



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: D2213/2019

In the matter between:

RINALDO INVESTMENTS (PTY) LTD

APPLICANT

and

MINISTER OF PUBLIC WORKS

FIRST RESPONDENT

MINISTER OF DEFENCE

SECOND RESPONDENT

MINISTER OF FINANCE

THIRD RESPONDENT

THE MUNICIPAL MANAGER:

ETHEKWINI MUNICIPALITY

FOURTH RESPONDENT

REGISTRAR OF DEEDS, PIETERMARITZBURG

FIFTH RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 10h00 on 9 March 2021

ORDER

1. It is declared that the Special Conditions contained in the Deed of Transfer No.

T565/1937, for the property described as Remainder of Erf 11543 Durban and in Deed of Transfer No. T9182/1962 for the property described as Erf 11545 Durban, and known as the Natal Command Property, for the retransfer of those properties to the eThekweni Municipality, have been met.

2. The Minister of Public Works, is ordered to take all steps necessary to effect the transfer the Natal Command Property to the eThekweni Municipality within 30 (thirty) days of this order.

3. This order constitutes the necessary authorisation on behalf of the first, second and third respondents for the transfer of the property from the Department of Public Works to the eThekweni Municipality.

4. The eThekweni Municipality be and is hereby directed, within a period of 10 (ten) days after service on it of this Order, to appoint a conveyancer to attend to the preparation and registration of the transfer of the Natal Command Property into its name.

5. The first respondent be and is hereby directed, within a period of 14 (fourteen) days after receipt by him from the conveyancer of the documentation necessary to give transfer of the Natal Command Property to the eThekweni Municipality, to sign and return same to the conveyancer.

6. The costs relating to the transfer shall be paid by the first respondent, who shall pay the conveyancer's *pro forma* account on presentation.

7. In the event of the first respondent failing to comply with paragraphs (2), (4), (5) and (6) above, the Sheriff of this Court is directed and authorised to sign all the necessary documents on behalf of the first respondent.

8. That the eThekweni Municipality be and is hereby directed after receiving transfer of the Natal Command Property from the Department of Public Works, to transfer such property to the applicant, in accordance with the agreement of sale concluded between these parties on 12 December 2003, and as amended thereafter on 6 May 2005.

9. The second respondent is ordered to pay the costs of the applicant and the fourth respondent on a party and party scale, including the costs of two counsel where so employed, such costs to include all costs reserved and those attendant upon the interlocutory applications.

JUDGMENT

Chetty J

[1] The fate of the decision by the eThekweni Municipality ('the municipality'), represented in these proceedings by the fourth respondent as the present municipal manager, to sell a property on the Durban beachfront, known as the Natal Command Property ('the property'), to the applicant, Rinaldo Investments (Pty) Ltd ('Rinaldo' or 'the applicant'), has been drawn through the courts for more than a decade. Originally, the sale was met with objection by Giant Concerts CC ('Giant'), an entity in the business of hosting live concerts. The property was sold to Rinaldo on the basis that the property would be developed as a film studio.

[2] In the KwaZulu-Natal High Court, Pietermaritzburg, Giant's objection was upheld and the sale of the property to Rinaldo was set aside.¹ This in turn led to an appeal to the Supreme Court of Appeal which was upheld, with the court concluding that Giant did not have the necessary standing to challenge the contract concluded between the municipality and Rinaldo.²

[3] Undeterred, Giant applied for leave to appeal to the Constitutional Court. That decision is reported sub nom *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* 2013 (3) BCLR 251 (CC). The Constitutional Court found that 'Giant never demonstrated that it had any serious commercial interest in the site'³ and accordingly dismissed the appeal. For the purposes of the present application it is necessary to clarify at the outset that the challenge to the lawfulness of the sale was dismissed on the basis of Giant's lack of standing, and the Constitutional Court did not consider the merits of the matter. Cameron J, writing for the court, said the following:

¹ *Giant Concerts CC v Minister of Local Government, Housing and Traditional Affairs, KwaZulu-Natal & others* 2011 (4) SA 164 (KZP).

² *Rinaldo Investments (Pty) Ltd v Giant Concerts CC & others* [2012] 3 All SA 57 (SCA).

³ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* 2013 (3) BCLR 251 (CC), para 51.

