CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 25/12
[2012] ZACC 28

In the matter between:

GIANT CONCERTS CC	Applicant
and	
RINALDO INVESTMENTS (PTY) LTD	First Respondent
MINISTER FOR LOCAL GOVERNMENT, HOUSING AND TRADITIONAL AFFAIRS FOR THE PROVINCE OF KWAZULU-NATAL	Second Respondent
eTHEKWINI MUNICIPALITY	Third Respondent
MINISTER FOR PUBLIC WORKS	Fourth Respondent
MINISTER FOR DEFENCE	Fifth Respondent

Heard on : 4 September 2012

Decided on : 29 November 2012

JUDGMENT

CAMERON J (Mogoeng CJ, Moseneke DCJ, Froneman J, Jafta J, Khampepe J, Nkabinde J, Skweyiya J, Van der Westhuizen J, Yacoob J and Zondo J concurring):

[1] The applicant, Giant Concerts CC (Giant), seeks leave to appeal against a judgment of the Supreme Court of Appeal that found it did not have legal standing to challenge the lawfulness of a contract under which the third respondent, the eThekwini Municipality (Municipality), sold land to the first respondent, Rinaldo Investments (Pty) Ltd (Rinaldo).[1] On this basis, the Supreme Court of Appeal reversed a judgment of the KwaZulu-Natal High Court, Pietermaritzburg (High Court) in favour of Giant, setting aside the sale.[2] The background is lucidly set out in the judgment of the Supreme Court of Appeal.[3] What follows draws on and expands that exposition.

[2] The land at issue, about 21 hectares in extent, is prime property on the Durban beachfront. The bulk of it houses the headquarters of the Natal Command of the South African National Defence Force (SANDF), but it also includes adjoining municipal land. The Municipality acquired the SANDF portion in 1855, but transferred it to the central government in 1937 for military purposes. This was subject to an express condition: if the land was no longer required for "defence purposes", it would "revert to and become the absolute property of" the Municipality. By 2003, the SANDF had decided to relocate the Natal Command to the port area. The result was that the property would revert to the Municipality.

[1] *Rinaldo Investments (Pty) Ltd v Giant Concerts CC and Others* [2012] 3 All SA 57 (SCA) (Plasket AJA, with Mthiyane DP, Cachalia, Cloete and Malan JJA concurring) (Supreme Court of Appeal judgment).

[2] *Giant Concerts CC v Minister of Local Government, Housing and Traditional Affairs, KwaZulu-Natal and Others* 2011 (4) SA 164 (KZP) (Mnguni J) (High Court judgment).

[3] Supreme Court of Appeal judgment above n 1 at paras 2-10.

[3] The Minister for Public Works, through whose department the transfer was being managed, and the Minister for Defence were cited as parties to the litigation, and are the fourth and fifth respondents respectively in this Court. But no relief was sought against them, and they were not represented before us. The second respondent is the Minister for Local Government, Housing and Traditional Affairs for the Province of KwaZulu-Natal (MEC), whose approval of the contested transaction is in issue.[4]

[4] When the SANDF decision became known, Mr Anant Singh's film production company, Videovision Entertainment (Pty) Ltd (Videovision), proposed to the Municipality that it purchase the site to establish a modern film studio in Durban. Rinaldo is Videovision's property holding arm, and has the same shareholders and directors. Mr Singh is a Durban-born film maker with an international reputation.

[5] The proposal struck a chord, since the Municipality had earlier established a film office to promote Durban as an international destination for film production. This had been included in the Municipality's integrated development plan,[5] which recognised the importance of the film industry for economic development. The Municipality had also entered into a partnership with the provincial government of KwaZulu-Natal to promote precisely this.

[4] At the material times, the contested actions were those of the acting MEC, Mr Michael Mabuyakhulu.

[5] The Local Government: Municipal Structures Act 117 of 1998 requires all municipalities to address priority needs through an integrated development plan. See in this regard sections 30(5), 44(2)(c), 56(2)(c), 83(3)(a) and 84(1)(a).

[6] The Municipality considered the proposal internally, and its executive committee approved it in principle. Protracted negotiations followed. Eventually the terms of a contract of sale were agreed. In November 2003, the executive committee resolved to recommend that the full council approve the sale to Rinaldo for R15 million. The statutory foundation was a provision of the Local Authorities Ordinance[6] (Ordinance) that permits the Municipality to sell immovable property "by private bargain" if satisfied that "the interests of the borough will be better served than by a sale or lease by public auction or public tender, or that other circumstances connected with the proposed transaction, justify such a course."[7]

[7] During the negotiations the land was independently valued, if rezoned for optimal use, at R71 million. The Municipality added conditions on top of the purchase price. These were that the land had to be used for the core activities of the development of a film studio and associated infrastructure. If it was not, or if Rinaldo sold the land to an outsider for non-core purposes, a "claw-back" provision provided that the purchase price would increase, according to a prescribed formula, up to the stipulated market value of R71 million. To cast this in iron, the agreement required that the usage restriction be recorded as a restrictive condition in the title deed. The effect was that Rinaldo was obliged, in return for a heavily reduced purchase price, to develop the land at its own

[6] 25 of 1974.

