

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, PORT ELIZABETH)

CASE NO: 2864/12

IN THE MATTER BETWEEN:

SUNDAYS RIVER VALLEY MUNICIPALITY

APPLICANT

AND

CINZACO 180 (PTY) LTD

RESPONDENT

Coram: Lowe J

Date Heard: 21 February 2013

Date Delivered: 14 March 2013

JUDGMENT

LOWE, J:

INTRODUCTION:

[1] Applicant in this matter on application, sought that the agreement concluded between the parties which is referred to as the “Addo Land Availability Agreement” in respect of Erf 943 Addo Township on 25 February 2008 be declared void *ab initio*. Respondent brought an application to strike

out the entire founding affidavit of Mr Ngoqo, the supporting affidavit of Mr Somngesi and the entire replying affidavit of Ngoqo

[2] The application was opposed by respondent which filed answering papers, both parties seeking costs on the scale as between attorney and own client. Counsel argued that the striking out application should be dealt with as part of the main application the basis thereof being the allegation that the affidavits were entirely inadmissible hearsay.

[3] Both counsel in the matter filed quite extensive heads of argument, persisting in some but not all of the issues raised on the papers.

[4] Counsel for respondent Mr **Pretorius** quite correctly, did not persist in the suggestion that was made in the answering affidavits that applicant should be estopped from seeking the relief sought.

THE APPROACH TO DISPUTES OF FACT ON APPLICATION:

[5] Having regard to the nature of this application, the allegations and counter allegations made it is relevant to refer to the principles applicable not only to answering affidavits, but to the resolution (if appropriate) of factual disputes that might arise on the papers between the parties.

[6] In answering affidavits a respondent is required to set out which of the applicant's allegations he admits and which he denies and to set out his

version of the relevant facts. Of course the applicant's allegations of fact is not a pleading, and a statement of lack of knowledge, coupled with a challenge to the applicant to prove part of his case does not, amount to a denial of the averments of the applicant. See **Gemeenskapontwikkelingsraad v Williams (2)** 1977 (3) SA 955 (W); **Traut v Fiorine** [2007] 4 All SA 1317 (C) at para [35].

[7] It is normally not sufficient for a respondent to rely on a bare or unsubstantiated denial but the respondent may, of course, attack the credibility of the applicant's allegations by examining their inherent validity or probity in all the proved circumstances and without advancing further evidence. See **Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1163 and 1165; **Engar v Omar Salem Essa Trust** 1970 (1) SA 77 (N); **Kelleher v Minister of Defence** 1983 (1) SA 71 (E).

[8] In this matter and on numerous issues, respondent, whilst putting up a version in paragraph 12 of its answering affidavit, nevertheless states that it has no knowledge of the contents of paragraphs 10 to 13 of the applicant's founding affidavit putting applicant to the proof thereof. It takes the same approach in respect of applicant's paragraph 15, and pleads no knowledge of the meetings of applicant's council that took place or of the resolution LMRN1.

[9] As will be seen hereafter, this has the effect that respondent may well not be held to have properly put in issue the crucial allegations in this regard,

save that it is still open for me to consider respondent's counsel's argument that these allegations constituted hearsay material by applicant and should not be admitted or that no regard could be had thereto.

[10] In order to adjudicate this issue it is necessary to analyse the contents of the affidavits in the light of the rules which I refer to hereafter. Motion proceedings, unless relevant to interim relief, are about the resolution of legal issues based on common cause facts. They are not appropriate generally to the resolution of factual disputes as they are not designed to determine probabilities, unless the circumstances are special.

[11] A real dispute of fact may arise of course where the respondent denies one or more of the material allegations made by the applicant and produces evidence to the contrary or applies for the leading of oral evidence (no such application for the leading of oral evidence having been made by either party in this matter).

[12] Of course a real dispute of fact does not usually arise where the respondent:

[12.1] States that he can lead no evidence himself or by others to dispute the truth of the applicant's statements but puts applicant to the proof; or

[12.2] Relies on a bare denial of allegations contained in the applicant's affidavits. See **Saflec Security Systems (Pty) Ltd v Group Five Building (East Cape)(Pty) Ltd** 1990 (4) SA 626 (E); **Ripoll-Dausa v Middleton NO** [2005] 2 All SA 83 (C).

