

REPUBLIC OF SOUTH AFRICA



**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

CASE NO: 09/20062

DATE:09/09/2011

REPORTABLE

In the matter between

COSIRA DEVELOPMENTS (PTY) LTD

APPLICANT

and

**SAM LUBBE INVESTMENTS CC
T/A LUBBE CONSTRUCTION**

1ST RESPONDENT

SAMUEL MANDLA LUBBE

2ND RESPONDENT

**THE EKURHULENI METROPOLITAN
MUNICIPALITY**

3RD RESPONDENT

Contract – specific performance – successive sales of immovable properties – tripartite agreement not concluded - privity of contract between second purchaser and seller – second purchaser (applicant) lacks locus standi to claim for specific performance against seller.

Specific performance – nature of – court’s discretion in ordering – factors affecting – public policy - in circumstances of this matter order for specific performance not appropriate.

J U D G M E N T

VAN OOSTEN J:

[1] This application concerns specific performance, sought by the applicant, of alleged contractual obligations embodied in two agreements of the sale of immovable properties.

[2] A brief summary of the events that led to the conclusion of the agreements relied upon by the applicant, is the following. The third respondent, a local authority (the council), is the owner of three vacant stands in Bedfordview, described as erven 1798 and 1799 Bedfordview Extension 361, and erf 798 of the farm Elandsfontein 90. The three erven (the properties) are adjacent to each other and border the N3 motorway on its eastern boundary.

[3] During 2002 the council invited tenders to purchase and develop the properties. The tender process was conducted in accordance with s 79(18) of the Local Government Ordinance 17 of 1939 (Gauteng) (the LGO) and the council's alienation policy. Although scarce information concerning the council's has been revealed in the papers before me, it can safely be accepted, as I was informed in argument, that the policy promotes the black economic empowerment requirements, as legislated by the national government. I will return to this aspect in due course.

[4] The tender submitted by an entity described as "Lubbe Building Contractors CC" was accepted by the council, and this was conveyed to the successful tenderer in a letter, dated 20 October 2003. The relevant part of the letter, reads as follows:

Please be informed that the 26th Corporate Affairs Committee resolved as follows:

1. That in terms of the provisions of s 79 (18) of the Local Government Ordinance 17 of 1939 as amended and the Councils' Alienation Policy, the tender received from Messrs Lubbe Building and Contractors CC to purchase and develop [the properties] for a total amount of R1 050 000,00 VAT exclusive) BE ACCEPTED subject to the following conditions...

I pause to mention that the identity and correct description of the tenderer and eventual purchaser pursuant thereto, were hotly disputed in the papers before me. In the view I take of this matter it is unnecessary to determine this issue. Suffice to say that I will assume in favour of the applicant (without deciding)

that that identity should be ascribed to the first and/or the second respondent and I shall, for ease of reference, collectively refer to them as “Lubbe”.

[5] In June 2005 Lubbe having been awarded the tender, as purchaser and the council, as seller, concluded two agreements of sale, the one in respect of the erven 1798 and 1799 and the other, on identical terms, in respect of erf 798, for a total purchase consideration of R1 050m (the June 2005 agreements). These agreements apparently superseded a prior agreement which had made provision for the composite sale of all three erven which, according to the conveyancing attorneys, had to be re-drafted to provide for two separate agreements as the erven resorted under different registration authorities. Of relevance at this stage is that both the June 2005 agreements provide for an obligation on the purchaser to commence with the development of the properties within six months from the date of transfer of the properties and to complete such development within eighteen months thereafter.

[6] The applicant and Lubbe had since 2004 been involved in negotiations for the sale of the properties by Lubbe to the applicant, which culminated in the conclusion of an agreement of sale, on 10 November 2004. This agreement, the applicant states, was superseded by two separate subsequent agreements which were both concluded in August 2005 (the August 2005 agreements). Those agreements, as were the earlier June 2005 agreements, were drafted by the attorneys instructed by the council to attend to the registration of transfer of the properties pursuant to the June 2005 agreements. The August 2005 agreements are except for the names of the purchaser identical to the June 2005 agreements and seem to have been produced by a process of simply *copying and pasting*. In terms of the August 2005 agreements Lubbe sold the properties to the applicant for a total purchase price of R1 050m. These are the agreements relied upon by the applicant for purposes of this application. An interesting revelation concerning the purchase price agreed upon in the August 2005 agreements emerged as late as in the applicant’s replying affidavit, which is that Lubbe, in terms of an oral “undertaking” by the applicant, stood to gain an additional payment in the sum of R303 000 which the applicant states was regarded as either “commission” or “a finder’s fee”. This, it is hardly surprising, provided fertile

earth for a number of legal contentions, which in the view I take of this matter, are unnecessary for me to consider any further.

