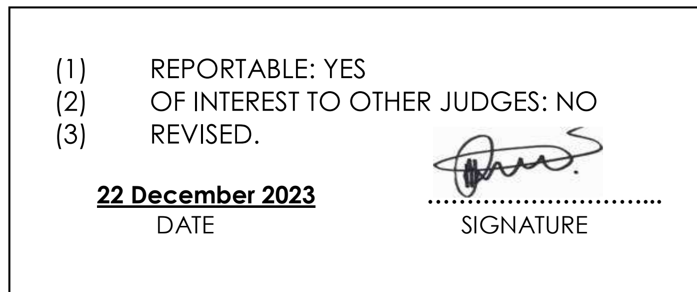
THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG LOCAL SEAT



(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

22 December 2023 ....
DATE SIGNATURE

CASE NO: 69 / 2022

In the matter between:

HOKU INVESTMENTS (PTY) LTD	**APPLICANT**
And	
DR PIXLEY KA ISAKA SEME MUNICIPALITY	**1ST RESPONDENT**
THE MAYOR OF THE DR PIXLEY KA ISAKA SEME MUNICIPALITY	**2ND RESPONDENT**
THE MUNICIPAL MANAGER OF THE DR PIXLEY KA ISAKA SEME MUNICIPALITY	**3RD RESPONDENT**
GSNY CONSTRUCTION (PTY) LTD	**4TH RESPONDENT**

THE MEMBER OF THE EXECUTIVE COUNCIL: 5TH RESPONDENT
COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS: MPUMALANGA

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 22 December 2023.

Introduction

[1] This is a legality review as well as a review in terms of Promotion of Administrative Justice Act, in which the Applicant seeks an order in the following terms:

1.1. The late delivery of the amended Notice of Motion and Supplementary Founding Affidavit is condoned.

1.2. The following resolutions of the First Respondent, i.e.:

1.2.1. Resolution A59/2021 Annexed hereto as Nom1;

1.2.2. Resolution A195/2021dated 03 August 2021, as amended on 21 October 2021, a copy of which is annexed hereto as NoM2;

1.3. are reviewed and set aside.

1.4. The deed of sale that had been entered into between the First Respondent and the Fourth Respondent on 12 October 2021< annexed hereto as Nom3, is declared to be null and void.

1.5. The Fourth Respondent is ordered to restore the land that the Fourth Respondent occupies relying on the said Deed of Sale of 12 October 2021 to its original condition, i.e. the condition the land was in prior to occupation by the Fourth Respondent in 2021

1.6. The Fourth Respondent in restoring the land to its original condition to demolish any structure that the Fourth Respondent has erected on such land.

1.7. The First Respondent is interdicted from passing transfer of the land that is the subject matter of the Deed of Sale of 12 October 2021 to the Fourth Respondent.

1.8. The Fourt Respondent is interdicted from receiving transfer of the land that is the subject matter of the Deed of Sale of 12 October 2021.

1.9. Alternatively, and in the event of transfer of Erf 1096 from the First Respondent to the Fourth Respondent taking place prior to adjudication of this application, an order compelling the Fourth Respondent to retransfer Erf 1096 to the First Respondent and compelling the First Respondent to receive transfer of Erf 1096.

1.10. In the event that the First and Fourth Respondent do not comply with prayer 7 above (by preparing and signing all transfer documents and lodging same with the Registrar of Deeds) within one month from date of this order the sheriff for the district of Dr Pixley Ka Isaka Seme Municipality is authorised to prepare and sign all transfer documents and lodging same with the Registrar of Deeds and take all steps so as to effect transfer of Erf 1096 from the Fourth Respondent to the First Respondent.

1.11. The First and Fourth Respondent are to pay the Applicant's costs of suit in *solidum* of each other.

[2] The application is opposed by the First, Second, Third and Fourth Respondents. The Fifth Respondent filed a notice of intention to abide.

Background.

[3] Before unpacking the factual matrix of this application, it is apposite to lay bare the historical background. The Applicant and the Fourth Respondent are the companies that find themselves in the same industry that involves building of the shopping centres. The First Respondent is the common denominator to these companies in that they operate (or intend to) in the same area, being its municipal land or land under its control. The similarities between the Applicant and the Fourth Respondent are peculiar in that both of them had at some stage approached the First Respondent with the request that they should be sold the municipal land for purposes of development into shopping centres. After engaging in a process that involves the public participation, both applications were approved by the First Respondent.

