IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO.: 1323/2008

Reportable

In the matter between:

ROGER RODNEY HATTON SMITH	Applicant
and	
BUFFALO CITY MUNICIPALITY	1st Respondent
CITY MANAGER FOR THE BUFFALO CITY METROPOLITAN MUNICIPALITY	2nd Respondent
THE REGISTRAR OF DEEDS (KWT)	3rd Respondent
GPR PROPERTIES (PTY) LTD (In her representative capacity as the Executrix in the estate late GJ van Niekerk)	4th Respondent
PETER ST MELIER WARREN	6th Respondent
RONNIE COETZEE	7th Respondent

JUDGMENT

JOLWANA J

Introduction

[1] The controversy in this matter is whether ownership of land that had been transferred to a public body under expropriation for a legitimate public purpose can be restored to the previous owner subsequent to the land being found to be unsuitable for the purpose for which it was acquired. The applicant instituted motion proceedings seeking a declarator, the effect of which, if granted, will be the restoration of the ownership of the property to him. Only the first and second respondents are enmeshed in these proceedings. I shall henceforth refer to the first and second respondents simply as the municipality for brevity's sake, save where it becomes necessary to refer to a specific respondent.

Factual background

[2] On 1 April 1985, the applicant purchased a property known as Wembley Farm, described in the relevant title deed as the Remaining Extent of Farm 813, Division of East London, in extent 49,1949 hectares (the property). The said property was thereupon registered by the Registrar of Deeds in the applicant's name under Deed of Transfer No. T691/1985. On 3 May 1999, subsequent to the conclusion of a sale agreement, the first respondent acquired ownership of the property, which was later registered by the Registrar of Deeds in its name under Deed of Transfer No. T3955/1999. The first respondent's Deed of Transfer reflects the agreed purchase price as having been the sum of R670 000.00. However, in his founding affidavit, the applicant explains that the total consideration that was paid to him was R762 440.00. This figure comprises of R670 000.00 being the accepted value of the property; a

solatium of R35 100.00 provided for in the Expropriation Act 63 of 1975[1]; removal costs amounting to R5000.00; loss of earnings in the sum of R3000.00; transfer costs in the sum of R5640.00; and transfer duty in the sum of R43 700.00. The transfer costs and the transfer duty amounts were said to be payable for a replacement property of the same value, which the applicant may buy and for which he may be required to pay transfer costs and transfer duty.

[3] The property has not been used for any purpose since the municipality took ownership thereof in 1999 and has been left fallow to date. As a result, the house, outbuildings, reservoirs and other infrastructure that were there when ownership was transferred to the municipality have been vandalised and destroyed. On 2 June 2008, the applicant instituted action proceedings against the municipality. In those action proceedings, the applicant sought relief for the restitution of the property, subject to a full refund of all the monies that were paid to him in exchange for the ownership of the property, together with interest thereon at the applicable legal rate.

[4] The genesis of the applicant's cause of action in those proceedings was that he was an unwilling seller who sold and transferred ownership of the property to the first respondent under a threat of expropriation for what he was given to understand, was an expropriation for a legitimate public purpose of the establishment of a municipal cemetery. However, the property was subsequently found to be unsuitable for the purpose for which he was coerced to sell it. He contends that he was therefore induced into losing ownership of his property under a false representation that it was suitable for the identified legitimate public purpose.

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[1] Section 12(1)(a) reads:
(1) The amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed –

(a) in the case of any property other than a right, the aggregate of –
  (i) the amount which the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer; and
  (ii) an amount to make good any actual financial loss caused by the expropriation.

[5] His restitution claim in those proceedings was dismissed by the court on the basis of a special plea of prescription. The court came to the conclusion that the applicant did not act reasonably in not finding out before June 2005 whether or not the property would be developed for the intended legitimate public purpose. The court reasoned that if he had exercised reasonable care when he saw the property not being developed, he could have acquired the requisite knowledge that the property would not be developed. He could have become aware that the property was unsuitable for the purpose for which it was acquired. Dissatisfied with the court's judgment, the applicant applied for and was granted leave to appeal by that court against its judgment.

