IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 6567/2007

In the matter between:

IXHANTI LETHU TRADING (EDMS) BEPERK	Applicant
and	
MATJHABENG MUNISIPALITEIT	First Respondent
DIE DORPERAAD VAN DIE VRYSTAAT PROVINSIE	Second Respondent
DIE LID VAN DIE UITVOERENDE RAAD: PLAASLIKE BESTUUR EN BEHUISING VRYSTAAT PROVINSIE	Third Respondent

---

HEARD ON: 12 FEBRUARY 2008

JUDGMENT BY: MOLOI, AJ

DELIVERED ON: 27 MARCH 2008

---

[1] This matter comes before me for confirmation of an interim order granted by Wright J on 7 December 2007. The interim order prohibited the respondents from *inter alia* alienating the property which is the subject matter of the dispute between the parties pending final adjudication of the matter.

[2] The above order was granted in the absence of the first respondent while the second and the third respondents filed a notice to abide the decision of the court. The return day of the interim order was fixed at 17 January 2008. The matter was thereafter postponed to 21 February 2008 and 28 February 2008 when the applicant was ordered to replicate by 22 February 2008. On 28 February 2008 the matter was postponed for argument on 13 March 2008 and the parties were ordered to file the heads of argument not later than 11 March 2008.

[3] On 11 March 2008 the first respondent, in addition to the heads of argument, filed a notice of rejoinder as it wished to apply to court for permission to file a further affidavit to respond to certain allegations made in the replying affidavit. On 13 March 2008 this application was argued but wisely abandoned by the first respondent. The matter proceeded to be heard on the main application.

[4] The application was essentially based on a deed of sale

attached to the applicant's founding affidavit as annexure "A". The said deed of sale was signed by the parties' representatives on 14 December 2004. On behalf of the applicant one Mziwandile Benedic Ngezi, a director of the applicant company signed purportedly duly authorised by the board of directors. It needs to be mentioned that no resolution in writing to this effect was included. On behalf of the first respondent the deed of sale was signed by one R.S.B. Sesele and one S. Leeuw, the Municipal Manager and Executive Mayor of the first respondent, respectively, duly authorised by a council resolution dated 2 November 2004 attached to the papers as annexure "B".

[5] The relevant parts of the council resolution (annexure "B") read as follows:

"1. That Council approves the application of Ixhati Lethu (Pty) Ltd to purchase the Remainder and Subdivision 3 of Erf 8, Welkom.

2. That a selling price of R35/m² be determined for the areas known as Phase I and phase II (Phase I – hotel and conference area and Phase II – office block area).
3. That the final area to be purchased be determined by a land surveyor at the expense of the developer prior to the finalisation of the Deed of Sale.

5. That the transaction be structured in a Deed of Sale whereby the interest of Council be protected, which Deed of Sale to be signed by the Executive Mayor and the Municipal Manager on behalf of Council."

The property to be bought is described in the deed of sale as follows:

"1.

SALE:

The SELLER sells to the PURCHASER who purchases the following property upon the terms and conditions hereof:

THE IMMOVABLE PROPERTY:

The property hereby sold is a portion of the immovable property on which Rovers Club is currently situated, also known as Remainder and Subdivision 3 of Erf 8, Welkom (hereinafter referred to as "the **Property**") and demarcated in the color pink on the diagram hereto marked "A". The area is known to the parties as the current rugby fields of Rovers Club (hereinafter referred to as "**Phase 1**") and the area opposite the Welkom Magistrate Court which include the current parking area situated in the vicinity (hereinafter referred to as "**Phase 2**".

The SELLER will appoint land surveyors at the cost of the PURCHASER to survey the land as described above and prepare the diagram necessary for the purposes of giving the PURCHASER title to the property. The parties agree to be bound by the diagram prepared for this purpose provided it is essentially in compliance with Annexure "A" and waive any minor deficiency or surplus in extent which may be in either parties favour."

[6] In addition the deed of sale provided for an option to the applicant to purchase additional adjacent property from first respondent which option was duly exercised by the applicant.

[7] The application was prompted by a letter from the first

respondent dated 3 August 2007 to the effect that the first respondent is of opinion that the deed of sale is null and void in that the statutory prescribed procedures were not followed at the conclusion of the agreement and that the conduct of the Executive Mayor and the Municipal Manager when concluding the agreement was "*ultra vires*" and the agreement was consequently *ab initio* invalid. As a result of these defects, the letter stated, the first respondent was not proceeding with the registration and transfer of the property to the applicant.

[8] Applicant responded by writing a letter to the first respondent on 5 September 2007 denying the alleged invalidity of the agreement and requiring the first respondent to state the alleged statutory procedures that were not followed and the grounds of the alleged invalidity of the agreement. In addition the first respondent was requested to undertake that it will not alienate the said property pending the legal action applicant would institute to enforce the agreement. No response from first respondent was forthcoming, however.

[9] Applicant believed the first respondent was in the process of alienating the said property and attached to his papers a notice in "The Sowetan" newspaper dated 27 September 2007 inviting interested persons to make proposals for the development of the property forming the subject-matter of the alleged sale.