[7] Section 233(8) of the Ordinance.

expense, in accordance with details set out in annexures to the agreement, so as to fulfil the Municipality's and the Province's economic development vision.

[8] The Ordinance requires that property sales be advertised before a final decision is taken.[8] The Municipality advertised the sale in December 2003, the parties signed the contract, and it lay for public inspection. The contract's terms made it expressly subject to the Municipality acquiring the SANDF property, and obtaining all required administrative approvals.

[9] Two objections were received. One was from Giant. It was signed by Mr Karamchand Modilal Gayadin who, although not a member of the close corporation, represented it throughout. The objection read:

> "Kindly take notice that the above named close corporation hereby places on record its objection to the sale of the aforesaid property.
>
> The close corporation furnishes *inter alia* its reasons for such objection, namely that it is involved in the entertainment business and has an interest in the development of a movie studio and other allied facilities on the site.
>
> Further take notice that the close corporation's offer to purchase the aforesaid immovable property shall be greater than the present offer submitted to you, which offer I am given to understand is R15 million.

[8] Section 234(1) of the Ordinance. In the case of private bargains, section 234(2)(c) requires, in addition, that the name of the purchaser generally be stated.

> We trust you find the above in order and invite you to contact the writer should you require any further information."

[10] In January 2004, senior municipal officials met with Mr Gayadin to allow him to explain and expand upon this objection. Mr Gayadin told them he was involved in the entertainment industry and imported videos primarily from India.[9] He said he wanted an opportunity to purchase the site. He was then invited to disclose his proposals for its development. But he refused to do so, on the basis that these were confidential. He was unable to show that he had any involvement in or knowledge of the film industry. Indeed, Giant's letterhead indicates that its area of operation, as its name suggests, is organising large concerts – "Mind Blowing Live Concerts". There is no mention of film.

[11] Inasmuch as Giant had based its objection on the purchase price of R15 million, the Municipality's officials explained the pricing in the context of the use restrictions and claw-back provisions. Mr Gayadin stated simply that he would pay more. But he declined to indicate how much. Similarly, he did not submit any information or proposal for the development of the property. During the meeting, the officials told Mr Gayadin that nothing had been said or disclosed to them justifying any change in the Municipality's decision to sell the site to Rinaldo, and that they would accordingly submit a report to the Municipality's Executive Committee to confirm the decision to sell

[9] The account of the meeting is from the affidavits of the Municipality's head of real estate, Mr Keith Mattias. Since Giant did not ask for the municipal officials at the meeting to be cross-examined, counsel for Giant, which asked for final relief on affidavits, rightly accepted during oral argument that the usual rule required the matter to be decided on the officials' version.

the site to Rinaldo. The officials state that Mr Gayadin was invited to submit proposals and chose not to do so. Indeed, at no stage did Giant submit any offer of any kind to the Municipality regarding either price or development. In a later letter, the Municipality advised Mr Gayadin that a report had been submitted detailing Giant's objections, and that he would be advised further in due course, though this was never done.

[12] Having considered Giant's objections the Municipality's Council, a little over a month later, on 26 February 2004, approved the sale to Rinaldo. As the Ordinance required, the transaction was then referred to the MEC for approval.[10] Giant persisted with its objection. On 24 March 2004, its attorney wrote to the Premier of KwaZulu-Natal (Premier) complaining that the Municipality was "not transparent in awarding the site to Mr Anant Singh's company." Giant insisted that it was entitled to place before the Premier a "substantive proposal regarding the site and its planned development". Giant received no reply to this assertion until shortly before the sale was approved. At this stage, the MEC stated that he had not seen the various letters sent to the Premier. In his replying affidavit, dealing with the Municipality's account of the January 2004 meeting, Mr Gayadin on behalf of Giant said: "What I had in mind was that I would be afforded an appropriate opportunity to revert with a counter proposal before a final decision was taken." (Emphasis removed.)

[10] Section 235(1) of the Ordinance.

