellant – hence the appellant's interest in these proceedings. The second respondent also applied for the rezoning of certain erven in order to allow for the development of the mall. The application for rezoning was opposed by the appellant. On 18 September 2009, the appellant launched an urgent application for an interdict. Two days later, the first and second respondents concluded a Municipal Services Agreement.

[16] The two applications were subsequently consolidated in terms of a directive issued by the Judge President of the court below. The matter came before Murphy J. It was submitted on behalf of the appellant that the procedure adopted by the first respondent in complying with the provisions of s 79(18)(b) of the Ordinance and ss 14 and 33 of the MFMA was incorrect. According to the appellant, the first respondent had been obliged to comply with these provisions before concluding the agreement of sale. It therefore sought an order declaring the deed of sale invalid and unenforceable. The respondents, on the other hand, contended that there had been substantial compliance with the relevant legislative provisions. They thus sought an order dismissing the application on the basis of the delay rule as well as the fact that they had complied with the applicable statutory provisions.

[17] The learned judge held that the principle enunciated in *Corondimas v Badat* 1946 AD 548 (discussed below) was applicable as the sale of the property was subject to suspensive conditions. The judge

further held that the first respondent had complied with the relevant legislative provisions before the agreement of sale became unconditional and therefore enforceable. The judge accordingly held that there was no basis for declaring either the resolution of council or the agreement of sale invalid. In the event, the court below dismissed the application with costs. The appeal is before us with the leave of that court.

[18] Before dealing with the issues we must express our disapproval in the manner in which the appellant compiled its founding affidavit. It is trite that in motion proceedings affidavits serve not only to place evidence before court but also to define the issues between the parties. In *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA)[1] para 43 Cloete JA stated:

'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, affidavits constitute both the pleadings and the evidence.'

[19] In this matter the appellant recited legal submissions in its founding affidavit without any foundation and annexed the 60-page Item to Council that, we have said, dealt with the steps taken to comply with the statutory requirements and had been furnished to the first respondent's Council. The appellant did not identify the portions of the document on which reliance would be placed nor did it provide an indication of the

[1]1.See also *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 322F-J.

case which was sought to be made on the strength thereof. It did not raise any issue nor challenge the correctness of the document or the first respondent's compliance with any provision. The appellant thereafter raised new issues and attempted to bolster its case in its replying affidavit. Such conduct cannot be countenanced.

[20] Before us on appeal, the appellant assailed the validity of the deed of sale. The crux of the appellant's challenge is that the first respondent had to comply with s 79(18)(b) of the Ordinance and s 33 of the MFMA before the conclusion of the sale agreement dated 2 October 2007. Put differently, the issue raised by the appellant was not non-compliance, as a fact, with the statutory provisions but the timing of the process; its argument was that such compliance had been compromised because the sale agreement was signed prior to compliance with the applicable statutory provisions. In this regard counsel for the appellant relied on the decision of *Ferndale Crossroads Shareblock (Pty) Ltd v City of Johannesburg Metropolitan Municipality* (unreported judgment, case no 3879/08 WLD).[2] We will later show how the facts of that case are distinguishable for the reasons that appear below. Counsel submitted that the respondent had also failed to comply with ss 14 and 33 of the MFMA.

[21] We turn now to deal with the primary issue, that is the argument that the first respondent had not complied with the provisions of s 79(18)(b) of the Ordinance. Section 79(18) provides:

'The Council may do all or any of the following things, namely –

[2]The appeal against this decision was dismissed. See *Ferndale Crossroads v Johannesburg Municipality* 2011 (1) SA 24 (SCA).

. . .

(18)(a) Notwithstanding the provisions of the Townships Act, 1907 (Act 33 of 1907, Transvaal), but subject to the succeeding paragraphs and the provisions of any other law –

(i) let, sell exchange or in any other manner alienate or dispose of any movable or immovable property of the council: Provided that where a council exchanges immovable property for other property, the other property shall be wholly or predominantly immovable;

. . .

