DELIVERED: 9 MARCH 2010
REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 47201/09
9 March 2010

In the matter between:

DIGGERS DEVELOPMENT (PTY) LTD Applicant

and

CITY OF MATLOSANA 1st Respondent
ISAGO @ N12 (PTY) LTD 2nd Respondent

JUDGMENT

MURPHY J

1. The applicant seeks an order reviewing and setting aside a resolution taken by the first respondent, the City of Matlosana ("the City"), in terms of which it approved the sale of a substantial piece of land to the second respondent ("ISAGO"). It seeks further an order compelling the

respondents to restore the *status quo* prior to the resolution in respect of the immovable property forming the subject matter of the sale agreement. The sale agreement in question was concluded on 2 October 2007, while the resolution approving it and authorising its execution was taken on 5 February 2009. The applicant in addition seeks a declarator that the sale agreement is invalid and unenforceable, an interdict restraining the respondents from acting in accordance with the sale agreement and an order "that first respondent be instructed to comply with all statutory prerequisites, prior to concluding any further agreements in respect of the immovable properties…"

2. The property in question comprises 1124 hectares of land consisting of various portions of the farms Townlands and Palmfontein lying adjacent to the N12 highway between Klerksdorp and Potchefstroom in the North West Province.

3. During September 2006, the City published an invitation in various newspapers for proposals to develop the land. The notice described the land and mentioned that it was zoned for agricultural purposes, but that an environmental impact assessment had been approved for industrial development in respect of "Phase 1", being approximately 65,23 hectares of the land. The notice stated further: "Emphasis should be on extending

bulk services and the broadening of Council's tax base. Parallel to this design/planning framework, proposals should be made for the release of the Council owned land in the marketplace". The wording and purport of the notice made it evident that the invitation was aimed at development of the land with socio-economic benefits in the form of enlarging the City's tax base, job creation and benefitting historically disadvantaged individuals. It now appears that the development will include a new shopping centre.

4. The applicant is a private company that has developed and operated a shopping centre known as Flamwood Walk upon property within the boundaries of the jurisdiction of the City as local authority. The shopping centre is situated on the N12 highway and presently comprises 12 375 square metres gross leasable area for retail purposes. It is common cause that the applicant possesses development rights in respect of the remaining extent of its property. It has plans to engage in further development and thus has an interest in the development of competing shopping centres in the same area, especially along the N12 highway.

5. The City, as intimated, is the local authority in whose jurisdiction the applicant's shopping centre is situated. It also was the owner of the

immovable property prior to its alienation to the second respondent, ISAGO.

6. The applicant did not respond to the invitation to submit proposals published by the City in September 2006.

7. Various development proposals were received for consideration by the City. On 23 March 2009 a resolution in terms of section 115 of the Municipal Finance Management Act 56 of 2003 resolved that the entity "Anglo Saxon/Group 5 Consortium" be approved "for appointment for the planning and developing of the N12 corridor between Klerksdorp and Stilfontein subject to an agreement being entered into with Council for the development of the vacant 1172 ha of land adjacent to the N12 route between Klerksdorp and Stilfontein".

8. The consortium is not defined in the resolution. However in para 2.6 of its answering affidavit the City explains that the consortium consisted of the five original shareholders of ISAGO, namely Anglo Saxon Developments (Pty) Ltd, Syfin Property Developers (Pty) Ltd, RKK Family Trust, Group Five Construction (Pty) Ltd and Moedi Bosele Investors (Pty) Ltd. The members of the consortium are all investors, developers and business entities in their own right and had prior to 2006 been involved in business

activities either as parties, shareholders, or members of joint ventures with common business interests. The development of the N12 project was but one project among various other projects in South Africa and Mauritius. ISAGO is a special purpose vehicle or development company comprising the members of the consortium.

9. The sale agreement concluded between the City and ISAGO on 2 October 2007 ("the sale agreement"), which the applicant seeks to set aside, defines "the purchaser" in clause 1.2.11 to mean ISAGO @ N12 (Pty) Ltd "with the shareholders as described in clause 8 hereof". Clause 8.1 in turn records that the shareholders of the purchaser are the members of the consortium to which I have referred above. On account of delays experienced in implementing the project some of the members of the consortium, namely Group Five Construction (Pty) Ltd, Syfin Property Developments (Pty) Ltd and RKK Trust have relinquished their shareholding in ISAGO during 2008-2009. The relinquishing of shares by certain of the consortium members does not mean they will not be involved in the execution of the project in their respective capacities as advisors, consultants, building contractors, or other service providers. They also remain bound as sureties and in respect of certain guarantees given in the sale agreement.

10. The resolution of 23 March 2007 appointing "the Anglo Saxon/Group 5 Consortium for the planning and developing of the N12 corridor accordingly led to the conclusion of the sale agreement between the City and ISAGO on 2 October 2007.

11. In terms of the agreement the City sold the property to ISAGO at a purchase price of R20 million plus VAT. The price was payable by way of an initial payment of R3 million plus VAT with the balance payable in the future at different stages of the development in accordance with clause 5.2. This arrangement was later changed and the full purchase price was paid prior to the commencement of this litigation. In addition to the purchase price, the City will be paid 10% of the net profit for each portion of the sale property rezoned and sold to a third party.

12. The entire sale agreement was subject to the suspensive conditions contained in clause 4. These are central to the issues in dispute. Clause 4 reads as follows:

> "4. **SUSPENSIVE CONDITIONS**
>
> 4.1 This Agreement, save for the provisions of this clause 4, and clauses 11,16,18,19,20,22 and 23, is subject to the suspensive conditions that the Seller:

4.1.1 provides the Purchaser with a certificate from either the head, legal department or the municipal manager of the Seller that the sale of the Land to the Purchaser-

4.1.1.1 complies with section 79(18) of the Local Government Ordinance 17 of 1939;

4.1.1.2 has complied with section 84 of the Systems Act;

4.1.1.3. has complied with the provisions of the MFMA, in particular sections 14, 20, 33, 90, 110(3), 116 and 168 thereof.

4.1.2. the full council of the Seller will, after performing all the requirements, as set out in the legislation applicable to local government in respect of the sale of the Land as contemplated herein, adopt a final resolution, to endorse the sale of the said Land in terms of this agreement.

4.2. The Seller undertakes to use its reasonable endeavours to procure the fulfillment of the conditions in clause 4.1 at its cost.

4.3. Unless the conditions in clause 4.1 are duly fulfilled on or before the first anniversary of the Date of Signature Hereof, this Agreement, save for the provisions of this clause 4, and clauses

11, 16, 18, 19, 20, 22 and 23, shall never become of force or effect, and neither party shall have any claim against the other arising from the entering into of this Agreement, the implementation thereof, and/or the Agreement never becoming of force or effect (save where such failure is due to a breach by the Seller of the provisions of clause 4.2). The Purchaser shall be entitled to extend the period for the fulfilment of such conditions on one or more occasions and for a maximum period of 1(one) year on each occasion by giving written notice to that effect to the Seller before the date for the fulfilment of such conditions.

4.4. The Seller undertakes in favour of the Purchaser that, after fulfilment of the conditions in clause 4.1, it shall for the duration of this agreement use its best endeavours to continue to comply with section 79(18) of the Local Government Ordinance, 17 of 1939, section 84 of the Systems Act and sections 14, 17, 19, 20, 33, 90, 110(3), 115, 116 and 168 thereof, in as much as such sections may be continue to be applicable to this Agreement.

13. In spite of the suspensive conditions the purchaser, ISAGO, was entitled to take occupation of the land, and did in fact do so, in terms of Clause 11. The relevant provisions of clause 11 provided for the taking of occupation, the commencement of improvements and the installation of services on the land immediately upon signature of the agreement. However, clause 11.1 goes on to state:

> "The construction of such improvements shall be at the risk of the Purchaser and should this Agreement be cancelled as a result of default of the Purchaser, then the land shall be vacated and all improvements, at the election of the Seller, shall be removed or shall remain on the Land and the Purchaser shall have no claim against the Seller in respect of any such improvements whatsoever."

Similarly, despite the Purchaser being entitled to enjoy all rights of ownership on taking occupation, the seller retained the right in terms of clause 11.4.3 on the Purchaser ceasing to occupy the land "for any reason whatsoever" to require *inter alia* that the Purchaser rehabilitate the land to its original state.

14. About seven months after signature, on 21 May 2008 the City acting in terms of section 33(1)(a)(i)(bb) of the Municipal Finance Management Act ("MFMA") 56 of 2003 read with section 21A of the Municipal Systems Act ("MSA") 32 of 2000 caused to be published a notice that the City intended to enter into a contract which would impose financial obligations upon the City beyond the three year period covered in the annual budget for the financial year. It was stated in the notice that the contract and an information statement summarising the City's obligations in terms of the contract would be open for inspection for a period of 60 days at certain identified premises, and the local community and interested persons were

invited to submit comments or representations in respect of the contract by no later than 4 August 2008.

