

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 490/13

In the matter between:

ILLOVO OPPORTUNITIES PARTNERSHIP #61	**APPELLANT**
and	
ILLOVO JUNCTION PROPERTIES (PTY) LTD	**FIRST RESPONDENT**
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**SECOND RESPONDENT**

Neutral citation: *Illovo Opportunities Partnership #61 v Illovo Junction Properties* (490/13) [2014] ZASCA 119 (19 September 2014)

Coram: Maya, Cachalia, and Zondi JJA and Schoeman and Dambuza AJJA

Heard: **2 September 2014**

Delivered: **19 September 2014**

Summary: **Application for declaratory order under s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959 – Whether direct and substantial interest established – Proper construction given to ss 48 and 63 of the Town Planning and Townships Ordinance 15 of 1986.**

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Potgieter AJ sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Cachalia JA (Maya and Zondi JJA and Schoeman and Dambuza AJJA concurring)

[1] This is an appeal from the Gauteng Local Division, Johannesburg, of the high court (Potgieter AJ), dismissing an application for declaratory relief.

[2] The appellant, Illovo Opportunities Partnership #61 sought a declaration that the first respondent, Illovo Junction Properties (Pty) Ltd, was liable for the payment of approximately R8.8 million to the second respondent, City of Johannesburg Metropolitan Municipality (the City). The City had levied the amount as a contribution after the first respondent's property was rezoned to permit further development. The contribution was meant to fund the cost of engineering services, parks and open spaces for the property. The appellant purchased the property from the first respondent (the seller), before the contribution was levied, but took transfer thereafter.

[3] The appellant's case is that the seller is liable for the payment because the contribution was levied against the owner of the property, ie, the seller, before the appellant took transfer of the property. The seller denies liability. It contends that the liability to pay the contribution will rest on the owner – the appellant in this case – once it chooses to develop the property in line with the rezoning. The high court did not consider the merits of the dispute because it dismissed the application on the ground that the appellant lacked standing. It held that the appellant had no legal interest in the relief claimed because it concerned the rights and obligations between third parties (the City and the seller); it did not concern the appellant's own rights. It is therefore necessary first to determine the issue of the appellant's standing to seek the declaration, and if necessary to then deal with the merits of the dispute. The City has not taken any steps to obtain payment from either party.

[4] It will be helpful to set out some of the background facts to better understand the dispute between the parties. The appellant concluded a sale agreement with the seller during September 2009 to purchase a property situated in Illovo, Johannesburg, for approximately R35,5 million. The seller had earlier that year applied to the City for the property to be rezoned so that its primary development rights would include offices, residential buildings and shops. In March 2009 the seller informed the appellant that the City had approved the application. However, at the time when the agreement was concluded, the City had not yet published a notice to this effect.

[5] In October 2009, a month after the agreement was concluded, the seller obtained a clearance certificate from the City indicating that its outstanding levies on the property had been settled. The seller maintains that it had thus discharged all its debts to the City. It then began to give effect to the agreement by taking steps to transfer the property to the appellant.

[6] On 4 November 2009 the City published a notice in the provincial gazette for the property to be rezoned in terms of an amendment scheme (the scheme), which

became effective on 30 December 2009. This meant that the property could now be developed in a manner consistent with its new use rights.

[7] On 5 January 2010, before the property was transferred to the appellant, the City informed the seller, which was still the owner, that an amount of R 8 749 758.04 was due for a 'bulk services contribution' in terms of s 63(1) of the Town- Planning and Townships Ordinance 15 of 1986 (the Ordinance).[1] On 19 January 2010, the appellant became the owner of the property on registration of transfer. The appellant now wishes to sell the property to a developer or develop the property itself, and needs clarity in regard to where liability to pay the contribution lies.