[4] The differences in the two deals referred to above are that, the one was approved in 2005 whereas the other was in 2021; and that the one was not subjected to judicial review whereas the other one is. The 2005 deal was between the Applicant and the First Respondent whereas the one under judicial review is between the First Respondent and the Fourth Respondent. These facts suffice to paint a picture of a strong possibility of competition between the Applicant and the Fourth Respondent due to the nature of their business.

[5] Although the Fourth Respondent now argues that what is good for the goose should also be good for the gander, the Applicant sees it differently. The Applicant submits that two wrongs (assuming that the 2005 deal was based on wrong administrative decision) do not make a right. I agree with this assertion especially because the 2005 deal was not subjected to a judicial review process. This historical background remains relevant not only for possible competition but also for one to understand the origin of precedence on the part of the First Respondent.

The deal under review.

[6] On 04 February 2021 the Council for the First Respondent (the Council) considered a "Request to purchase" letter from the Fourth Respondent dated 02 October 2020. In this letter, the Fourth Respondent requested to purchase a portion of land described as Erf 1096 Volkrust: Dr Pixley ka Isaka Seme Local Municipality (the property). At that stage the property was a park area located near the Country College and next to Dr. Nelson Mandela Drive (N11). According to the Request to purchase letter, the reason for the request was for the Fourth Respondent to develop the land into a new shopping centre with Checkers as the main tenant.

[7] In the said letter, the Fourth Respondent indicated that in case permission is granted, it would like to relocate the existing park and fencing to the opposite side of Country College which is zoned as a park area. It would also build new ablution facilities for the park which would contain three toilets with basins for "Ladies" and two toilets with one urinal with basins for "Men," all of which would be done at its costs. The Fourth Respondent also offered to pay all costs that arise for "evaluation, transfers, land savoir, zoning and upgrading of existing infrastructure" if needed. The rest of the letter gave

details on how the local community and the municipality are expected to benefit from the whole project. It also contained the drawings and drafts of the envisaged project.

[8] According to a letter from the Third Respondent dated 04 March 2021, which was directed to the Fourth Respondent, the Council resolved to engage on public participation to hear if the community agrees on the sale of the land for the development of a shopping centre.[1] An advert in which members of the public were invited to comment within 30 days from the date of the signature (17 March 2021) was also attached to this correspondence.

[9] After receiving and considering the letters of objections and/or support for the project proposed by the Fourth Respondent, and on 03 August 2021, the Council took a decision to sell the land to the Fourth Respondent. A Deed of Sale was signed by the First and the Fourth Respondent on 12 October 2021.[2] The purchase price according to the Deed of Sale was R300 000.00 (three hundred thousand rand).

[10] One of the persons who had objected to the project proposed by the Fourth Respondent is Dreyer Retailers (Pty) Ltd (Dreyer). When the project received the thumbs up from the Council despite this objection, Dreyer brought an urgent application before the court under case no. 3669/2021, in an attempt to interdict the whole process. That application is not before this court and the contents thereof remain irrelevant for purpose of this application. It suffices to state that on 04 November 2021, the urgent application was struck off the roll for lack of urgency.

[1] See Annexure NTM4 on p. 247 of the paginated bundle.
[2] See Annexure NOM2 at p. 7 of the paginated bundle.

The current Application.

[11] Before delving into the merits for this application, it is indispensable to deal with points *in limine* raised by the First, Second and Third Respondents (municipal Respondents), whose opposition is contained in an affidavit attested to by the Third Respondent. The points *in limine* raised challenge the reference and reliance by the Applicant on the contents of the affidavits in the application launched by Dreyer as being irrelevant and inadmissible for not being properly before this court. It is their contention therefore that such paragraphs should be struck out of the Applicant's affidavit. This would entail that paragraphs 11.1, 17, 18, 45, 48, 49 and 50 of the Applicant's Founding Affidavit stand to be struck out if this request is acceded to.