15. On 29 July 2008 attorneys on behalf of the applicant wrote to the municipal manager as follows:

> "1. We refer to the abovementioned matter and confirm that we act herein on behalf of Diggers Development (Pty) Ltd.
>
> 2. Our client is an interested and affected party in respect of the agreement of sale concluded between the City of Matlosana and Isago @ N12 (Pty) Ltd ("the agreement").
>
> 3. The agreement was concluded without compliance with the provisions of the Municipal Finance Management Act or the Local Government Municipal Systems Act.
>
> 4. As a result of the above, the entire process followed by the City of Matlosana is *ultra vires*."

16. On 4 September 2008, the municipal manager of the City caused the following letter to be sent to a number of officials in the national and provincial governments:

LOCAL GOVERNMENT: MUNICIPAL FINANCE MANAGEMENT ACT: SECTION 33(1)(a)(ii)(aa) PROCEDURE/AGREEMENT OF SALE/CITY OF MATLOSANA/ISAGO @ N12 (PTY) LTD

The abovementioned matter refers. In this regard the following:

1. The City of Matlosana, a local government, and Isago @ N12 (Pty) Ltd concluded a written Agreement of Sale in terms of which certain portions of land were sold by the City of Matlosana to Isago @ N12 (Pty) Ltd. The operation of this Agreement of Sale was however suspended in terms of Clause 4.1 thereof, pending inter alia compliance with the provisions of Section 33 of the Local Government: Municipal Finance Management Act, Act 56 of 2003.

2. The City of Matlosana is in the process of complying with the provisions of Section 33 of the Local Government: Municipal Finance Management Act, Act 56 of 2003 and as such, and in compliance with the provisions of Section 33(1)(a)(ii)(cc), your department's views and recommendations are requested and hereby solicited as per provisions of Section 33(1)(a)(ii)(aa) of the Local Government Municipal Finance Management Act, Act 56 of 2003.

3. Accordingly, we attach hereto a copy of the Agreement of Sale, the Notice in Terms of the provisions of Section 33(1)(a)(i) that was published in the Klerksdorp Record Newspaper of 5 June 2008, as well as the "Report on the Isago @ N12 (Pty) Ltd Development and the Implications in terms of Section 33 of the Municipal Finance Management Act, Act 56 of 2003 as prepared by our Directorate Finance

Dated 14 May 2008 for your attention and perusal, in order to enable you to supply us with your views and recommendations.

4. We await your views and recommendations."

17. In response to the letter of 4 September 2008, the Acting Director General of the national Department of Provincial and Local Government on 7 October 2008 addressed a letter to the municipal manager in the following terms:

"I refer to your letter dated 4 September 2008 in the above regard, the contents of which have been noted.

Kindly be advised that in terms of section (33)(1) of the Municipal Finance Management Act, No 56 of 2003, a municipal manager has to solicit the views and comments of the **dplg** before the draft contract is placed before municipal council for approval and not the other way round.

The fact that the operation of this Agreement of Sale was suspended in terms of Clause 4.1 thereof pending compliance with the provisions of *inter alia* section 33 of the MFMA, does not detract from the requirement that the views of the **dplg** must be solicited at least 60 days before the meeting of the council at which the contract is to be approved. As the contract was entered into in September 2007, it would appear that the provisions of section 33 (1) of the MFMA have not been complied with."

18. On 21 November 2008 the City caused to be published a further notice. It differed from the notice of 21 May 2008 in certain respects but most materially in that it included a reference to section 79 (18)(b)(ii) of the Local Government Ordinance 17 of 1939. The relevant part of the notice reads:

> "Notice is hereby given in terms of the provisions of Section 33 (1)(a)(i)(bb) of the Municipal Finance Management Act, 2003 (Act No 56 of 2003) and Section 79 (18)(b)(ii) of the Local Government Ordinance 17 of 1939, read together with Section 21A of the Municipal Systems Act, 2000 (Act no 32 of 2000) (Act no 32 of 2000) that it is the intention of the Municipality to enter into a contract which will impose financial obligations on the Municipality beyond the three-year period covered in the annual budget for the current financial year and in terms of which the Municipality will dispose of immovable property of the Municipality as described below.
>
> The contract is in relation to the development of the area between Klerksdorp and Stilfontein, with the conditions thereof suspended, as set out in Clause 4.1 of the said agreement and the alienation of the said land to Isago @ B12 (Pty) Ltd.
>
> The contract and an information statement summarizing the Municipality's obligations in terms of the contract will be open for inspection as from 20 November 2008 at the following places:

Room 109, Civic Centre as well as the satellite offices and libraries of the Municipality and on the Municipality's official web-site with address: www.klerksdorp.org.

The local community and other interested persons are invited to submit comments or representations or objections in respect of the said contract by not later than 19 January 2009 at room 109, Civic Centre, Klerksdorp, where after such comments or representations or objections will be taken up in an item to serve before the Municipal Council for the Council's consideration."

19. Between July and December 2008 correspondence passed between attorneys acting for the applicant and the City in which certain comments were made regarding the legality of the contract and requesting information about amendments to the agreement, the shareholding of ISAGO and whether the suspensive conditions had been fulfilled. The letter of 5 September 2008 from the City's attorneys is important. It reads:

"The abovementioned matter as well as the comments or representations received from you on behalf of your client Diggers Developments (Pty) Ltd in respect of the Agreement of Sale, by means of your letter dated 29 July 2008 refers. We confirm that we act herein on behalf of our client by City of Matlosana. In this regard the following:

1. We thank you for submitting comments or representations as envisaged by the provisions of Section 33 (1)(a)(i)(bb) in respect of the Agreement of Sale between the City of Matlosana and Isago @ N12 (Pty) Ltd.

2. Your comments and representations will be taken into account by the City of Matlosana as prescribed by the provisions of Section 33 (1)(b)(iii) of the Local Government: Municipal Finance Management Act, Act 56 of 2003 (hereafter "the MFMA") in the taking of a decision regarding the said agreement.

3. You will note that the Agreement of Sale is subject to suspensive conditions, one of them being compliance with the provisions of Section 33 of the MFMA and another the adoption of a final resolution by the Council of the City of Matlosana to endorse the sale of the land in question to Isago @ N12 (Pty) Ltd.

4. We note that you commented that the *'… agreement was concluded without compliance with the provisions of the Municipal Finance Management Act or the Local Government: Municipal Systems Act."* Although the reasons for this submission is not set out or motivated, the submission is not correct. Our client duly complied with the relevant provisions of the Local Government: Municipal Systems Act, the MFMA and any other applicable legislation."

20. In response to the notice published on 21 November 2008, the applicant's attorney addressed a letter dated 9 December 2008 recording the applicant's wish to place comments and representations before the City, but indicated that information required in terms of a letter dated 29 July 2008 had not been furnished. It was specifically pointed out that

information had been obtained that shareholders of ISAGO had withdrawn from the agreement and the City was required to indicate what the position relating to security was. The relevant letter of 29 July 2008 is a detailed account of the applicant's position regarding the legality of the agreement. It further sought information regarding certain amendments to the agreement, the shareholding of ISAGO and whether the suspensive conditions had been fulfilled. The letter does not assert any legal basis for the applicant's entitlement to the information. Notwithstanding the absence of information, the applicant proceeded to make representations in the letter to the effect that the agreement was illegal for want of statutory compliance; and further that it was not in the interests of the community to proceed with the agreement because the "economic and community value" to be received by the City and the ratepayers had not been properly considered and the agreement was "potentially very burdensome" to the City. The letter then briefly set out the basis for that view. It concluded with a statement of opinion that the process was flawed and thus the City had "no option but to cease the current process, considered all the relevant legislation and to follow the due processes."

21. The City, through its attorneys, responded to the letter of 9 December 2008, on 20 January 2009 about two weeks before the resolution was passed. The relevant part of this letter stated:

"1. We confirm the contents of our letters dated 5 September 2008 addressed to you regarding the comments and representations made on behalf of your abovementioned clients.

2. We regret to inform you that your interpretation of the contents of Paragraph 4.8 of our letter dated 5 September 2008 addressed to you in response to the comments and representations made by you on behalf of your client Growthpoint Securitisation Warehouse Trust, is not correct. We kindly refer you to the contents of Section 33(1)(a)(i) read with the provisions of Section 33(1)(b)(iii) of the Local Government: Municipal Finance Management Act, Act 56 of 2003 (hereafter "the MFMA") as referred to and restated in Paragraph 4.8 of our letter dated 5 September 2008 referred to above.