[13] The **Plascon-Evans** rule (**Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634), relevant to disputes of fact provides that if disputes of fact arise on the affidavits and neither party asks that the matter be referred for evidence or trial, the court will not do so, and is entitled to deal with the application on the undisputed facts. If notwithstanding that there are facts in dispute on the papers the court is satisfied that the applicant is entitled to relief, in view of the facts stated by the respondent together with the facts in the applicant's affidavits which are admitted or have not been denied by respondent, it will make an order giving effect to such finding. See **National Director of Public Prosecutions v Zuma (Mbeki and Another Intervening)** 2009 (2) SA 277 (SCA) at para [26]. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact or is so farfetched that a court may simply reject same on the papers. In motion proceedings the question of onus does not arise. The more serious the allegations or its consequence the stronger must be the evidence before the allegation will be found to have been established. (Zuma supra: [26] and following.)

[14] I should explain clearly in adding to what I have set out above, that there may be instances where a bare denial meets the requirements of

placing an applicant's allegation seriously in dispute in circumstances where there is no other way open to the disputing party and nothing more can therefore be expected of him. Even in this situation, however, this may not be sufficient even if the facts alleged lie within the knowledge of the averring party where no basis is laid for disputing the veracity of the averment or its accuracy. It must be remembered that:

"This rule of evidence, namely that if the facts are peculiarly within the knowledge of a defendant the plaintiff needs less evidence to establish a prima facie case, applies to trials. In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph governs irrespective of where legal or evidential onus lies."

(Zuma : supra Para (26) and following.)

[15] In arriving at this decision, the court must and I will have regard to the broader matrix of circumstances all of which need to be borne in mind when arriving at a decision.

THE FACTS AND ISSUES:

[16] The following facts are, on a proper reading of the affidavits filed by the various parties, common cause:

[16.1] That the deponent Ngoqo is the municipal manager of the applicant municipality having been appointed as such on 6 April 2012 long after the events relevant hereto unfolded;

[16.2] The appellant and the respondent concluded an agreement for the sale and transfer of Erf 943 in Addo Township ("the Erf") falling within applicant's jurisdiction signed and dated on 25 February 2008 (LMRN4 to the papers);

[16.3] This agreement was signed for and on behalf of applicant by the then municipal manager N K Singanto ("Singanto") and by Fanie de Lange for respondent;

[16.4] The agreement post-dated an advertisement placed by applicant in the EP Herald on the 28 January 2008 calling for proposals for the development of a piece of land in "Addo town" (failing to identify which piece of land) but with reference SCH/adt-2-2008 (signed by Singanto) by no later than 14 February 2008;

[16.5] On 18 February 2008 (a mere four days after the tenders closure date) Singanto addressed a letter to respondent informing respondent that the tender (which the letter indicates had being submitted) had being considered by the Bid Adjudication Committee which had resolved that the tender SCN–adt-2-2008 had being awarded to respondent, subject to

the submission of a detailed business plan and the signing of a memorandum of undertaking and the signing of a land availability agreement (calling for acceptance within seven working days);

[16.6] Respondent accepted this on 19 February 2008;

[16.7] The municipality appointed attorneys Canter and Company to attend to the transfer of the property (Erf 943) in terms of the agreement;

[16.8] Those attorneys addressed a number of letters to the municipality, the first on the 27 May 2008 *inter alia* asking for confirmation that in terms of paragraph 15.2 of the written agreement a deposit of 10 % of the purchase price had been paid by respondent to applicant (to which it seems there was no response); and a further letter on 27 November 2008 referring to other matters relevant to the transfer;

[16.9] Finally on the 14 November 2011 there is a further letter from Cantor and Co to applicant referring to the instruction from applicant to effect transfer to respondent and calling *inter alia* for confirmation of the payment of the R60 000-00 deposit referred to in the first letter;

[16.10] Analysis of the agreement establishes this was indeed in respect of the Erf alleged (although incorrectly described as 934 whereas it should have being 943), the purchase price therefore being R600 000-00 of which R60 000-00 was payable within seven days of signature;

