



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1299/2018

In the matter between:

KHUTALA PROPERTY CONSORTIUM (PTY) LTD

APPELLANT

and

MTUBATUBA MUNICIPALITY

FIRST RESPONDENT

BAMBA NDWANDWE

SECOND RESPONDENT

SIPHO R MATHOBELA

THIRD RESPONDENT

MGA MBATHA

FOURTH RESPONDENT

NQ MZIMELA

FIFTH RESPONDENT

GREEN MILE INVESTMENTS 340 CC

SIXTH RESPONDENT

THE MEC FOR CO-OPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS, KZN

SEVENTH RESPONDENT

Neutral citation: *Khutala Property Consortium (Pty) Ltd v Mtubatuba Municipality and Others* (1299/2018) [2020] ZASCA 35 (6 April 2020)

Coram: NAVSA, SALDULKER, DAMBUZA, and PLASKET JJA and LEDWABA AJA

Heard: 26 February 2020

Delivered: 6 April 2020

Summary: Local government – municipal tender – notarial lease invalid for lack of authority

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Mbatha J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel, where so employed.

JUDGMENT

Saldulker JA (Navsa, Dambuza, and Plasket JJA and Ledwaba AJA concurring):

[1] This appeal concerns the validity of a lease agreement purportedly concluded between the first respondent, Mtubatuba Municipality (the Municipality), and the appellant, Khutala Property Consortium (Pty) Ltd (Khutala). The background is set out hereafter.

[2] During November 2009, the Municipality, a local authority established in terms of the Local Government: Municipal Structures Act 117 of 1998, published an advertisement inviting bids for a tender for the development of a commercial site, through a long-term lease - not less than 30 years, in relation to Erven 197 and 312 Mtubatuba (the property), Extent 9645m², registration division GV, Province of KwaZulu-Natal, commonly known as the old taxi rank.

[3] The Municipality accepted the bid by the Alliance Property Group (Pty) Ltd (Alliance), and on 29 January 2010, at a Council meeting the following was noted: 'The Municipality accepts the offer proposed by ALLIANCE PROPERTY GROUP (PTY) LTD after careful consideration of their lease agreement as attached and on consideration that the Council intends to lease the property.'

The resolution at the centre of this appeal then followed:

'COUNCIL RESOLVED THAT:

1. The Municipal Manager be authorised to sign the lease agreement on behalf of Council,

2. The consideration of this proposal outside the disposal policy be condoned,
3. The Municipal Manager facilitates the development of the Disposal Property.'

The following also appears in the minutes of that Council meeting:

'Subject to comments from the MEC, the lease will be signed and/or the processes will be rectified towards the signing of a valid and enforceable lease agreement.'

The Municipal Manager also indicated that in order to speed up the processes in this regard, a request will be made from the MEC that both written and verbal presentations be made.

[4] On 1 March 2010, a Special Council meeting was convened. Under item MTMSC 463/2010, the prior resolution of 29 January 2010 was noted and it was recorded that on 2 February 2010, the Municipal manager (Mr Ntombela) delegated the Chief Financial Officer (Mr Dlodla), in writing, to sign the lease agreement, as resolved. It appears from the minutes of that meeting that the following concerns were expressed after legal advice had been obtained: The lease agreement that was presented for signature on behalf of the Municipality was not with Alliance but with Crowned Cormorant Investments (Pty) Ltd (Crowned Cormorant) and there was no indication that Crowned Cormorant was part of the Alliance Property Group. A further concern related to the right of the lessee (as expressed in the proposed lease) to immediately cede it to any third party. There were other concerns also. In conclusion, the Council resolved on 1 March 2010, that:

- '1. Council notes and adheres to the legal advice provided;
2. Council reconsiders Clauses 4 (Rent); 6 (Cession); and 20 (Option to purchase property);
- ...
5. Prior to the implementation of this decision to dispose of Erf 197-Mtubatuba and enter into an agreement with the preferred bidder, the following information be submitted to the MEC . . . for her comment. . .
6. The Municipal Manager to sign the agreement with Alliance Property Group;
7. The Municipal Manager, the CFO and Alliance Property Group to discuss clause 5.3 on the legal advice.'

[5] It is common cause on the papers that at the time the resolutions were taken by the Council, Crowned Cormorant was a deregistered company.

[6] On 25 March 2010, the Municipal manager wrote to the director of Alliance, informing him that the matter had been referred to the MEC, specifically stating that 'we draw to your attention that the ongoing negotiations and the agreements that will be reached shall only be enforceable subject to their endorsement by the MEC'.

[7] On 8 April 2010 a resolution was passed at the meeting of a company called Alliance Property Developments (Pty) Ltd in terms of which that company resolved to enter into a lease agreement with the Municipality in respect of the property. On 9 April 2010, a meeting of the directors of Alliance took place where it was resolved as follows: 'Alliance Property Developments (Pty) Ltd, being a 100% owned subsidiary company of the company [Alliance Property Group (Pty) Ltd] enter, in place of the company, as the nominated development company for Erf 197 Mtubatuba'.