[7] The applicant over an extended period of time unsuccessfully attempted to obtain implementation of the August 2005 agreements. Neither was there implementation of the June 2005 agreements: the properties are still registered in the name of the council and no development has taken place.

[8] This brings me to the present application. The applicant having meticulously set out the history of “many years of unfulfilled promises and undertakings” by both Lubbe and the conveyancing attorneys acting for the council to affect transfer of the properties in its name, now, in an amended notice of motion, seeks relief, firstly, for a declarator that Lubbe is bound by and in terms of the August 2005 agreements, secondly, directing Lubbe to take transfer of the properties from the council and, thirdly, directing Lubbe and the council “to do all things necessary” to “give effect” to the August 2005 agreements. In the alternative the applicant seeks an order directing Lubbe and the council “to do all things necessary” and “sign all necessary documentation” in order to cause registration of the properties to be effected into the applicant’s name. Although the nature and form of the relief sought call for comment, it is not necessary in the view I take of the matter, to do so, and I will consequently determine the issues before me on the plain basis of an application for specific performance which is in accordance with the premise on which the arguments before me were presented.

[9] The application eventually expanded into a formidable bundle extending into almost 500 pages. Substantially contributing to the paper trail was the council’s belated filing of an answering affidavit after it had initially decided to abide the decision of this court. The council’s answering affidavit was filed eleven months after the launching of this application, in April 2011, and was accompanied by an application for condonation for the late filing thereof. By then the applicant had already filed its replying affidavit in the main application. The applicant opposed the council’s condonation application and in any event proceeded to file a replying affidavit to the council’s answering affidavit. The day before the hearing of this application the applicant filed a

substantive application in which it seeks an order referring the main application for trial. That application is similarly opposed.

[10] At the commencement of the hearing before me three interlocutory applications were pending: firstly, by the applicant for a further amendment to the notice of motion, secondly, by the council for condonation for the late filing of its answering affidavit and, thirdly, by first and second respondents for striking out certain portions in the applicant's replying affidavit. The first and second interlocutory applications were conceded and I ruled that the third interlocutory application as well as the application for a referral to trial be argued as part of the argument on the main application.

[11] A myriad of factual disputes and legal conundrums arise from the facts of this matter. The factual disputes, which undoubtedly exist, lie at the heart of the application for the referral of this application for trial. A number of legal issues however, arise from the undisputed facts of this matter. In the view I take of the matter it will not be necessary to consider the application for a referral for trial as at least one of those is capable of determination without having recourse to evidence. It concerns the question whether the applicant has the necessary *locus standi* to claim the relief it seeks. As will become apparent later in the judgment the outcome of this issue is decisive of the matter and these are my reasons.

[12] The general rule that a person who claims relief from a court must establish an interest in that matter in order to acquire the necessary *locus standi* to seek relief is well-established. The interest, Rabie ACJ pointed out in *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) at 388A-I, with reference to earlier judgments of the then Appeal Court, must be direct and not therefore not too remote or as it has also been referred to, an actual and existing interest in the matter.

[13] Applied to the facts of this matter the question arising is whether the August 2005 agreements for the purchase of the subject matter of the June 2005 agreements, gives the applicant, as the successive purchaser, a sufficient legal interest or *locus standi* to enforce such agreement as against the original seller. I have not been referred to nor have I been able to find any