[13] The MEC, after considering the objection, required that various further protective conditions be added to the sale agreement. These the Municipality accepted. On 22 February 2005 he approved the transaction. In response to Giant's request for reasons, he explained that he approved the transaction because it would enhance local economic development through the creation of a film industry in Durban and in KwaZulu-Natal; the claw-back provisions ensured that if the land were sold for non-core activities the Municipality would recover; and Rinaldo could call upon considerable expertise and leadership in film-making both within South Africa and internationally, which made the development more likely to be sustainable. The MEC explained that, after weighing Giant's objections and the Municipality's response, he considered that the transaction's benefits outweighed any disadvantages.

[14] On 3 May 2005, Giant launched these proceedings to review and set aside the Municipality's and the MEC's decisions. Giant's papers contain no more detail regarding price or development than it was prepared to proffer at the meeting in January 2004. The High Court heard the application on 11 June 2009, more than 4 years after it was lodged.

High Court

[15] In the High Court, the Municipality and Rinaldo[11] contended that Giant had no standing to challenge the validity of the sale. The High Court rejected this argument.[12] Giant claimed on a number of grounds, going to lawfulness, procedural fairness and reasonableness, that the decisions were invalid. In a judgment delivered more than 15 months after argument, the High Court upheld all Giant's arguments. It set aside the Municipality's decision to sell the property to Rinaldo, as well as the MEC's approval of the sale.

Supreme Court of Appeal

[16] The Supreme Court of Appeal overturned the High Court judgment on the narrow basis that Giant lacked standing to bring the review. It therefore did not find it necessary to comment on the substance of Giant's complaints. In essence, the Court found that "only those with an interest in the 'interests of the borough' have standing" to challenge decisions under the Ordinance since it "concerns itself with local interests".[13] The provisions of the Ordinance[14] regulating the sale of immovable property are designed to protect the interests of the local community only.[15] The Court reasoned that Giant

[11] In the High Court, the MEC no longer persisted with the point on Giant's standing: see the High Court judgment above n 2 at para 15.

[12] They also contended that because Mr Gayadin had been convicted of offences involving dishonesty, section 47 of the Close Corporations Act 69 of 1984 disqualified him from taking part in the management of Giant. This point, too, was rejected, and was not persisted in before us.

[13] Supreme Court of Appeal judgment above n 1 at para 31.

[14] Sections 233, 234 and 235 of the Ordinance.

[15] Supreme Court of Appeal judgment above n 1 at paras 25-6.

claimed to act only in its own interest. Its registered address was not in Durban, but in Pietermaritzburg. It therefore did not have ratepayer status in the Municipality.[16]

[17] Giant accepted that the land should be sold to develop a film industry. It objected that the private sale to Rinaldo deprived it of an opportunity to present its own proposals. By definition, the Supreme Court of Appeal found, once Giant accepted that there would be no public tender, it had no interest in who the Municipality chose to contract with.[17] Since Giant had no interest in the interests of the borough, it did not have the right to object to the sale or to seek to review the decisions in issue.[18]

Parties' contentions in this Court

[18] Giant submits that the Supreme Court of Appeal's approach to standing is inconsistent with the Constitution and the Promotion of Administrative Justice Act[19] (PAJA). It relies on the jurisprudence of this Court to argue that section 38 of the Bill of Rights requires a broader approach to standing (even where the provision is not of direct application).[20] The transaction is not an ordinary private agreement but one with an organ of state disposing of state-owned land, at a highly favourable price, and by private

[16] Id at para 13.

[17] Id at para 30.

[18] Id at paras 30 and 32.

[19] 3 of 2000.

[20] Section 38 is quoted in full at [28] below.

treaty, without a competitive process. Thus Giant's objection ought not to be dealt with under the restrictive common law approach to standing.

[19] Giant also contends that section 217 of the Constitution[21] applies to transactions in which an organ of state contracts for the sale of land, and that the Ordinance should be interpreted as part of a legislative system giving effect to that section. Section 217 makes competitiveness a necessary component of state tendering and thus there is a presumption in favour of open and competitive auctions, and the sale of assets at market-related prices. In stripping non-ratepayers of the right to object to sales by private treaty, competition will be diminished.

[20] The Supreme Court of Appeal decision, Giant says, denies an affected party the right to secure redress for administrative unfairness when it participates in the sale of land by private treaty. The Court's restrictive approach to standing is inconsistent with the right to just administrative action and the principle of legality. Giant contends that its

[21] Section 217 provides:

> "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
>
> (a) categories of preference in the allocation of contracts; and
>
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

involvement in the objection process constituted an exercise of its right to political participation. This the judgment undermines by precluding it from challenging a sale of municipal land on the basis that it is not a ratepayer.