[6] Thereafter, the parties engaged in settlement negotiations with a view to arriving at an acceptable compromise to settle those proceedings. Those negotiations reached a successful conclusion on 30 July 2018, with a settlement agreement being reached. The agreed terms of the settlement were, *inter alia*, that the ownership of the property would be restored to the applicant against payment in the sum of R3 006 090.00. This amount represented the amount the applicant received from the municipality when ownership of the property was divested from him, together with interest. It was further agreed that the applicant would pay an additional amount of R4 393 910.00, being the applicant's contribution towards the costs incurred by the municipality in the litigation that was being settled. The restoration of the applicant's ownership of the property was made subject to the first respondent retaining a one-hectare portion thereof, which the municipality indicated it needed for the establishment of a fire station.

[7] That portion was to be subjected to a restricted use servitude in favour of the municipality pending the transfer of its ownership to the municipality. It was further agreed that the applicant would withdraw the appeal and the municipality would abandon the judgment that is the subject of the appeal. The parties further agreed that the settlement agreement would be made an order of court. For that purpose, it was agreed that the settlement agreement should be recorded in a single document that would also clarify additional matters like the provision of guarantees for the payment of

the agreed amounts, the method of payment, the sequence of events, the location and extent of the one-hectare portion and other related matters.

[8] The onset of the worldwide COVID-19 pandemic resulted in considerable delays in finalising the details about the outstanding issues. On 28 June 2022, the municipality's attorney wrote an email to the applicant's attorney, attaching a resolution of its council dated 25 August 2021 confirming the council's acceptance of the terms of the settlement agreement. The municipality's attorney further indicated that a land surveyor would be instructed to attend to the subdivision diagram and the servitude diagrams that were required. After an exchange of further correspondence, the parties agreed that the applicant would, at his own costs, submit the revised settlement agreement to the court by way of an application for it to be made an order of court.

[9] On 6 June 2023, the applicant's attorney wrote a letter to the municipality's attorney, attaching the revised settlement agreement and requesting that it be signed and returned to him to facilitate its implementation. The applicant's attorney further confirmed that he was holding in trust an amount of R7 400 000.00, representing the total amount payable by the applicant to the first respondent as provided for in the revised settlement agreement. After several email exchanges about technical issues around the implementation of the terms that had already been agreed upon and the capturing of those issues in the revised draft settlement agreement, a final revised settlement agreement was sent to the municipality's attorney for the signature of municipality.

[10] The municipality's attorney confirmed that he had sent the revised settlement agreement to the municipality's legal department. Further ancillary information was requested by the municipality's legal department, and the municipality's attorney confirmed that he had transmitted the required information. Subsequently, the municipality's legal department sent the revised settlement agreement to the second respondent for his signature. However, the second respondent never signed the revised settlement agreement, nor did he give reasons for not doing so. At that stage, there

were no outstanding issues that still needed to be discussed or captured in the settlement agreement. The applicant contends that he has been suffering and continues to suffer prejudice as a result of the municipality's failure to comply with the agreed terms of the revised settlement agreement.

[11] In their deed of settlement, the parties agreed that the restoration of the property to the applicant would have to comply with the provisions of section 6 of the Deeds Registries Act 47 of 1937 (the Deeds Registries Act). Subsequent to the institution of these proceedings, a report from the Registrar of Deeds, who is cited as the third respondent, was filed. In essence, the third respondent indicates that he would have no difficulty in implementing the court order for the re-transfer of the property back to the applicant as prayed for in the notice of motion. This means that the third respondent confirmed that he would have no practical or legal difficulties in cancelling Deed of Transfer No. T3955/1999 and reviving Deed of Transfer No. T691/1985. Section 6 of the Deeds Registries Act reads:

> "Save as is otherwise provided in this Act or in any other law no registered deed of grant, deed of transfer, certificate of title or other deed conferring title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court."