[8] In July 2011 the appellant instituted proceedings in the high court to resolve the dispute. The main relief sought was an order declaring the seller liable to pay the contribution. Prayer 2 was for consequential relief for the seller to pay the City in the event of the main relief being granted. The appellant added an alternative prayer for relief against the City, but later abandoned it, as it did the consequential relief it sought against the seller. In the high court the only relief sought, as it seeks in this appeal, is an order declaring the seller liable to pay this amount to the City. The City has been joined in these proceedings but is content to adopt a non-committal stance. It abides the decision of this court.

[9] In its founding affidavit, and in the high court, the appellant relied on the sale agreement read with s 63(1) of the Ordinance to establish its cause of action. Clause 5.2 upon which particular reliance was placed, reads:

'5.2 From the date of possession –

5.2.1 . . .

5.2.2 . . .

[1] See fn 4 below.

5.2.3 The purchaser shall be liable for all rates, taxes and other *imposts* levied against the property by any authority. Should the seller have prepaid any such rates and taxes beyond the date of possession, the purchaser shall refund to the seller all amounts paid beyond the said date on demand. For the purpose of this clause the words "Assessment rates" includes the electricity levy charged with respect to property not consuming electricity.' (my emphasis)

Accordingly, the appellant contended that until it obtained possession, which is when transfer was effected, the seller was liable to pay rates, taxes and other imposts for the property.

[10] The founding affidavit asserts that it was 'an express, alternatively tacit, further alternatively implied term' of the contract that the seller would pay the contribution to the City. This is because the parties assumed that once the scheme came into operation, and the City had directed the seller to pay the contribution, the seller would pay. And further, that the City's direction to the seller under s 63(1) of the Ordinance to pay the contribution amounted to the levying of an *impost* against the property within the meaning of clause 5.2.3 of the agreement. The seller is therefore liable for the payment to the City. The appellant thus contended, for the purpose of establishing its standing, that it has a direct and substantial interest in ensuring that the seller discharges its obligation to the City.

[11] The high court found that the appellant's founding papers had not established the contractual term for which it contended. And it followed that the declaration sought – that the seller is liable to pay the contribution to the City – did not concern the appellant's *own* rights under the contract but rather related to a 'concomitant right' that the City may have against the seller, which the City has not asserted. Consequently the appellant had established no more than a 'derivative interest' – that it would be compelled to pay the City if it wished to develop the property – and not a direct and substantial interest in the grant of the declaratory order. The learned judge thus dismissed the application but granted leave to this court.

[12] In its heads of argument prepared for the appeal the appellant persisted with its submission that under the sale agreement the seller was and remains liable for the payment of the contribution. But, before us, counsel abandoned any reliance on the agreement as there was no express term providing for the payment and simply no basis for reading a tacit or implied term to this effect into it.

[13] Instead he submitted that if the appellant is compelled to pay the contribution, the seller would still incur liability on the basis of unjust enrichment or *negotiorum gestio*. Simply put, the appellant says that the seller is liable for the payment under the Ordinance, and if the appellant is obliged to discharge the seller's debt, the latter would be unjustly enriched at its expense. This submission was not advanced in the court a quo but now forms the basis for the legal interest the appellant contends it has in the relief claimed. It is to this issue that I now turn.

[14] Section 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959,[2] empowers a high court to grant declaratory relief,

'. . . in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

The existence of a dispute between the parties is not a prerequisite for the court to exercise its power under this sub-section. The court must, however be satisfied that the applicant seeking the relief has a legal interest – a direct and substantial interest – in the order sought and also that the order would be binding upon interested parties. It is insufficient for the applicant to have an indirect interest such as a financial or commercial interest in the outcome of the litigation. It is also inadequate for the interest to be derivative in the sense that it depends upon the validity and existence of some other right.[3]

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[2] Section 19(1)*(a)*(iii) has now been replaced by s 21(1)*(c)* of the Superior Courts Act 10 of 2013.
[3] *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 417B-C.

[15] On behalf of the seller it was submitted that the appellant's interest in whether the first respondent is liable under the Ordinance to pay the contribution to the City is not direct and substantial because it concerns the rights and obligations of third parties – the City and the seller – and not its own rights. It is thus a typical example of an indirect interest, which disentitles it to the relief claimed and means that it lacks standing to claim the relief. Before I consider this submission it is necessary to examine the nature of the relief claimed.