[12] For the sake of completeness, I shall zoom into the paragraphs sought to be struck out. The following was averred in the Founding Affidavit

> "11. I have already annexed the objection that had been submitted by the Applicant. I also annex further objections that had been submitted, i.e.
> 11.1 An objection by Korb Attorneys on behalf of Dreyer Retailers (Pty) Ltd. I mark such "FA3"
>
> 17.When Dreyer Retailers (Pty) Ltd came to know of the fact of the resolution of 3 August 2021, it had through its attorney (presently the attorney of record of the Applicant) addressed a letter to the First Respondent for attention of the Third Respondent. I annex a copy of such letter dated 23 September 2021 hereto "FA7". I point out that in such letter the Applicant's attorney of record requested of the Third Respondent, alternatively, the First Respondent, to make available the consolidated report on the objections that the First Respondent had received. The First Respondent elected not to respond to such letter. That much is confirmed by Korb Attorneys in an affidavit hereto, Annexure "FA8".

18. Dreyer Retailers (Pty) Ltd thereupon attempted to obtain an interim interdict to stop the development of Erf 1096 by launching an urgent application. The court found that such application was not urgent. Such application would be made available to the Honourable Court.

27.In the urgent application referred to above, there are a number of further grounds for review that appear from the papers filed by the municipality. I turn to deal with such.

45. Furthermore, the Third Respondent had stated in the Answering Affidavit of the municipality in the urgent application, that the municipal council had as a result of receiving the application of the Fourth Respondent to purchase the Erf (which was dated 2 October 2020) obtained a valuation patently a new and ad hoc valuation for purposes of a possible transaction. The valuation referred to in the answering affidavit that cannot be the Municipal Valuation Roll.

48. A further ground for review appears from the documents filed by the municipality Respondents in the urgent application. The municipality was biased against the Applicant. Such is a ground for review as provided for in section 6(2)(a)(iii) of the Promotion of Administrative Justice Act.

49. Firstly, the municipality Respondents had in a notice in terms of Rule 41A (Annexure “FA12”) recorded the First, Second and Third Respondents expressed an opinion that there cannot be mediation because “the Applicant is not is not bona fide as they are only scared of the competition and such discussion with them will never yield any results”.

50. Also, in paragraph 27.2 of the Answering Affidavit of the municipal Respondents, the Third Respondent stated that the “real truth the Applicant is not stating in its papers is that the Applicant is running away from competition”.

> 55. In the papers before the urgent court, the Fourth Respondent had testified that he had received "permission" from the municipality to occupy. There is no proof thereof and I suggest that it is for the First to Third Respondents to provide such proof when it submits the record of proceedings.
>
> 59. The Fourth Respondent should be ordered to restore the land to its condition prior to occupation by the Fourth Respondent. In this regard it is pointed out that Dreyer Retailers (Pty) Ltd had attempted to obtain an interdict to prevent construction. The Fourth Respondent thus was aware of the grounds for review since an early stage. It elected to proceed with the development regardless thereof. In consequence, it was well informed of the risk to indeed proceed. There is no sound reason why the Fourth Respondent should not be ordered to restore the land to its previous condition."

[13] In a Replying Affidavit, the Applicant is opposed to this point *in limine* saying, it is entitled to raise any point of law, whether it had been raised before or not. It further submitted that it was entitled to raise issues alluded to by Dreyer as the same were raised in an open court. It also argued that the municipal Respondents cannot cry foul as the Applicant attempted to be joined in that application and they are obstructing the application of the interim relief. No submissions were made by the Applicant's counsel in the written heads of arguments on this aspect.

[14] The reasons for the municipal Respondents' arguments are that that Dreyer did not file confirmatory affidavits to the allegations alluded to it, that Korb Attorneys was not authorised to confirm these on behalf of Dreyer and that the Applicant lacks authority to act on behalf of Dreyer. All these aspects deal with one and the same issue to wit, whether facts attributed to Dreyer are properly before this court.

[15] It is trite that evidence in motion proceedings has to be presented by way of affidavits, otherwise, there would not be evidence before court. Facts attributed to a third party for which the deponent has no personal knowledge thereof, need to be confirmed by such third party having personal knowledge by way of an affidavit, before it could be considered as evidence. Failure to do so would result in such allegations not accorded status of evidence.