3. As stated it is evident from the contents of the above referred to legislation that the comments and representations that have to be solicited from the local community and other interested persons should be "… in respect of the proposed contract …", so too will our client take into account comments and representations made by your clients "… on the proposed contract…"

4. Both the contract and the information statement summarising the municipality's obligations in terms of the proposed contract were published as prescribed by the relevant statutory provisions in order to allow for your clients to submit comments and representations "… in respect of the proposed contract…" As previously stipulated the

provisions of Section 33 do not allow for the continuous process of exchanging information beyond what is contemplated in the provisions of Section 33(1)(a)(i)(aa) for the mere purpose of allowing your clients to make their comments and representations "… in respect of the proposed contract…".

5. This said, our client in the interest of transparency will provide you with the views and recommendations received from the various state departments as well as our client's responses thereto."

The letter then detailed a list of letters and representations received from other interested persons and entities. It concluded by addressing the questions raised about the shareholding and the amendment of the agreements as follows:

"As to the content of Paragraph 5 of your letter, our client received no notification of the withdrawal of any of the shareholders of the prospective purchaser from same. The proposed contract currently remains unaltered."

The shareholding changed at a later date and the applicant was informed of that in July 2009.

22. A few months later, on 30 January 2009, the municipal manager signed the certificate of compliance, required in terms of clause 4.1 of the sale agreement, certifying that there had been compliance with the relevant

statutory provisions. The document is 24 pages in extent and deals with various statutory provisions, some of which may not be entirely relevant or applicable.

23. The matter was placed on the agenda of the Council of the City for 5 February 2009. The "Item to Council" comprised a 60 page document together with detailed annexures dealing fully with the development proposal, and including the sale agreement and the representations received regarding it. The Council resolved to approve the sale, noting that the suspensive conditions had been fulfilled. The resolution reads as follows:

> "**RESOLVED**
>
> a) That after taking into account the contents of Section 16, Section 33(1)(b)(i) to Section 33 91)(b)(iv) of the MFMA, the relevant provisions of the Supply Chain Management Policy and Preferential Procurement Policy of the CoM, the Municipal Asset Transfer Regulations 2008 as well as the contents of the written Agreement of Sale and the other relevant statutory provisions as referred to in Clause 4.1.1 of the Agreement of Sale concluded between the CoM and Isago on 2 October 2007, it is being resolved that:
>
> The reasons forwarded by the Municipal Manager for the deviation from the provisions of Section 40(4)(a) and Section 40(4)(b) of the Supply Chain Management Policy and Preferential Procurement Policy be

accepted and the deviation from the Supply Chain Management Policy and Preferential Procurement Policy is hereby approved and will be noted in the annual financial statements of the CoM as required by Section 36(2) of the Supply Chain Management Policy and Preferential Procurement Policy;

b) That after the Council has taken into account the issues set out in the provisions of Section 79(18)(c)(i) and the valuation report as contemplated in the provisions of Section 79(18)(d) of the Local Government Ordinance, Ordinance 17 of 1939, as well as the provisions of Section 33(1)(b) of the MFMA, with specific reference to the objections, comments and representations received from interested persons and Government Departments, the City of Matlosana determined that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the Agreement of Sale and hereby approves the entire written Agreement of Sale entered into between the CoM and Isago on 2 October 2007 exactly as it is to be executed;

c) That cognizance be taken that the land that is being sold to Isago @ N12 (Pty) Ltd:

- is an asset not needed to provide the minimum level of basic municipal services; and
- is sold for the fair market value thereof and the transaction is structured in a fashion that the community also receive value in exchange for the land.

d) That the transfer of ownership of the land, as referred to in the Agreement of Sale, is accordingly in keeping with the provisions of Section 14 of the MFMA fair, equitable, transparent, competitive and consistent with the supply chain management policy of this municipality.

e) That the Municipal Manager be authorised to take such further steps as may be necessary for the further execution of the Agreement of Sale.

f) That the requirements as set out in Clause 4.1.1 of the written Agreement of Sale have been performed and accordingly the City of Matlosana herewith adopts a final resolution to endorse the sale of the Land as described in Clause 4.1.2 of the written Agreement of Sale.

g) That the Technical Steering Committee appointed for the N12 Development oversee the implementation of the Agreement of Sale between the City of Matlosana and Isago @ N12 and reports to this effect be submitted to the Council on a quarterly basis."

24. There was no immediate response by the applicant to the resolution taken by the Council on 5 February 2009. The properties were transferred into the name of ISAGO on 19 May 2009. Ten days later, on 29 May 2009 an application by the applicant for the extension of the boundaries of its property with business rights served before the relevant committee of the Council, in terms of which it seeks to exercise its development rights in respect of the remaining extent of its property. Westbridge Shopping

Centre (Pty) Ltd objected to the application. On 22 June 2009 the committee upheld a technical point *in limine* and postponed the application *sine die*. There is an appeal pending before the North West Province Townships Board regarding that ruling.

25. The fate of the application before the committee galvanized the applicant into action to bring the present application. It is understandably troubled by the prospect of a competitor shopping centre in its immediate vicinity. The applicant lodged its application in this court on 4 August 2009 seeking: 1) to review and set aside the resolution adopted by the Council on 5 February 2009; 2) the restoration of the status quo ante in respect of the immovable property transferred to ISAGO; 3) to declare the sale invalid and unenforceable; 4) an interdict restoring the respondents from acting in accordance with the sale; and 5) a directive that the City comply with all statutory pre-requirements prior to concluding any further agreements in respect of the immovable property. About eight weeks later, on 17 September 2009, the applicant brought an urgent application for an interim interdict, pending the determination of the main application, interdicting the respondents from giving effect to the resolution of the Council and in particular from proceeding with the further development of the immovable property, and further interdicting ISAGO from alienating, transferring or further encumbering the immovable property.

26. Both respondents opposed the urgent application on the basis *inter alia* that there were no grounds for urgency. The second respondent however brought an urgent application that the two applications, the main and the urgent applications, be heard together. On 29 October 2009 the Deputy Judge President directed that the main application would be heard on 26-27 November 2009 with the result that the relief sought in the urgent application was no longer proceeded with.

27. The applicant has attacked the City's action in entering into the sale of the immovable property and the Council's resolution basically on two bases. Firstly, that there has been non-compliance with the principle of legality and secondly, that the decisions taken constitute administrative actions which were procedurally unfair, contravened a law, were not authorised by the empowering provisions or did not comply with a mandatory and material procedure or condition prescribed by an empowering provision. So stated, the grounds relied upon to review the administrative action are those provided for in section 6 of the Promotion of Administrative Justice Act 3 of 2000, ("PAJA"), in particular: section 6(2)(b) (non-compliance with a mandatory pre-condition or procedure); section 6(2)(c) (procedural unfairness); and section 6(2)(f)(i) and section 6(2)(i) (contravention of a law). The respondents have put up substantive defences but have also

pleaded that the application should be dismissed on the ground of unreasonable delay.

28. During argument counsel for the applicant tended to conflate the various review grounds in a manner posing some conceptual difficulty. But perhaps most unsatisfactorily, all parties failed to address adequately, or at all, the threshold question of whether the action and decisions taken constitute "administrative action" in the first place. Administrative action is defined in section 1(i) of PAJA to mean a decision or any failure to take a decision by an organ of state when exercising constitutional powers, public powers or performing public functions in terms of legislation, or in certain instances where natural or juristic persons act similarly; and which decision or failure to decide adversely affects the rights of any person and has a direct, external legal effect. In terms of section 1(i)(cc) of PAJA, administrative action by definition does not include "the executive powers or functions of a municipal council". The intention of section 1(i)(cc) of PAJA is to exclude from judicial review under PAJA decisions or failures to decide by municipal councils in the exercise or performance of their executive powers or functions. Administrative action in the context of municipal government is then a decision by an organ of state exercising public powers or performing public functions unless the powers or functions exercised or performed are the executive powers or functions of

a municipal council. Section 1(i)(dd) similarly excludes the legislative functions of a municipal council.

29. Additionally, a decision by a municipal council, in order to constitute administrative action, would need also to fall within the parameters of the definition of "decision" in section 1(ii) of PAJA. The relevant part of section 1(ii) provides:

> "decision means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to …..(b) giving, suspending, revoking or refusing to issue a certificate, direction, approval, consent or permission;…."

30. Two actions are relevant in this case. The execution of the contract by the municipal manager and the approval of the contract by the resolution of the Council. It is the latter which is the subject of the applicant's challenge. While the giving of approval or consent by the Council to the sale of council land is in general terms a decision, by reason of section 1(ii) and section 1(i)(cc) of PAJA, two further questions must be asked: Firstly, is the approval of a commercial sale of land a "decision of *an administrative nature*"; and secondly, is it one taken pursuant to an exercise or performance of the executive powers or functions of a municipal council? If the answer to the first question is negative, or the

answer to the second is affirmative, then in either case review under PAJA would find no application.