'(b) Whenever a council *wishes*[3] to exercise any of the powers conferred by paragraph (a) in respect of immovable property, excluding the letting of any other property than land in respect of which the lease is subject to section 1 (2) of the Formalities in respect of Leases of Land Act, 1969 (Act 19 of 1969), the council shall cause a notice of the resolution to that effect to be –

(i) affixed to the public notice board of the council; and

(ii) published in a newspaper in accordance with section 91 of the Republic of South Africa Constitution Act, 1983,

in which any person who wishes to object to the exercise of any such power, is called upon to lodge his objection in writing with the town clerk within a stated period of not less than fourteen days from the date of the publication of the notice in the newspaper: Provided that where a council wishes to alienate or dispose of immovable property to the State or a statutory body, the Administrator may exempt the council from all or any of the provisions of this paragraph.'

[22] It is clear from this section that it is triggered once the council 'wishes' to exercise any power referred to in s 79(18)(a). It must then

[3] Our emphasis.

publish the notices to enable persons to object. The appropriate dictionary meaning of the word 'wish' in the Shorter Oxford English Dictionary is:

'2. A desire expressed in words, or the expression of such.'

There is a difference between 'wish' and 'contemplate', the latter word being defined in the same dictionary as:

'1. To look at with continued attention . . . 2. to view mentally, to meditate upon, ponder, study. 3. to consider in a certain aspect.'

A person who 'wishes' to do something, has decided to do so; a person who contemplates doing something has not yet decided whether or not to do so. The section uses the word 'wishes' in two places: 'whenever a council wishes to exercise any of the powers and 'any person who wishes to object. Both in context connote a settled intention. But that was not the position when the sale agreement was signed, as we shall now demonstrate: no final decision to alienate the land was taken before the notice of intention to do so was advertised and when the council of the first respondent decided to do so, there had been compliance with the requirements of the section.

[23] It is not in dispute that the agreement of sale contained suspensive conditions as set out in clause 4.1. The authors R H Christie and G B Bradfield[4] state that a condition precedent or suspensive condition suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event. The author A J Kerr[5] describes a suspensive condition as one which suspends the operation or effect of one or some or all of the obligations until the

[4] R H Christie *The Law of Contract in South Africa* 6 ed (2011) 145.
[5] A J Kerr *The Principles of the Law of Contract* 4 ed 339-340.

condition is fulfilled. In *Corondimas v Badat*[6] Watermeyer CJ enunciated the principle relating to a contract of sale subject to a suspensive condition, as follows:

'[W]hen a contract of sale is subject to a true suspensive condition, there exists no contract of sale unless and until the condition is fulfilled. . . . Until that moment, in the case of a sale subject to a true suspensive condition, such as this is, it is entirely uncertain whether or not a contract of sale will come into existence at some future time' (the *Corondimas* principle).

[24] In *Geue v Van der Lith* 2004 (3) SA 333 (SCA) para 8 Brand JA referred to a body of authority and summarised the application of the *Corondimas* principle as follows:

'In all these cases it was held that contracts subject to these suspensive conditions were not hit by the legislative enactments concerned. The reasoning that formed the basis of these decisions was essentially that the agreement prohibited by both enactments was a *sale* whereas, in accordance with the decision of this Court in *Corondimas*, an agreement of sale subject to a suspensive condition cannot, pending fulfilment of the condition, be regarded as a "sale". It only becomes a sale when the condition is fulfilled, in which event there is no contravention of the statutory provisions involved.'

[25] Counsel for the appellant urged this court to revisit the *Corondimas* principle in view of the treatment of that judgment in *Tuckers Land & Development Corporation v Strydom* 1984 (1) SA 1 (A) (the *Strydom* case), and in view of the new constitutional dispensation aimed at curtailing abuse of power and corruption at municipal level. We shall deal in turn with each leg of the argument.

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[6] Above at 551.

