THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 79/2014

In the matter between:

STRATA INTERNATIONAL (PTY) LTD	**FIRST APPELLANT**
THE GARDEN ESTATE FOR SMALL AND MEDIUM ENTERPRISES (PTY) LTD	**SECOND APPELLANT**

and

EKURHULENI METROPOLITAN MUNICIPALITY	**RESPONDENT**

Neutral citation: *Strata International (Pty) Ltd v Ekhurhuleni Metropolitan Municipality* (79/2014) [2015] ZASCA 47 (26 March 2015)

Coram: Navsa ADP, Leach and Saldulker JJA and Van der Merwe

and Meyer AJJA

Heard: **24 February 2015**

Delivered: **26 March 2015**

Summary: Local government – resolution by municipality to dispose of immovable property in response to unsolicited private bid – no public participation or transparency – resolution does not give rise to enforceable public law rights.

ORDER

On appeal from Gauteng Division, Pretoria (Mathopo J sitting as court of first instance):

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

JUDGMENT

Van der Merwe AJA (Navsa ADP, Leach and Saldulker JJA and Meyer AJA concurring):

[1] The respondent, the Ekurhuleni Metropolitan Municipality (the municipality), is the owner of a proclaimed township named Selcourt Extension 4 (the property). The first appellant, Strata International (Pty) Ltd, and the second appellant, the Garden Estate for Small and Medium Enterprises (Pty) Ltd, unsuccessfully claimed rights in respect of the property in the Gauteng Division of the High Court before Mathopo J. He did, however, grant leave to appeal to this court.

[2] The property is approximately 103 hectares in extent. It was proclaimed as a residential township on 23 December 1992 but remained undeveloped. During March 2000 Mr Joseph Basil Johnson approached the municipality with a proposal to develop the property as an industrial park for small and medium industries. Negotiations ensued and several draft agreements between the municipality and Mr Johnson in his capacity as trustee for a company to be formed, were prepared in respect of the proposed development.

[3] A draft agreement was placed before the Corporate Affairs Committee of the municipality (the committee) on 10 February 2003. On 28 November 2002 the council of the municipality delegated to the committee the power and

function ‘to approve all alienation of Council-owned land in terms of Council policy, as well as the granting of rights over Council-owned land’. The committee resolved that the draft agreement be referred to the municipality’s legal department for comment.

[4] The Executive Director: Corporate and Legal Services of the municipality provided the required legal advice to the committee per letter dated 28 August 2003. The committee was inter alia advised ‘. . . that the stipulations contained in Section 79(18) of the Local Government Ordinance 17 of 1939 and/or any other legislative stipulation dealing with the alienation etc. of immovable property by any Local Government be complied with’ before entering into an agreement with Mr Johnson. This document served before the committee on 19 January 2004, together with the draft agreement that it related to, termed the Land Availability Agreement.

[5] It is common cause that s 79(18)(*a*), (*b*) and (*c*)(i) of the Local Government Ordinance 17 of 1939 (the LGO) are applicable to the municipality. In terms of s 79(18)(*a*)(i) the council of a municipality may, inter alia, sell or in any other manner alienate or dispose of any immovable property of the council. Section 17(18)*(b*) provides that whenever a council wishes to exercise any power conferred by subsec 18(*a*) in respect of immovable property, the council shall cause a notice of the resolution to that effect to be affixed to the public notice board of the council and published in a newspaper. The notice must call upon any person who wishes to object to the exercise of the power, to lodge his or her objection in writing within a stated period of not less than 14 days from date of publication of the notice in the newspaper. Section 79(18)(*c*)(i) provides that where such objection is received, the council shall not exercise the power unless the council has considered the objection. The object of such notice and publication is, inter alia, to promote transparent and accountable government. No such notice or publication took place in respect of the disposal of the property.

[6] On 19 January 2004 the committee resolved as follows:

‘1. That the report indicating the progress made with the obtaining of legal comments regarding the development of Selcourt Extension 4, BE NOTED.

2. That the Sale of the remainder of the erven in Selcourt Extension 4 to Mr J B Johnson on the basis of a Land Availability Agreement BE APPROVED in principle subject to the Land Availability Agreement being finalised and submitted for approval.

3. That the Land Availability Agreement should address at least the following matters:

(a) The purchase price payable to the Council that should at least be market related taking into consideration the services presently existing as well as the developer’s obligation to improve and/or restore the services to the standard required for an industrial township.

(b) A clear and realistic timeframe with clear deliverables for the development and sale of erven within the township taking into consideration the lack of interest to date.

(c) Council should not be liable for any further costs in respect of the development neither during the development nor if the development should fail and the envisaged Land Availability Agreement be cancelled.

(d) The developer be allowed at his own cost and risk to consolidate and subdivide erven within accepted development parameters and subject to the normal prescribed procedures being followed.

4. . . .

