THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 542/2009

In the matter between:

FERNDALE CROSSROADS SHARE BLOCK (PROPRIETARY) LIMITED	**First Appellant**
FERNDALE INVESTMENTS SHARE BLOCK (PROPRIETARY) LIMITED	**Second Appellant**
URBAN REAL ESTATE (PROPRIETARY) LIMITED	**Third Appellant**

and

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**First Respondent**
CITY OF JOHANNESBURG PROPERTY COMPANY (PROPRIETARY) LIMITED	**Second Respondent**
CITY OF JOHANNESBURG DEVELOPMENT AGENCY (PROPRIETARY) LIMITED	**Third Respondent**
RANDBURG PROFESSIONAL HAWKERS ASSOCIATION INCORPORATED	**Fourth Respondent**
RANDBURG MANAGEMENT DISTRICT INC.	**Fifth Respondent**

Neutral citation: *Ferndale Crossroads Share Block v City of Johannesburg Metropolitan* (542/09) [2010] ZASCA 126 (30 September 2010)

Coram: MPATI P, HEHER, CACHALIA JJA, BERTELSMANN and EBRAHIM AJJA

Heard: 19 August 2010

Delivered: 30 September 2010

Updated:

Summary: Local authority: Section 79(18) of Local Government Ordinance 17 of 1939 – power of local authority to alienate immovable property – no such power in absence of preconditions – lease agreement concluded without

compliance with preconditions invalid.

ORDER

On appeal from: South Gauteng High Court (Johannesburg)(Marais J sitting as court of first instance):

The appeal is dismissed with costs, which shall include those of two counsel.

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JUDGMENT

MPATI P (HEHER, CACHALIA JJA, BERTELSMANN and EBRAHIM AJJA):

[1] Two applications came before the Johannesburg High Court (Marais J) concerning the same issue, which is also the primary issue in this appeal, viz the validity of a written agreement (the agreement) concluded between the first and second appellants (of the one part) and the first respondent. Clause 5 of the agreement reads:

`[The City of Johannesburg] agrees to lease the land. . .marked in Red between BE and F on the Drawing at an annual nominal rental of R499 . . . to [the first and second appellants]. The land leased in terms hereof measures approximately 627 square meters and is in accordance with the draft surveyors' diagram attached hereto as annexure "A". . .'

In part B of their notice of motion the appellants sought an order, inter alia, '[d]eclaring that the written agreement concluded between the first and second appellants (of the one part) and the first respondent on 27 March 2002 is valid and enforceable'. No relief was sought against the second, fourth and fifth respondents; they were cited by virtue of the interest each held in the subject matter of the application. The third respondent featured in part A of the notice of motion where interdictory relief was sought against it and the first respondent, the City of Johannesburg Metropolitan Municipality. Part A of the appellants' notice of motion is not relevant for purposes of this appeal.

[2] In its notice of motion, which was coincidentally issued on the same day as that

of the appellants, the first respondent sought the following order:

`1. That the lease agreement entered into between [first and second appellants] and the City of Johannesburg dated 27 March 2002. . .be declared to be invalid *ab initio;*

2. In the alternative to prayer 1, if the lease is found to be valid, that clause 18.2 of the lease be declared invalid;

3. In the alternative to prayer 2, if clause 18.2 is found to be valid, that an order of specific performance of the lease agreement by [the City of Johannesburg] would be inappropriate.'

Clause 18.2 of the agreement provides that '. . . no party shall in any circumstances be entitled to cancel this agreement'.

[3] The appellants own commercial property in the Randburg Central Business District (CBD). The property consists of a shopping centre known as the Oriental Plaza, one of a number of such centres forming the Randburg Mall (the mall). A major thoroughfare, Hendrik Verwoerd Drive (H V Drive), separates the CBD and the Randburg Civic Precinct (Civic Precinct) which is located on a triangular-shaped piece of land owned by the first respondent and bounded by H V Drive, Jan Smuts Avenue (Jan Smuts) and Selkirk Avenue. Jan Smuts and H V Drive meet at a point close to the Oriental Plaza while Selkirk Avenue, which links Jan Smuts and H V Drive, is the base of the triangle. The Civic Precinct is utilized for a variety of purposes, including a taxi rank and a traders' market. The Oriental Plaza is situated opposite the taxi rank and traders' market, across H V Drive.