[12] In the action proceedings sought to be settled, the applicant had, *inter alia*, sought relief rescinding the deed of sale he entered into with the municipality in terms of which the ownership of the property was transferred from him to the first respondent. He further sought an order for the repayment by him to the first respondent of all the monies that were paid to him when the property was transferred to it. The revised settlement agreement provides for the simultaneous restoration of the applicant's ownership of the property and the subdivision of the one-hectare portion and the right-of-way servitude. In the final analysis, the applicant contends that he is entitled to an

order that the action proceedings in case No.1323/2008 have been settled on the terms set out in the revised settlement agreement.

[13] The answering affidavit filed on behalf of the municipality was deposed to by the second respondent. The second respondent points out that the background facts as set out by the applicant in his founding affidavit relating to the acquisition of the ownership of property by the first respondent, the litigation history between the parties, and the settlement agreement that was reached are correctly recorded. He, however, says that the municipality is obliged to oppose the application because the alleged settlement agreement is invalidated by the fact that the council resolution from which it derives its validity is itself invalid. In foregrounding this proposition, the second respondent contends that the applicant can only validly have the ownership of the property restored to him by getting a positive litigation outcome in case No. 1323/2008. Alternatively, by a correct application of section 14 of the Municipal Finance Management Act 56 of 2003 (the MFMA). He then makes the assertion that section 14 of the MFMA was not complied with by the first respondent's council.

[14] It is so that the applicant did not get a positive outcome in case No. 1323/2008 as his claim was dismissed on a special plea of prescription as earlier indicated. That matter did not reach finality in that an appeal was launched and is still pending, leave to appeal having been sought from and granted by that court. Subsequently, the parties seriously engaged in prolonged settlement negotiations, which ultimately resulted in a compromise being reached as recorded in the revised settlement agreement annexed to the applicant's founding affidavit as annexure RRHS28.

[15] On the basis of his underlying contention that the first respondent's council did not comply with section 14 of the MFMA, the second respondent postulates that the municipality is obliged to oppose this application. Section 14, on which the second respondent relies, reads:

"(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 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 municipality 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."

[16] The municipality's opposition to the revised settlement agreement being made an order of court is largely based on the provisions of section 14 (2) and (5). It contends that in the first place, the property is a capital asset. That being the case, it predicates

that its council was required to consider the fair market value of the property as provided for in sub-section (2)(b). Its failure to comply with section 14(2)(b) made the council resolution in terms of which the agreement was authorised unlawful and void. The resolution that was passed was taken on the strength of the recommendations of the council's Spatial Planning and Development Portfolio Committee (the committee). The municipality alleges that the committee did not make any reference to the fair market value of the property in its recommendation for the acceptance of the total sum of R7,4 million. Finally, the municipality bemoans its council's failure to comply with sub-section (5). In terms of subsection (5), any transfer of ownership of a capital asset must be fair, equitable, transparent, competitive and consistent with a municipality's supply chain management policy. For this reason too, the resolution fell foul of the provisions of section 14 and therefore it is unlawful and void. Any settlement agreement concluded pursuant to that resolution would, a *fortiori*, also be invalid.

[17] It is important to point out that at no stage during the protracted settlement negotiations did the second respondent communicate to the applicant or his attorney that he questioned the validity of the settlement agreement or that he doubted its lawfulness. It does not appear that he communicated his discomfort about the alleged non-compliance with section 14, even with the municipality's own attorney. Instead, there was an unexplained failure to sign the settlement agreement notwithstanding its formal endorsement thereof through a council resolution that to date is still extant. It was only when these proceedings were instituted that, in the answering affidavit, the second respondent raised, for the very first time, his concerns about non-compliance with section 14 of the MFMA.

Discussion.