[16] It is clear that Dreyer, and not Korb Attorneys, was (and still is) a party in a matter that was struck off the urgent court roll due to lack of urgency. That matter may still be enrolled under normal roll. It is clear that Korb Attorneys who act on behalf of Dreyer in that matter and also acted on behalf of the Applicant in this application, acts through a power of attorney in the respective matter, to the extent mandated by the client.

[17] Under normal circumstances, a legal practitioner instructed to act on behalf of a client in a particular case, would have his power of attorney limited to that case. The mandate given to Korb Attorneys in the urgent application, was to act on Dreyer's behalf in that case and cannot extend to being authorised to pass over the affidavits acquired therein to other parties to use in their private litigations. Even if it was to be presumed that Dreyer could mandate Korb Attorneys to do so, that is not what Nicholas Korb (Korb) alleges in his confirmatory affidavits.[3] In his affidavits, Korb confirms the correctness of affidavits in so far as it relates to him. All that was said relating to him in the Founding Affidavit is what he did on behalf of Dreyer. It does not go beyond that. Dreyer, and not his mandated agent, is the only person who can attest to the correctness of the facts he alluded to, in his own affidavit. Equally, Korb would need Dreyer's permission to use

[3] See Annexures FA8 and JFA1 on p. 102 and 171 of the paginated bundle.

whatever he acquired when acting on his behalf for any other purpose or in a different case.

[18] One of the reasons an affidavit cannot be used other than for purpose it was deposed for, is that it is a criminal offence for one to give a false statement under oath. If any allegation attributed to Dreyer was to be found to be false, the deponent to the affidavit would have to face the consequences which may include criminal prosecution. Fairness demands that such should happen only when the said person has deposed to an affidavit and submitted it in a particular case for it to be used therein. It would be absurd if an affidavit would draw such consequences when used in cases it was not deposed for, merely because it is a public document presented in a different matter in an open court.

[19] I am as such not persuaded, that facts attributed to Dreyer, flowing from case no. 3669/2021, are properly before this court as they were not confirmed by the deponent who signed the founding affidavit in that case. I agree that all the paragraphs referred to in paragraphs 11 and 12 above, should be struck out or be ignored for containing inadmissible evidence. This leaves much of the Applicant's case hanging in the air without the foundation the deponent to the Founding Affidavit expected it would have if it was not for those paragraphs being struck out.

Grounds for review.

[20] The Applicant's grounds of review are rooted on section 6(2)(b) of the Promotion of the Promotion of Access to Justice Act, no. 3 of 2000 (PAJA) which provides,

"6. Judicial review of administrative action

> (2) A court or tribunal has the power to judicially review an administrative action if
> (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with."

[21] In substantiation of the above, the Applicant argues that the First Respondent failed to comply with section 14(2) and (5) of the Local Government: Municipal Finance Management Act, no. 53 of 2003, which provides,

> "14. Disposal of capital assets
> (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.
> (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."

[22] In expanding on this ground, the Applicant submitted that the First Respondent failed to give heed to section 37(2) to (8) of the Supply Chain Management Policy passed in terms of section 111 of the Local Government: Municipal Finance Management Act.[4] The relevant section of the policy provides,

> "37. Unsolicited bids.

[4] See section 39 of the same policy reviewed on 31 May 2023 under Resolution R2023-03-31 (9.3).

37.2 The Accounting Officer may decide in terms of section 113(2) of the Act to consider an unsolicited bid, only if-

(a) the product or service offered in terms of the bid is a demonstrably or proven unique innovative concept;
(b) the product or service will be exceptionally beneficial to, or have exceptional cost advantages for, the municipality or municipal entity;
(c) the person who made the bid is the sole provider of the product or service; and
(d) the reasons for not going through the normal bidding processes are found to be sound by the accounting officer.

37.3 If the Accounting Officer decides to consider an unsolicited bid that complies with subregulation (2), the municipality or municipal entity must make its decision public in accordance with section 21A of the Municipal Systems Act, together with-

(e) its reasons as to why the bid should not be open to other competitors;
(f) an explanation of the potential benefits for the municipality or entity were it to accept the unsolicited bid; and
(g) an invitation to the public or other potential suppliers to submit their comments within 30 days of the notice.

37.4 The Accounting Officer must submit all written comments pursuant to subregulation (3), it must submit such comments, including any responses from the unsolicited bidder, to the National Treasury and the relevant provincial treasury for comment.