[4] Prior to the conclusion of the agreement the taxi rank was partly enclosed by walls, the side closest to the Oriental Plaza being left open. Entry to it was gained from Jan Smuts. Thus, to reach the mall and the rest of the CBD from the taxi rank pedestrians had to cross H V Drive. It is common cause that the conflict between pedestrian and vehicular traffic constituted a safety hazard. The appellants, who were the lessors of all the shops inside the Oriental Plaza, saw in this an opportunity for securing their lessees' tenancy. So they devised a plan to 'channel' the pedestrians from the taxi rank to the Oriental Plaza through an overhead bridge across H V Drive.

They anticipated that this would increase business for their tenants. To achieve their goal the appellants applied to the first respondents' property management forum, the City of Johannesburg Property Company (Pty) Ltd (JPC), in May 2001 to lease a portion of the land making up the Civic Precinct and from which the bridge could be accessed. (One foot of the envisaged pedestrian bridge would rest on the leased land.) Considering that an overhead bridge would assist in solving the problem of the safety hazard caused by pedestrians crossing H V Drive the first respondent approved the application and on 27 March 2002 the agreement, which is the subject matter of this appeal, was concluded.

[5] In addition to the lease provisions in clause 5[1] the agreement also provided, inter alia, for the appellants to extend the existing walls around the taxi rank so that the taxi rank would be completely enclosed (clauses 6.2 and 6.3).[2] Clause 7.1 is in these terms:

'7.1 [The appellants] undertake, as soon as possible after signature of this Agreement and the obtaining of all necessary approvals from all relevant authorities, to attend to the passing of plans for the design and construction of a pedestrian bridge . . . over [H V Drive] close to the intersection with [Jan Smuts] . . . which Bridge will link the taxi rank with the Oriental Plaza Shopping Centre.'

Clause 7.2 stipulated that a consideration of R1.00 'will be payable by [the first respondent] to [the appellants] . . . for the construction of the Bridge'. In terms of clause 8.2 the bridge and a certain barrier, also to be constructed by the appellants at their own cost, would become the property of and be controlled and maintained by the first respondent. Subject to the support of the Randburg Chamber of Commerce, the appellants would be entitled to construct and lease to hawkers twelve kiosks at the foot of the bridge (clause 9).

[6] The parties appear to have complied with their respective obligations in terms of the agreement until the beginning of May 2006 when the first respondent caused

1 Quoted in paragraph 1 above.
2 Clause 6.4 reads: 'The walls referred to in 6.2 and 6.3 are to be or have been constructed in such a way to ensure that the commuters at the taxi rank who wish to exit the taxi rank will be prevented from doing
so and that the exit of such commuters will be directed towards the pedestrian bridge referred to in 7.1.'

hawkers' facilities to be erected outside the wall enclosing the taxi rank. Thereafter, it caused a portion of the wall to be demolished in order to allow access from the enclosed area to the newly constructed hawkers' facilities. It is alleged in the appellants' papers that this led to 'thousands of pedestrians streaming through the gap in the wall and traversing [H V Drive] on their way to and from the taxi rank'. This resulted in some skirmishes between the parties to the agreement the detail of which is not necessary for present purposes. In the meantime, during September 2004, a Ms Tanya van Schalkwyk of JPC discovered that the first respondent had not published a notice of its resolution to lease the land concerned as required by the provisions of s 79(18) of the Local Government Ordinance (the Ordinance)[3], calling for objections, if any, to the proposed lease. The relevant part of the Ordinance reads:

'79 General Powers – The Council may do all of the following things – namely:

. . .

(18)(*a*) . . . 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 council . . .;

(*b*) whenever a council wishes 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 18 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) publish in a newspaper in accordance with section 91 of the Republic of South African 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. . .