[16.11] A further letter was addressed by Canter and Co to applicant on 1 February 2012 stating that respondent maintained that it had paid the deposit of R60 000-00 on 3 March 2008;

[16.12] The current municipal manager then, when transfer was demanded, (after he came into office) made enquiries relevant to the background of the matter and says that he sought relevant documents making enquiries with the officials of the applicant particularly relevant to:

[16.12.1] a resolution of the applicant's counsel referred to in the letter awarding the tender (LMRN2);

[16.12.2] a copy of the proceedings of the Bid Evaluation Committee of the applicant dealing with the tender;

[16.12.3] a copy of the valuation which would have being required in respect of Erf 943 (para 10).

[17] In this regard respondent claims no knowledge hereof in its answer, but in argument contended that this was essentially a precursor to mere hearsay evidence of what was discovered and not that personally known to the deponent.

[18] Ngoqo then states that he did not “get these documents” following this with the statement that he was “... advised that they did not exist” (para 11).

[19] He says that “I also did not find any resolution relating to the Erf in the resolutions of the Applicant’s council” (para11). In answer to all the above respondent says that it has no knowledge hereof puts applicant to the proof but is not able to contest the allegations made.

[20] Ngoqo continues to say that he sought a copy of the applicant’s procurement policy procedures as well as its supply chain management policy. He was told that both these documents were non-existent (para12). Again respondent says that it has no knowledge hereof.

[21] Suspecting now that there had not been proper process, as would have being required, Ngoqo refers to the Municipal Finance Management Act and states that Erf 943 was a non-exempt capital asset, in which respect in terms of the Regulations and section 14 (2), Applicant would have first to determine in a public meeting whether the asset was required for the provision of minimum level of basic municipal services with its fair market value being disclosed. He states that “I could not find, nor could anyone produce a copy

of a record of the council of the applicant in which prescripts of s 14, s 111 and the Regulations of the MFMA were considered (sic para 13.4).” Again respondent states that it has no knowledge hereof.

[22] The deponent continues to say “I also did not find any record of public participation that has to be undertaken in respect of a considered lease or a disposal of a municipal asset as prescribed in regulation 528 of the Regulations MFMA” (sic) (para 13.5). Again respondent states that it has knowledge hereof putting Applicant to the proof.

[23] Importantly, at paragraph 14 of the founding affidavit Ngoqo states that the only document that relates to a public invitation relevant to the sale of Erf 943 in question is the tender advertisement referred to above (LMRM9).

[24] Respondent admits this fundamental allegation which then becomes common cause. Put otherwise, the respondent in the application admits that there was no other document relating to public invitation dealing with the sale of Erf 943 other than the tender advertisement. It is immediately apparent that if this advertisement fell short of the statutory requirements applicable to the sale of immovable property by a municipality, this would afford applicant with the necessary foundation for declaring those proceedings a nullity having regard to what follows.

[25] Ngoqo continues to say the following at paragraph 15 of the affidavit: “I also satisfied myself that there had not been any Tender Committee or Bid

Adjudication Committee that sat and considered the tender in respect of which the agreement leading to the sale of Erf 943 was entered into.” Although conceding the letter from Singanto accepting the tender, he states that there is in fact still no record of any such tender in the municipal offices. Again in this regard, the respondent states that it has no knowledge hereof placing reliance on the principles of estoppel.

[26] In support hereof applicant refers to the affidavit of Somngesi who was in the employ of applicant at the time of the transaction in question holding the portfolio of Director Corporate Services and acting thereafter from 1 April 2008 to 30 June 2008 as acting municipal manager of applicant.

[27] He confirms that Ngoqo requested “... the necessary documents and resolutions from me and I assisted in investigating the matter” (para 3.3) and further “I confirm further that there are no documents showing that the statutory procedure prescribed for a transaction of this nature was followed” (para 3.4). As I have said the Somngesi affidavit is referred to in applicant’s paragraph 15 to which respondent states that it has no knowledge putting applicant to the proof thereof. Respondent further does not deal specifically with the Somngesi affidavit or join issue therewith directly at all other than to the extent that I have referred above.