37.5 The adjudication committee must consider the unsolicited bid and may award the bid or make a recommendation to the accounting officer, depending on its delegations.

37.6 A meeting of the adjudication committee to consider an unsolicited bid must be open to the public.

37.7 When considering the matter, the adjudication committee must take into account-

(h) any comments submitted by the public; and

(i) any written comments and recommendations of the National Treasury or the relevant provincial treasury.

37.8 If any recommendations of the National Treasury or provincial treasury are rejected or not followed, the accounting officer must submit to the Auditor General, the relevant provincial treasury and the National Treasury the reasons for rejecting or not following those recommendations.

37.9 Such submission must be made within seven days after the decision on the award of the unsolicited bid is taken, but no contract committing the municipality or municipal entity to the bid may be entered into or signed within 30 days of the submission."

[23] Further grounds of review are to the effect that the price for the property was not considered by the First Respondent before Approving the deal; and bias against Dreyer and/or the Applicant or in favour of the Fourth Respondent. The grounds for review are considered hereunder.

[24] Before evaluating the basis for these grounds any further, it is apposite to visit the legal framework relied on by the municipal Respondents in their opposition. The municipal Respondents aver that the First Respondent relied on section 40 of the Supply Chain Management Policy which provides,[5]

"40 Disposal management

(1) The criteria for the disposal or letting of assets, including unserviceable, redundant or obsolete assets, subject to sections 14 and 90 of the Act, are to be determined by the council.

(2) Assets may be disposed of by -

(a) (i) transferring the asset to another organ of state in terms of a provision of the Act enabling the transfer of assets;

(ii) transferring the asset to another organ of state at market related value or, when appropriate, free of charge;

[5] See section 42 of the same policy reviewed on 31 May 2023 under Resolution R2023-03-31 (9.3).

(iii) selling the asset; or

(*b)* The Accounting Officer must stipulate that-

immovable property is sold only at market related prices except when the public interest or the plight of the poor demands otherwise;

(ii) movable assets are sold either by way of written price quotations, a competitive bidding process, auction or at market related prices, whichever is the most advantageous to the municipality or municipal entity;

(iii) in the case of the free disposal of computer equipment, the provincial department of education must first be approached to indicate within 30 days whether any of the local schools are interested in the equipment; and

(iv) in the case of the disposal of firearms, the National Conventional Arms Control Committee has approved any sale or donation of firearms to any person or institution within or outside the Republic;

(c) provided that-

immovable property is let at market related rates except when the public interest or the plight of the poor demands otherwise; and

(ii) all fees, charges, rates, tariffs, scales of fees or other charges relating to the letting of immovable property are annually reviewed;

(d) where assets are traded in for other assets, the highest possible trade-in price is negotiated."

[25] It is the Applicant's argument that in disposing with the property, the decision by the First Respondent was not taken in a meeting open to the public in which it considered the fair market value of the asset and the economic and community value to be received in exchange for it. Failure to give heed to this provision, was in contravention of section 14(2) of the Local Government: Municipal Finance Management Act. Three issues come from this provision: One is about a meeting of the Council which had to be open to the public, the other is a consideration of a fair market value of the

property and lastly, the economic and community value to be received in exchange thereof.

[26] The relief sought by the Applicant is interdictory in nature. There is no doubt that the First Respondent is mandated and authorised by the empowering statute, the Local Government: Municipal Finance Management Act, to dispose and transfer the ownership of the property to a third party, after observing certain prescripts. In *Gool v Minister of Justice and Another*,[6] a full bench of the Cape Provincial Division was called upon to grant an interdict restraining the Minister *pendente lite* from exercising certain powers vested in him by a statute. Thompson J, writing for a unanimous Court, considered the requirements for an interim restraining order laid down in *Setlogelo*[7] and said the following:

> "The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of *mala fides*, the Court does not readily grant such an interdict…
>
> The various considerations which I have mentioned lead, in my opinion, irresistibly to the conclusion that the Court should only grant an interdict such as that sought by the applicant in the present instance upon a strong case being made out for that relief. I have already held that the Court has jurisdiction to entertain an application such as the present, but in my judgment that jurisdiction will, for the reasons I have indicated, only be exercised in exceptional circumstances and when a strong case is made out for relief."