[16] It is common ground that a court must approach the question of standing on the assumption that the allegations of fact in the founding affidavit are correct. The appellant has abandoned reliance on the sale agreement. What remains are two material allegations that now form the basis of the claimed relief: first, that the seller is liable for the payment of the contribution to the City, and secondly, that if the seller does not pay the City, the appellant shall be compelled to make the payment to enable it to transfer the property to a prospective buyer or to apply for building plans to exercise its zoning rights under the Ordinance.

[17] In effect the appellant asserts that it has a legal interest in both the existing right of the City to demand payment from the seller and also in the seller's corresponding obligation to pay the City. It also has a contingent right to demand payment from the seller in the event of the seller failing to meet its payment obligations to the City. For, it will then have to step into the seller's shoes and pay the City so that it can exercise the zoning rights, and thereafter reclaim the money from the seller, which would have been unjustly enriched at the appellant's expense.

[18] Notwithstanding the fact that the appellant's application for declaratory relief is outwardly aimed at establishing the rights and obligations of third parties, the court's decision has a material bearing on its ability to exploit the development rights in the property, and if necessary its own right to claim a repayment from the seller in the event it is compelled for practical reasons to pay the contribution. Furthermore, properly understood, the order sought carries with it the necessary implication that, if

granted, the appellant shall have the right to resist an application by the City to enforce a claim for the contribution against it, if it chooses to exercise its rights under the scheme. Finally, whether or not the appellant succeeds in its application, the outcome of this court's judgment on the merits, ie, on the proper construction to be given to the Ordinance, will be *res judicata* between the parties, determining the legal rights inter se of all three parties. That is an important factor in deciding the standing issue.[4]

[19] In my view the appellant has, therefore, established a legal interest in the relief sought. It follows that the seller's objection to the appellant's standing was not well taken.

[20] I turn to consider whether or not the City's notice delivered to the seller on 5 January 2010 had the effect of imposing an obligation on the seller to pay the contribution as the appellant contends it did. If this question is answered in the affirmative, it means that appellant may exercise the new use rights under the scheme, without incurring any liability to the City. The answer resides in the construction that is given to the relevant provisions of the Ordinance, namely ss 48 and 63.[5]

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[4] *Ex Parte Nell* 1963 (1) SA 754 (A) at 760C.

[5] Section 48: '**Contribution in respect of engineering services, open spaces or parks.**—

(1) . . .
(2) . . .
(3) . . .
(4) . . .
(5) . . .
(6) Subject to the provisions of subsections (7) and (8), a contribution contemplated in subsection (1) payable in respect of any particular land shall be paid to the local authority before—
(*a*) a written statement contemplated in section 50 (1) of the Local Government Ordinance, 1939, is furnished in respect of the land;
(*b*) a building plan is approved in respect of—
(i) the proposed alteration of or addition to an existing building on the land;
(ii) the erection of a new building on the land,
where that building plan, were it not for the commencement of the amendment scheme contemplated in subsection (1), would have been in conflict with the town-planning scheme in operation;

(*c*) the land is used in a manner or for a purpose which, were it not for the commencement of the amendment scheme contemplated in subsection (1), would have been in conflict with the town-planning scheme in operation.

(7) Where an amendment scheme which gave rise to a contribution contemplated in subsection (1) has been prepared by a local authority and a prospective transferee of the land in respect of which the contribution is payable furnishes an undertaking to the local authority, which is to the satisfaction of the local authority, to pay the contribution should he exercise any new right conferred in respect of the land by the scheme—

(*a*) the statement contemplated in subsection (6) (*a*) shall, where such land is acquired by the transferee as a beneficiary in a deceased estate;

(*b*) the statement contemplated in subsection (6) (*a*) may, in any other case,

be furnished before the contribution is paid.