[26] In so far as the *Strydom* case is concerned, Van Heerden JA (writing for the majority) said at 18C-G:

‘'n Laaste aspek wat oorweging verg, is tot welke mate handhawing van die *Corondimas*-opvatting tot min of meer permanente onreg aanleiding kan gee. Soos dit my voorkom, het die opvatting weinig, indien enige, praktiese betekenis anders as by die uitleg van wetgewing waarin begrippe soos "'n koopkontrak" of "verkoop" gebruik word. Of 'n verkoop onderhewig aan 'n opskortende voorwaarde nou ook al as geen koopkontrak nie, dan wel as 'n koopkontrak wat nog net nie *perfecta* is nie, bestempel word, is daar geen rede waarom die regsgevolge wat gemeenregtelik aan so 'n verkoop geheg is nie nog steeds ten volle toepassing sal vind nie. En wat wetgewing betref, sal vermoedelik in die toekoms duidelik aangedui word, soos nou deur die wysiging van art 57A (2) geskied het, wat met die gebruik van bogenoemde begrippe beoog word. Voorts staan dit naturlik die wetgewer vry om, sonder inbreukmaking op bestaande regte, statutêre bepalings waarin die begrippe reeds voorkom te wysig indien die huidige stand van die regspraak en hierdie uitspraak meebring dat nie gevolg gegee word aan die wetgewer se werklike maar onvoldoende uitgedrukte bedoeling nie. Dit is dan ook insiggewend dat, na verloop van onderskeidelik vyf en vier jaar na die beslissings in die *Wallis*-[7]en *Nieuwoudt*-sake,[8] art 3 (*e*) van Wet 70 van 1970 ongewysig bly voortbestaan.'[9]

[27] It is in the context of these remarks that the following legislative history is important. Section 79(18) was substituted by s 9(1)(h) of the

[7] *Sentraalwes Personeel Ondernemings (Edms) Bpk v Wallis* 1978 (3) SA 80 (T).
[8] *Sentraalwes Personeel Ondernemings (Edms) Bpk v Nieuwoudt* 1979 (2) 538 (C).
[9] 'A last aspect for consideration is to what extent maintaining the *Corondimas* approach could lead to permanent injustice. It appears to me that the approach has little, if any, practical meaning other than to the interpretation of legislation wherein terms such as "contract of sale" or "sale" are used. Whether a sale subject to a suspensive condition is characterised as not being a contract of sale, or as a contract of sale which is not *perfecta*, there is still no reason why the common law legal consequences which attach to such a sale should not find full application. And regarding legislation, more clarity will presumably be provided in the future, as was achieved now by s 57A(2) as to the interpretation of the above mentioned concepts. It is also the legislature's prerogative to enact statutory provisions which, without infringing on existing rights, would amend the interpretation given by judgments, including this judgment, so as to give effect to the true intention of the legislature which had previously not been clearly articulated. It is also instructive that after periods of respectively five and four years following the judgments in *Wallis* and *Nieuwoudt*, s 3*(e)* of Act 70 of 1970 has remained unamended.' (Our translation.)

Ordinance 18 of 1985 after the *Strydom* case had been decided in September 1983 and reported in January 1984 after the definition of ‘sale’ in the Subdivision of Agricultural Land Act 70 of 1970 had been amended by s 1(*c*) Subdivision of Agricultural Land Amendment Act 18 of 1981, to include a sale subject to a suspensive condition; and after a similar amendment to s 57(A) of the Town Planning and Township Ordinance 25 of 1965 (T) by s 3 of Ordinance 19 of 1982 (T), (the amendment of which van Heerden JA referred to in the passage quoted above). The legislature has not seen fit to provide that ‘sell’ for the purposes of s 79(18) of the Ordinance shall include an agreement of sale subject to a suspensive condition. In our view therefore the legislature must be deemed to have been aware of the numerous cases since *Corondimas* but to have elected not to amend the definition in the Ordinance. In the result this court must draw an inference and conclude that the legislature intends ‘sale’ in the Ordinance not to include a sale subject to a suspensive condition.[10]

[28] The rationale underlying the *Corondimas* principle was recently repeated by this court in *Paradyskloof Golf Estate v Stellenbosch Municipality* 2011 (2) SA 525 (SCA) para 17 where Mpati P held:

'An agreement of purchase and sale entered into subject to a suspensive condition does not there and then establish a contract of sale, "but there is nevertheless created a very real and definite contractual relationship which on fulfilment of the condition develops into the relationship of seller and purchaser".'