[6] 1955 (2) SA 682 (CPD) at 688F and 689B-C.
[7] See *Setlogelo v Setlogelo* 1914 AD 221.

This approach was quoted with approval by the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[8]

[27] This important principle was followed by the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and Others*[9] when it held,

> "Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

[28] It follows from the above then, that if a decision has to be made on reasonable grounds, it is the municipal Council that should decide if the grounds are reasonable or not. It is not a call to be made by the business entities, the courts or the legal practitioners, but the politicians on the level of local government. This does not mean the courts cannot interfere and review decisions taken unreasonably. From the precedence relied on above, it would be justified to interfere in "exceptional circumstances" or where the discretion was exercised with "*mala fides*."

Public participation.

[29] With the above on the background, one needs to consider the following that flows from the municipal Respondents' Answering Affidavit. At the

[8] 2012 (6) SA 223 (CC) at para 43.
[9] 2006 (6) SA 416 (CC) at para 95.

time the decision to invite members of the public to take part, South Africa was placed in level three lockdown under Covid-19 Regulations imposed by the government.[10] Public gatherings were prohibited, with limited exceptions. The impact of these regulations was felt even in the courtrooms where the proceedings were conducted away from the public. Covid-19 regulations did not mean that public work should be halted. Various institutions had to devise means through which work would progress without putting the public at risk of gathering, which was outlawed after all.

[30] The unfairness that flows from the failure to hold a public meeting as provided should be evaluated against the purpose of this requirement. The intended purpose was obviously to allow full public participation in the decision making. The public was afforded the full participation when the decision was published and everyone was allowed thirty days to file objections if they wished to. Objections and letters of support were filed and considered by the First Respondent. Nothing comes out of the failure to hold the public meeting given the public involvement that was allowed. As a result, this ground of review stands to be dismissed.

Consideration of property value.

[31] As for the ground of review to the effect that the property value was not considered, the Applicant's Founding Affidavit avers that this is a ground advanced from the failed urgent application by Dreyer.[11] To the extent that this argument is advanced as Dreyer's, I have already ruled that the same should be struck out or be considered as inadmissible evidence since Dreyer is not before the court and did not give a confirmatory affidavit. To the extent

[10] See para 66.1 of the First to Third Respondent's Answering Affidavit on p. 195 of the paginated bundle.
[11] See para 27 & 28 of the Founding Affidavit on p. 25-26 of the paginated bundle.

that this could be advanced as the Applicant's own argument (although it does not appear so from the papers filed), I now proceed to consider it.

[32] It is not clear as to how the Applicant reached the conclusion that in agreeing to have the land sold to the Fourth Respondent, the First Respondent had not considered the purchase price thereof. It would appear from the Applicant's Founding Affidavit that such conclusion may have been reached because the resolution itself does not contain the value or the purchase price.[12] This approach is however flawed in that it suggests that the resolution is bound to reflect everything considered and/or discussed before it is adopted, which is not always the case. Moreover, the First to Third Respondents dispute that interpretation.

[33] The Applicant further argues that the first time the amount of R300 000.00 was mentioned was in a resolution dated 21 October 2021 which may have been an attempt to rectify the earlier resolution which was passed without the value of the property being considered. It goes on to argue that even then, that amount was for the cost of relocating the park to the other side not the value of the land. The said resolution read,

> "3. THAT Council approves the purchase of the remaining extent of the municipal land described as Erf 1096, Volksrust and to relocate the recreational facility (park from the remaining Extent of Erf 1096 for the development of a shopping centre at the corner of Pretorius Street and Nelson Mandela Drive (N11) on Erf 1096 Volksrust to the amount of R300 00.00."[13]

[34] This interpretation makes it evident that the Applicant is hopelessly capitalising on whatever grammatical error, real or perceived, contained in the First Respondent's resolutions, with the hope to have the administrative

---

[12] See para 28 of the Founding Affidavit on p. 26 of the paginated bundle.
[13] See Resolution A195/2021 on p. 104 of the paginated bundle.

decision it took, reviewed and set aside; irrespective of the essence thereof. It was clear right from the "request to purchase" letter that the Fourth Respondent was to bear all the costs associated with the relocation of the park.[14] While the wording of the resolution could be subjected to more than one interpretation, it is a hopeless act of desperation for the Applicant to attach any other interpretation than the obvious one given the rest of the information that was at its disposal. The Applicant's suggestions in this regard appear to be nothing more than semantics, to which I will remark no further.