[10] In its opposing affidavit the first respondent raised several points on which it relied for the invalidity of the agreement. In argument before this court these points were restricted to the

following:

(a) Non-compliance with the provisions of section 2 of the Alienation of Land Act, No. 68 of 1981;

(b) The provisions of paragraph 3 of the Council resolution of 2 November 2004, and

(c) The provisions of section 14 of the Local Government: Municipal Finance Management Act, No. 56 of 2003.

Section 2 of the Alienation of Land Act provides as follows:

> "(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

[11] Arguments advanced at length on behalf of both parties during the hearing centred around the adequacy of the description of the land sold. Several cases were referred to. For the applicant it was argued that the *merx* was sufficiently described and is ascertainable "on the ground" as comprising the two "rugbyfields" and the "area next to the magistrates

court, Welkom including the parking area" according to the diagrams attached to the Deed of Sale and accepted by both parties. A counter submission with substantial reference to case law was equally made on behalf of the first respondent to illustrate how inadequate the description of the *merx* was.

[12] The court was not moved by either argument and found them wanting for lack of relevance to the provisions of section 2. Section 2 requires the contract for alienation of land to be in writing and is silent on the question of the description of the land to be sold. It also requires that if the contract is concluded by agents, it be under **written** authority. The provisions relating to the description and extent of the land to be sold are contained in section 6(1)(b) of the Alienation of Land Act. As regards section 2 what the court found wanting, however, is the written mandate or authority of Mziwandile Benedic Ngezi, the director of applicant who signed the deed of sale as an agent for applicant which is a prerequisite for the validity of the agreement of sale of land.

[13] No such document was attached to the papers filed of record especially where it is alleged such agent was duly authorised by

the board of directors as was done with those that acted under authority of the council of the first respondent. Without such document the authority of the agent cannot be determined; neither the validity of the agreement. An agent cannot act on mere oral authority when signing on behalf of a company in a sale of land transaction. Proof of a resolution or mandate of the company's board of directors is sufficient. See R H Christie, **The Law of Contract in South Africa**, 5th Edition, p. 116. Mere allegation that an agent is acting duly authorised by the board of directors is not necessary. Particularly in application proceedings: **AFRICAN PEACH GROWERS (EDMS) BPK v BOUWER EN 'N ANDER** 1973 (4) SA 654 (T) op 655 C – F; **WESSELS EN 'N ANDER v GROENEWALD EN 'N ANDER** 1963 (4) SA 30 (O) p.33 G – H; **TREVER INVESTMENTS (PTY) LTD v FRIEDHELM INVESTMENTS (PTY) LTD** 1982 (1) SA 7 (A) P. 16 F – H. The court will not know if there is, in fact, compliance with the requirement of section 2(1) until and unless a written authority is filed of record.

[14] Paragraph 3 of the Council resolution of 2 November 2004 categorically required that a land surveyor be engaged to demarcate and measure the land to be sold **prior** to the deed of sale being signed on behalf of council. According to the papers filed, the land surveyor, a Mr. P.J. Human, completed this process in October 2006 whereas the deed of sale was signed on 14 December 2004 already.

[15] It was argued on behalf of the applicant that "die afwyking is nie wesenlik nie" as only the sequence was not followed.

The court does not agree. The insistence by the council of the first applicant in having the demarcation and measurement of the *merx* to be done before the agreement of sale is concluded, was unquestionably based on the need to obtain accurate description and extent of the land to be sold as is required by section 6(1)(b) of the Alienation of Land Act in order to remove all doubts relating thereto. The designated officials of the Council, acting outside this stipulation clearly acted *ultra vires* and the contract is thus *ab initio* null and void. There having been no question of estoppel raised or arguable on the papers before me, I cannot find otherwise than that the agreement was invalid as a consequence.

[16] On 17 January 2008 the application was postponed to 21 February 2008 and first respondent was ordered to file opposing affidavit on or before 28 January 2008 and applicant its replication on or before 15 February 2008. Costs were to be costs in the cause. On 21 February 2008 the matter was further postponed to 28 February 2008 and

applicant was ordered to replicate not later than 22 February 2008 and costs were to stand over. On 28 February 2008 the matter was further postponed to 13 March 2008 by agreement and both parties were ordered to file their heads of argument by 11 March 2008. The court is of opinion that it will be fair to let costs follows the cause. On 13 March 2008 three counsel appeared for the first respondent and the court is of the view that this was not warranted. The court, therefore, orders that the applicant pay the costs.

[17] Having reached the above conclusions I do not deem it necessary to deal with the third ground of opposition. The application is consequently dismissed with costs.

K.J. MOLOI, AJ

On behalf of applicant: Adv. F.W.A. Danzfuss SC
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of first respondent: Adv. P.J. Pretorius SC
With him:

Adv. M.D.J. Steenkamp
and
Adv. N.R. Rathidili
Instructed by:
Moroka Attorneys
BLOEMFONTEIN

/sp