Reportable: Yes/No

Circulate to Judges: Yes/No

Circulate to Magistrates: Yes/No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case No.:906/2007

Date heard:16/08/2007

Date delivered:21/09/2007

In the matter between

GA-SEGONYANA FORUM **APPLICANT**

versus

GA-SEGONYANA MUNICIPALITY **FIRST RESPONDENT**

THE MANAGER GA-SEGONYANA MUNICIPALITY **SECOND RESPONDENT**

TEB PROPERTIES CC **THIRD RESPONDENT**

JUDGMENT

MOKGOHLOA AJ

1. The applicant, Ga-Segonyana Forum Ward 1, instituted proceedings by way of motion against the Ga-Segonyana Municipality (First Respondent), the Municipality Manager of Ga-Segonyana , Mr Eric Atlholang Gaborone (Second Respondent) and TEB Properties CC (Third Respondent) for an order in the following terms:

"2. Dat die derde respondent verbied word om enige bouwerk te doen of voort te sit op Erf 489, Kuruman, solank as wat die bepalings van Wet 56 van 2003 met betrekking tot die vervreemding van gemelde erf nie voldoen is nie en solank die erf nie hersoneer is in terme van die toepaslik wetgewing in daardie verband nie.

3. Dat die eerste en tweede respondente gelas word om alle moontlike stappe te doen ten einde bouwerk op of ontwikkeling van Erf 489, Kuruman, te verhoed totdat behoorlik voldoen is aan die wetgewing na verwys in paragraaf 2 hiervan.

4. Dat respondente, gesamentlik en afsonderlik, indien die een betaal die ander pro tanto kwytgeskeld te wees, gelas word om die applikant se koste van hierdie geding te betaal op die skaal soos tussen prokureur en klient.

5. Sodanige verdere en/ of alternatiewe regshulp as wat die agbare Hof mag goed ag.

2. The applicant requested further during the hearing of this matter on 16 August 2007 that an order be granted prohibiting the first respondent from transferring Erf 489, ("the Erf") Kuruman, to the third respondent or any other person for as long as the relevant legislation, particularly the provisions of **The Municipal Finance Management Act 56 of 2003**, have not been complied with.

3. The factual background of this case is common cause between the parties or at least not specifically disputed. The Erf which is the subject matter is an open place owned by the first respondent. On 23 February 2005 the council of the first respondent

passed a resolution that this Erf shall not be considered to be used for the creation of business establishment. It can however be considered to be developed into an open space or sold to adjacent owners to be developed into gardening or parking areas.

4. On 30 August 2006 council of the first and second respondent resolved to invite tenders according to the council's policy for the sale of the Erf. Pursuant thereto and on 29 September 2006 the Erf was advertised for sale by way of a tender.

5. Twelve (12) tenderers responded to the advertisement. The highest bidder was for R365 232-00 and the lowest was R50 279-13. The third respondent also tendered and his tender was R117 000-00 for use of the Erf for residential purposes. On 15 December 2006 the bid adjudication committee resolved that the original resolution of the 23 February 2005 had to be rescinded. It was then resolved not to award the tender but to re-advertise it.

6. On 26 January 2007 without any resolution taken to that effect, the Erf was re-advertised for retail purposes. Tenders were received, the highest bidder being R508 716-00. The third respondent tendered again and his offer was R217 560-00. Neither the first respondent nor the tender committee considered

or accepted this tender and as a result the tender is still open.

7. On 4 April 2007 the first respondent received a letter from the third respondent requesting the first respondent to make land available for him to erect an office park. The second respondent and the adjudication committee convened a meeting on 20 April 2007 and considered the third respondent's request as an unsolicited bid. They then resolved to sell the Erf to the third respondent. On 7 June 2007 the first respondent, represented by the second respondent signed the offer to purchase the Erf by the third respondent, represented by Mr Thamsanqa Samuel Bokwana, for an amount of R283 000-00. The Erf was then sold for purposes of erecting an office park for the Department of Local Government.

8. In the meantime, and on 14 February 2007, the applicant wrote a letter to the Mayor of the first respondent enquiring amongst other things about the alienation of the Erf and the advertisement in the bulletin on 26 February 2007. On 15 May 2007 a similar letter was sent to the second respondent. The Mayor only responded on 2 May 2007 and advised the applicant that a public meeting will be arranged where these issues would be clarified. However that public meeting never took place.

9. The second respondent in his opposing affidavit denies that the provisions of Act 56 of 2003 were not complied with. He stated that a public meeting as required by section 14 (2) was held on 2 August 2007 and that it was advertised. He however failed to annex to his papers a copy of the advertisement and/ or the minutes of such meeting. This clearly shows that the meeting was never held. He further denies having received a letter on 15 May 2007 from the applicant enquiring about the alienation of the Erf. The applicant proved receipt of this letter by the second respondent who actually acknowledged receipt thereof by appending his signature. The second respondent's response thereof is that he receives many letters and cannot remember having received this one in particular.

10. **Section 152** of the **Constitution of the Republic of South Africa 108 of 1996** provides that the objects of local government are to provide democratic and accountable government for local communities. **Section 195 (1)** provides that:

"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles.

(a) A high standard of professional ethics must be promoted and maintained.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing

the public with timely, accessible and accurate information".