(8) A local authority contemplated in subsection (1) may—

(*a*) in the circumstances contemplated in subsection (6) (*b*) or (*c*), allow payment of the contribution contemplated in the first-mentioned subsection in instalments over a period not exceeding 3 years;

(*b*) in any case, allow payment of the contribution contemplated in the first-mentioned subsection to be postponed for a period not exceeding 3 years where security for the payment is given to its satisfaction;

(*c*) in exercising the power conferred by paragraph (*a*) or (*b*), impose any condition, including a condition for the payment of interest.'

Section 63: '**Contribution in respect of engineering services, open spaces or parks.**—(1) Where an amendment scheme which is an approved scheme came into operation in terms of section 58 (1), the authorised local authority may, within a period of 30 days from the date of the commencement of the scheme, by registered letter direct the owner of land to which the scheme relates to pay a contribution to it in respect of the provision of—

(*a*) the engineering services contemplated in Chapter V where it will be necessary to enhance or improve such services as a result of the commencement of the amendment scheme;

(*b*) open spaces or parks where the commencement of the amendment scheme will bring about a higher residential density.

and it shall state in that letter—

(i) the amount of the contribution;

(ii) particulars of the manner in which the amount of the contribution was determined; and

(iii) the purpose for which the contribution is required:

Provided that—

(*aa*) the amount of the contribution required in respect of open spaces or parks, where applicable, shall be determined by the local authority in the manner prescribed;

(*bb*) in calculating the contribution an amount paid, payable or becoming payable in terms of section 20 (2) (*c*) shall be taken into account.

(2) An owner who—

(*a*) wishes to avoid the payment of a contribution contemplated in subsection (1) may request the local authority contemplated in that subsection to repeal the amendment scheme concerned;

(*b*) wishes to avoid payment of or wishes to reduce the amount of a contribution contemplated in subsection (1) may, in terms of section 56 (1), apply for the further amendment of the town-planning scheme concerned,

within a period 60 days from the date of the letter contemplated in that subsection or, where he has appealed in terms of section 124 or 139, from the date on which he was notified of the decision of the Services Appeal Board or the Board.

(3) . . .

(4) . . .

(5) . . .

(6) The provisions of section 48 (6), (7) and (8) shall apply *mutatis mutandis* to the payment of a contribution contemplated in subsection (1).'

[21] The liability to pay a contribution rests with the owner of the land. Thus s 63(1) permits the local authority, by registered letter, to direct the owner within a period of 30 days of the commencement of the scheme to pay the contribution. The local authority may claim the contribution only if it is necessary to enhance or improve the engineering services or to provide for open spaces and parks following the commencement of a scheme.[6] The owner must be informed of the amount of the contribution, how it was determined and the purpose for which it is required.[7]

[22] Notwithstanding the exhortation in s 63(1) for the owner to 'pay a contribution', it is not a payment demand. Its purpose is to fix the amount of payment when the scheme commences. Thus an owner, who receives the 'direction' to pay from the local authority and wishes to avoid paying the contribution, may within 60 days of having received the notice request the local authority to repeal or amend the scheme to reduce the contribution payable.[8] The owner, who receives the direction to pay the contribution, may take the steps contemplated in s 63(2) to avoid paying or reduce the amount of the contribution.

[23] It follows that an owner who has received the direction and fails to take any steps contemplated in s 63(2) to avoid or reduce the amount of the contribution will have his liability fixed, and he will have to pay the amount. The purpose of the section is therefore evidently to ensure that the owner pays the fixed contribution that is necessary to fund the engineering services, open spaces or parks envisaged in the scheme. The question that arises is when, exactly, is the payment due and payable?[9]

[24] The seller relies heavily on ss 48(6)*(b)* and *(c)* to support its submission that the obligation to pay arises only when the rezoning is implemented, because these

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[6] Sections 63(1)*(a)* and 63(1)*(b)*.
[7] Sections 63(1)*(b)*(i),(ii) and (iii).
[8] Section 63(2).
[9] This question was not decided in *Stands 5/1 Wierda Valley (Pty) Ltd & another v Sandton Town Council* 1994 (1) SA 333 (A) at 346G-347B.

sections say that the contribution must be paid before a building plan is approved or the land is used in accordance with the scheme. This implies that the contribution does not have to be paid if the rezoning is not implemented.