31. Regrettably, these critical issues were not addressed directly, nor canvassed adequately in argument. As I see it, they are questions going to jurisdiction, and their resolution determines the nature and ambit of any review challenge to the decisions in issue.

32. Any argument that a resolution by a municipal council approving a commercial transaction for the sale of land by a municipal council is a decision *not* of an administrative nature, and hence excluded from review under PAJA, depends up to a point upon the *a priori* classification of such as an exercise or performance of the municipal council's executive powers or functions. Is the decision one involving the exercise of an executive power or the performance of an executive function and therefore *not* a decision of an administrative nature? Put in another way, the question of whether a municipal council decision is of an administrative nature or not, begs the *a priori* determination or classification of the power or function involved as executive or non-executive. And while courts and many administrative lawyers have expressed legitimate reservations about the usefulness of classifying functions in administrative law, it would seem to me that the express provisions of PAJA render categorisation

inescapable. The intention of the legislature was to narrow down the common law notion of administrative action and the courts are not at liberty to ignore that intention. I make that observation conscious of the apprehension that may be evoked by the idea that a wide range of decisions of local authorities could escape review under the provisions of PAJA, which, to state the obvious, introduce legitimate constraints upon governmental action in the interests of efficiency, accountability and fairness. The problem though may be less troubling than it seems. The constitutional principles of legality, the *rechtstaat* and proportionality will in any event operate to constrain exercises of executive power and function by municipal councils. A municipal council may not act *mala fide*; nor may it misconstrue its powers or act arbitrarily - *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at 18A-C.

33. Moreover, there is a plethora of statutes governing local authorities which in many instances introduce special remedies, unique review and appeal mechanisms, as well as standards of procedural fairness, reasonableness and rationality, which will be reinforced by the constitutional principle of legality guaranteeing adherence in specific instances. Therefore the consequences of excluding from PAJA review municipal decisions taken when exercising executive powers or performing executive functions may prove minimal in practical terms. Nevertheless, the distinction will not be

one without difference. Review under law other than PAJA will generate specific remedies, as well as different approaches to such matters as time delays, condonation and the exhausting of remedies, which may well benefit from and be improved by the peculiar legislative, political, administrative and social contexts in which they evolve. Accordingly, it will become important, if not essential, for litigants to formulate their causes of action and review grounds within the applicable constitutional and legislative framework.

34. Turning back to the question at hand: is the approval by a municipal council of a sale of land not needed to provide basic services a decision involving the exercise or performance of "the executive powers and functions of a municipal council" and thus excluded from the definition of administrative action in PAJA? The classification quite evidently must depend on the nature of the power exercised or the function that is being performed. In one sense executive action might be construed narrowly to relate only to the development and formulation of policy. A broader view might include executory acts of implementation. It has been held on the contrary that action not taken in implementation of legislation is executive, while action taken to implement legislation is administrative - *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA); and *Steele v South Penunsula Municipal Council* 2001 (4) BCLR

418 (C). I doubt the distinction is uncontentious or unproblematic. The term “executive” etymologically in certain contexts implies action taken in implementation. One carries into effect by executive action. *Webster’s New International Dictionary* defines “executive” to mean:

> “designed or fitted for, or pertaining to, execution, or carrying into effect …. qualified for, concerned with, or pertaining to, the execution of the laws or the conduct of affairs; belonging to that branch of the government charged with such execution.”

Executive powers are typically contrasted with legislative powers. A legislative power or function is the making of or the power to make laws. Law making is mostly the product of elected, deliberative bodies such as parliament or municipal councils. Original legislation in the form of statutes or municipal by-laws enacted through performance of the legislative function does not constitute administrative action (section 1(i) (dd) of PAJA) - *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Municipal Council* 1999 (1) SA 374 (CC). On the other hand, delegated legislation is often the result of legislative administrative action which refers to law or rule making by administrators authorised by empowering provisions to do so, and could arguably in a specific context constitute administrative action. Both original and delegated legislation differ from executive and typical administrative action in that they usually

involve rules of general application, applied to broader groups rather than to individuals, which endure for an indefinite period.

35. The question posed by the exclusion in section 1(i)(cc) is: What is meant by executive in the context of decision making by municipalities? Chapter 7 of the Constitution of 1996, dealing with local government, draws a distinction between “municipalities” and “municipal councils”. Section 151(1) provides that the local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic. Importantly for present purposes, section 151(2) provides: “The executive and legislative authority of a municipality is vested in its Municipal Council”. The categorisation into executive and legislative is reiterated in section 156 dealing with the powers and functions of municipalities. Section 156(1) defines the areas of functional or subject matter competence falling within executive authority, while section 156(2) does the same in respect of legislative functions by providing: “A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.” These matters are identified in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. Section 160, dealing with the internal procedures of municipal councils, distinguishes between legislative and executive

functions. In terms of section 160(2) of the Constitution a municipal council may not delegate the passing of by-laws, the approval of budgets, the imposition of rates, and other taxes, levies and duties, and the raising of loans. In *Fedsure Life Assurance v Greater Johannesburg TMC* (*supra*) at 397C-D the Constitutional Court held that the exercise of the taxing power by a municipal council is legislative action by the council acting as a deliberative legislative assembly with power to enact original legislation in the form of by-laws and taxing measures. The exercise of these powers is indisputably not administrative action. In terms of section 160(3)(b), all questions concerning these matters must be determined by a decision taken by the council with a supportive vote of a *majority of its members*. To that end, section 160(4) provides that no by-law may be passed unless *all the members* of the Council have been given reasonable notice and the by-law has been published for public comment. "All other questions" before a municipal council must be decided by a majority of *votes cast*, provided at least a majority of members are present - section 160(3)(c) read with section 160(3)(a). The constitutional arrangement therefore distinguishes between the legislative functions set out in section 160(2) (which may not be delegated to administrators) and "all other questions" being those referred to in section 160(3)(c).

36. What is meant by “all other questions”? One possible interpretation is that any decision other than the passing of by-laws, the approval of budgets, the imposition of rates and taxes, and the raising of loans (being the legislative functions), *prima facie* will involve the exercise of an executive power or a performance of executive function because that is the stark dichotomy delineated by the Constitution in respect of the powers and functions of municipal councils. Such “questions” or matters would then not constitute administrative action in terms of section 1 of PAJA, with the consequence that PAJA would not apply and judicial review of such decisions will need to be brought on a different basis.

37. A different approach might be preferable. The legislative powers and functions of municipal councils, as contemplated in the Constitution, and perhaps in the exclusion in section 1(1)(dd) of PAJA, as just outlined, are those related to the making of original legislation of more general application. Whether all other municipal council decision making, including the implementation of legislation and the making of delegated legislation, can be categorised as “executive” is debatable and possibly undesirable from a policy perspective. Certainly, executive actions might literally very well be those which implement or give effect to a policy, a piece of legislation or an adjudicative decision, broadly encompassing any action aimed at operationalising the law, policy and functions of an

institution. But that is a very wide ambit of decisions indeed. Accordingly and alternatively, executive action might better be considered to be a narrower sub-set of a wider category of action, which narrow field would exclude administrative action by administrators implementing by-laws or resulting in delegated legislation or ministerial (purely administrative) conduct of officials. This line of reasoning informs the decision in *Steele v South Peninsula Municipal Council* (supra).

38. The legislative context, however, militates against accepting the narrow view. Section 11 of the Local Government: Municipal System Act 32 of 2000 reiterates that all executive and legislative authority of a municipality is exercised by the council. This distinction, drawn from the constitutional framework, makes it difficult to reach any conclusion other than that any action by a council which is not legislative is executive. If one accepts that, the result startlingly would be that no municipal council action qualifies as administrative. The conclusion is reinforced by section 11(3) which provides that a municipality exercises its legislative or executive authority by *inter alia* developing and adopting policies, plans, strategies and programs; promoting and undertaking development; implementing its own by-laws; providing municipal services; preparing, approving and implementing its budgets; and, importantly, “taking decisions on any of the above-mentioned matters; and doing anything else within its executive

competence" - section 11(3)(iii) and (ii). The distinction between formulation of policy (executive action) and implementation of policy (administrative action) preferred by the Supreme Court of Appeal in relation to the action of national government ministers in *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) therefore might not find easy application in the sphere of local government.