[28] In essence the approach taken by respondent is the following:

[28.1] It admits the general background to the conclusion of the agreement referred to above and evidenced by the letters attached in support thereof and claims that it paid the deposit of R60 000-00 to applicant on 3 March 2008 attaching as “proof of payment” a cheque in the sum of R60 000-00 drawn by “O de Lange” which is made out in favour of applicant but which bears no bank stamp. It further attaches a Standard Bank statement of O de Lange showing that this particular cheque number 1047 was debited to the account in the sum of R60 000-00 in 5 March 2008 there being funds in the account against which this cheque could be met.

[28.2] The respondent continues to state, as I have said, that it has no knowledge whatsoever of the documentation in the applicant’s possession, or rather the lack thereof, the fact that there appeared to be no resolution of applicant’s council relevant, no proceedings of the bid evaluation committee or valuation of Erf 943, let alone any record showing compliance with the requirements of the MFMA and its regulations or anything relating to public participation, (and admitting that there was no document relating to a public invitation applicable to the sale of the property other than the tender advertisement). This enables it (so it is argued) to rely on estoppel. It states that it obtained the necessary documentation from the municipal offices completed and submitted the tender, accepted the conditions,

filed its business plan, paid valuers an amount of R20 000-00 to provide a valuation of the property (when this was done is not clear), signed the written agreement and paid the purchase price deposit timeously. It says that it acted *bona fide* and paid the transfer fees to applicant's attorneys but that applicant acting negligently or intentionally caused respondent to act to its prejudice and misrepresented to respondent that the applicant had complied with all the legislative requirements to sell the property, causing respondent prejudice when concluding the agreement. Finally at paragraph 12.16 of its affidavit it says applicant is accordingly estopped from relying on its own failure.

[26] In dealing with this difficult matter respondent's counsel quiet correctly did not pursue the estoppel argument. This is so in as much as it is trite that a court will not allow a respondent to succeed on the basis of estoppel in respect of a matter in which to do so would sanction an illegality, in circumstances where there was non-compliance with the necessary statutory formalities without which the conclusion of the agreement would have being illegal. Indeed he conceded in effect that if I find against his argument on hearsay and restitution the respondent may well be in difficulty.

[27] It was rather applicant's counsel's argument that although the affidavits purported to set out that applicant had no knowledge of compliance and could not find the documents (and concluded therefore they did not exist), and although respondent could not contest this (directly) it was significant that no

records were annexed of the minutes of the meetings adverted to and particularly in any event that, so it was contended, Ngoqo's allegations were entirely hearsay. This was especially so, so it was argued, having regard to the fact that the minutes of the Bid Adjudication Committee meeting and the Council meetings were not annexed which would have enabled a analysis by respondent itself of whether or not these matters have been dealt with or not. Of course I should immediately point out that Applicant could in all probability have secured these documents to peruse and comment on had it sought on application that the discovery process be made applicable to this application in terms of Rule 35 (13). It did not do so.

[28] He argued further that there was more than adequate evidence of payment to the municipality and that the applicant's response hereto, that it could not trace the payment, was wholly inadequate.

[29] The conclusion he submitted to be drawn from this was that there was thus no tender of repayment this being, so it was argued, a matter of restitution and that applicant was therefore not entitled to an order declaring the written contract void in the absence of same, referring to **Hall-Thermotank in Natal (Pty) Ltd v Hardman** 1968 (4) SA 818 (T) at 832.

THE HEARSAY ARGUMENT:

[30] Dealing firstly with the allegations that the main facts upon which applicant relies amounted to hearsay the following appears.

[31] It would already be apparent from what I have summarised above, that the main deponent Ngoqo, in my view, sufficiently qualifies his affidavit to establish that in the main this is not hearsay there is certainly no basis laid for striking out of the entire affidavit nor could this be the case in respect of the Somngesi affidavit.

[32] Ngoqo says (paragraph 10) that he made enquiries with the officials of the applicant and sought the relevant documents referred to in that paragraph. He says that “I did not get these documents” having being advised that they did not exist. Whilst this would seem to indicate in this regard that it was his officials that sought and did not find the documents, he continues to say “I also did not find any resolution relating to the Erf in the resolutions of the applicant’s council”. This is a statement of direct knowledge although he does not depose to or give the details of his search in this regard.