[21] Giant says it has standing independently of the Constitution because the Ordinance gave it the right to object[22] – a right it exercised. Had Giant not had an interest in the first place, its objection would not have been entertained or would have been rejected on the basis of absence of an interest. The decisions of the Municipality and the MEC, it says, constituted administrative action and Giant was entitled to a lawful and procedurally fair process and outcome. The principle of legality means that an unlawful decision is liable to be set aside whether or not it infringed the rights of Giant.

[22] On the substance of its challenge, Giant advances six grounds on which the transaction must be set aside: (i) the sale was beyond the Council's powers under the Ordinance (ultra vires), since the land was not owned by the Municipality, nor was it freely alienable;[23] (ii) the agreement was subject to suspensive conditions, regarding title to and rezoning of the property, which were not satisfied in a reasonable time or at all;[24] (iii) there was no proper authority for approval of the sale, since the MEC, and not the

[22] Section 234(1) of the Ordinance requires "consideration of the objections, if any, lodged in accordance with [an] advertisement".

[23] Section 233(1) of the Ordinance.

[24] Section 233(12) of the Ordinance.

Premier, granted authorisation;[25] (iv) the Municipality breached the Ordinance because it approved the sale before hearing objections, and failed to make the agreement available for inspection in both English and Afrikaans;[26] (v) procedural fairness was violated in that Rinaldo was given undue preference and no alternative proposals were considered while, in addition, Giant was never notified of the outcome of its objection and no reasons were furnished for rejecting it; and (vi) the decision was unreasonable in the circumstances.

[23] Rinaldo argues that, despite the constitutional approach to standing being generous, the indispensable requirement remains that a litigant must show "sufficient interest". This is not a case of public interest standing. It supports the finding of the Supreme Court of Appeal that even a generous approach to constitutional standing "does not mean that everyone who alleges an infringement of a fundamental right has an unfettered right of access to court".[27]

[24] To bring a PAJA challenge, Rinaldo says, Giant had to establish that the administrative action complained of adversely affected its rights, or that the acts had the capacity to affect its legal rights; and that the acts had a direct, external legal effect. Instead, Giant has failed to establish that it was an "affected party" at all, or that it had an

[25] Section 235(1) of the Ordinance.

[26] Section 234 of the Ordinance.

[27] Supreme Court of Appeal judgment above n 1 at para 14.

affected right or prospective right that was violated. Rinaldo disputes that the Supreme Court of Appeal judgment limits objectors to ratepayers; rather, all who have a demonstrable interest in the interests of the borough may object. The outcome would have been different if a viable competitor from the industry had objected on the basis that concluding the transaction with it would be more advantageous either to the Municipality or to the public interest. Reading section 233(8) of the Ordinance through the prism of section 217 of the Constitution does not improve Giant's claim to standing.

[25] Rinaldo disputes that simply by raising an objection Giant automatically gains standing to challenge the process either as "participant" or "competitor". Even a complainant under section 38(a) of the Bill of Rights must have an actual or a potential right or interest that is affected by the ultimate administrative decision. Giant cannot acquire standing merely because it participated in the objection process, and despite the fact that its participation was not generated by any affected interest or right (actual or potential). Finally, Rinaldo argues that it is illogical to reason that an individual's mere participation in a notice and comment procedure gives rise to standing under section 38(a).

[26] As regards the merits, Rinaldo says that all the substantive challenges to the transaction are without merit and should fail.

Leave to appeal

[27] For leave to appeal to this Court, there must be a constitutional issue, and the interests of justice must favour its grant. The ambit of standing to challenge a public transaction plainly raises a constitutional issue. And Giant advances arguable contentions regarding the Supreme Court of Appeal judgment. Leave should be granted.

Does Giant have standing to challenge the transaction?

[28] Giant seeks to vindicate a constitutional right. The injury it claims to have suffered is to the right to just administrative action conferred by section 33 of the Constitution.[28] Hence its standing is determined under the Bill of Rights. Section 38 provides:

> "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;

[28] Section 33 of the Constitution provides:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted to give effect to these rights, and must—
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration."

(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."

[29] PAJA, which was enacted to realise section 33, confers a right to challenge a decision in the exercise of a public power or the performance of a public function that "adversely affects the rights of any person and which has a direct, external legal effect".[29] PAJA provides that "any person" may institute proceedings for the judicial review of an administrative action.[30] The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because "it seems clear that the provisions of section 38 ought to be read into the statute."[31] This is correct.

[30] The Supreme Court of Appeal has rightly suggested that "adversely affects" in the definition of administrative action was probably intended to convey that administrative

[29] Definition of "administrative action" in section 1 of PAJA. In *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) (*Greys Marine*) at para 21, Nugent JA consolidated and abbreviated this definition as follows:

> "Administrative action means any decision of an administrative nature made . . . under an empowering provision [and] taken . . . by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect".