direct authority on the question of *locus standi* in successive sales agreements. Some useful guidance may be derived from reviewing the nature of contractual relationships giving rise to a direct interest or *locus standi* in situations akin to successive sales. In contracts for the benefit of a third person (*stipulatio alterii*) it is only the acceptance of the offer by the third person that will bring the new contact between the offeror and third person into being (AJ Kerr *The Principles of the Law of Contract* 6th Ed p 88). The legal consequences of a cession are well-known: a non-party to a contract becomes a party to the rights thereto by way of cession. Negotiable instruments afford a further example: it is only by negotiation of the instrument that a third party acquires rights thereto. Likewise, it has been held that a purchaser of immovable property has no *locus standi* in the registered owner's application for the rezoning of the property: the interest of the purchaser is commercial or financial and not legal (See *Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape and Others* 2000 (4) SA 681 (C) 691J). And a landlord may, in evicting a tenant, evict his tenant's subtenant without joining that sub-tenant in the proceedings as the sub-tenant has no legal interest in and is not a privy to the contract between the landlord and the tenant (See *Ntai and Others v Vereeniging Town Council and Another* 1953 (4) SA 579 (A)). It is a well-entrenched principle, where there have been successive sales, that the implied warranty against eviction in each sale is actionable only as between immediate parties to each of the successive sales: the warranty binds a seller to the purchaser to whom he has sold and to no one else (See *Louis Botha Motors v James & Slabbert Motors (Pty) Ltd* 1983 (3) SA 793 (A) 800G-801B). Finally, the nature of a "direct and substantial interest" also arises in the context of joinder: see *Aquatour (Pty) Ltd v Sacks & Others* 1989 (1) SA 56 (A) at 62A-F).

[14] Against this background I turn now to the agreements we are concerned with in this matter: it must be pointed out that the June 2005 agreements and the August 2005 agreements are entirely distinct agreements providing, in effect, for two separate transactions. The relationship between parties in all respects is governed by the agreements and is therefore contractual. No contractual relationship exists between the applicant and council. A practical

and often used way of linking the transactions would have been by way of a tripartite agreement, which would have created a contractual relationship between the original seller (the council) and the successive purchaser (the applicant). In the present matter, although the possibility of the conclusion of a tripartite agreement did arise, nothing further happened. The applicant states that a tripartite agreement was considered prior to the conclusion of the August 2005 agreements but discarded as it would have necessitated “a complicated lengthy internal procedure...if the applicant was to be made a party to the agreements already entered into (*ie* the June 2005 agreements)”. It follows that in the absence of privity of contract between the applicant and the council I am driven to conclude that the applicant does not have the necessary *locus standi* to bring the present application against the council (see *Wessels’ Law of Contract in South Africa* 2nd Ed para 4610) and that the application for this reason alone, must fail.

[15] I wish, in conclusion, to deal briefly with the further reasons for holding against the applicant. The grant or refusal of specific performance, it is well-settled, is entirely a matter for the discretion of the court (*Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 781H). On the assumption that the applicant would have been entitled to specific performance, I in the exercise of my discretion would not have ordered specific performance it because it would have frustrated the council’s black empowerment policy as well as its plans for future development of the property, and thus offended public policy. The council in awarding the tender to, and in consequence contracting with Lubbe, exercised a *delectus personae* (See *Fick v Woolcott and Ohlsson’s Cape Breweries Ltd* 1911 AD 214 230), which prevented a sale by Lubbe to the applicant without a council resolution and, in any event I should add, without compliance with the appropriate procedures, now regulated by the Municipal Finance Management Act, 2003. Finally, there is this additional consideration: an order for specific performance would have resulted in this court sanctioning a transaction which in the absence of compliance with the provisions of s 79(18) of the LGO, is invalid, as was recently held by the SCA in *Ferndale Crossroads Share Block (Pty) Ltd and*

Others v Johannesburg Metropolitan Municipality and Others 2011 (1) SA 24 (SCA) [21] and [22].

[16] It remains to deal with the costs of this application. The applicant, as the unsuccessful party, must bear the costs of the application. Much was made by counsel for the applicant of the council's change in stance and its belated entry into the fray. The contention is not without merit as it resulted in an extended paper trail including, as I have alluded to, an application for condonation. It however, did not have any bearing on the hearing of the matter. In the exercise of my discretion I have decided, in fairness to the applicant, that some allowance in respect of the extra costs resulting from the council's belated entry into the proceedings, should be made. The most practical and just manner of achieving this, in my view, is to limit the applicant's liability for the council's costs to the costs incurred in respect of the hearing of this matter, as is reflected in the order I propose to make. As for the rest, the parties are in agreement that the employment of two counsel was justified.

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

1. The application is dismissed.
2. The applicant is ordered to pay:
 1. the first and second respondents' costs of the application, including the costs of two counsel.
 2. the third respondent's costs of the application, such costs:
 - 2.1. to be limited to the hearing of the matter, and
 - 2.2. to include the costs of two counsel.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

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**THIRD RESPONDENT'S
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NOZUKO NXUSANI INC

**DATE OF HEARING
DATE OF JUDGMENT**

**11 AUGUST 2011
9 SEPTEMBER 2011**