[33] He says in paragraph 12 that he sought a copy of the applicant’s Procurement Policy in Supply Chain Management Policy, following this with a statement that he was told that both these documents did not exist. Again this would seem to indicate that he is relying in this instance upon what he was told.

[34] However, and of considerable importance is that having then set out what he considered were the relevant statutory requirements arising from various statutes and regulations, he says that he could not find any record of the Council showing compliance therewith (paragraph 13.4 and paragraph

13.5) he says “I also did not find any record of public participation that has to be undertaken ...”.

[35] The Somngesi supporting affidavit is in any event first hand support herefor from a senior official who says he assisted in investigating the matter – which averment is not properly contested in answer.

[36] Even if I am incorrect in the above regard it is in fact unnecessary to decide whether there is sufficient assertion of personal knowledge to establish the necessary in this regard, even in the light of respondent's inability to deny same.

[37] I say this, as at much as paragraph 14 Ngoqo states clearly that the only document that relates to public invitation relevant of the sale of the property in question is the tender advertisement – this admitted unequivocally by respondent.

[38] That being so, applicant contended that having regard to the requirements of section 14(2) of the MFMA read with its regulations, (regulation 3) there must be a public meeting to determine issues relevant to the sale of such a municipal asset with disclosure of its fair market value, and further having regard to section 124(2) of the Municipal Ordinance 20 of 1974 it is necessary to advertise the intention to sell property and to consider objections if any lodged, it has to be accepted as common cause that this

simply did not occur. The advertisement such as it was is certainly not compliance herewith if in fact this is required.

THE STATUTORY FRAMEWORK:

[39] Before the new Local Government dispensation when local authorities were creatures of statute the power to dispose of property, particularly immovable property, was specifically granted to such authorities in terms of the various Municipal Ordinances. In the late 1980's permission was usually no longer required by the municipalities from the Province as they held delegated power to dispose of immovable property subject to a process of public participation and calling for tenders.

[40] With the establishment of Local Government as a sphere of government in terms of the Constitution the important thing became the functional areas in terms of which municipalities could exercise their constitutionally –protected original powers.

[41] Just as Provincial Governments may do so, a municipality is able to take the necessary measures in its functional areas to achieve its objects. (Constitution 2156 (5)). This precludes the right to dispose of immovable property.

[42] The MFMA which commenced on 1 July 2004 deals inter alia with the disposal by a municipality of capital assets.

[43] On the coming into operation of the MFMA, there seem to be a widely held view that municipalities continued to be bound to the original Provincial Ordinances.

[44] This suggestion was put to rest in **CDA Boedery (Edms) Bpk and Others v The Nelson Mandela Metropolitan Municipality and Others 2007 (4) SA 276 (SCA)**, where the court made it clear that all legislation was implicitly repealed if it conflicted with local governments new constitutional status.

[45] In respect of capital assets the MFMA simply provides that a municipality may not alienate an asset if it is needed “to provide the minimum level of basic municipal services”. (S 14 (1)). Although the power to transfer property is subject to a specific regulatory framework the basis of MFMA and that framework is that the power to dispose of an asset is an aspect of state power exercised by Municipality.

[46] Importantly the power to alienate a municipal asset is subject to the MFMA and its regulations.

[47] The first principle introduced by the MFMA is that assets necessary for the provision of minimum level of basic municipal services may not be transferred by municipality. (Section 14 (1)).

[48] The second principle is that a municipality should get market value when it disposes of an asset. (Section 14 (2)).

[49] Section 14 (5) of the MFMA provides that “(a)ny transfer of ownership of a capital asset” must be “fair, equitable, transparent, competitive and consistent with the [municipalities] supply chain management policy”.

[50] The alienation of an asset must thus be in terms of the municipalities supply chain management policy which must statutorily contain a section on disposal management.

