FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 7493/2008

In the matter between:-

THABO DANIEL LEPHONDO Applicant

and

DIHLABENG LOCAL MUNICIPALITY Respondent

HEARD ON: 18 JUNE 2009

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 25 JUNE 2009

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[1] This application and counter-application concern property belonging to the respondent local municipality known as erf 4247, Bergsig, Bethlehem ("the property").

[2] The history of the litigation between the parties in respect of the property is somewhat chequered. For present purposes the following exposition of facts that are common cause, in my view suffices.

[3] At the meeting of the council of the respondent held on 28 November 2005 the council noted counsel's opinion obtained in respect of the interpretation and effect of the provisions of section 14 of the Local Government: Municipal Finance Management Act, No. 56 of 2003 ("the Act") and *inter alia* resolved that in terms of section 14 of the Act the council will follow a fair, equitable, transparent and competitive process where assets are disposed of and that no transfer of immovable property can be effected in the absence of a bid process. Despite this resolution and despite the absence of any bid process, a written agreement for the sale of the property by the respondent to the applicant ("the sale agreement") was signed on 9 December 2006. The signatories on behalf of the respondent were the then mayor and director of housing of the respondent.

[4] In terms of the sale agreement the respondent sold the property to the applicant for the purchase price of R15 709,20. In terms of clause 8(a) of the sale agreement transfer of the property would be given to the applicant upon payment of the full purchase price and interest, if any.

Clause 8(b) of the sale agreement however provided as follows:

> "If a **PURCHASER** has, however, paid 50% or more of the purchase price which is due to the **SELLER**, in accordance with the contract he is entitled to demand transfer of the erf from the **SELLER** on condition that simultaneously with the transfer of the erf a first bond in favour of the **SELLER** has been passed over the erf to ensure payment of the balance of the purchase price with interest in accordance with the contract."

[5] Although in clause 12 thereof the sale agreement is expressly made subject to the provisions of the Alienation of Land Act, No. 68 of 1991, the sale agreement contains no mention of the provisions of the Act.

[6] During October 2007 the applicant paid the amount of R15 000,00 to the respondent in respect of the purchase price in terms of the sale agreement. Thereafter the applicant continuously attempted to obtain transfer of the property in terms of clause 8(b) of the sale agreement.

[7] On 8 November 2007 the then municipal manager of the respondent signed a power of attorney to pass transfer of the property to the applicant ("the power of attorney") pursuant to the sale agreement. The power of attorney was handed to the applicant on 19 February 2008. The respondent, however, effectively prevents the transfer of the property to the applicant by refusing to issue the necessary rates clearance certificate. The respondent justifies this stance by contending that the sale agreement is invalid for non-compliance with the provisions of section 14 of the Act.

[8] Section 14 of the Act provides as follows:

"**14 Disposal of capital assets**

(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 basic 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.

(3) A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services, may not be reversed by the municipality after that asset has been sold, transferred or otherwise disposed of.

(4) A municipal council may delegate to the accounting officer of the municipality its power to make the determinations referred to in subsection (2) (a) and (b) in respect of movable capital assets below a value determined by the council.

(5) Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the supply chain management policy which the municipality must have and maintain in terms of section 111.

(6) This section does not apply to the transfer of a capital asset to another municipality or to a municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework."

[9] The English text of the Act was signed by the President but it is not suggested that there is any significant difference between the Afrikaans and the English versions thereof.

[10] It is common cause that transfer or disposal of the property was not considered in a meeting of the respondent's council as contemplated in section 14.

[11] Against this background the relief claimed by the applicant in the notice of motion is that the respondent be ordered to table the following motions on the agenda of the next meeting of the council of respondent, namely:

> "1.1 a proposal that the sale of Erf 4247, Bergsig in the town Bethlehem in the municipality of Dihlabeng to the Applicant be ratified and that the Respondent issue the necessary Clearance Certificate and instruction to their attorneys to pass transfer thereof to the Applicant;
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> 1.2 in the alternative, that Applicant's offer to purchase the said erf, based upon the Deed of Sale already concluded, be deliberated upon in accordance with the provisions of Act 56 of 2003."

[12] During argument the relief claimed in the counter-application of the respondent was limited to orders declaring that the sale agreement is invalid and of no force and effect; that the power of attorney is invalid and of no force and effect and that the applicant has no enforceable right against the respondent to obtain transfer of the property.

[13] It was conceded on behalf of the applicant, correctly in my view, that if the sale agreement is to be declared invalid, the relief claimed by the applicant would be pointless.

[14] On behalf of the respondent it was argued that the words "or otherwise dispose of a capital asset" *inter alia* mean to enter into an agreement to transfer ownership of an asset such as a sale agreement. In this regard the reference was made to **REX v STEIN** 1947 TPD 442 as well as dictionary meanings of disposal and dispose.