[25] The seller submits that s 48(7) also supports this construction. It provides for a prospective buyer to furnish an acceptable undertaking to pay the contribution when he exercises the new rights in accordance with the scheme. The import of this, so it is submitted, is that after transfer, the local authority may no longer insist on payment from the previous owner; it can only do so from the new owner, and then only if the latter chooses to exercise its new use rights. It follows, so the submission goes, that where the land is transferred after a direction is issued in terms of s 63(1), as occurred here, the obligation to pay rests with the new owner when it elects to exercise the new use rights.

[26] In summary, when these sections are read together this is what they contemplate. The local authority fixes an amount of the contribution and directs the owner of the land, within 30 days of the scheme coming into operation, to pay. If the owner takes no steps to avoid payment or to reduce the amount of the contribution the full amount is payable. But it only becomes due when the owner elects to implement the scheme by applying for building plans to be approved or uses the land in a manner contemplated in the scheme, not before this.

[27] Where the land is sold before the contribution is paid or the new use rights have been implemented the prospective buyer must furnish an undertaking to the satisfaction of the local authority to the effect that the contribution shall be paid should he exercise any new right envisaged in the scheme. This can only mean that the contribution need not be paid if the new rights are not exercised.

[28] This brings me to s 48(8), which says that when the payment is due in the circumstances mentioned in ss 48(6)*(b)* and *(c)* the local authority may allow the

contribution to be paid in instalments over a period not exceeding three years, or postpone the payment for this period where security for the payment is given to its satisfaction. If the local authority allows this it may impose any condition, including a condition for the payment of interest. It therefore follows that if neither the owner nor the prospective buyer choose to implement the scheme s 48(8) does not apply.

[29] It seems odd that ss 48(6), (7) and (8), when applied mutatis mutandis to the payment of the contribution in s 63(1), appear to allow an owner or prospective buyer to postpone implementing the scheme – and thus liability for payment of the contribution indefinitely – without any financial penalty. Counsel for the appellant thus submits, with some force, that this could never have been what the Ordinance contemplated. He thus contends that s 48(6) does not affect the date on which the owner of the land becomes liable for the payment of the contribution, which is when he has been directed to do so.

[30] There are, however, several pointers that weigh against the appellant's submission. First, s 63 does not in terms specify a date when the contribution must be paid; it cannot be on the day when the owner is directed to pay because he has 60 days after that to avoid or reduce it. Secondly, no time period is stipulated for the implementation of the scheme. If there was, one would have expected the Ordinance to say so clearly. Thirdly, it is not unreasonable for the Ordinance to require the contribution to be payable only if the new use rights are exercised because the City incurs these costs only as a consequence of the implementation of the scheme. Finally, s 48(8) provides for the payment of instalments or the furnishing of security and interest payments in the circumstances contemplated in s 48(6)*(b)* and *(c)*. It would be incongruous for the Ordinance to permit this indulgence to an owner or prospective buyer only when the new use rights are exercised and not immediately after the direction to pay was issued, which would be the consequence if the appellant's contention were correct. This suggests strongly that the owner need not pay the contribution immediately upon receipt of the directive. This, I think, is the proper construction to be given to ss 48 and 63.

[31] It follows that the appellant's contention that the seller became liable for the payment of the contribution when it received the directive on 5 January 2010 must fail and consequently its application for declaratory relief cannot be upheld.

[32] The following order is made:

The appeal is dismissed with costs including the costs of two counsel.



A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For Appellant:	H F Oosthuizen Instructed by: Hooyberg Attorneys, Johannesburg Webbers, Bloemfontein
For First Respondent:	J Suttner SC (with him A Lamplough) Instructed by: Edward Nathan Sonnenbergs, Johannesburg McIntyre & Van der Post, Bloemfontein
For Second Respondent:	No attendance Instructed by: Lennon Moleele & Partners, Johannesburg