[30] Section 6(1) of PAJA.

[31] See Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co, Cape Town 2012) at 494.

action is action that has the capacity to affect legal rights, and that impacts directly and immediately on individuals.[32] The effect of this is that Giant, as an own-interest litigant, had to show that the decisions it seeks to attack had the capacity to affect its own legal rights or its interests.

[31] In seeking to assert this right, Giant has never claimed to be acting on behalf of someone else who was incapacitated,[33] or as a member of, or in the interest of, a group or class of persons,[34] or in the public interest,[35] or in the interest of the members of an association.[36] The sole interest it claims to assert is its own, which during argument its counsel correctly described as commercial. It is that interest we must examine to see whether it affords Giant title to challenge the transaction.

[32] And in determining Giant's standing, we must assume that its complaints about the lawfulness of the transaction are correct. This is because in determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified.[37] As Hoexter explains:

[32] *Greys Marine* above n 29 at para 23.

[33] Section 38(b) of the Constitution.

[34] Section 38(c) of the Constitution.

[35] Section 38(d) of the Constitution.

[36] Section 38(e) of the Constitution.

[37] *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 536A (*Jacobs*).

> "The issue of standing is divorced from the substance of the case. It is therefore a question to be decided *in limine* [at the outset], before the merits are considered."[38]

[33] The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.

[34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings".[39] To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and

[38] Hoexter above n 31 at 488.

[39] Supreme Court of Appeal judgment above n 1 at para 14, quoting Wade and Forsyth *Administrative Law* 9 ed (Oxford University Press, New York 2004) at 281, as approved in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para 28.

determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.

[35] Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.

[36] How much more was the issue in *Ferreira*.[40] There this Court considered own-interest constitutional standing under the interim Constitution, whose provision here was materially similar to section 38 of the Constitution.[41] The applicants were obliged to answer questions at an inquiry under a statute providing that their answers, even if incriminating, could later be used in evidence against them. They sought to challenge the constitutional validity of the provision. But they had not yet been charged, nor was there

[40] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

[41] Section 7(4) of the interim Constitution provided:

> "(a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
>
> (b) The relief referred to in paragraph (a) may be sought by—
>
> (i) a person acting in his or her own interest;
>
> (ii) an association acting in the interest of its members;
>
> (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
>
> (iv) a person acting as a member of or in the interest of a group or class of persons; or
>
> (v) a person acting in the public interest."

an actual prosecution, or even one threatened,[42] where their answers would be used against them. This Court split on whether this gave them standing to challenge the provision on fair-trial grounds. A majority found that it did.[43] Chaskalson P held that, even where own-interest standing is at issue, this Court should adopt a "broad approach":[44]

> "This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of protection to which they are entitled."[45]

[37] The object of the standing requirement, the Court held, was that courts "should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it".[46] The Court held that own-interest standing does not require that a litigant must be the person whose constitutional right has been infringed or threatened: "What the section requires is that the person concerned should make the challenge in his or her own interest."[47] That was plainly the case with the applicants. The core of their complaint was that they were required to answer questions that might incriminate them, and which might later be used in evidence against

[42] See the judgment of O'Regan J in *Ferreira* above n 40 at paras 224 and 228.

[43] Seven members of the Court (Chaskalson P, with whom Mahomed DP, Didcott J, Langa J, Madala J and Trengove AJ concurred, and with whom Mokgoro J concurred on this point) found that the applicants had own-interest standing. Ackermann J, Kriegler J, O'Regan J and Sachs J held that the applicants had not established own-interest standing.

[44] *Ferreira* above n 40 at para 165.

[45] Id.

[46] Id.

[47] Id at para 168.

them.[48] This meant that the provision directly affected their interests.[49] Even though the "direct" interest lay in the potential impact of the challenged provision on their interests – since no prosecution was impending or threatened – their wish to secure a ruling on the provision was not hypothetical or academic, but raised a real and substantial issue. They therefore had sufficient interest in having it resolved.[50]

[38] Similarly, in *Eisenberg*,[51] the question was whether the Minister could issue regulations without following a statutory consultative process involving a public notice and comment procedure. This Court held that a law firm practising mainly in immigration law had own-interest standing to challenge regulations that the Minister issued without following that process. The Court pointed out that the law firm would have had a right to comment on the draft regulations, had the process been applicable to them. The law firm therefore "had an interest as a member of the public in asserting the right that it claimed to have and had standing to raise that issue in its own interests."[52]

[48] Id at para 160.

[49] Id at paras 162 and 166-8.

[50] Id at para 160.