5. That a further report BE SUBMITTED as soon as (2) and (3) above has been addressed.’

[7] On 30 June 2004 a valuation of the property was received, presumably as a result of para 3(a) of the resolution of 19 January 2004. As the development proposal involved a changed layout of the township, the valuer was instructed not to value the proclaimed erven but to render a valuation of the area thereof per square metre. In terms of the valuation the envisaged industrial erven were valued at R1.00 per square metre and common areas at R0.25 per square metre, both excluding VAT. At a subsequent meeting between Mr Johnson and officials of the municipality, he made an offer of R5.00 per square metre excluding VAT for the erven and R0.25 per metre for the common areas. The remaining outstanding matters in respect of the

proposed agreement, now entitled Land Availability and Services Agreement (the agreement) were finalised at this meeting.

[8] Mr Johnson in his capacity as trustee for a company to be formed, was referred to in the agreement as the developer. In terms of the agreement the property (with the exclusion of one erf) was made available by the municipality to the developer for purposes of developing and marketing it as an industrial park, with effect from date of signature of the agreement. The developer was granted authority to amend the layout of the erven, including consolidation and subdivision of erven, at its cost. The developer was responsible for all ground works and preparation of erven and for the construction of improvements on the erven. The developer was obliged to commence marketing of the industrial erven within six months of approval of the amended layout plans and to continue developing and marketing the property 'vigorously'. Nevertheless, the developer was expected to effect transfer of ownership of at least one erf before expiration of a period of five years after signature of the agreement. Transfer of ownership of 30 per cent of all erven had to take place within ten years after signature of the agreement. The developer was afforded a period of 30 years from date of signature of the agreement to dispose of all the erven.

[9] In terms of the agreement only the developer had the right to dispose of the erven and would do so for its own account. The consideration for this right was an amount calculated at R5.00 per square metre per erf and at R0.25 per square metre in respect of the common areas proportionate to the particular erf. The consideration had to be guaranteed before transfer of an erf and paid to the municipality upon transfer thereof. There is therefore no doubt that in terms of the agreement the municipality disposed of the property.

[10] The Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA) came into operation on 1 July 2004. Section 14(1) and (2) thereof provide:

‘(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 basis 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.’

[11] On 15 July 2004 the council of the municipality revoked the power delegated to the committee to approve the sale and lease of immovable property of the municipality. However, on 26 August 2004, it resolved:

‘That in terms of section 59 of the Municipal Systems Act, the powers to decide in terms of section 14(2)(a) and (b) of the Municipal Finance Management Act, 56 of 2003, in respect of the disposal of immovable capital assets BE DELEGATED to the Corporate Affairs Committee in terms of Council’s System of Delegations.

. . .

That the meetings of the Corporate Affairs Committee BE OPENED to the public only for purposes to consider the decisions required in terms of section 14(2) of the Municipal Finance Management Act, 56 of 2003.

. . .

That the meeting dates and times of the Corporate Affairs Committee and the fact that these meetings are open to the public for this specific purposes BE PUBLISHED together with the publication of the meetings of the Council.’

[12] This resolution was clearly brought to the attention of the committee. The committee met on 30 August 2004 to consider approval of the agreement. There is no evidence that the public was notified of this meeting or of the fact that the disposal of the property would be considered at the meeting, nor is there any evidence that the meeting was open to the public. It can safely be accepted that the public was not notified of the meeting and afforded no opportunity to participate in the decision to dispose of the property.

[13] On 30 August 2004 the committee took the following resolution:

‘1. That the report regarding the proposed development of Selcourt Extension 4 Township, Springs as an industrial park by Johnson International Trading and Investments (Pty) Ltd and the recommended approval of the Land Availability and Services Agreement in respect thereof BE NOTED.

2. That in terms of Section 14(2)(a) of the Municipal Finance Management Act, 56 of 2003, it BE RESOLVED that on the basis of the comments from all the departments as set out in the report and annexures, the property is not an asset needed to provide the minimum level of basis municipal services.

3. That the Land Availability and Services Agreement in respect of Selcourt Extension 4 Township, Springs attached hereto as Annexure “C” BE APPROVED.

4. That cognisance BE TAKEN of the valuation performed of properties in Selcourt Extension 4 Township, Springs by C S Massel Valuation Services CC attached hereto as Annexure “B” and that in terms of the provisions of section 79(18) of the Local Government Ordinance, 1939, the properties in the said Township be alienated in terms of the Land Availability and Services Agreement referred to in 2 above at the following selling prices:

(a) All erven R5,00 per m² (excluding VAT)

(b) Common property areas R0,25 per m²

5. That the Executive Director: Corporate and Legal Services or nominee, BE AUTHORISED to do or cause to be done whatever shall be requisite and to sign all documents to give proper effect to the above.’