[35] Over and above that, it was submitted by the Applicant that the property should have been sold for the value it was intended to be used for, being commercial value, and not based on Municipal Valuation Roll which was prepared based on the land being zoned as a park. The Applicant also argued that as a "rule," Municipal Valuation Roll reflects values lower than the market value. No such "rule" was pointed to or elaborated on. The importance of pointing to the said rule manifests itself with the Respondents disputing this averment. The allegation is not supported the disposition of facts.

[36] There is no requirement from the Supply Chain Management Policy that the property should be sold at commercial value. The requirement is rather for "immovable property to be sold at a market related price except when the public interest or the plight of the poor demands otherwise."[15] It is worth noting that the First Respondent had used the same approach in property valuation when the land was sold to the Applicant in 2005. It was not valued and sold at commercial price. Any property valuation looks at the value at

---

[14] See the Request to purchase letter on p. 86 of the paginated bundle where the following appears on the fourth paragraph: "If permission is granted, we would like to relocate the existing park and fencing to the opposite side of Country College <u>at our cost</u>…"

[15] See section 40(2)(b)(i) of the Supply Chain Policy under para 22 above.

the time of valuation as opposed to what it would be sometime in the future. Perhaps the Applicant should have challenged the statutory provision if it had any prospects of success in challenging the provision so as to include the value based on the envisaged future usage thereof.

[37] In *Pharmaceutical Manufacturers Association of SA and Another in Re Ex Parte President of the RSA*,[16] the Constitutional Court said,

> "The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."

[38] Presuming that at the time that a resolution to sell the land was adopted by the First Respondent, there was no value attached to the land, would that make the deal and process irregular for that reason? It should be remembered that it is common cause that at the time the Deed of Sale was signed, the value of the property was already agreed to as it is reflected therein. I take guidance from a decision by the Supreme Court of Appeal in *Emalahleni Local Municipality and Others v Propark Association and Another*[17] where a similar question was considered. Just as *in casu*, the decision of a local municipality was challenged before the court *a quo,* for having not complied with section 14 of the Local Government: Municipal Finance Management Act, no. 53 of 2003.[18]

---

[16] 2000 (2) SA 674 (CC) at para 90.

[17] (089/2012) [2012] ZASCA 177; [2013] 1 All SA 277 (SCA) (29 November 2012).

[18] See para 19 above.

[39] The court *a quo* had reviewed and set aside the decision of the local municipality for reason that upon taking a resolution, there had not been compliance with this section. On appeal, the decision of the court *a quo* was set aside for reason that compliance with section 14 (price determination) does not have to be taken before a resolution is adopted. As long as there is compliance before a Deed of Sale is signed, there is no irregularity. As indicated above the valuation for determination of a market related price was done before the Deed of Sale was signed. I am of the view that the Applicant failed to make a case demonstrating that upon a resolution adoption, the First Respondent had not considered the value of the property. It only made out a case demonstrating that a resolution does not say what was considered. Even so, I find that there was full compliance with section 14 of the Local Government: Municipal Finance Management Act, no. 53 of 2003.

Biasness.

[40] As for the ground of review of biasness against Dreyer, allegations relating to Dreyer remain struck out or should be considered as inadmissible evidence for reasons alluded to above. To the extent that it is alleged that the First Respondent was biased against the Applicant or in favour of the Fourth Respondent, I proceed to consider the submissions. There is nothing submitted by the Applicant exhibiting biasness on the side of the First Respondent before a resolution was adopted to sell the land. Snippets of incidents are however quoted of what happened or what was averred in this litigation with a suggestion that it displays biasness.

[41] The reasoning for Applicant's argument is based on the submission by the municipal Respondents to the effect that mediation would not be possible because the Applicant is in competition with the Fourth Respondent. The

argument to the effect that such a statement reflects biasness is shallow and not convincing because all that the municipal Respondents averred are the facts as they see them. The Applicant does not even hide that it is in the same industry of building shopping centres as the Fourth Respondent. It even voiced the desire to purchase the same property that was sold to the Fourth Respondent in order to develop it, although in the same papers it is opposed to the park being developed into a shopping centre.