[51] *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs and Others* [2003] ZACC 10; 2003 (5) SA 281 (CC); 2003 (8) BCLR 838 (CC) (*Eisenberg*).

[52] Id at para 28 (Chaskalson CJ, on behalf of a unanimous Court).

[39] And in *Kruger v President of Republic of South Africa and Others*[53] an attorney was held to have personal standing to challenge presidential proclamations that were of "direct and central importance" to the field in which he practised.[54] The attorney had established that significant legal uncertainty existed about the proclamations, with adverse effects on the administration of justice. This had negatively affected his ability to understand and engage with the legislative scheme on which his clients relied for compensation, making him less able to manage his clients' affairs.[55] This Court held that even though the Bill of Rights standing provision was not directly applicable, since the proclamations were challenged on rationality and rule of law grounds,[56] a generous approach to standing was nonetheless necessary.[57] This was to "facilitate the protection of the Constitution"[58] because—

> "constitutional litigation is of particular importance in our country where we have a large number of people who have had scant educational opportunities and who may not be aware of their rights".[59]

[40] The Court nevertheless cautioned that legal practitioners asserting personal standing to challenge legislative acts have to show that bringing the challenge is in the

[53] [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) (Skweyiya J, with whom Langa CJ, O'Regan ADCJ, Madala J, Mokgoro J, Ngcobo J, Nkabinde J, Van der Westhuizen J and Kroon AJ concurred, and with whom Yacoob J concurred on standing at para 119; Jafta AJ accepted that the applicant had standing at para 90).

[54] Id at para 25.

[55] Id.

[56] Id at paras 14, 49 and 64.

[57] Id at para 23.

[58] Id.

[59] Id.

interest of the administration of justice (for instance, a "need for legal certainty").[60] Relying "purely on financial self-interest" is not enough.[61]

[41] These cases make it plain that constitutional own-interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

a) To establish own-interest standing under the Constitution a litigant need not show the same "sufficient, personal and direct interest" that the common law requires,[62] but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.[63]

b) This requirement must be generously and broadly interpreted to accord with constitutional goals.[64]

c) The interest must, however, be real and not hypothetical or academic.[65]

d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation,[66] but in a challenge to legislation purely financial

[60] Id at para 26.

[61] Id.

[62] Hoexter above n 31 at 488.

[63] *Ferreira* above n 40 at paras 162 and 166-8.

[64] Id at para 165.

[65] Id at paras 160 and 164-5. *Eisenberg* above n 51 sets out the reasoning of the High Court at para 25, whose finding is endorsed at para 28.

[66] *Jacobs* above n 37 at 535A-B.

self-interest may not be enough – the interests of justice must also favour affording standing.[67]

e) Standing is not a technical or strictly-defined concept.[68] And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time,[69] and to put the opposing litigant to trouble.

f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement.[70] And here a measure of pragmatism is needed.[71]

[42] The impact of the Constitution on own-interest standing is evident in *Ferreira*,[72] *Eisenberg*[73] and *Kruger*.[74] However, it is in my view necessary to emphasise that in each of those cases the own-interest litigant showed that his or her interests or potential interests were "directly affected" by the action sought to be challenged.[75] It should be

[67] *Kruger* above n 53 at para 26.

[68] *Jacobs* above n 37 at 534A-B.

[69] Compare *Ferreira* above n 40 at para 165 ("it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it").

[70] *Ferreira* above n 40 at para 231, per O'Regan J. See also *Jacobs* above n 37 at 534D.

[71] *Jacobs* above n 37 at 541E.

[72] Above n 40.

[73] Above n 51.

[74] Above n 53.

[75] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 54, which the parties in the present matter debated in argument, does not address standing at all, since standing was not in issue (because the residents' association clearly had associational, surrogate or representative standing). Chaskalson P noted that it was "not necessary" for determining legality to consider whether the decision in issue "affects the rights or interests of

noted that the own-interest provision in section 38(a) is not isolated – it stands alongside section 38(b)-(e).[76] These provisions create scope for public interest, surrogate, representative and associational challenges to illegality. The risk that an unlawful decision could stand because an own-interest litigant cannot establish standing is diminished by the fact that broad categories of other litigants, not acting in their own interest, are entitled to bring a challenge.

[43] The own-interest litigant must therefore demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned.

[44] The Supreme Court of Appeal found the key to Giant's lack of own-interest standing in a provision of the Ordinance that empowered the Municipality to sell by private bargain if this was "in the interests of the borough".[77] The Court concluded from this that the Ordinance was concerned with local interests only, and was designed to protect those "with an interest 'in the interests of the borough'".[78] Since Giant was not a local ratepayer, and since its objections were not aimed at the "interests of the borough", it had no standing:

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the Kyalami residents". He said "[i]f it were an unlawful decision it would be invalid and liable to be set aside whether it infringed their rights or not." The passage merely affirms that the impact of an impugned decision on those who have standing to challenge it is not part of the inquiry into its legality.