[15] I cannot agree with this submission. In my judgement the essential approach to interpretation of a statutory provision is to ascertain the ordinary meaning of the words thereof within the context in which they were used. The context here is not

limited to the language of the rest of the statute but refers also to the matter of the statute, its apparent scope and purpose and, within limits, its background. See the oft-quoted seminal exposition by Schreiner JA in **JAGA v DÖNGES, NO AND ANOTHER; BHANA v DÖNGES, NO AND ANOTHER** 1950 (4) SA 653 (A) at 662 G – 664 H. Many words have more than one meaning that could be described as an ordinary meaning and therefore "context is everything". See **KPMG CHARTERED ACCOUNTANTS v SECUREFIN** (644/07) [2009] ZASCA 7 (13 MARCH 2009), para [39]. This last mentioned point is demonstrated well by **REX v STEIN**, *supra*. The essential question in that judgment was whether the word "use" in section 22(a) of the War Measure that empowered the relevant official to "... prohibit or regulate the acquisition, disposal or use of any controlled material...", limited the wide meaning of disposal to the restricted meaning of alienation in the sense in which the words "dispose of" were used in section 22(b) of the War Measure.

[16] The words "disposal" and "dispose of" have several ordinary grammatical meanings. See **The New Shorter Oxford**

English Dictionary, 1993, Volume 1, p. 699 – 700. In the context in which the words "dispose of" are used in section 14 of the Act, they mean in my view, to make a disposition in the sense of the action of getting rid of or making over an asset. They do not in my judgment mean to enter into an agreement aimed at the transfer of ownership of an asset.

[17] I say this for the following reasons. Especially if regard is had to subsection 14(1), the words "transfer of ownership" mean the act of transferring by registration or delivery and not any agreement to do so. In my judgment the words "or otherwise dispose of" are restricted and qualified by the preceding words "may transfer ownership" to something akin thereto, namely the act of getting rid of or handing over of an asset. Also, on the interpretation put forward on behalf of the applicant, to otherwise dispose of an asset in terms of section 14 of the Act, would include to enter into an agreement aimed at the transfer of an asset which is in terms thereof in some or manner made subject to compliance with the provisions of section 14. It is clear, as was properly conceded by counsel for the applicant, that a disposal of an asset contrary to the provisions of section 14, is invalid. In

context, section 14 of the Act cannot in my judgment have the meaning that an agreement aimed at the transfer of a capital asset of a municipality that is in terms of the agreement made subject to compliance with section 14, is invalid.

[18] Nevertheless I am satisfied, for the reasons that follow, that the sale agreement is invalid. It follows that the power of attorney is also invalid.

[19] As pointed out already, a transfer of ownership or other disposition of a capital asset that takes place without compliance with the provisions of section 14, is invalid. The sale agreement makes no mention of compliance with the provisions of section 14. On the contrary, it purports to grant a right to transfer of ownership of the property subject only to the provisions in respect of payment of the purchase price in clauses 8(a) and 8(b) thereof. Seen thus, the sale agreement is a contract to commit an act that is made unlawful by statute. Such contract is void. This principle is stated as follows in R H Christie, **The Law of Contract in South Africa**, Fifth Edition, p. 356:

> "An act that is made unlawful by statute is, it need hardly be said, unlawful, so whether or not on a proper interpretation of the statute the contract that is in itself the unlawful act is void as well as being criminally punishable, a contract to commit the unlawful act must be void, and so is a contract that facilitates or encourages the commission of the unlawful act, even if only indirectly, provided the connection is sufficiently close."

[20] It follows that in my judgment the application cannot succeed but that the relief sought in terms of the counter-application should be granted. No reason to deprive the successful party of costs presents itself.

[21] The following orders are made:

1. The applicant's application is dismissed with costs.
2. It is declared:
    - 2.1 that the agreement of purchase and sale concluded between the respondent and the applicant on 9 December 2006 in respect of erf 4247, Bergsig is invalid and of no force and effect.
    - 2.2 that the power of attorney signed on behalf of the respondent at Bethlehem on 8 November 2007

authorising the transfer of erf 4247, Bergsig to the applicant pursuant to the aforesaid agreement of purchase and sale, is invalid and of no force and effect.

2.3 that the applicant has no enforceable right to obtain transfer of erf 4247, Bergsig and that the respondent is not obliged to transfer such erf to the applicant.

3. The applicant is ordered to pay the costs of the counter-application.

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C.H.G. VAN DER MERWE, J

On behalf of the applicant:	Adv. J.M.C. Johnson Instructed by: Lovius Block BLOEMFONTEIN
On behalf of the respondent:	Adv. D.J. van der Walt Instructed by: Symington & De Kok BLOEMFONTEIN

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