11. **Section 217** of the Constitution provides that when an organ of the State in the national, provincial or local sphere of government contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

12. The preamble to the **Municipal Finance Management Act 56 of 2003** ("the Act") reads as follows:

> *"To secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government; to establish treasury norms and standards for the local sphere of government; to provide for matters connected therewith".*

13. As far as the disposal of the capital assets is concerned, **Section 14** of the Act provides as follows:

> *"(1) A Municipality may not transfer ownership as a result of a sale or other transaction or 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 <u>meeting open to the public</u> –*
>
> *(a) has decided on reasonable grounds that the*

asset is not needed to provide the minimum level of basic municipal service; and

(b) has considered the fair market value of the asset and the economic and community value to be received in exchange of 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 service, 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 determination referred to in ***subsection (2) (a) and (b)*** *in respect of movable capital assets below a value determined by the council".* (My underlining.)

14 It is clear from the facts of this case and the applicable legislation referred to above that the first and second respondents did not follow the correct procedure in disposing and selling the Erf to the third respondent. Inter alia,

14.1. The first and second respondent accepted the third respondent's offer while the tender of 26 January 2007 was not yet considered or awarded, and therefore still pending;

14.2. The second respondent failed to exercise its powers vested in it by **section 151 (2) of the Constitution** in authorising the alienation and selling of the Erf;

14.3. The first respondent failed to comply with **section 14(1) and (2)** of the **Municipal Finance Management Act 56 of 2003** in that it disposed of the Erf without a decision being taken in an open public meeting to sell and furthermore without considering its market value and the economic and community to be received in exchange of the Erf.

15. Mr Botha for the first and second respondents argued that, although the second respondent decided on 23 February 2005 not to sell the Erf, this decision was going to be reconsidered at the meeting scheduled for 23 August 2007. I have already found at para 8 (supra) that no such meeting was held. Self – evidently the failure to hold such a meeting prior to the sale is a fatal defect to the whole sale. Moreover, **section 14 (2)** of the Act states "a municipality may transfer ownership or otherwise dispose…but only after…" It is clear that even though transfer of this Erf is not yet effected, the Erf has already been sold to or disposed of in favour of the third respondent notwithstanding the fact that there was no compliance with **section 14 (2)** of the Act.

16. It should be clear from the wording of **section 14 (2)** that the intention is set out clear and elaborate mechanisms to ensure that all essential steps leading to the eventual sale and alienation of capital assets belonging to a municipality are taken in an open, transparent and fair manner. As the municipality is, in terms of the Act obliged to be accountable, it makes even more sense that such an important legal procedure (sale of municipal capital assets) must be preceded by a public meeting for the people who will be affected by such sale. In my view, such meeting is intended to give the public an opportunity to debate, interrogate, approve or object to such a sale. This is in keeping with the clear dictates of what is popularly called participatory democracy. Needless to state that such public participation is crucial and essential in any democracy. Regrettably there was no public meeting held *in casu* as envisaged by section 14 (2). In the circumstances and for the aforegoing reasons I find that the sale and alienation of the Erf is unlawful and cannot stand.

17. Mr Van Niekerk SC for the appellant, asked for costs against the second respondent de bonis propiis. Notwithstanding the fact that I am of the view that there is a serious neglect of duty on the part of the second respondent but, I cannot grant such an order for the following reasons:

17.1. Section 161 of the Constitution of the Republic of South Africa 108 of 1996 provides that:

"Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members"

17.2. Section 28 of the Local Government Municipal Structures Act 117 of 1998 provides that:

"(1) Provincial legislation in terms of section 161 of the Constitution must provide at least –

(a) that councillors have freedom of speech in a municipal council and its committees, subject to the relevant council's rules and orders as envisaged in section 160 (6) of the Constitution; and

(b) that the councillors are not liable to civil or criminal proceedings, arrest, imprisonment or damages for –

(i) anything that they have said in, produced before or submitted to the council or any of its committees; or

(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the council or any of it's committees.

(2) *Until provincial legislation contemplated in subsection (1) has been enacted the privileges referred to in paragraphs (a) and (b) of subsection (1) will apply to all municipal councils in the*

province concerned."

18. The wording of **section 28** exempt members of a municipality council from liability for their participation in deliberations of the council. See **Swartbooi and Others v Brink and Another (2) 2003 (2) BLCR 502 (CC).** The third respondent also asked for costs against the first and second respondent.

I therefore make the following order:

1. The third respondent is prohibited from continuing with the building construction on Erf 489 Kuruman, until the provisions of Act 56 of 2003 pertaining to the alienation of the Erf had been complied with and the Erf is rezoned.

2. The first and second respondents are ordered to comply with the requirements of Act 56 of 2003 and of the Northern Cape Planning and Development Act 7 of 1998 when alienating the Erf.

3. The first respondent is prohibited from transferring Erf 489, Kuruman, to the third respondent or any other person for as long as the provisions of Act 56 of 2003 have not been complied with.

4. The first and second respondents are ordered to pay the applicant's and third respondent's costs jointly and severally, the one paying the other to be absolved.

FE MOKGOHLOA
ACTING JUDGE
HIGH COURT
NORTHERN CAPE DIVISION

For the Applicant: Adv Van Niekerk SC Instructed by: Duncan & Rothmans

For the 1st, 2nd Respondents: Adv. Botha Instructed by: Job Attorneys
For the 3rd Respondent: Adv Coetzee Instructed by: Haarhoffs Attorneys