(*c*) where any objection is received by the Town clerk in terms of paragraph (*b*), the council shall not exercise the power concerned if it is-

(i) a council referred to in part I or II of the Sixth Schedule to this Ordinance, unless the council has considered any objection; or

(ii) . . . .'

After they had been advised of this fact the appellants forwarded a written request to JPC to advertise the lease. Notices calling for objections to a proposed 'long-term

3 17 of 1939.

lease of the pedestrian bridge across [H V Drive]' were published in two newspapers on 19 November 2004. In response to the notices three objections were received, after which certain further developments occurred, culminating in the first respondent obtaining legal advice to the effect that the agreement (lease) was void *ab initio.* In January 2007 the first respondent's Director: Legal Services gave instructions that application proceedings be instituted on behalf of the first respondent for an order, inter alia, declaring the lease to be invalid.

[7] For the order it sought declaring the 'lease agreement' to be void *ab initio* the first respondent relied on its own failure to comply with the provisions of section 79(18) of the Ordinance. It asserted in its founding affidavit that the agreement constituted a lease and thus that the council was obliged to publish its resolution to lease the land described in it and to invite objections to it.

[8] That the first respondent is a local authority as contemplated in Part 1 of the Sixth Schedule to the Ordinance is not in issue. And it is common cause that the provisions of s 79(18) were not complied with before the conclusion of the agreement.

[9] In the founding papers in their application the appellants intimated that it would be contended on their behalf that upon a proper consideration of its contents the agreement is not essentially a lease agreement (as contemplated in, and provided for, in terms of s 79(18)), but is rather a composite arrangement, the true nature of which is not governed by the provisions of s 79(18) of the Ordinance. That stance was maintained in their answering affidavit in the first respondent's application. However, the court a quo found that the agreement 'in its own terms was a lease and was so regarded by the parties. . .' and that s 79(18) of the Ordinance applied to it. Consequently, in the first respondent's application the court declared the agreement void *ab initio;* ordered the appellants to pay the first respondent's costs. It dismissed the appellants' application with costs. The appellants are before us with leave of this court, the court a quo having refused leave to appeal.

[10] The issues on appeal are (1) whether the agreement, properly construed, constitutes a lease, in which event it would have been subject to the provisions of s

79(18) of the Ordinance; (2) whether, if the agreement is a lease, the court a quo had a discretion nevertheless to uphold it and, (3) if it had such a discretion, whether the court a quo should have exercised it in favour of the appellants. A related issue is whether, if the agreement were found to be valid, an order for specific performance of the first respondent's obligations is appropriate.

[11] Since, on the side of the appellants, the issues in the appeal concern only the first and second appellants I shall, for convenience, refer to them collectively as 'the appellants'. The third appellant, although a party to the proceedings against the respondents by virtue of the fact that it had acted as the first and second appellants' agent in the negotiations that led to the conclusion of the agreement, was not cited as a party in the first respondent's application against the first and second appellants. I shall also refer to the first respondent as 'the respondent' and to the first and second respondents collectively as 'the respondents'.

[12] The respondent asserts in its founding affidavit that the agreement constitutes a lease and that it was therefore obliged to publish its resolution embodying its intention to lease the land described in it (the agreement) and to call for objections.

'A contract of lease is entered into when parties who have the requisite intention agree together that the one party, called the lessor, shall give the use and enjoyment of immovable property. . . to the other called a lessee, in return for the payment of rent.'[4]

In *Kessler v Krogmann*[5] Innes CJ said the following on the essentials of a lease:

'A reference to the authorities will show that the essentials of a contract of lease are that there must be an ascertained thing, and a fixed rent at which the lessee is to have the use and enjoyment of that thing.'[6]

In the present matter counsel for the appellants conceded that clause 5 of the agreement utilizes language typically associated with a lease – the clause identifies a specific piece of land to be leased (an ascertainable thing) at an annual nominal rental of R499 – but he submitted that the clause is only part of the agreement and not of itself determinative of its character. The import and essence of the agreement, so it was contended, was for a bridge to be constructed at the appellants' cost to serve as a