[18] When a court decides whether it should make a settlement agreement an order of court, it exercises a discretion taking into account a number of factors that are not only beneficial to the parties involved in the litigation but also the court brings into consideration, the wider impact a settlement may have in the broader administration of

justice[2]. In exercising this discretion, a court is guided by established legal principles which ensure that a deed of settlement not only serves a legitimate purpose but also guards against the court process being used to legitimise a settlement agreement that may not be related to pending court proceedings. In *Eke*[3]*,* the applicable legal principles for a compromise to be made an order of court were explained as follows:

> "[Not] anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place, relate directly or indirectly to an issue or *lis* between the parties. Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court. On this *Hodd* says:
> '[I]f two merchants were to make an ordinary commercial agreement in writing, and then were to join an application to court to have that agreement made an order of court merely on the ground that they preferred the agreement to be in the form of a judgment or order because in that form it provided more expeditious or effective remedies against possible breaches, it seems clear that the court would not grant the application.'
> That is so because the agreement would be unrelated to litigation.
> Secondly, 'the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order'. That means, its terms must accord with both the Constitution and

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[2] PL v Y 2013 (6) SA 28 (ECG) at 49 paras 36 and 38, Van Zyl ADJP said: [T]he policy underlying the framing of a settlement has as its underlying foundation the benefits it provides to the orderly administration and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial but it also serves to benefit the judicial administration by reducing overcrowded court rolls, thereby decreasing the burden on the judicial system. By disposing of cases without the need for trial, the case load is reduced. This gives the court capacity to conserve its limited judicial resources and allows it to function more smoothly and efficiently. To the litigants it has the benefit of reducing expenses and the risks which are associated with litigation.
…
If one is then to proceed from the premise that the wider interests under consideration is that of the administration of justice, then the court is required, when exercising its discretion whether to make a settlement agreement an order of court, to give consideration not only to the need to made orders that are readily enforceable, but also to assess the wider impact which its order may potentially have.

[3] Eke v Parsons 2016 (3) SA 37 (CC) at 48H to 49 A-D.

the law. Also, they must not be at odds with public policy. Thirdly, the agreement must hold some practical and legitimate advantage."

[19] All the other possible legal obstacles to the revised settlement agreement being made an order of court do not arise in this matter, save for the singular issue raised by the municipality. That is the lawfulness of the compromise agreed upon in light of the provisions of section 14 of the MFMA. Section 109 (2) of the Systems Act[4] makes provisions for a compromise by municipalities in the following terms:

"A municipality may compromise or compound any action, claim or proceedings, and may submit to arbitration any matter other than a matter involving a decision on its status, powers or duties or the validity of its actions or by-laws."

[20] It was never contended by the municipality that this matter is one of those excluded from a compromise in terms of section 109(2) of the Systems Act. The issue raised by the municipality is not even that it did not reach a settlement agreement on the terms alleged by the applicant or even that its council did not authorise the settlement agreement. It raises a different issue, which is that the settlement agreement was entered into in circumstances in which the peremptory provisions of section 14 of the MFMA were not complied with. This is against the backdrop of the municipality's acquisition of the property being for the establishment of a municipal cemetery. This is specifically stated in the committee's recommendation to the council for the ratification of the settlement agreement. By way of a background to the acquisition of the property, the committee pointed out that the council took a resolution on 7 December 1998 to acquire the property from the applicant for the sum of R762 440.00 for the purpose of the establishment of a cemetery. The committee further recorded that it subsequently transpired that the property was not suitable for the establishment of a cemetery.

[21] Central to the applicant's case is that the municipality's reliance on section 14 of the MFMA is misplaced and incorrect. This, he says, is the case because the effect of

[4] Local Government: Municipal Systems Act 32 of 2000.

the compromise entered into by and between the parties is to undo the consequences of the sale agreement which led to the transfer of the property to the municipality, consequent upon the property being found unsuitable for the intended purpose. The proceedings that were settled through the compromise sought to have that sale agreement declared void *ab initio* and, resultantly, the restitution of the parties' respective performances.

[22] Pellucidly, the parties have used the word "*restitution*" in describing what they intended to achieve in the settlement agreement. Elsewhere in the agreement, the word "*restoration*", which has the same connotation as restitution in this context, is also used. In other words, the parties agreed that, subject to compliance with the agreed terms, the property would be restituted to the applicant or the ownership thereof would be restored to the applicant. On the other hand, section 14 of the MFMA does not use the words "*restitution*" or "*restoration*". On the contrary, it uses the word "*transfer*". It is not the municipality's case that the entire property is earmarked for the provision of some or other minimum level of basic municipal services to its community as provided for in section 14. The parties have reached an agreement on how the municipality's need for the portion of the property required for the establishment of a fire station would be met. Beyond that, it has not made a case that it needs the rest of the property for any purpose whatsoever.