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[10] *Geue v Van Lith* above, paras 8 to 11.

[29] In the event, *stare decisis* applies. On a proper application of the *Corondimas* principle, there was no contract of sale until the suspensive conditions in clause 4.1 had been fulfilled. It is evident from the document ‘Item to Council' that these conditions had been fulfilled as the first respondent had complied with the applicable statutory requirements. It is clear therefore that the council's intention to exercise the power to alienate was only formulated on 5 February 2009 when it took the resolution sought to be impugned by the appellant. The contract of sale thus came into existence on that day. Counsel for the appellant correctly conceded that the council could have decided at that stage not to proceed with the contract. And that is the answer to the appellant’s submission that the *Corondimas* principle should be departed from in view of the new constitutional dispensation aimed at curtailing abuse of power and corruption at municipal level. The effect of the *Corondimas* principle in a case such as the present, is that interested parties affected by the sale contract would be able to examine not proposals, but the detailed scheme itself. Any competitor of the successful tenderer could be relied upon to draw the council's attention to any irregularity or corruption, and at the end of the day, the elected council of the respondent could have walked away from the project if it thought this would be in the interests of the first respondent and its ratepayers.

[30] Counsel for the appellant submitted that the provisions of the contract of sale and in particular, clause 22 fettered the discretion of the full council. There is no merit in this submission. It is clear from the agreement of sale that the party to the agreement is the municipality and not the council. Clause 4.1.2 requires that 'the full council of the seller [the municipality] will . . . adopt a final resolution to endorse the sale

after compliance with all legislature requirements'. It has to be borne in mind that the full council consists of councillors from different political parties and is not bound in any way. It follows that the council retained its unfettered discretion.

[31] We should mention briefly that the reliance by the appellant on the *Ferndale* case referred to above is misplaced as the facts of that case are distinguishable from the facts of this case. In *Ferndale*, it was common cause that there was no compliance with the requirements of s 79(18) of the Ordinance before the conclusion of the lease agreement. An attempt at compliance was done ex post facto, two years after the conclusion of the said agreement as it was not clear to the municipality whether the publication had to take place before or after the conclusion of the lease. That was not the situation in this case.

[32] It follows therefore that there was proper compliance with the provisions of s 79(18)(b) of the Ordinance and there is no basis to interfere with the findings of the court below.

[33] The challenge with regard to non-compliance with s 33 of the MFMA can be disposed of relatively simply. It is subject to the same answer as s 79(18) of the Ordinance. A municipality may in terms of s 33 enter into a contract having future budgetary implications subject to certain conditions. The appellant relied on the publication by the first respondent of notices in terms of this section as constituting an admission that the section applies. But it did not raise this contention in its founding

papers. As we mentioned in paras 18 and 19 above, it was incumbent upon the appellant to do so, so that the first respondent could respond thereto. In any event, the financial obligations referred to in s 33 could only be imposed after the suspensive conditions had been fulfilled. It follows therefore that no case has been made out with regard to s 33 of the MFMA.

[34] It remains for us to deal with the argument that there was no compliance with s 14 of the MFMA. A municipality may in terms of s 14(2) 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, has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services and has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset. The submission on behalf of the appellant was that administrative action consisting in the transfer of ownership of an asset must be fair and transparent. In our view, a fair and transparent process was indeed followed by the first respondent and it complied with the provisions of this section.

[35] The conclusion we have reached renders it unnecessary to consider the argument raised by both respondents that immense prejudice would be suffered by them and third parties were the appeal to succeed.

[36] In the result the following order is made:

1 The appeal is dismissed with costs.

2 The appellant is ordered to pay the respondents' costs including the costs of two counsel in each case.

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T D CLOETE

JUDGE OF APPEAL

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N Z MHLANTLA

JUDGE OF APPEAL

APPEARANCES:

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A Liversage

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For 2nd Respondent:	R J Raath SC J A Venter Adriaan Venter Attorneys & Associates, Pretoria Rossouws, Bloemfontein