4 A J Kerr *The Law of Sale and Lease* 3 ed (2004) p245.
5 1908 TS 290.
6 At 297.

conduit for the safe conveyance of commuters between the taxi rank and the Oriental Plaza over the H V Drive. The substratum of the agreement, the argument continued, is identified in clause 5 where it is recorded that '[i]n the event of the taxi rank . . . being moved from the [Civic Precinct] and the demolition of the kiosks then the lease may be terminated by either [of

the parties]'. It was contended further that clause 7.1 is fundamental to the overall purpose of the agreement.[7]

[13] It is true, as the court a quo observed, that the agreement 'contains other provisions not normally part of a lease agreement' and that the appellants entered into the agreement with the objective of effecting the 'funnelling' of commuters from the taxi rank to the Oriental Plaza, while the respondents' objective was to obtain a pedestrian bridge over H V Drive which would eliminate the problem of a safety hazard caused by pedestrians crossing H V Drive at ground level. But to achieve their objectives, the appellants, on the one hand, had to construct the pedestrian bridge and extend the existing walls around the taxi rank so as to enclose it completely, while on the other hand the first respondent had to make available a piece of land on which one of the legs of the bridge was to rest.

[14] I agree with counsel for the respondents, however, that the objectives and motives of the parties are of secondary importance in characterising the agreement and that the primary indicator for such characterisation is the intention of the parties as expressed by them in creating the contractual rights and obligations contained in the agreement. As was said by this court a century ago, 'as a general rule, the parties to a contract express themselves in a language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant'.[8] The issue in that case was whether a certain transaction constituted a sale or a pledge. After referring to the old authorities and, with approval, to English authority, Innes JA said:

'We may take it, therefore, both on principle and on authority, that in considering whether the real nature of any particular contract is different from its ostensible form, we must endeavour from all the circumstances to get the actual meaning of the parties.'[9]

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7 Clause 7.1 reads: '[The appellants] undertake as soon as possible after signature of this agreement and the obtaining of all necessary approvals from all relevant authorities to attend to the passing of the plans for the design and construction of the pedestrian bridge' . . . over [H V Drive] close to the intersection with Jan Smuts Avenue as depicted on the Drawing, which Bridge will link the taxi rank with the Oriental Plaza Shopping Centre.'

8 *Zandberg v Van Zyl* 1910 AD 302 at 309.

9 At 310.

[15] It was not suggested on behalf of the appellants that there was any subterfuge about the transaction between them and the respondent. With regard to the circumstances relevant to the present matter, I have mentioned above that the appellants saw, from the many commuters who crossed H V Drive from the taxi rank into the CBD, an opportunity to bolster the trade conducted by their lessees in the Oriental Plaza by 'funnelling' the commuters from the taxi rank through an overhead pedestrian bridge to the Oriental Plaza. For the construction of the pedestrian bridge they required the use of a piece of land owned by the respondent. In the respondent's founding affidavit in its application the allegation is made that Urban Real Estate (Pty) Ltd (third appellant), acting on behalf of the appellants, 'submitted an application to JPC to lease a portion of [the Civic Precinct], belonging to [the first respondent]'. (My underlining.) The appellants admitted the allegation, but qualified their admission by adding that 'upon a proper construction of the agreement . . . it is not, in essence, a lease, but rather a composite agreement, of which the lease provisions forms an insignificant part.' It was accordingly submitted, on behalf of the appellants, that there had been no obligation on the respondent to comply with the provisions of s 79(18) of the Ordinance.