[51] This being so, it was held that **Lephondo v Dilhlabang Local Municipality (unreported case no 7493/2008 FSHC at para 19)** that the transfer of ownership of a capital asset that takes place without compliance with the provision of section 14 isn't valid. See also **Biong Africa Free State (Ems) Bpk v Freedom Front Plus [2011] JOL 27944 (FSB) at para 8.**

[52] It must follow that failure to comply with any subsidiary legislation relevant to procedural requirements, would also render the transaction invalid.

[53] The detailed framework in which the MFMA disposal of asset provision operate include the Asset Transfer Regulations and the Supply Chain Management Regulations (GN R 868 of 30 May 2005).

[54] These regulations entrench the valuation principle to ensure that the interests of the municipality are not prejudice by its disposal. (Regulation 3(a) Asset Transfer Regulations).

[55] The regulatory framework guides the disposal and transfer of Assets including immovable property.

[56] There is no doubt in my view that Erf 943 is an “Asset” as defined in the regulations which makes it clear that this includes immovable property.

[57] Once a municipal council has given its approval in principle to the sale of an Asset, it steps out of the picture and the municipal manager must act in terms of the municipalities disposal management system. (Regulation 12(4) Asset Transfer Regulation.) That policy must comply with regulation 40 of the Municipal Supply Chain Management Regulations. This is irrespective of the value of the asset to ensure that the asset is sold at market related prices, unless the public interest or the plight of the poor demands otherwise. (Regulation 40(2)(b)(i).) In applying the disposal management system the municipality must consider the gain or loss that will result from the transfer and record this in the accounting records of the municipality. (Regulation 12(5) Asset Transfer Regulations.)

[58] It is disturbing to say the least that it appears from the founding affidavit in this matter that at the time of this transaction in 2008, there was in all probability no Supply Chain Management Policy at applicant municipality.

[59] It was and remains every municipality's obligation to have and implement an SCM policy that gives effect to the MFMA's requirements relating to Supply Chain Management (section 111 MFMA).

[60] That policy must comply with the prescribed regulatory framework (section 112(1) and the lengthy list of matters specified in section 112 of the MFMA. The SCM regulations apply to municipalities and the policy is a public document to which parties wishing to participate in tendering process have a right to access, this including respondent in this matter. (**Nelson Mandela Bay Municipality v Afrisec Strategic Solutions Limited 2008 JDR 1014 (SC) para 29-30.**)

THE RESULT:

[61] Whatever the position in this regard, it appears that:

[61.1] There was a poor and inadequate attempt at advertisement relevant to "proposals for the development of a piece of land in the Addo town", without any reference even to the Erf number or the fact that the property would be sold, and no other public advertisement;

[61.2] There were no municipal council resolution relevant;

[61.3] There was no Bid Adjudication Committee resolution relevant;

[61.4] Apparently there was no Supply Chain Management Policy in place let alone a disposal policy;

[61.5] Effectively there was no public notification or participation invited in the process which in any satisfactory manner referred to this Erf in question;

[61.6] Save for the valuation apparently obtained by respondent, there was no municipal valuation of the property concerned.

[62] It must follow from the above, and even having regard to the limited information contained in the founding and replying affidavit, that there simply was a gross failure to comply with the statutory and regulatory requirements for the disposal of the immovable property by a municipal entity.

[63] That being so, and having regard to section 172 (1) (a) of the Constitution, I “must” issue a declaration of invalidity the transaction being inconsistent not only with the Constitution but also with the MFMA and the statutorily regulatory framework as set out above.

[64] I am persuaded on the appropriate approach set out above to disputes of fact:

[64.1] That there is sufficient personal knowledge of the lack of the required process, documentation and resolutions applicable to

the sale of such an asset as set out by Ngoqo (as supported by Somngesi);

[64.2] There is also on the common cause facts non-compliance with the requirements of the MFMA (and its regulations) and the remaining statutory framework and regulations relevant to the sale of this property.

[65] That being so, and in the absence of the availability of an estoppel argument in the circumstances, it is clear that the process and procedure relevant to the sale of this property did not comply with the statutory requirements.

[66] In the circumstances, and unless there is merit in counsel for respondent's argument that in the absence of a tender of return of the deposit contract cannot be set aside, I would have no choice but to do so.

