FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : 339/2010

In the matter between:-

BIO ENERGY AFRIKA FREE STATE (EDMS) BPK Appellant

and

FREEDOM FRONT PLUS Respondent

Case No.: 1507/2010

In re:

In the matter between:

FREEDOM FRONT PLUS Applicant

and

MOQHAKA LOCAL MUNICIPALITY 1st Respondent
BIO ENERGY AFRICA FREE STATE (EDMS) BPK 2nd Respondent
THE REGISTRAR OF DEEDS, BLOEMFONTEIN 3rd Respondent

CORAM: MUSI, JP *et* VAN ZYL, J *et* DAFFUE, AJ

JUDGMENT BY: MUSI, JP

HEARD ON: 11 AUGUST 2011

DELIVERED ON: 1 SEPTEMBER 2011

INTRODUCTION

[1] This is a full bench appeal against the judgment of Cillié J wherein he confirmed, with minor amendments, a *rule nisi* that

was granted by Jordaan J on 25 March 2010. The appeal is before us with leave of the court *a quo*.

[2] The amendments to the *rule nisi* relate only to the issue of costs and are not being challenged in this appeal. By the time that the *rule nisi* was confirmed some of the prayers contained therein had become irrelevant. For purpose of the appeal, the critical paragraphs of the *rule nisi* as confirmed are the following:

> "3.1 Dat die Tweede Respondent verbied word om die eiendom wat bekend staan as Gedeelte 225, Gedeelte 226 en Gedeelte 227 van die plaas "Dorpgronden" van Kroonstad, provinsie Vrystaat, onderskeidelik groot 12.5617 (twaalf komma vyf ses nul sewe) hektaar; 14,0370 (veertien komma nul drie sewe nul) hektaar, 2,9300 (twee komma nege drie nul nul) hektaar oorspronklik geregistreer en steeds gehou kragtens titelakte T26721/2009 met diagram SG506/2009 van toepassing daarop tesame met die roerende bates wat daarmee saam verkoop en/of oorgedra is aan die Tweede Respondent, te beswaar of te vervreem.
>
> …
>
> 3.8 Dat verklaar word dat die oordrag en registrasie van die gemelde onroerende eiendom, Gedeelte 225, Gedeelte 226

en Gedeelte 227 van die plaas “Dorpgronden” van Kroonstad 460, distrik KROONSTAD, provinsie Vrystaat, onderskeidelik groot 12,5617 (twaalf komma vyf ses een sewe) hektaar, 14,0370 (veertien komma nul drie nul nul) hektaar oorspronklik geregistreer en steeds gehou kragtens titelakte T26721/2009 met diagram SG506/2009 van toepassing daarop in die naam van die Tweede Respondent nietig is;

3.9 Dat die oordrag van die onroerende eiendom vermeld in bede 3.8 hierbo tersyde gestel word;

3.10 Dat gelas word dat die Eerste en Tweede Respondent alle stappe neem en alle dokumente onderteken ten einde toe te sien dat die gemelde onroerende eiendom teruggetransporteer word in die naam van die Eerste Respondent.”

In essence, the application seeks the setting aside of the transfer and restoration of ownership to the first respondent (restoring the *status quo ante*).

[3] There is only one issue to be determined in this appeal. It is whether the respondent, a political party operating in the national, provincial and local level, had the necessary standing in law (*locus standi*) to bring this application seeking the orders granted herein. Such issue cannot, however, be properly

considered without the benefit of the background against which it arises. It becomes necessary therefore to set out the relevant factual and legal background whereafter the real issue will be addressed.

FACTUAL BACKGROUND

[4] The factual background to the matter is either common cause or undisputed and is set out hereunder. I shall henceforth refer to the parties as in the court *a quo*. In this regard I should indicate that the first respondent, Moqhaka Local Municipality, had filed a notice of intention to oppose the application but subsequently did not file any opposing papers and has not joined issue in this appeal. It apparently will abide the decision of the court.

[5] The first respondent, a local municipality established in terms of section 12 of The Local Government Municipal Structures Act, No 117 of 1998, was the owner of the immovable property known as portions 225, 226 and 227 of the farm Dorpgronden, Kroonstad 406, Free State Province, measuring respectively 12.5617 hectare, 14.0370 hectare and 2.9300 hectare registered under Title Deed T26721/2009 with diagram SG506/2009 applicable thereto. On this farm is located an

electricity power station together with movable assets which also belonged to the first respondent. The dispute centres on the immovable property which includes the power station and I shall henceforth simply refer to it as the property. On 3 December 2009 the property was sold and transferred to the second respondent allegedly pursuant to a Deed of Sale concluded on 23 September 2008. The purchase price thereof inclusive of the movable assets was R8 million. Significantly, such purchase price was not paid to the first respondent. Instead a mortgage bond was registered over the property in favour of the first respondent to secure payment of the R8 million.

