

Councillors and contracts with their municipality

key points

In the case of *Mpakathi v Kgots Development and Others SCA*, Case No. 334/03, the Court had to consider whether a property attached by a municipality may be sold in execution to a close corporation if one of the members of that close corporation is a municipal councillor.

Facts

A municipality obtained a court judgment against an individual (the appellant) for the payment of money owed to the municipality. The appellant failed to pay the judgment debt and the municipality arranged for the appellant's movable property to be attached and sold in execution.

At the sale, held as a public auction, the property was purchased by a close corporation. One of the members of the close corporation was at the same time a councillor in the municipality that had sold the property in execution.

The appellant challenged the sale, arguing that it should be declared null and void on the basis that the councillor was prohibited from entering into such a contract with the municipality.

Appellant's argument

The appellant relied on the provisions of section 40 of the Transvaal Local Government Ordinance 17 of 1939 (T) ('the ordinance'), which is still applicable in Gauteng Province. Section 40(1) provides that a municipal councillor may not enter into a contract with the council in which he or she has a pecuniary interest. Subsection (3) declares that such a contract "shall be null and void," in other words, it is as if it has never been entered into.

The appellant argued that the sale in execution to the close corporation was a contract with the

- As a rule councillors cannot benefit financially from a contract they enter into with their municipality.
- An exception exists when purchasing property in a public auction at a sale in execution.

municipality in which the councillor had a pecuniary interest and so fell within the ambit of this provision. The contract should therefore be declared null and void.

Decision

The Court held that the agreement that comes into being at a judicial sale is one between the purchaser and the Sheriff, acting as the executive of the law. This kind of a contract is a special type of situation where the municipality, the Sheriff and the purchaser are all parties to what is, in effect, a tripartite agreement in terms of which the municipal council acquires a contractual bond with the purchaser, and therefore indirectly with a councillor. The contract would fall within the ambit of section 40(1) of the ordinance only if the councillor acquired a direct or indirect pecuniary interest as a result.

The Court took a contextual interpretation to get to the real meaning of the words, "direct or indirect pecuniary interest". It held that apart from avoiding conflict of interest, section 40 has the purpose of protecting councils from fraud and corruption by councillors, preventing their misuse of insider knowledge of municipal business and preventing their abuse of their position in dealing with municipal employees and administrators in the performance of contracts with the municipality.

In this matter the contract was entered into at a public auction open to all ratepayers and other interested parties. The municipality had no part in,

or control over, the auction, in that the Sheriff is obliged to sell the property to the highest bidder. This greatly reduce the risk of impropriety on the part of the councillor in purchasing the property.

The purpose of execution is to enforce the Court's judgment. To this end, the proceedings are driven by the municipality for its exclusive benefit, through the Sheriff, acting in his or her executive capacity. The municipality, as execution creditor, has the right to prepare the conditions of sale, which it did in this case. The purchaser, in accepting these conditions of sale, was therefore instrumental in the municipality obtaining its objectives.

Further, the purchaser's bid, being the highest bid, was the best bargain possible for the municipality at this sale in execution. The purchaser's obligation to fulfil that bargain can hardly create scope for corruption, fraud or insider trading. The Court thus found that there was no direct or indirect pecuniary interest on the part of the councillor.

Comment

The importance of this decision is that where the council has no power or control over the contract, as in a public auction, the issue of pecuniary interest by councillors will not arise. Although, as a general principle, councillors are prohibited from financially benefiting from contracts entered into with their municipalities, the intention of this prohibition is clearly to discourage corruption, fraud and the unfair advantage councillors may have as a result of insider knowledge. However, an exception may be made if the contract involves the purchase of property at a public auction, and so occurs in the public eye, to the highest bidder and beyond the control of the municipality.

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