[8] On 3 May 2010 the MEC addressed a letter, to the Municipality concerning the Council resolution of 29 January 2010, in which she cautioned that pending her obtaining a legal opinion, and until further notice, the Municipality was not to conclude any agreements for the letting of the property. On 6 May 2010, the MEC also addressed a letter to Alliance, in similar vein.

[9] On 19 May 2010, Cox Yeats, the attorneys tasked with registering the notarial lease, wrote to the Municipal manager, informing him that they had received a power of attorney and a draft notarial lease signed by Mr Dludla and that they were instructed to proceed with the execution and registration of a notarial lease. The heading to that letter reads as follows:

'LEASE AGREEMENT: MTUBATUBA MUNICIPALITY/ ALLIANCE PROPERTY DEVELOPMENT (PROPRIETARY) LIMITED – ERF 197 MTUBATUBA.'

[10] On 2 July 2010, the MEC addressed a letter to the acting Municipal manager, Mr Dludla, requesting documentation relating to information on various matters, in order to enable her to make an informed decision in relation to the lease. Furthermore, she re-iterated her previous caution not to conclude any agreement in respect of the property.

[11] Following on what is set out above, on 22 February 2011, and while the matter was still pending before the MEC, Mr Dhlomo, the acting Municipal manager at the time, signed a power of attorney authorising certain named employees of Cox Yeats to act as agent in appearing before the notary to execute the notarial lease purporting to be authorised by a resolution of the Municipality.

[12] On 28 February 2011, the MEC sent her advices in a letter addressed to the acting Municipal manager, Mr Dhlomo. In that letter, she raised various issues concerning the proposed lease agreement. She directed that the following clauses be removed from the lease agreement, inter alia, the option in favour of the lessee to purchase the property upon commencement of the lease; clauses granting pre-emptive rights and the clause entitling the lessee to cede its rights to the property to a third party. The MEC further directed that the amended lease be submitted to the Council for its consideration and approval.

[13] In a document dated 4 March 2011, printed on a Municipal letterhead and addressed 'TO WHOM IT MAY CONCERN', and which contained Mr Dhlomo's signature in his capacity as the acting Municipal manager, reference was made to the 'RESOLUTION: MTMSC 463/2010', relating to the 'LEASE AGREEMENT FOR THE PROPOSED DEVELOPMENT OF ERF 197 – MTUBATUBA (OLD TAXI RANK)'. What follows thereafter appears to be a resolution taken on 31 March 2010, which reads:

'This serves to certify that Council in its meeting of 31st March 2010 resolved as follows on the above matters:

Council resolved that:

1. Council noted the legal advice.
2. Council mandates the Municipal Manager and the CFO to go and negotiate with the developer Allied property group the concerns raised by the lawyers on clauses 4, 6 and 10 finalise lease agreement and sign it.'

[14] On 16 June 2011, the company Crowned Cormorant was restored to the company's register and on 30 August 2011 changed its name to Khutala Property Consortium (Pty) Ltd.

[15] On 15 September 2011 a company described in a power of attorney as Khutala Property Consortium (Proprietary) Limited, signed a power of attorney appointing employees of Cox Yeats to act as its agents in concluding a notarial lease.

[16] On 16 September 2011, two copies of the notarial lease between the Municipality and Khutala were signed by employees of Cox Yeats, purportedly on the strength of the powers of attorney in question. Both copies recorded that the authority to sign for the Municipality was derived from the power of attorney signed by Mr Dhlomo on 22 February 2011, under the authorisation of the resolution MTMSC 463/2010, dated 31 March 2011. It was also recorded that on 15 September 2011, a power of attorney was granted by Khutala, relying on a resolution of its directors on 8 April 2010. On 20 October 2011 a notarial deed of lease was registered in the deeds office between the Municipality and the appellant.

[17] Notwithstanding the conclusion of that lease, during January 2013, the Municipality re-advertised a tender for the development of the same property. This was challenged by the appellant's attorneys who sought to engage with the Municipality to interdict what they considered was an unlawful action. Even though the Municipality gave an assurance to the appellant that no award would be made to any third party, in July 2013, the Municipality notified the sixth respondent, Green Mile Investments 340 CC (Green Mile), that it had been awarded a tender to develop the property.

[18] That notwithstanding, during October 2014, the Municipality's attorneys demanded building plans for the development of the property from the appellant. The plans that were submitted by the appellant for approval in November 2014, were later revised and delivered to the Municipality in September 2015. The Municipality did not approve the plans. In the meanwhile, the Municipality received demands from Green Mile for the formal award of the development rights in respect of the property, which the Municipality ignored.

[19] During January 2016, Khutala launched an application against the Municipality for an order compelling it to approve its building plans for the property for which it said it had been awarded a tender for the purpose of the development of the property. There was no opposition and this application was granted. The Municipality ignored

the court order which led to a follow-up application by Khutala for a *rule nisi* for the Municipality to show cause as to why it should not be held in contempt of court. In May 2016, Green Mile applied for an order interdicting the appellant from developing the property. On 20 July 2016, and on the return date of the *rule nisi*, the Municipality joined the fray by making a counter-application for a stay of the execution of the order requiring the Municipality to approve the appellant's building plans and for an order that the notarial lease between the appellant and the Municipality be declared invalid, and that the award of the property development rights to Green Mile be declared valid.