[16] Before us counsel sought support for this proposition from this court's decision in *Wed (Pty) Ltd v Pretoria City Council & others,*[10] a case in which the Pretoria City Council (the Council) had expropriated two adjacent buildings which it intended to redevelop. Eighteen years later it decided to approach interested persons and bodies to assist with the restoration of the buildings. The appellant, who occupied part of one of the buildings caused to be submitted, on its behalf, proposals to the Council for the restoration of the buildings. But the Council resolved to conclude a contract with the second respondent who had also submitted proposals. The appellant was dissatisfied with the decision and instituted motion proceedings against the Council and the second respondent for the review and setting aside of the former's decision on grounds of non-compliance with the provisions of s 35(1) of the Ordinance, which provides, inter alia, that 'before a council enters into any contract for the execution of any works . . . it shall give . . . notice of its intention to enter into such contract. . .' and call for tenders. No such notice had been given and no tenders were invited. In terms of the proposed

10 1988 (1) SA 746 (A).

agreement the second respondent would finance the cost of the restorations by means of a loan and would, in return, be granted (by the Council) a long-term lease of the buildings which it would then be entitled to sub-let. In considering whether the proposed agreement was one 'for the execution of any works for and on behalf of the Council' this court said:

'For the purposes of this case it may be assumed that the activities which the second respondent will perform in restoring the buildings will amount to the carrying out of "works" within the ordinary meaning of the word . . . These activities will, however, form only one facet of a composite contract which will also sanction the occupation of the buildings by the second respondent for at least 50 years and will contain the financial arrangements between the parties consisting in part of the payment of rent by the second respondent and in part of the sharing of profits. The contract as a whole is therefore clearly something more than a mere contract for the execution of works.'[11]

This court consequently held that the section 'is intended to apply only to contracts to which the procedures laid down in [it] are capable of being applied . . .' and that 'it must accordingly be limited to contracts for the execution of works in return for a money consideration'.

[17] I do not agree with the submission by the counsel for the appellant that the facts in the *Wed* case are similar to those of the present matter. It is true, as I have already stated, that in the instant case the agreement contains other provisions not normally part of a lease agreement. But unlike the *Wed* case where the Council was not going to spend any public funds on restoring the buildings – which, in my view, was the main ground upon which this court came to the conclusion that the agreement in that case was not struck by s 35(1) of the Ordinance – in the present matter the first respondent was required to make available (let) what may be referred to as public space to private entities mainly for the latter's own advantage.

[18] That the agreement contains a lease element is common cause. And again, I do not agree with counsel for the appellants that the lease provisions form an insignificant part of the agreement. In my view, they form an integral part of the agreement without which the parties' objectives could not have been realised. Indeed, as the

11 At 757G – I.

respondent's counsel correctly pointed out, without the lease element, in terms of which the respondent was obliged to permit the bridge to occupy the leased area of land on the Civic Precinct for a lengthy period the agreement would not make any sense. It cannot stand without the lease element.

[19] Apart from the fact that the appellants had applied to the first respondent to lease the piece of land concerned and apart from the contents of clause 5 of the agreement, which contains the *essentialia* of a lease – it identifies the thing to be leased and the annual rental to be paid in exchange – there are other indicators present, evidencing the substance of the parties' intention, viz to conclude a lease agreement and, in addition, to record other rights and obligations flowing from it. In terms of the agreement the appellants 'shall be entitled to cede, transfer or assign any of [their] rights under this lease . . .' (clause 15). (My underlining.) The agreement makes provision for 'advertisement costs' and a 'valuation fee' to be paid by the appellants (clause 5.3), a clear indication that the parties had the provisions of s 79(18) of the Ordinance in mind. And the parties themselves in fact treated the agreement as a lease. When the appellants were informed that the respondent had not complied with the provisions of s 79(18) they requested that the lease be advertised so as to overcome the problem. In correspondence that passed between the parties' legal representatives the agreement was constantly referred to as a lease.

[20] In my view, the appellants failed to discharge the onus resting upon them, of proving, on a balance of probabilities, that the agreement is something different from what it appears to be: a contract of lease,[12] or that the lease element of it is so insignificant that compliance with the provisions of s 79(18) of the Ordinance was not required or necessary.