[14] The agreement was signed on 17 September 2004. The appellants say that by December 2004 the second appellant had adopted the agreement and accepted its benefits and obligations. In terms of an agreement dated 7 August 2009 the second appellant transferred these rights and obligations to the first appellant. The appellants therefore aver that the first appellant stepped into the shoes of the second appellant as far as the agreement and the resolutions of 19 January 2004 and of 30 August 2004 are concerned.

[15] The officials of the municipality initially gave some assistance to efforts to execute the agreement. However, no erven were disposed of or transferred. By July 2006 reports began to surface of large scale irregularities in respect of alienation of immovable property of the municipality. The agreement and the circumstances under which it was entered into were

considered. As a result, the municipality refused to give effect to the agreement. It took the attitude that the agreement was invalid on a variety of grounds.

[16] The appellants approached the court a quo on motion for an order declaring that the first appellant had become the contracting party of the municipality in terms of the agreement and obliging the municipality to give full effect to the agreement. In the alternative, they asked that the municipality be ordered to comply with any outstanding statutory requirements and to do whatever may be necessary to give effect to the resolutions of 19 January 2004 and/or 30 August 2004. Further alternative prayers were aimed at obliging the municipality to ratify the transaction referred to in the resolutions of 19 January 2004 and 30 August 2004 (the resolutions) ex post facto.

[17] The court a quo refused all the relief sought. It dismissed the application with costs, including the costs consequent upon the employment of two counsel. The court a quo concluded that the resolution of 19 January 2004 was provisional and could not confer any rights. It found that both the resolution of 30 August 2004 and the agreement were invalid for non-compliance with s 79(18) of the LGO and s 14(2) of the MFMA. It upheld the municipality's contention that the power conferred in s 14(2) of the MFMA must be exercised by its council and may not be delegated. Furthermore, the court a quo held that the invalid resolution of 30 August 2004 was not capable of being ratified. On the view that I take of the matter, it is unnecessary to express a view on these findings.

[18] The appellants accept that the agreement is invalid. They did not appeal against that finding of the court a quo. They persist however in their reliance on the resolutions. They aver that the resolutions gave rise to 'public law rights' that are enforceable independently of the agreement. Their case is that the content of these rights include that all statutory requisites necessary in order to give effect to the resolutions must be complied with. Relying on these alleged rights, they sought the following order as amended on appeal:

'The Respondent is ordered to forthwith comply with the outstanding requirements of section 14(2)(b) of the Local Government: Municipal Finance Management Act, 56 of 2003, not already complied with at the meeting of its Corporate Affairs Committee of 30 August 2004 and with the requirements of section 79(18) of the Local Government Ordinance, 17 of 1939, as well as with any other statutory requirements for the alienation of the remainder of the erven in Selcourt Ext 4, and to do whatever may be necessary to give effect to the resolutions of its Corporate Affairs Committee of 19 January 2004 and 30 August 2004.'

The alternative relief in respect of ratification was not abandoned, but not pressed.

[19] The amended relief correctly recognised that the resolution of 19 January 2004 cannot stand on its own. It was a decision in principle that could have no binding effect in the absence of the further resolution that it envisaged. Read together, the resolutions constitute a final decision to dispose of immovable property of the municipality.

[20] The committee was at least alerted to the provisions of s 79(18) of the LGO and s 14(2) of the MFMA. Nevertheless, it was content to accept an unsolicited private bid and dispose of the property without any public participation or transparency.

[21] Can the resolutions in these circumstances give rise to enforceable rights? In my view the answer is an emphatic no. The founding values of our Constitution include accountability, responsiveness and openness. Section 152(1)(*a*) of the Constitution provides that the object of local government is to provide democratic and accountable government for local communities which we should all strive to promote. In terms of s 6(1) of the Local Government: Municipal Systems Act 32 of 2000, a municipality's administration is governed by the democratic values and principles embodied in s 195(1) of the Constitution. Section 195(1)(*f*) provides that public administration must be accountable. In terms of s 195(1)(*g*) transparency must be fostered by providing the public with timely, accessible and accurate information. These provisions inform s 14(5) of the MFMA which provides that any transfer of

ownership of a capital asset of a municipality must be fair, equitable, transparent, competitive and consistent with the supply chain management policy which the municipality must have and maintain.

[22] The resolutions fall foul of these Constitutional imperatives. They are thus fatally flawed and incapable of giving rise to enforceable rights. For the same reasons there can be no ex post facto ratification of the resolutions.

[23] The appeal is dismissed with costs, including the costs of two counsel.

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C H G VAN DER MERWE
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:	S J Grobler SC (with him D P J Rossouw SC) Instructed by: Bothma Incorporated, Brakpan McIntyre & Van der Post, Bloemfontein
For Respondent:	P Pauw SC (with him Ms M Sello) Instructed by: Tshiqi Zebediela Incorporated, Kempton Park Matsepes Inc, Bloemfontein