[20] In August 2018, by agreement amongst the parties, an order was granted consolidating the applications, and the issue relating to the validity of Khutala's lease, was separated in terms of rule 33(4) of the Uniform Rules of Court, with all other remaining issues to stand over for later determination. The separated issue did not involve the second, third, fourth and fifth respondents. The matter came before Mbatha J in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) on the separated issue, as to whether the notarial lease between the Municipality and the appellant was valid.

[21] Mbatha J found that the lease registered in favour of the appellant was invalid and made the following order:

'(a) The notarial lease dated the 16 September 2011 and held under protocol number 1535/2011 of Robin Peter Westley, notary public, as between Mtubatuba Municipality and Khuthala Property Consortium (Pty)Limited is declared to be invalid.

(b) Khuthala Property Consortium (Pty) Limited is to pay costs to Mtubatuba Municipality, costs to include the costs consequent upon the employment of two counsel.

(c) Khuthala Property Consortium (Pty) Limited is ordered to pay costs for Green Mile Investments 340CC.'

It is against those orders that the present appeal is directed. It is before us with the leave of the court below.

[22] It is clear that unless the Council revoked or amended the 29 January 2010 resolution, the Municipal manager could only sign the lease agreement debated at the Council meeting on that date, and no other. The lease that was executed did not have the approval of the Municipality. This was rightly conceded by Mr Westley, the notary

who attended to the execution and registration of the lease, in his testimony before Mbatha J.

[23] The principle of legality applies. In *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA); [2016] ZASCA 122 para 25, this court said that it is now accepted as elementary that the exercise of public power is subject to constitutional control and is clearly constrained by the principle of legality. A repository of power may not exercise any power or perform any function beyond that conferred upon it by law and must not misconstrue the nature and ambit of the power.

[24] Furthermore, the approval of the lease was subject to comments from the MEC. The concluded lease agreement retained all that the Council's attorneys and the MEC considered objectionable.

[25] The power of attorney in respect of the lessee was also problematic. On 15 September 2011, the company described in the power of attorney as Khutala Property Consortium (Pty) Ltd, purportedly signed a power of attorney appointing employees of Cox Yeats to act as their agents in concluding a notarial lease. The resolution referred to in the notarial lease is one dated 8 April 2010. It is common cause that Khutala passed no such resolution. On that date, a company known as Alliance Property Developments (Pty) Ltd resolved to enter into a lease with the Municipality in respect of the property, and on 9 April 2010 was identified by Alliance as its 100% owned subsidiary company to enter the lease agreement in its place as the nominated development company for the property. That fact is of no assistance to Khutala.

[26] Furthermore, the document dated 4 March 2011, which purported to be an extract of resolution MTMSC 463/2010 of the Council, and which contained Mr Dhlomo's signature, deviated significantly from the original resolution adopted by Council on 1 March 2010. It is not clear who drafted the document, but it appears to have been provided to Mr Westley on his request, as he was concerned, and rightly so, that he had no resolution to support the power of attorney that Mr Dhlomo had signed on 22 February 2011. Mr Westley conceded that he did not see the actual resolution, and had relied upon the document as a true copy of the resolution of the Council, and the basis of the authority in the power of attorney that had been obtained

from Mr Dhlomo. The document contains inaccurate details as to the actual resolution adopted by Council on 1 March 2010. It misstated the date and the terms of the resolution, and the name of the proposed lessee. The lease was clearly executed without investigating whether the MEC had in fact reported her concerns. Mr Westley acknowledged that the resolution that was passed by the Municipality was not accurately reflected in the document he received from Mr Dhlomo, nor did it authorise the signing of a lease with the appellant.

[27] The re-advertisement of the tender and the granting thereof to Green Mile appears to have coincided with the change of political power in the Municipality. Counsel for the Municipality rightly conceded that the Municipality appeared to be in chaos. We are not to decide the legality of the grant of the second tender. We are to adjudicate only the narrow question of the validity of the lease.

[28] Counsel for Khutala was constrained to accept, in light of the judgment of this Court in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Limited* [2007] ZASCA 28; 2008 (3) SA 1 (SCA) para13, that estoppel could not be relied on.

[29] For all of the above reasons, the conclusion reached by the court below cannot be faulted and the appeal must fail.

[30] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel, where so employed.

H K SALDULKER

JUDGE OF APPEAL

APPEARANCES

For Appellant: C J Pammenter SC (with him E Crots)

Instructed by: Beall, Chaplin & Hathorn, Durban

Rossouws Attorneys, Bloemfontein

For First Respondent: M Pillemer SC (with him B Bedderson)

Instructed by: Matthew Francis Incorporated, Pietermaritzburg

Phatshoane Henney Attorneys, Bloemfontein

For Sixth Respondent: M Collins SC

Instructed by: V Chetty Incorporated, La Lucia

Lovius Block Attorneys, Bloemfontein