39. It is not now necessary for me to pronounce definitively on these difficult questions, because whether or not the wider or narrower concept of "executive action" applies, I hold the view that the disposal of land by a municipal council to an individual, by means of a resolution, by its nature is not action taken to implement legislation, nor is it ministerial, and accordingly my *prima facie* view is that it does not constitute administrative action. It is an instance of the council acting executively in the narrower sense. Furthermore, within the stark dichotomy of the powers and functions of municipal councils adnumberated by the Constitution, the categorisation of such action as an exercise of executive action in the wider sense would be unavoidable. When a council passes a resolution, by a majority of the members present, adopting or ratifying conduct of the municipal manager, it does not act legislatively. The action is akin to a

board of directors ratifying the actions of its CEO. In such circumstances the council acts executively. In this case the municipal manager was authorised by means of a standing resolution to execute any sale which the Council was legally authorised to conclude. His role was to act in concert with the Council acting executively.

40. In the result, the sale of land between the second and first respondents would seem to be either an exercise of the executive powers or the performance of an executive function of the Council and hence would be excluded from review under PAJA. The difficulty though is the application has been brought and defended on the premise that PAJA is applicable. The implications of the non-applicability of PAJA were not sufficiently weighed and considered in argument. Without the benefit of full argument, I accordingly hesitate to reach a definitive conclusion. Fortunately, my ultimate decision is sustainable under both PAJA and on alternative legal bases. In the final analysis, therefore, the result will be the same whether I am right or wrong. Accordingly, lest I be mistaken in my *prima facie* view that PAJA has no application, I will proceed on the assumption that PAJA might well apply.

41. Mr Maritz SC, who appeared on behalf of the first respondent, characterised the crux of the case to be whether the statutory

requirements applicable where a local authority disposes of immovable property were complied with or not. Non-compliance with statutory requirements potentially could give rise to three possible review grounds under PAJA, namely that a mandatory and material procedure or condition prescribed by an empowering provision was not complied with (section 6(2)(b)); that the action itself contravened a law (section 6(2)(f)); and that the action is otherwise unlawful (section 6(2)(i)). The case put otherwise than on a PAJA basis is simply that there has been non-compliance with the principle of legality.

42. Various statutory provisions have been referred to in the pleadings as requiring mandatory compliance. Those mentioned in clause 4.1 of the sale agreement are:

- section 79(18) of the Local Government Ordinance 17 of 1939;
- section 84 of the Municipal Systems Act 32 of 2000; and
- sections 14, 20, 33, 90, 110(3), 116 and 168 of the Municipal Finance Management Act 53 of 2003.

43. In argument, counsel for the applicant, Mr Bergentuin SC, focused his efforts on section 79(18) of the Ordinance and section 33 of the Municipal

Finance Management Act ("MFMA"). This was prudent in the light of the purport of the other mentioned provisions which renders them inapplicable.

44. Section 84 of the Local Government: Municipal Systems Act ("the Systems Act") quite evidently finds no application and probably was included in the agreement by error or *ex abundanti cautela*. The provision describes a procedure to be followed in relation to *service providers* selected from a number of bidders. The second respondent, ISAGO, is not a service provider. The mere fact that contracts with developers may provide for the provision of infrastructure aimed at the eventual delivery of services by third parties does not render the purchaser or developer of the land a service provider.

45. Likewise, section 20 of the MFMA has no conceivable application in that it deals with the obligation of the Minister to prescribe the form of the annual budget of municipalities and his power to prescribe in relation to various issues related to the budget; none of which has any direct connection to the issues in dispute in the present matter.

46. The applicant also did not persist with any challenge that there had been non-compliance with section 14 of the MFMA; presumably because no

foundation was laid in support of that challenge in the founding papers. The section prohibits municipalities from disposing of capital assets needed to provide the minimum level of basic municipal services. Capital assets not needed for that purpose may be disposed of only after the municipal council in a meeting open to the public has decided on reasonable grounds that such is indeed the case, and has considered the fair market value of the asset and the economic and community value to be received in exchange for it. In terms of section 14(5) any transfer of ownership of a capital asset must be fair, equitable, transparent, competitive and consistent with the supply chain management policy. It will be seen immediately that this provision sets up various grounds of possible review, akin to, and potentially as effective as, those available under PAJA. But, as just indicated, the applicant did not persist with the assertion that section 14 has been contravened. In paragraph 38 of the founding affidavit the claim is made that the first respondent failed to comply with its supply chain management policy, but that allegation is not substantiated in any way either in the founding affidavit or in any supplementary affidavit in terms of rule 53. Nor did the applicant in reply counter the second respondent's contention in its answering affidavit that the applicant had failed to make any case whatsoever in support of its assertion of non-compliance with section 14. That, to my mind, is the end of the matter and there is no need to examine or finally determine whether

the section finds application in respect of land transfers on account of being restricted, as contended by the respondents, to the transfer of ownership of capital assets which are *goods*, meaning movables. The applicant's failure to press the issue suggests that it takes the point that the capital assets contemplated by the section are those other than immovable assets.

47. The applicant has made no allegations of any kind pertaining to compliance or non-compliance with sections 90, 110(3), 116 and 168 of the MFMA. In consequence, the only allegations of non-compliance remaining for consideration are those relating to section 79(18) of the Ordinance and section 33 of the MFMA.

48. Section 79(18)(a)(i) of the Ordinance authorizes a local authority to "let, sell, exchange or in any other manner alienate or dispose of any movable or immovable property of the council…" Section 79(18)(b) provides that:

> "Whenever a council wishes to exercise any of the powers conferred by paragraph (a) in respect of immovable property …. the council shall cause a notice of the resolution to that effect to be-
>
> (i) affixed to the public notice board of the council; and

(ii) published in a newspaper in accordance with section 91 of the Republic of South Africa Constitution Act, 1983;

in which any person who wishes to object to the exercise of any such power, is called upon to lodge his objection in writing with the town clerk within a stated period of not less than 14 days from the date of publication of the notice in the newspaper…."

49. Section 33(1) of the MFMA provides:

"**Contracts having future budgetary implications. -**

(1) A municipality may enter into a contract which will impose financial obligations on the municipality beyond a financial year, *but if the contract will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year*, it may do so only if -

(a) the municipal manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved-

(i) has, in accordance with section 21A of the Municipal Systems Act-

(aa) made public the draft contract and an information statement summarising the municipality's obligations in terms of the proposed contract; and

(bb) invited the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed contract; and

(ii) has solicited the views and recommendations of-

(aa) the National Treasury and the relevant provincial treasury;

(bb) the national department responsible for local government; and

(cc) if the contract involves the provision of water, sanitation, electricity, or any other service as may be prescribed, the responsible national department;

(b) the municipal council has taken into account-

(i) the municipality's projected financial obligations in terms of the proposed contract for each financial year covered by the contract;

(ii) the impact of those financial obligations on the municipality's future municipal tariffs and revenue;

(iii) any comments or representations on the proposed contract received from the local community and other interested persons; and

(iv) any written view and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department responsible for local government and any national department referred to in paragraph (a) (ii) (cc); and

(c) the municipal council has adopted a resolution in which-

(i) it determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract;

(ii) it approves the entire contract exactly as it is to be executed; and

(iii) it authorises the municipal manager to sign the contract on behalf of the municipality."

50. The factual basis in the founding affidavit supporting the claim of non-compliance with the provisions of section 33, is, to say the least, skimpy. The heads of argument provide some elaboration, albeit not entirely satisfactory.

51. Before dealing with the alleged contravention of these two provisions, it may be helpful to recap briefly on the chronology. During September 2006 the City published the request for proposals to enhance and promote development along the N12 corridor. There was no mention in the invitation of any intended sale of land or the development of a shopping centre. The latter issue being of the greatest concern to the applicant. On 23 March 2007 the consortium was "approved for appointment for the planning and development of the N12 corridor… subject to an agreement being entered into with Council for the development …" of the land. The approval was done in terms of resolution MM101/2007 - Exhibit A103. Clause (d) of the resolution required the developer to "address" the alienation of the land. The sale agreement was signed by the City on 6 September 2007 and by ISAGO on 2 October 2007. Clause 2.7 of the sale agreement refers to the prior request for proposals for development and states that for such purpose the seller *is prepared* to sell the land to the purchaser who will assume the obligation related to planning, rezoning and subdivision. Of most relevance is clause 4.1 which introduced the

suspensive conditions. The first notice given to the public was that stated to be in terms of section 33(1)(a) of the MFMA published on 21 May 2008. This was followed by the publication of the second notice stated to be in terms of both section 33(1)(a) of the MFMA and section 79(18)(b) of the Ordinance, which was published on 21 November 2008. Both notices invited comments or representations or objections in respect of the contract and advised that the contract and an information statement summarising the obligations were open for inspection at the office of the municipality. The item served before the Council and the resolution finally approving the sale and accepting that the suspensive conditions had been fulfilled was adopted on 5 February 2008.