[67] This requires a consideration of whether, in any event, it was necessary for applicant to tender return of the R60 000-00 in as much as its attitude is that the receipt of this sum has not yet been traced notwithstanding enquiry. Ngoqo states that he asked the chief financial officer of applicant to trace payment of this amount and "... to date this money has not been traceable". Applicant puts respondent to proof of the payment, but fails in its main affidavit to even deal with whether or not payment was received, and

only in reply stating that it could not be traced but falls short of saying that this definitely was not received.

[68] This is significant, in as much as the annexing of the cheque, albeit not drawn by one of the directors of respondent, discloses that the payment cheque was made to the municipality within the seven day period during which it should be made, was reported to the attorneys as having been paid, and it was certainly debited against the relevant cheque account (although the cheque bears no bank stamp on the face of it), proof of which is annexed and cannot be disputed.

[69] I must conclude inevitably on the appropriate test, referred to above, that the deposit of R60 000-00 was paid on 3 March 2008 to the applicant and debited against the drawer's account on 5 March 2008 within the period during which this should have been done.

[70] The attorney's letter to applicant at that time asking for confirmation of payment went unanswered, and although it is disturbing that applicant's chief financial officer could not in the time given presumably trace same, this is insufficient for me to conclude that the payment was not made and received.

[71] The matter thus turns on whether or not there is force in the respondent's counsel argument that absent a tender the relief sought cannot be granted.

[72] In this regard, in my opinion, counsel is wrong. **Hall-Thermotank** relates to an entirely different concept, attaching to the circumstance in which where rescission of a judgment is sought, restitution must follow and to preserve the entitlement to restitution there must be a tender to restore the benefits received pursuant to the contract as well as whatever was received by virtue of the contract whether or not it has value.

[73] The basis of the applicant's contention in this regard is not that there was any breach of agreement or any action of either party warranting cancellation for any reason that would otherwise be valid in the law of contract, but rather that the conclusion of the agreement constituted an illegality as a matter of public law there having been a failure to comply with the statutory requirements therefore, and that therefore on the authority of numerous cases it was the duty of the applicant to come to court to have the agreement declared an illegality.

[74] In the result, and having concluded that the contract on the evidence before me constituted an illegality, it must be set aside regardless of applicant's failure to tender return of the R60 000-00. To do otherwise would be to sanction a clear illegality.

[75] I consider, however, that I am able, having regard to the conclusion that I have reached relevant to the payment of this money, to order nevertheless, that applicant must pay R60 000-00 to respondent within seven days of the date of this order. Whilst respondent did not bring a conditional

counterclaim in this regard it would seem to me that it need not have done so and that as part of the relief sought by applicant it is implicit that any money paid by respondent must be returned to it.

COSTS:

[76] It will be noticed that the order that follow does not incorporate an order as to costs in applicants favour, as I intend to make to no order as to costs. In this regard, and although applicant has been successful in having the contract set aside, I have nevertheless been obliged to visit it with an order for repayment of the deposit which it failed to tender. Further, and even though applicant was substantially successful in this regard, on the papers before me, I cannot conclude that it was in any way respondent's fault that the statutory requirements were not complied with, and accordingly, in the broad discretion I have in respect of costs, I consider it just and equitable that each party bear its own costs in this matter.

ORDER:

[77] It is ordered accordingly that:

[77.1] The application to strike out is dismissed.

[77.2] The Addo Land Availability Agreement, LMRN4 to the founding papers dated 25 February 2008 is declared null and void *ab initio*.

[77.3] Applicant pay respondent the sum of R60 000-00, being the deposit received in respect of the sale, within seven days of the date of this order.

[77.4] There is no order as to costs.

M.J. LOWE
JUDGE OF THE HIGH COURT

Obo the Applicant/Plaintiff:

Adv Msizi

Instructed by:

Doreen Mgoduka Attorneys

10 Buckingham Road

Mount Croix

Port Elizabeth

(041 – 3732031/2901)

Obo the Respondent/Defendant:

Adv Pretorius

Instructed by:

De Villiers & Partners

62 Erasmus Drive

Summerstrand

Port Elizabeth

(041 – 5835534)