[6] The sale followed upon proposals embodied in a document entitled “Project Lesedi Co-operation Agreement” which essentially proposed the setting up of a Steering Committee whose mandate was to conduct a feasibility study on the utilisation of the property, particularly the power station which had been dysfunctional. This document had been prepared and signed by the representatives of the second respondent and the first respondent’s municipal manager, then one Mr Mokete Duma. The document was discussed at meetings of the council

of the first respondent on 11 March 2008 and 31 March 2008 and ratified. A steering committee was then constituted to carry out the feasibility study and to compile a report thereon. It included the representatives of the second respondent, on the one hand, and the first respondent's municipal manager aforesaid and its director of technical services, on the other hand. The document envisages transfer of the property together with the movables thereon to the second respondent but subject to certain conditions precedent. Significantly, one of the conditions was approval of the first respondent's municipal council. It also stipulated that approval by the first respondent would transpire in terms of the Municipal Finance Management Act (the MFMA). Of further note is that in approving or rather, ratifying, the agreement, the meeting of the first respondent's council specifically declared that "The final asset transfer will be presented for approval by Moqhaka Council".

THE LEGAL POSITION

[7] It is apposite to briefly set out the statutory framework applicable to disposal of property belonging to a municipality. Section 14 of the Municipal Finance Management Act, No 56 of 2003 (MFMA) provides as follows:

"(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) …

(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 assdets 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."

Section 60(1) of the Local Government: Municipal Systems Act, No 32 of 2000 provides as follows:

> "The following powers may within a policy framework determined by the municipal council, be delegated to an executive committee or executive mayor only:
>
> (a) decisions to expropriate immovable property or right in or to immovable property;"

[8] It is not disputed that the above statutory precepts were not complied with in the transfer of the property to the second respondent. In this regard, it is worth noting that section 14(1) of the MFMA may not be applicable, given that the property was not being used and, in particular, the power station was dysfunctional. But sub-section (2) applied and was not complied with. Neither was sub-section (5) complied with. Most fundamentally, the disposal was not authorised by the first respondent's municipal council. The sale was apparently concluded by the municipal manager who also authorised the transfer, purportedly on behalf of the first respondent, when he had no authority to do so. The transfer was clearly unlawful and

invalid. See **CITY OF TSHWANE METROPOLITAN MUNICIPALITY v RPM BRICKS (PTY) LTD** 2008 (3) SA 1 (SCA) paras [13] and [17]; **LEGATOR McKENNA INC AND ANOTHER v SHEA AND OTHERS** 2010 (1) SA 35 (SCA) para [29]; **MUNICIPAL MANAGER: QUEKENI LOCAL MUNICIPALITY AND ANOTHER v FV GENERAL TRADING CC** 2010 (1) SA 356 (SCA) para [14]; **EASTERN CAPE PROVINCIAL GOVERNMENT AND OTHERS v CONTRAPROPS 25 (PTY) LTD** 2001 (4) SA 142 (SCA) para [8]. And it matters not whether the purported sale agreement pursuant to which the transfer took place (*causa)* was valid or not (See **LEGATOR** paras [20], [21], [22]) nor would the rule in **WILKEN v KOHLER** 1913 AD 135 apply (See **LEGATOR** para [29]). Furthermore, it makes no difference that the transferee (the second respondent) may have been an innocent party. Compare the remarks made in **EASTERN CAPE PROVINCIAL GOVERNMENT AND OTHERS** *supra* para [9]. The point is that the transfer was prohibited by law and is a nullity. As was stated in **CITY OF TSHWANE** para [25] the Court cannot breathe new life into a dead transaction.

[9] In view of the weight of authority, counsel for the appellant was

constrained to concede right from the beginning of the hearing of the appeal that he could not argue that the transfer of the property was legal. He accordingly only relied on the one ground relating to *locus standi*, to which I now turn.

LOCUS STANDI

[10] This issue was foreshadowed in the second respondent's answering affidavit. It was correctly characterised as a legal point (point *in limine*) and was canvassed in the court *a quo*. The issue arises out of the fact that the applicant is a political party which stated in its founding affidavit that it was not acting in its own interest but in the public interest and seemed to rely on section 38 of the Constitution. The question was therefore whether the requirements of section 38 were met.

[11] The court *a quo* decided the point in favour of the applicant. Its reason for this was that section 38 of the Constitution was broad enough to permit the applicant to bring the application in the interest of the residents and ratepayers in the area of the respondent's jurisdiction, some of whom are also its supporters. But the learned judge did not elaborate.

[12] Section 38 of the Constitution provides as follows:

> "**38 Enforcement of rights**
>
> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
>
> *(a)* anyone acting in their own interest;
>
> *(b)* anyone acting on behalf of another person who cannot act in their own name;
>
> *(c)* anyone acting as a member of, or in the interest of, a group or class of persons;
>
> *(d)* anyone acting in the public interest; and
>
> *(e)* an association acting in the interest of its members."