52. The essence of the applicant's challenge is that the City had to comply with sections 33(1) of the MFMA and section 79(18) of the Ordinance *before* the "conclusion" of the sale agreement in October 2007, and that it was neither sufficient nor proper to do so after signature of the agreement and before the adoption of the resolution in February 2008. The attack was formulated on two bases. The first was stated thus: "if there was no compliance with the statutory prerequisites there was no procedural fair administrative action (sic), and the administrative action of the First Respondent stands to be reviewed and set aside in terms of PAJA." This, it was submitted, entitled the applicant to relief in terms of prayer 1 of the

notice of motion. The second leg of attack was stated thus: "If the formalities and requirements prescribed by law were not complied with, the agreement of sale entered into by Respondents was simply void *ab initio*, and Applicant will be entitled to the relief asked for in prayer 3 of the notice of motion", namely a declaration that the sale agreement is invalid and unenforceable.

53. Despite the lack of privity of contract between the applicant and the other parties, there has been no challenge to the standing of the applicant to seek a declarator that the contract between the respondents is invalid and unenforceable. The applicant has sufficient interest as a competitor of the second respondent and as a ratepayer of the first respondent entitling it to impugn the validity of the action.

54. Mr Maritz, however, argued that I should not issue a declarator where neither consequential relief is asked for, nor reversal of the transfer is sought. A prayer for consequential relief might be prudent in practice, but I am unable to agree that such is a necessary pre-condition to the grant of a declarator. Section 19(1)(a)(iii) of the Supreme Court Act permits the High Court, in its discretion, and at the instance of any interested party, to inquire into and determine any existing, future or contingent right or obligation, "notwithstanding that such person cannot claim any

consequential relief upon the determination". The present application does not give rise to a dispute or question which is hypothetical, abstract or academic. There is a real and pertinent dispute between the parties in respect of which the applicant has an interest; and hence I see no justifiable basis to refuse to exercise the discretion to grant a declarator on that score - *Compagnie Interafricaine de Travaux v SA Transport Services* 1991 (4) SA 217 (A) at 230 I - 231 C. It is, of course, another matter altogether whether or not the applicant is entitled on the merits to the declaratory relief it seeks.

55. The applicant's formulation of the ground of review as an allegation of procedurally unfair administrative action, in my opinion, is a category mistake. Although non-compliance with the two statutory provisions undoubtedly would have a procedural dimension, the issue at hand does not concern the routine issues of procedural fairness envisaged in section 3 of PAJA, which relate to the observance of the tenets of due process, such as notice, the opportunity to make representations, rights to representation, the right to an appeal and so on. The real issue here is whether a mandatory and material procedure or condition prescribed by an empowering provision was not complied with. That is an issue of legality. There can be no doubt, whatever the applicant's formulation of the dispute, that such has always been the applicant's case. And, at risk

of being trite, illegality is in and of itself a sufficient ground of review, whether the cause of action is founded in PAJA or not. In *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and other* (supra) at para 56 the Constitutional Court stated:

> "A local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law."

56. As I understand the applicant's case, it is not contended that the applicant was denied a reasonable opportunity to make representations or was shut out from the public participation process which is the object of section 79(18) of the Ordinance. Rather the applicant argues that a municipal council may only exercise the power to dispose of land if the publication inviting objections and the public participation process takes place before a sale agreement is concluded. Prior publication of the notice inviting objections and the consideration of those objections are jurisdictional requirements for the exercise of the power to conclude a sale of immovable property. In this instance, according to the applicant, the sale was concluded in October 2007, and the publication of the notices and the

receipt and consideration of objections occurred subsequently in May and November 2008; consequently, it was submitted, there was non-compliance with the mandatory statutory requirements.

57. A similar submission was made regarding section 33 of the MFMA. That provision requires the municipal manager at least 60 day before any meeting convened to approve the contract to make public the *draft* contract and information statement summarising the obligations, and inviting comments or representations from the public. He or she is likewise expected to solicit the views and recommendations of the relevant government officials identified in section 53(1)(a)(ii). No case is made out that such was not done. Rather, the applicant's case is that the publication, invitation and solicitation, as well as the consideration of objections, all occurred after the contract was entered into; and such constituted non-compliance with a mandatory and material procedure or condition in breach of the principle of legality.

58. The immediate difficulty encountered with the contention regarding non-compliance with section 33 of the MFMA is that no factual foundation is laid in the founding affidavit in support of the assertion that it is applicable in this case. Before the procedures in section 33(1)(a), (b) and (c) of the MFMA will apply, the municipality must intend to enter into a contract

which will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year. The applicant has not made any factual averments in its papers that the agreement will impose financial obligations beyond the three year budget cycle. The only substantive reference to section 33 in the founding affidavit is contained in paragraph 34 thereof, where it is stated that the invalidity of the initial sale cannot be cured by subsequent compliance and approval. The deponent continues:

> "For example, section 33(1)(a)(i)(aa) of the MFMA makes reference to a "draft contract" and "proposed contract": First respondent did not make a "draft" or "proposed" contract public, but an agreement with final terms, already creating rights and obligations."

59. The assertion begs the question of whether the City had any obligation to publish a draft contract under that section. What financial obligations, if any, did the contract impose on the municipality beyond the three year budgetary cycle? None are mentioned or alluded to in the papers; nor are any immediately apparent from reading the terms of the sale agreement. When pressed in argument, counsel, seemingly caught off guard, referred me to clause 17.2 of the sale agreement dealing with the obligation of the City to procure an access road at its cost. The relevant part of the clause provides that in the event that the Seller fails to procure that the land

required for construction of the access road is available by the fourth anniversary of the signature date, the Purchaser shall be entitled to construct the access road. While this clause could conceivably operate to extend the duration of the contract beyond three years, that alone does not mean any unbudgeted expenditure will be imposed beyond the three year budgeting cycle. One might speculate that it may, but no case to that effect has been made. In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F-G, the court stated:

> "Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of an established practice would be destroyed. A party would not know what case must be met."

More recently the Supreme Court of Appeal in *Minister of Land Affairs and Agriculture v D and F Wevell Trust* 2008 (2) SA 184 (SCA) at 200 observed in similar vein:

> "It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the

conclusions sought to be drawn from such passages have not been canvassed in the affidavits … Trial by ambush cannot be permitted."

60. Nor does the fact that the City assumed, perhaps wrongly, that the provision applied, save the applicant. As discussed earlier, the agreement incorrectly and unnecessarily required compliance with a number of inapplicable statutory requirements. Before the City can be held to be in non-compliance with section 33(1)(a) of the MFMA it must be established that the provision is objectively applicable by reason of it imposing financial obligations beyond the three year cycle. As I have said, the applicant has neither alleged nor shown that in its papers.

61. Be that as it may, the main answer of the respondents to the claim of illegality applies equally to section 33(1)(a) of the MFMA as it does to section 79(18) of the Ordinance. As already explained, the applicant's case does not rest on allegation of total non-compliance in the direct sense, it contends rather that the City's ultimate compliance was compromised by having signed the sale agreement in October 2007, prior to compliance, albeit subject to the suspensive conditions in clause 4.1.1 and 4.1.2 of the sale agreement.

62. The applicant's position, in my view, loses sight of the legal effect attributed to a suspensive condition in an agreement of sale of immovable

property, as well as the fact that the first respondent in any event achieved and satisfied the legislature's purpose of securing public participation. The effect of clause 4.1 of the sale agreement was that the exercise of the power to alienate the immovable property was suspended until compliance with the applicable statutory requirements, as it turns out only section 79(18)(b) of the Ordinance, and, perhaps, section 33(1)(a) of the MFMA. Clause 4.3 leaves no ambiguity in that it explicitly provided that unless the conditions in clause 4.1 were duly fulfilled at the relevant time, the key clauses of the agreement "shall never become of force or effect, and neither party shall have any claim against the other". In terms of clause 4.3, clause 11 remained binding with the result that the purchaser was explicitly placed at risk for any improvements it made while occupying the land and may have become compelled to rehabilitate the land to its original state.

63. The respondents' argument is predicated on the principle enunciated in *Corondimas v Badat* 1946 AD 548 at 560, which holds that an agreement to sell property subject to a suspensive condition is a legal agreement, by the making of which a definite contractual relation is established, but that relationship is not the relationship of purchaser and seller until the condition is fulfilled. Stated simply, a contract of sale will only be concluded when any condition to which it is subject is fulfilled - *Tuckers*

Land and Development Corp v Strydom 1984 (1) SA 1 (A) at 18; and *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 888A. The first respondent argued accordingly that it was entitled to comply with the applicable statutory requirements for public participation subsequent to signature of the agreement because the coming into force of the obligation to transfer the property was suspended and not operative until approved by resolution of the Council. Where legislation seeks to prohibit a sale, an agreement of sale subject to a suspensive condition cannot, pending fulfilment of the condition, be regarded as prohibited. It only becomes a sale when the condition is fulfilled, and before that there will be no contravention of the prohibition - *Geue and Another v Lith and Another* 2004 (3) SA 333 (SCA) at 340G-I.