[23] The issue is not whether or not the property is a capital asset. To define the issue in that way, as the municipality does, is tantamount to a mischaracterisation of the history of the exchange of ownership between the parties; the basis of the litigation that ensued and, resultantly, the compromise that was reached. The gravamen of the dispute between the parties is the expropriation of the applicant's property that led to its transfer to the municipality for a legitimate public purpose. That any property may be expropriated for a legitimate public purpose is not controversial, at least if regard is had to the Constitution[5]. That legitimate public purpose was the establishment of a municipal

[5] Section 25 (2) of the Constitution of the Republic of South Africa, 1996 provides: Property may be expropriated only in terms of law of general application –

cemetery in this case. It is common cause that it later transpired that the property was not suitable for that purpose after the registration of the transfer of the ownership of the property to the municipality had been finalised.

[24] Professor *Hoops*[6] expresses himself as follows on the suitability of a property that is a subject of expropriation:

> "The function of the expropriation is to enable access to land that is suitable (and required) for the implementation of the project. If the expropriation failed to perform this function, the infringement of the property rights would fail to serve its legitimate purpose and the state action would possibly be unlawful because it infringes a property right without a proper purpose. …
>
> If expropriation is a suitable means to provide access to the land required for the project, the next question will be whether it is relevant to the lawfulness of the expropriation that it is necessary to make use of the state's power to expropriate the property or property rights on the whole parcel of land. In other words, it must be examined whether it is relevant that the expropriation is the least invasive means. Expropriation forces the land owner to sacrifice their land for the public good. This infringement of property is, to refer to two of the aforementioned theories, detrimental to human flourishing and leads to a dissatisfaction of the subjective needs of the owner. Any part of the exercise of this power that is not required to enable the transferee to implement the project should, therefore, not be allowed because that part of the infringement and the resulting loss of utility and human flourishing are not compensated by any relevant benefits of the project."

[25] It seems to me that section 14 of the MFMA is simply not implicated in this matter. The property in question is not just any of the municipality's properties that any

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(a) For a public purpose or in the public interest; and
(b) Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

[6] Bjorn Hoops: The Legitimate Justification of Expropriation – A Comparative Law and Governance Analysis. Published in 2017 by Juta and Company (Pty) Ltd at page 50.

person may very well be interested in acquiring. The property was acquired by the municipality to alleviate its need for land that is suitable for the establishment of a municipal cemetery. Put differently, the applicant was deprived of his right to ownership of the property through expropriation or threat thereof for that legitimate public purpose. The legitimate public purpose for which the applicant's right to have, to use and to keep the property was therefore infringed for a justifiable and legitimate public purpose and in the public interest. That was the understanding at the time the applicant's property rights were infringed. Once that public purpose became unattainable, the consequent unlawfulness of the applicant's deprivation of his property rights and the unconstitutionality of that entire process became fatally indefensible, leading to the entire edifice and rationale for the expropriation collapsing. To suggest that section 14 should be construed as requiring compliance with the supply chain management policy of the municipality, as the municipality does, is as untenable as is a clearly misguided proposition.

[26] Section 14 of the MFMA was not, in my view, crafted as to result in the restoration of property rights being unattainable under all circumstances once the expropriation process is finalised. To do so would, by other means, undermine a citizen's constitutional right to property as provided for in section 25(1) of the Constitution. Construing section 14 in that way seems to fall into the trap of embarking on a mechanical interpretative exercise.

[27] In cautioning against a mechanical interpretation, I can do no better than Unterhalter AJA (as he then was) in *Capitec*[7], in which he said:

> "Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings' consent was indeed required. The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality* (Endumeni) offer guidance as to how to approach the

[7] Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA) at para 25.

interpretation of the words used in a document. It is the language used, understood in the context in which it is used and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined."