[42] The decision by the First Respondent to allow the Fourth Respondent to occupy the land before the transfer of ownership is implemented is not unfamiliar especially in property business and there is nothing amiss about it. It would appear the Applicant interprets any act of cooperation extended to the Fourth Respondent by the First Respondent as being biased or favouritism. What defeats logic in my view is that the First Respondent extended the same cooperation to the Applicant in a similar deal in 2005 and this was not seen as being biased then. The more I analyse this ground the more the Applicant is exposed as a competitor who is jostling for space and business against the Fourth Respondent. This ground too, stands to be dismissed.

Wasted costs for 17 November 2022.

[43] The last aspect requiring court's attention is the costs for 17 November 2022. On that date, the matter could not proceed because the record to be reviewed was not in the court file, prompting the matter to be postponed. In terms of Rule 53 and the Notice of Motion, the First, Second and Third Respondents were called upon to dispatch to the Registrar, the record to be reviewed. Instead of availing the said record to the Registrar, the First, Second and Third Respondents dispatched the record to the Applicant. The matter was set down for hearing only to find that the court's file did not

contain that record. The Applicant and the Respondents pointed fingers at each other.

[44] Paragraph 8.4 of the Practice Directives of this Division provide,

> "The applicant shall ensure that a set of court papers are ready, i.e., indexed, paginated and bound together and filed with the Registrar's clerk by not later than 12h00 on a Monday and Friday preceding the hearing on the following Monday and Friday respectively of the motion week."

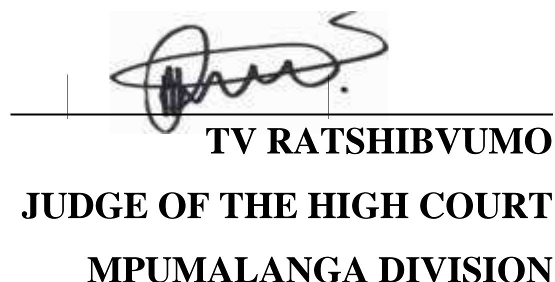
[45] Whereas in terms of Rule 53, the municipal Respondents had a duty to file the record sought to be reviewed and corrected, it remained the duty of the Applicant to prepare the court file for hearing. There were avenues available at the Applicant's disposal to deal with and force compliance by the respondents who failed to comply with Rule 53. Setting the matter down for hearing is not one of those avenues. Had the Applicant pursued the proper avenue, it could ask for compliance and costs order against the non-complying respondents, and it chose not to. Failure by the respondents to file the record does not take away the duty from the Applicant to see to it the court file is properly prepared.

[46] On the other hand, the municipal Respondents cannot be allowed to benefit the cost order for that date given the fact that the Applicant's failure to comply with the directives is rooted in their failure to comply with Rule 53 Notice of Motion. The only party entitled to costs for that date is therefore the Fourth Respondent.

[47] For the aforesaid reasons, I make the following order:

47.1The application is dismissed with costs; such costs are to include costs of two counsel for the First to Third Respondent (where such employed).

47.2 The Applicant is ordered to pay the Fourth Respondent wasted costs for 17 November 2022.



TV RATSHIBVUMO
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION

FOR THE APPLICANT	**: ADV Q PELSER SC**
INSTRUCTED BY	**: SOUTHEY ATTORNEYS** **C/O: GFT PISTORIUS INC** **MIDDELBURG**
FOR THE FIRST TO THE THIRD RESPONDENTS	**: ADV. MH MHAMBI** **: ADV K PAMA-SIHUNU**
INSTRUCTED BY	**: MJALI & ZIMEMA ATTOTNEYS** **C/O: MASHIFANE MOSWANE ATTORNEYS** **: MIDDELBURG**

FOR THE FOURTH RESPONDENTS	**: ADV. L KALASHE**
INSTRUCTED BY	**: MJALI & ZIMEMA ATTOTNEYS C/O: MASHIFANE MOSWANE ATTORNEYS**
	: MIDDELBURG
DATE HEARD	**: 03 OCTOBER 2023**
JUDGMENT DELIVERED	**: 22 DECEMBER 2023**