[13] A literal interpretation of this section seems to me to mean that the persons and associations enumerated therein will have standing to bring an action to court only if their complaint is an infringement of or threat to, a right contained in the Bill of Rights. And the rights contained in the Bill of Rights are essentially human rights. Infringement of rights other than human rights, will thus not confer standing. This view seems to find support in the statement made by Traverso DJP in

FIRSTRAND BANK LTD v CHAUCER PUBLICATIONS (PTY) LTD 2008 (2) SA 592 (CPD) at 599D to the effect that "an applicant in a class action must allege that a right enshrined in the Bill of Rights is being threatened." The learned judge proceeded to rule that there could be no infringement of the right implicated in that case and rejected the applicant's claim to standing based on section 38.

[14] On this interpretation, the applicant herein would have no standing because it has not alleged, let alone established, any violation of, or threat to, any of the rights contained in the Bill of Rights. However, the Constitutional Court has adopted a broad approach to the interpretation of section 38. See the judgment of Chaskalson P (as he then was) in **FERREIRA v LEVIN NO AND OTHERS; VRYENHOEK AND OTHERS v POWELL NO AND OTHERS** 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) in para [165], which is quoted in full in the **FIRSTRAND BANK LTD**-case, *supra* at 599A-C.

[15] It seems evident that the Constitutional Court has given an extended interpretation to Section 38 to incorporate violations of and threats to all the rights, obligations, values and principles

contained in the Constitution committed by public bodies or public officials. This would include "any executive or administrative act or conduct or threatened administrative act or conduct of any organ of the State,…" (**FERREIRA** at 1084C-D). Constitutional challenges to legislative measures allegedly enacted contrary to the precepts of the Constitution are similarly covered. The rationale for this approach is the principle of legality, which is enshrined in the Constitution. In terms thereof "any exercise of public power has to be carried out in terms of a valid rule of law", as was stated in **MENQA AND ANOTHER v MARHOM AND OTHERS** 2008 (2) SA 120 (SCA) para [19]. See **FEDSURE LIFE ASSURANCE v GREATER JOHANNESBURG TMC** 1999 (1) SA 374 (CC) paras [55] and [56].

[16] A typical example is the recent case involving the extension of the term of the office of the Chief Justice of South Africa by the President of the Republic of South Africa. This is the case of **JUSTICE ALLIANCE OF SOUTH AFRICA AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** [2011] ZACC 23, case number CCT53/2011, judgment delivered on 29 July 2011. The standing of the applicants was not disputed but in dealing with the issue

Moseneke DCJ, writing for the unanimous court, expressed himself in the following terms in para [17]:

> "All the applicants claimed standing in the public interest, in the interest of their members or in their own interest, pursuant to the standing provision of the Constitution.[18] They relied variously on certain constitutional or democratic concepts, which may be summarised as follows: the protection of the Constitution; the protection and advancement of the understanding of and respect for the rule of law and the principle of legality; the protection of the administration of justice and the independence of the judiciary; the promotion, protection and advancement of human rights; the strengthening of constitutional democracy; the promotion of social justice and equality; public accountability and open governance."

(The standing provision referred to in footnote 18 is Section 38).

[17] The applicant's claim for standing falls squarely within the ambit of the above passage. The applicant is challenging the legality of the conduct of an organ of state in transferring public property to a private entity in complete contravention of the applicable statutory provisions and seeking the setting aside of the impugned transaction. In so doing, it is acting in the public interest as well as the interest of its supporters who are

residents and ratepayers in the area of jurisdiction of the first respondent's municipality. It has *locus standi*.

[18] In view of this clear authority, it is unnecessary to consider the alternative grounds advanced on behalf of the applicant in regard to standing. In this regard, it matters not that a private person or entity may be adversely affected by the order undoing the illegality. As the authorities cited elsewhere in this judgment demonstrate, a transaction prohibited by law in the public interest must be visited upon by a declaration of invalidity irrespective of the consequences for even an innocent party involved in it (of course the second respondent was not an innocent party). This being so, the argument advanced on behalf of the second respondent to the effect that the proper course in this case was for the applicant to have sought a mandamus against the first respondent is untenable. It is premised on the wrong assumption that a party in the position of the second respondent should not be adversely affected by the consequences of the other contractant's breach of its statutory duties.

[19] In the premises, the appeal is dismissed and appellant (second

respondent) is to pay the costs.

H. M. MUSI, JP

I concur.

C. VAN ZYL, J

I concur.

J. P. DAFFUE, AJ

On behalf of the appellant:	Adv. S. J. Reinders Instructed by: Hill, McHardy & Herbst BLOEMFONTEIN
On behalf of the respondents:	Adv. N. Snellenburg Instructed by: Rosendorff, Reitz Barry BLOEMFONTEIN

/eb