[28] *Endumeni*[8] restated the proper approach to interpretation, and it does become necessary that from time to time, those principles which have now become trite are restated:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness like results or undermines the apparent purpose of the document."

[29] In *SA Machinery*[9], Binns-Ward J had occasion to look specifically at a proper interpretation of section 14 of the MFMA, albeit in a different context unrelated to

[8] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at 603 F-G to 604 A-B.

previously expropriated property. I am in respectful agreement with the sentiments expressed by the learned judge in that matter. He said:

> "The construction contended for by the appellant's counsel does not fit comfortably with the apparent objects of [section 14], which appear to be twofold: (i) to prohibit the taking of any decision by a local authority to alienate capital assets that are needed for the municipality to be able to discharge its core function of providing at least the minimum of basic municipal services to its community; and (ii) to introduce procedural constraints directed at minimising the possibility of decisions being made in respect of the alienation of municipal property, in circumstances likely to result in an unjustifiably adverse effect on the municipality's proprietary status. The proprietary status of any person or body is ordinarily reflected in that person's financial statements. It is difficult to accept that the legislature would have intended to impose the procedural formalities provided in terms of section 14 (2) of the MFMA, in respect of the disposal of goods not needed for the provision of basic services and the disposal of which would have no impact on the municipality's reportable financial position."

Conclusion.

[30] In their well-considered and quite detailed settlement agreement, the parties did not agree to an ordinary resale of the property to the applicant or, indeed, the ordinary transfer thereof to him. Perhaps in that situation, an argument could be made regarding the need for compliance with section 14 of the MFMA, in which case section 6 of the Deeds Registries Act would not have been the appropriate vehicle. They specifically agreed to the restitution of his property in accordance with section 6 of the Deeds Registries Act, with the applicant repaying all the monies that were paid to him. That, in essence, is the restoration of the status *quo ante*. They further agreed that the applicant would, in addition to repaying the amount paid to him as consideration plus interest, also contribute R4 393 910.00 to the municipality's litigation costs in respect of

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[9] SA Metal Machinery Co (Pty) Ltd v City of Cape Town 2011 (1) SA 348 WCC at 360 E to 361A.

case No. 1323/2008, the costs of the case that was being settled. On the proper construction of section 14 of the MFMA, the only issue raised by the municipality as an impediment to the settlement agreement being made an order of court, the applicant must therefore succeed. It follows that the revised settlement agreement marked as annexure RRHS28 to the founding affidavit must be made an order of court as agreed between the parties.

Costs.

[31] There is no reason why costs should not follow the result. In addition to that, something needs to be said about the conduct of the second respondent, who appears to have acted in bad faith in not communicating his concerns with the applicant's or the municipality's attorney, his views about compliance with section 14 of the MFMA. If he honestly held the view that section 14 of the MFMA could be a hindrance to the implementation of the settlement agreement, one would have expected him to be open and transparent about that. He lamentably chose opaqueness when transparency was required. The second respondent decided to attempt to renege from the settlement agreement only when he received papers for this application, which it was agreed should be instituted. This he seems to have done without even presenting his views to the first respondent's council. This, in circumstances in which the municipality's legal department had no difficulties with the lawfulness of the agreement. In all the circumstances, the applicant must succeed in his application with the costs occasioned by the opposition to the application being on scale C.

Order

[32] In the result, the following order shall issue:

1. It is hereby declared that the proceedings in Makhanda case no. 1323/2008 have been settled.

2 Paragraphs 2 to 5 of the deed of settlement marked as annexure RRHS28 to the applicant's founding affidavit are made an order of court.

3 The first respondent is ordered to pay the costs occasioned by its opposition to this application on scale C.

M.S. JOLWANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the applicant	:	Adv. G Solik
Instructed by	:	Nolte Smit Inc. Makhanda
Counsel for the respondent	:	Adv. O.H. Ronaasen SC
Instructed by	:	Whitesides Attorneys Makhanda
Heard on	:	06 March 2025
Judgment delivered on	:	08 May 2025