[21] Section 79(18)(b) is intended to ensure that no immovable property of a local authority is alienated or disposed of without notice to its ratepayers and the affording to interested persons of the opportunity to object and have such objections duly considered. 'Alienation' and 'disposal' are concepts which are obviously to be liberally construed in the public interest. The agreement in question detracts from the Council's

12 See *Zandberg v Van Zyl* above, at 314.

ownership of 627 square meters of its immovable property by transferring rights in that property to the appellants for 20 years. Such rights may be registered as real rights. Thus, the agreement factually gives rise to the very situation that the subsection was designed to regulate. The fact that the alienation may appear to be insignificant in the scheme of the agreement is irrelevant: the only question is whether or not there is an alienation or disposal. Once there is, interested parties could not be deprived of the opportunity to object.

[22] The effect of non-compliance with the provisions of s 79(18)(b) and (c) of the Ordinance, ie failure by the respondent to cause a notice of its resolution embodying its intention to let the area of land described in the agreement to be affixed to its public notice board and to publish it (the resolution) in a newspaper calling for objections to the proposed lease before exercising the power to let, is that the jurisdictional fact necessary for the exercise of the power was absent. In terms of s 79(18)(c) a council 'shall not exercise the power [to let immovable property] . . . unless [it] has considered every objection'. (My underlining.) In the absence of the necessary jurisdictional fact the respondent could not validly exercise the power,[13] with the result that the lease element of the agreement was *ab initio* invalid.

[23] The appellants contend, in the alternative, that should it be found that the court below was correct in its conclusion that the agreement contained a lease, the court nevertheless failed to exercise its discretion in favour of condoning the invalidity. I shall assume, without deciding, that such a discretion exists.[14] It is not in dispute that the learned judge did not bring any discretion to bear on this question. And ordinarily this would be a sufficient ground for an appellate tribunal to interfere with an order of a court of first instance.[15]

[24] The appellants did not, however, raise this issue in their founding affidavit in their application and made only a passing reference in their replying affidavit to it being

13 See *Paola v Jeeva NO & others* 2004 (1) SA 396 (SCA) paras 14 -16; *Kimberley Junior School v Head, Northern Cape Education Department* 2010 (1) SA 217 (SCA) para 11. Compare also *Foundation Estate & Finance Co. (Pty) Ltd v Johannesburg City Council* 1978 (1) SA 92 (W).
14 For a contrary view, see DM Pretorius 'The Status and Force of Defective Administrative Decisions Pending Judicial Pronouncements' (2009) 126 *SALJ* 537.
15 *Davidson v Honey* 1953 (1) SA 300 (A) 309A.

‘unfair and inappropriate to now declare it [the contract] void’ because ‘too much water has

already passed under this bridge to reverse the transaction'. The issue appears to have been only faintly argued in the court a quo and was raised expressly for the first time in the appellants' amended notice of application for leave to appeal – obviously as an afterthought.

[25] It should be mentioned that the appellants' failure to raise the issue was not an oversight. Their case was that the parties had entered into a commercial contract and it was in the law of contract – not in public law or administrative law – that they sought their remedy. Thus, in their answering affidavit in the respondent's application they sought to establish that they were entitled to an order for specific performance, which is a contractual remedy. Having failed to deal with the issue pertinently in their affidavits they cannot now seek to elevate it as a ground on appeal.

[26] Furthermore, in his judgment dismissing the appellants application for leave to appeal, Marais J found that even if the contract was valid he would, in the exercise of his discretion, not have ordered specific performance because this would have the effect of frustrating the first respondent's redevelopment plans for Randburg's central business district, which would not be in the public interest. And he concluded, fittingly, that this consideration would have been decisive had he exercised his discretion in relation to the declaratory relief that was sought. I concur with this approach.

[27] The appeal is dismissed with costs, which shall include those of two counsel.

L Mpati
President

APPEARANCES

APPELLANTS: S Snyman SC with him S J Bekker
Instructed by Salant Attorneys, Johannesburg;
Matsepes Inc., Bloemfontein

RESPONDENT: S J Du Plessis SC with him L B van Wyk SC
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