64. The applicant's rejoinder is that the *Corondimas* principle does not apply where the context indicates otherwise. Section 79(18)(b) of the Ordinance, it argued, does not oblige a municipality to give notice and to consider objections only when an agreement of sale is concluded, the trigger rather is "whenever a council *wishes* to exercise any of the powers conferred by paragraph (a) in respect of immovable property". The powers concerned are the power to "let, sell, exchange or in any other manner alienate". Accordingly, the timing of the requirement of causing a

notice to be published is linked to the arising of the wish to exercise the relevant power, and in this case that was prior to October 2007.

65. The respondents submitted in reply that the power in question is the power to alienate immovable property and not the power to enter into the *causa*, the sale or exchange. The purpose of section 79(18) is to ensure public participation before alienation occurs. The argument has much to commend it from the perspective of logic and policy. Linguistically it proceeds from the premise that the words “sell, exchange or in any other manner alienate” postulate alienation or transfers of ownership, and sales and exchanges are merely manners which may result in such. The obstacle in the way of accepting the proposition, or interpretation so put, is that the provision includes also the power “to let”. A lease of property does not involve the power or an act of alienation. However, the qualification is not destructive of the argument. The transactions contemplated in the provision should be considered disjunctively. The power exercised in the present instance was the power to sell and that power was exercised effectively with permanent consequences only once the suspensive conditions were fulfilled and alienation occurred. The power of leasing was never exercised. ISAGO’s right to take occupation

of the land, with the right to commence improvements and the installation of services, prior to the sale being perfected, and subject to the reversionary rights in clauses 11.1 and 11.4.3, did not arise pursuant to a lease, a completed sale, an exchange or any other manner of alienation. These rights arose pursuant to the *sui generis* contractual arrangement existing pending the fulfilment of the suspensive condition; and since they did not involve alienation of the land there was no obligation to comply with section 79(18)(b) before conferring them. The exercise of the power of sale and the concomitant power of alienation occurred only with the perfecting of the sale by fulfilment of the conditions, most particularly the adoption by the Council of the final resolution contemplated in clause 4.1.2. The wish to exercise that power most certainly occurred some time before then. Considering the legislative purpose that public participation should occur, in the case of a sale, before the obligation to alienate the property is perfected and operable, in both logic and policy it will be sufficient if the notice is published and the objection process is undergone before then. Provided the process occurs between the wish to exercise the power of alienation and its actual exercise, there has been compliance.

66. An interpretation along these lines avoids sacrificing substance to form. It is the duty of court to get at the real intention of the legislature by

attending to the whole scope of the statute to be construed. The question is: Has the thing ordered by the legislature to be done been done? - *Leibrandt v South African Railways* 1941 AD 1 at 13. Although the applicant has raised issues of due process and reasonableness which I discuss later, no case has been made that the objection procedures contemplated in section 79(18) of the Ordinance and section 33 of the MFMA were applied defectively in relation to the representations received on grounds of procedural shortcomings, irrationality or a discounting of relevant considerations by the first respondent. The notices were published in May and November 2008, objections were received, placed before the Council and considered by its members before the resolution exercising the power of alienation was taken in February 2009. What the legislature ordered to be done was in fact done.

67. By the same token, even if one were to interpret the provision to mean that the publication of the notice calling for objections is required immediately upon contemplating the wish to exercise the power, and thus in the present instance prior to the municipal manager executing the conditional agreement, I doubt that the legislature intended the timing to be mandatory. I have essentially already made the point, but from a different perspective. The general object intended to be secured by the section is that a public participation process must take place before a

binding and fully operative lease, sale, exchange or alienation occurs. And that, hence, is mandatory. The statutory directive that it should occur as soon as the wish to exercise the power arises, and before any further executory steps are taken, if that was indeed the intention, is, in my opinion, merely directory, for the simple reason that it would not be an essential prerequisite to achieving the legislative purpose to ensure public participation before disposal or alienation. In *Howard v Bodington* (1877) 2 PD 203 the distinction was described thus:

> "Now the distinction between matters that are directory and matters that are imperative is well known to us…. I am not sure that it is the most fortunate language that could have been adopted to express the idea; but still that is the recognized language and I propose to adhere to it. The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the Courts hold a provision to be …. directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one."

68. For those reasons, therefore, I am not persuaded that the resolution to approve and execute the sale agreement stands to be reviewed and set aside on the grounds of non-compliance with a mandatory and material

procedure or condition prescribed by legislation. Likewise, the resolution did not contravene any law, nor is it otherwise unlawful. There is accordingly no basis for declaring either the resolution or the sale agreement invalid and unenforceable on the grounds of illegality.

69. The applicant raised another possible ground of illegality which it did not substantiate in its papers and which counsel prudently did not pursue with any enthusiasm in argument. In paragraphs 29.4 and 30.5 of the founding affidavit the allegation is made that the first respondent was obliged to comply with its Supply Chain Management Policy and Preferential Procurement Policy prior to concluding the conditional agreement on 2 October 2007 and that the sale agreement is *ultra vires* and/or void and unenforceable due to the fact that compliance with the policies is not a suspensive condition. In paragraph 38 it further alleged that the first respondent had failed, prior to conclusion of the sale agreement, to consider its deviation from the policies, to record the reasons for deviation and to report same to the Council. Once again no case was made out in the founding affidavit in support of this challenge by identifying the parts of the annexed policy documentation upon which reliance is placed and stating the case to be made out at the hearing on the strength thereof with reference to the particular allegation of non-compliance or deviation made. That is the end of the matter; save to say that I agree with the submission

made by Mr Raath SC, on behalf of the second respondent, that the policy is in any event restricted to supply chain management in respect of goods and services as appears from the language of the Municipal Supply Chain Management Regulation GN868 GG 27636 of 30 May 2005. *Black's Law Dictionary* (8ed) defines "goods" as "tangible or *movable* personal property other than money; esp., articles of trade or items of merchandise (goods and services)". The sale of immovable property by a council most likely does not fall within the ambit of the policy.

70. The applicant has not limited its impugnment of the resolution to the ground of illegality. In addition, it submitted in paragraph 14 of its heads of argument that "the procedure followed by the first respondent in concluding the agreement, on first respondent's version on 5 February 2009, was unfair and unreasonable to an extent that no reasonable municipality could have acted accordingly". On the face of it, the ground of review is a conflation of two grounds, namely, that the action was procedurally unfair and also that it was unreasonable. When unpacked with reference to the factual allegations upon which the attack appears to be founded, it is clear that the applicant challenges the reasonableness of the decision. Review on such ground is permissible in terms of section 6(2)(h) of PAJA, which provides:

> "A court or tribunal has the power to judicially review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function."

71. The foundation for the argument is laid in different threads in various paragraphs of the founding affidavit. In paragraph 14.3 the applicant complains that the first respondent had committed itself, and/or had compromised the exercise of its discretion and/or had prejudged the outcome of any subsequent attempt to comply with the statutory prerequisites by concluding the sale agreement with specific terms and conditions. This allegation is supplemented in paragraph 42.4 by the assertion that there had not and could not be an unfettered exercise of first respondent's discretion in compliance with the statutory requirements, given its conclusion of the sale agreement, with the outcome of any public participation process therefore being predetermined. The point is enlarged upon in paragraphs 52 and 53 as follows:

> "The fact of the matter is that the first respondent had already negotiated final and binding terms, setting the structure of the deal as a sale, agreeing to the purchase price, manner of payment, benefits to first respondent, etc. This resulted in first respondent already having decided on all the terms, even before embarking on the compliance procedure otherwise put, any compliance

> procedure had a pre-determined outcome ……. The latter is borne out by each and every response, submission and resolution by first respondent in the compliance procedures. It had no room to manoevre and to consider alternative structures and/or terms and conditions."

72. Before examining the complaint more closely, it might help to say what it is not. There is no allegation made, nor evidence adduced, that the action taken by the Council was for a reason not authorised by the empowering legislation, or for an ulterior purpose, or because irrelevant considerations were taken into account. The suggestion though is made that relevant considerations were not considered, namely "alternative structures and/or terms and conditions". However, nowhere does it appear in the record that "alternative structures and/or terms and conditions" were placed before the Council at any time, and there is no allegation or evidence that the Council refused or failed to consider them. The best that can be made of the point, therefore, is the allegation of unlawful fettering, or the Council acting under dictation, resulting from the terms of the agreement.