[76] Section 38 is quoted in full at [28] above.

[77] Section 233(8) of the Ordinance.

[78] Supreme Court of Appeal judgment above n 1 at paras 29 and 31.

> "Giant Concerts is in the same position as the hypothetical ratepayer from Johannesburg or businessman from Cape Town. It is not a ratepayer in Durban or a member of the local community, if an artificial person could be said to be a member of a community, and it has no interest in the 'interests of the borough'. Furthermore, its objection was not aimed at the 'interests of the borough'. It accepted that the land should be sold by private bargain for the purposes proposed but to it, rather than to Rinaldo Investments. It has no interest in *who* the municipality chooses to contract with, once it has decided to sell immovable property by private bargain, because by definition one is not dealing with a public tender."[79]

[45] As appears shortly, I agree that Giant lacked standing, but I reach this conclusion on grounds that are less restrictive to own-interest standing. In my view, the Supreme Court of Appeal could have afforded more weight to the injunction in *Ferreira* that "we should rather adopt a broad approach" to the constitutional provisions on standing.[80] The Ordinance does indeed focus on local interests, but in my view determining own-interest standing under it should be done broadly and generously to ensure that any litigant who establishes that his or her interests or potential interests may be directly affected by a transaction can challenge it.

[46] And here I do not agree that Giant was in the same position as a hypothetical ratepayer from another city. At common law, of course, status as a ratepayer in a municipality was by itself enough to confer standing to challenge acts of the local

[79] Id at para 30.

[80] *Ferreira* above n 40 at para 165.

authority.[81] But the converse was not true. A litigant did not have to be a ratepayer to challenge a municipality's acts, provided he or she had a direct interest in the issue.[82] It would follow, in line with the greater amplitude afforded to standing in the constitutional setting, that even a non-ratepayer who establishes a sufficient interest in the lawfulness of the transaction has standing. Commitment to the "interests of the borough" is not the touchstone.

[47] Thus, while I endorse the overall conclusion of the Supreme Court of Appeal, it is important to emphasise that the broad ambit of constitutional standing must be preserved even for own-interest challenges.

[48] Did Giant, albeit a non-ratepayer with no interest in the interests of the borough, establish that its own interests were directly affected by the transaction? That depends on the particular way in which Giant described and asserted its interest. As explained earlier,[83] Giant, when confronted with an opportunity, refused to set out any development plans for the site, claiming they were "confidential". It could show no film industry expertise at all. Though claiming to be willing to pay more than the cash component of the purchase consideration, Giant declined to indicate how much. And the cash part was

[81] *Jacobs* above n 37 at 536D-E. See on this point the illuminating discussion of *Dalrymple v Colonial Treasurer* 1910 TS 372 in Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (unpublished DPhil thesis, Rhodes University 2002) at 204-6, and of constitutional standing generally at 208-43.

[82] See *Jacobs* above n 37 at 540I-541D (a non-ratepayer from an adjoining township who works in the town and regularly visits its parks has standing to challenge their segregation along racial lines).

[83] See [10] and [11] above.

heavily freighted with the developmental obligations Rinaldo undertook in the contract, and the international film-making expertise and clout it would bring. Giant never indicated that it could come close to matching these. In fact, it submitted no information or proposal for the development of the property at any stage, nor did it make any offer of any kind to the Municipality.

[49] Giant complains that it was never given a proper opportunity to present its own proposals to the Municipality. In fact, the municipal officials who met with Giant did invite Mr Gayadin to submit proposals.[84] He never did. But Giant's complaint seeks to require the Municipality to take active steps, beyond the invitation already extended, to give it a chance to submit a proposal. The Municipality was not obliged to do that. Giant was free to signify the seriousness of its interest in the development by going ahead and submitting a proposal to the Municipality; but it never did so.

[50] While constitutional own-interest standing is broad, it is not limitless. *Ferreira* draws the line at hypothetical and academic interests.[85] Giant objected to the Municipality and to the MEC about the transaction on the hypothesis that it wanted an opportunity to lodge its own offer. But it never substantiated the hypothesis in the form of a plan, price or proposal. And nothing stopped it from formulating and submitting an offer, even a tentative or outline offer. Yet it never did.

[84] See [11] above.

[85] *Ferreira* above n 40 at paras 164-5.