73. Mr Bergenthuin argued that the procedure followed "was designed to avoid the prior compliance with statutory prerequisites". This submission he based on the provisions of clause 4.2 of the sale agreement in terms of which the first respondent undertook "to use its reasonable endeavours to procure the fulfilment of the conditions in clause 4.1 at its cost". By doing

this, he said, the Council deprived itself of a proper evaluation of competing purchasers of the property. He did not identify, and the record does not disclose, any competitors who claimed that they were deprived of consideration or evaluation. Moreover, he added, the first respondent could not evaluate objections and representations objectively after it had "effectively bound" itself in the agreement with ISAGO, with the outcome that the procedure leading up to the resolution was not transparent, reasonable and fair, and thus the resolution itself could never amount to fair, transparent and reasonable administrative action. It is not clear from the founding papers in what respects the applicant regarded the process as lacking in transparency and what the consequences of that might be in terms of the law. Accordingly, I shall restrict my assessment to the valid concern about fettering and dictation.

74. I tend to agree that a more open process without pre-ordained arrangements generally might have been better, leading the council to pursue more effective competition. Yet, on the other hand, questions of efficiency may in specific instances justify putting a contractual proposal on the table before the public participation process begins. Indeed, section 33 of the MFMA envisages the publication of a "draft" contract before the public participation process. There is not a great deal of difference between a draft contract and one which is not operative until the

suspensive condition of approval by a council resolution is fulfilled. If the Council was not impressed by the agreement it could have refused to approve it.

75. In paragraph 17.3 of the replying affidavit the applicant builds its case on this aspect by referring in greater detail to various clauses in the agreement. This paragraph is the subject of a striking out application (along with many other paragraphs) on the ground that none of the references were identified in the founding affidavit, and nor was the case made on the strength of them. The paragraph thus seeks to import new material in the replying affidavit in contravention of the trite principle that in motion proceedings the case must be made out in the founding affidavit. The paragraph should properly be struck out. I will return to the striking out application in due course. But because I hold the view that paragraph 17.3 of the replying affidavit and the averments it contains do not advance the case of the applicant in any meaningful way, I am prepared to comment upon it.

76. The case made is that the various clauses of the agreement commit the first respondent in a manner resulting in a fettering of discretion. Thus, it is claimed that clauses 2.7 and 2.8 commit the respondent to sell the land. That is true, but the commitment had no operative capacity until the

conditions were fulfilled and the Council approved of the sale. Likewise, the undertaking by the City in clause 4.2 to use its reasonable endeavours is no more than an agreement not to act unreasonably to thwart compliance with the conditions. It certainly is not an agreement to fulfil the conditions. It means that the City will do what is necessary to ensure that the public participation process takes place properly and that the procedural steps involved in placing the matter before the council for consideration of a resolution are followed. There is no fettering in that. Similarly, while the rights of the second respondent to take occupation before transfer (clause 11), to effectuate improvements and the installation of services, and the commitment to develop the project (clause 16) created immediately binding "facts on the ground", admittedly of some influence, they were not irreversible rights by virtue of clauses 11.1 and 11.4.3 allowing for reversal without any financial consequence for the Council in the event that the suspensive conditions were not fulfilled.

77. There may be truth in the suggestion that there was a better and more competitive means of going about the sale of the land along the N12 corridor for the purposes of development than the method followed by the City. But it cannot be said that no reasonable local authority would proceed as the Council did. Objections and representations were received. The item that served before the Council disclosed fully and in

detail the relevant information required for the Council to make a decision. There is no evidence that any material relevant information was omitted or not considered, or that the Council acted in bad faith or with an ulterior motive or purpose. There was a rational relationship between the material placed before the Council and the decision taken; meaning that there was a rational objective basis for the resolution. Moreover, and perhaps most importantly, prior to the resolution no other ratepayer, or interested member of the community, objected forcefully to the method of contracting followed or the circumstance that the contract was entered into subject to suspensive conditions, despite that circumstance being public knowledge. There is accordingly no basis for setting aside the decision on grounds of unreasonableness.

78. In keeping with its “broad sweep” approach to review, casting the net as wide as possible, the applicant has made various unsubstantiated allegations of bias, unfairness, *functus officio* and others. None of these was pursued meaningfully in argument and therefore all can be safely ignored.

79. Lastly, the applicant has alleged that there was no resolution taken by the first respondent authorising the sale agreement or resolving to conclude it. The point is badly and ambiguously "pleaded" in paragraph 30.2 of the founding affidavit. All that is said is: "There is no resolution by the first respondent, resolving to conclude such an agreement". It is doubtful whether such an averment, without further ado, is sufficient to put the authorisation of the signatories to the agreement in issue. If the intention was to question the sufficiency of the authorisation bestowed by the two standing resolutions, and there may be merit in such a challenge, that needed to be pleaded with some specificity with reference to the terms of the standing resolutions. Whatever the case, paragraph (b) of the impugned resolution of the Council passed on 5 February 2009 can be construed to have ratified the action of 2 October 2007 in that it contains the following:

> "the City of Matlosane … hereby approves the entire written Agreement of Sale entered into between the CoM and Isago on 2 October 2007 exactly as it is to be executed.'

80. The finding that there is no merit in the review application or any entitlement to the relief sought in either prayer 1 or 3 of the notice of motion, makes it unnecessary to decide the issue of unreasonable delay. Taking account though of the possibility of an appeal, I will state my

findings succinctly. First of all, there may be doubt that an application for a declarator in terms of section 19(1)(a)(iii) of the Supreme Court Act for the determination at the instance of an interested party of a rights issue based on the principle of legality is subject to the undue or unreasonable delay rule applicable in proceedings to review administrative action. As for the review on the grounds of legality and unreasonableness, it is evident from the record that the applicant was aware of the sale agreement at the latest (if not before) in July 2008 as is evidenced by its attorneys challenging the legality of it in the letter dated 29 July 2008, that is more than a year before it brought review proceedings. The only other meaningful administrative law review ground it raised, namely that the Council fettered its discretion by the manner in which the agreement was structured, could have been raised at that time too had it wished to review that action. It became aware of the action almost a year before launching proceedings and that *prima facie* would have been an unreasonable delay. On the other hand, if the relevant action was the adoption of the resolution on 5 February 2009, the proceedings for judicial review were instituted 180 days after that on 4 August 2009. Counsel for the second respondent has argued forcefully that such too amounted to an unreasonable delay. Given the history between the parties, so he argued, the applicant ought to have sprung into action earlier and have avoided the possible disruption that would be experienced by having to reverse the

significant steps of implementation that took place between February and August 2009.

81. In my view, the applicant's delaying until the adoption of the resolution was entirely reasonable. The resolution is the appropriately impugned action. The applicant had no certainty before then that the council would not be influenced by its entreaties that there had been non-compliance. The Council may well have altered course. The applicant was accordingly prudent and within its rights to deploy litigation as a last resort once the resolution was taken, and this action was the right target. It is unnecessary to resolve the dispute of fact about when precisely the applicant learnt of the resolution. The proceedings were instituted within 180 days of the resolution. 180 days is the statutory yardstick in section 7 of PAJA, even though the standard is expressed as "without unreasonable delay *and not later* than 180 days". The applicant has put up reasons for it taking as long as it did, albeit in somewhat unsatisfactory fashion in its replying affidavit. I do not propose to canvass them because even were I persuaded that its failure to act sooner within the 180 day period was unreasonable, I would condone the unreasonable delay for two principal and overriding reasons: firstly, the public interest in this contract favours a finding that it be subjected to judicial scrutiny; and secondly, being within

180 days, the delay in instituting proceedings, even if unreasonable, was relatively short and did not outweigh the imperative for review.

82. I have been able to arrive at the conclusion that there is no merit in the application without considering the second respondent's striking out application. It is a sensible canon of judicial practice that where an application can be disposed of on its merits, without striking out the offending averments, the court should proceed accordingly and there is no need to determine the striking out application. The relief sought by the second respondent was directed at striking out an extensive number of averments in the replying affidavit introducing new matter in relation to both the merits and the undue delay point. The applicant did not oppose it in a coherent fashion and effectively conceded. Therefore, despite not determining the application for striking out, I am satisfied that the second respondent is entitled to its costs in respect of it. The complexity of the matter and the public interest in it justified the use of two counsel and senior counsel.

83. In the premises, the following order is issued:

The application is dismissed with costs including the costs of two counsel and senior counsel, where applicable; as well as the second respondent's costs in the application for striking out.

JR MURPHY
JUDGE OF THE HIGH COURT

Dates Heard:	26 & 27 November 2009
For the Applicant:	Adv JG Bergentuin SC
Instructed By:	Van Zyl Le Roux & Hurter Inc.
For the 1st Respondent:	Adv. NGD Maritz SC, Adv NG Laubscher
Instructed By:	Rooth Wessels Motla Conradie
For the 2nd Respondent:	Adv RJ Raath SC, Adv JA Venter
Instructed By:	Roestoff Venter & Kruse Attorneys