[51] A hypothetical interest is one that is expressly claimed, but is neither real nor true.[86] And an academic interest is one that is not related to a real or practical situation and is therefore irrelevant.[87] It seems plain that a commercial interest in the subject-matter of the transaction will be sufficient to establish own-interest standing to challenge it. But Giant never demonstrated that it had any serious commercial interest in the site. In saying that it wanted to develop the site, but never saying how, the interest Giant claimed remained hypothetical. In saying that it wanted to offer more, but never saying how much, its offer remained academic. An unsubstantiated expression of a future wish or intention to submit a proposal, or to purchase a site, is not sufficient. Giant did not show that it had interests that were capable of being directly affected. That is why this case is different from *Ferreira*,[88] *Eisenberg*[89] and *Kruger*.[90]

[52] Even in all the hundreds of pages of contesting documents and attestations lodged over a period of many years in these proceedings, Giant never expanded on its plans or its purported interest or proposed offer. It gave no more detail than it did to the Municipality's officials who met Mr Gayadin in January 2004. There was no reason why

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[86] *Concise Oxford English Dictionary* 11 ed (Oxford University Press, Oxford 2009) defines "hypothetical" as follows:

> "1. based on or serving as a hypothesis . . . supposed but not necessarily real or true."

[87] *Concise Oxford English Dictionary* above n 86 defines "academic" as follows:

> "3. not related to a real or practical situation and therefore irrelevant."

[88] Above n 40.

[89] Above n 51.

[90] Above n 53.

it could not. It was free at any stage when the transaction was published in December 2003 to propound more detail of what it wanted to do with the site, and the commercial and monetary foundation on which it proposed to do it.

[53] This is not to say that to acquire standing Giant had to make a binding offer, or one capable of immediate acceptance or implementation. For it to demonstrate that the proposed transaction would directly affect its interests, it had only to give a realistic indication, in some form, *first* that it was serious in its intentions, by indicating the price it was willing to pay, and *second* that it had the capacity to give practical substance to its intentions. This it never did. Merely postulating a claim to interest is not enough. The interest must be described and have some tangibility. Giant does not meet even this minimal own-interest threshold.

[54] Giant's complaint was that the Municipality, the Premier and the MEC did not give it an opportunity to make an alternative proposal to that embodied in the transaction with Rinaldo. But nothing prevented it from giving more flesh and bones to its interest when it approached the High Court. It had to demonstrate its standing for the purpose of the review, which was different from what was required under the Ordinance to lodge an objection. All that was required of Giant when it lodged its legal challenge was to show that its complaint – that it should have been given an opportunity to present its own proposal – was well-grounded because it had the capacity to make a realistic counter-

proposal. It did not have to show that its proposal would have carried the day. Yet nothing in the papers suggests that Giant had that capacity.

[55] The inference that Giant was merely toying with process, or seeking to thwart a propitious public development because it had been made available to someone else, is therefore one the Court is entitled to draw. The consequence is that Giant lacks standing, since its interest remains incipient and has never become direct or substantial.

[56] Giant's mere participation in the notice and comment process by lodging an objection did not confer standing on it to challenge the transaction. The very point of that process is to identify objections, to afford them expression, and then to evaluate and consider them.[91] It is not logical to assert that an own-interest standing qualification arises from participation in a process if the objection remains hypothetical and academic.

[57] Section 217 of the Constitution, on which Giant relied, does not give stronger warrant to its claim to standing.[92] This is because Giant never gave substance to its complaint that the process should have involved competitive tendering by even

[91] In *Kruger* above n 53, the applicant's right to participate in a notice and comment process was held to give it own-interest standing to challenge a proclamation *on the ground that the proclamation was issued without complying with that very process*.

[92] Section 217 is quoted in full above n 21.

minimally showing in the review proceedings that it had the capacity to make a competitive alternative proposal. Ultimately this is why it should be denied standing.[93]

Merits

[58] This conclusion makes it unnecessary to address the merits of Giant's challenges to the transaction, since it has established no legal interest in their adjudication. When a party has no standing, it is not necessary to consider the merits, unless there is at least a strong indication of fraud or other gross irregularity in the conduct of a public body. The full record of the dispute was before us, and we heard full argument on all of Giant's complaints. On the papers before us, we are unable to find that there is fraud or gross irregularity. I will therefore say nothing about the merits.

Order

[59] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, including the costs of two counsel.

[93] Hoexter above n 31 at 491, would prefer that "judges [should] overtly state that certain matters [are] not appropriate for adjudication and [should] refuse to exercise their jurisdiction on that basis."

For the Applicant:	Advocate GJ Marcus SC and Advocate N Ferreira instructed by Vathers Attorneys.
For the First Respondent:	Advocate PJ Olsen SC and Advocate AA Gabriel SC instructed by J H Nicolson Stiller & Geshen.