'This conclusion makes it unnecessary to address the merits of Giant's challenges to the transaction, since it has established no legal interest in their adjudication. When a party has no standing, it is not necessary to consider the merits, unless there is at least a strong indication of fraud or other gross irregularity in the conduct of a public body. The full record of the dispute was before us, and we heard full argument on all of Giant's complaints. On the papers before us, we are unable to find that there is fraud or gross irregularity. I will, therefore, say nothing about the merits.'⁴

[4] The second respondent ('the Minister of Defence') took issue with the applicant's citing of the introductory paragraphs in the Supreme Court of Appeal judgment and that of the Constitutional Court, to which I have referred to above, as being 'common cause'. While it is correctly pointed out that the Constitutional Court did not deal with the merits of the lawfulness of the contract of sale, both courts had before them the historical basis on which the property was entrusted to the Department of Defence and the grounds stipulated for its return. The interpretation by both courts of that background is binding on this court. I therefore do not understand the basis for the objection to these facts being regarded as 'common cause'.

[5] The facts of the matter, historically, and as both the Supreme Court of Appeal⁵ and the Constitutional Court⁶ interpreted them at the time was that the land at issue described as the Remaining Extent of Erf 11543 and Erf 11545 Durban, commonly known as the Natal Command Property, constitutes about 21 hectares in extent, and is prime property on the Durban beachfront. The bulk of it housed the headquarters of the Natal Command of the South African National Defence Force ('SANDF'), as well as including certain adjoining municipal land. The former Corporation of the City of Durban ('the Corporation'), now the municipality, acquired the SANDF portion in 1855, but it donated the land to the central government in 1937 for military purposes. This donation was subject to an express condition that the Government was to use the property for defence purposes only, and in the event of it not being used or required for such purposes, the land would revert to

⁴ Ibid, para 58.

⁵ *Rinaldo Investments* (supra fn 2) paras 2-9.

⁶ *Giant Concerts CC v Rinaldo Investments* (supra fn 3), paras 2-14.

and again become the absolute the property of the Corporation. As the terms of the donation are vital to the outcome of this application, I set them out in full below:

'The land shall be used for defence purposes only, and in the event of its not being so required or used, it shall revert to and become the absolute property of the Corporation without any liability to pay compensation of any kind whatsoever in respect thereof, and the Government undertakes to sign and complete any documents necessary to re-transfer the said land to the Corporation as aforesaid, and to hand over the land in a proper and undamaged condition. The expenses of and relative to the said re-transfer to the Corporation shall be paid by the Government. The Government, however, shall be entitled to remove any buildings that may be standing upon the land or to make over all or any of such buildings to the Corporation upon a valuation or upon such terms and conditions as may be being mutually agreed upon. All buildings not so removed or made over at the end of six months from the date upon which the City Council notifies the Government that the land is to be re-transferred, shall become the property of the Corporation without the necessity of any compensation being paid therefor.'⁷

[6] In 1962 a portion of the property was transferred back to the Corporation, which in turn donated an adjoining property to the Government. This property forms part of the Natal Command Property. This transfer was subject to a similar condition as the 1937 transfer, and provided that '... the said land shall be used for Defence purposes only, and in the event of it not being so required or used, it shall revert to the City Council of the City of Durban'.⁸ These conditions will be referred to herein as the 'special conditions'.

[7] By 2003, the SANDF had decided to move its defence headquarters elsewhere in the port area of Durban, and to vacate the property. Once this decision became known, the applicant approached the municipality with a proposal to purchase the property on the basis that it would develop it into a film studio.

[8] The notion of establishing a film studio was something that aligned with the municipality's Integrated Development Plan, which recognised the film industry as important for the economic development of the municipality and KwaZulu-Natal as a whole.

⁷ Deed of Transfer No. T565/1937, p. 40 of the indexed papers.

⁸ Deed of Transfer T9182/1962, p. 52 of the indexed papers.

[9] In October 2009 the SANDF, in keeping with its plans to relocate its headquarters elsewhere, vacated the Natal Command Property. In December 2015, the first respondent ('the Minister of Public Works') approved the transfer of the property back to the municipality ('the December 2015 authorisation'). In April 2017, almost 14 years after deciding that it would relocate its headquarters to another area in Durban and eight years after vacating the property, the Department of Defence, through the Director-General of Public Works, indicated that it still required the property 'for defence purposes moving forward'.

[10] It is not in dispute that the sale of the property to the applicant was subject to a suspensive condition that the municipality first acquire the property from the Department of Defence. The Minister of Defence, which is the only respondent opposing the relief sought by the applicant, contends that as the suspensive condition was never fulfilled, no rights could flow from the agreement concluded between the municipality and the applicant.

[11] The position at present, more than a decade after the Army marched off the property, is that the property lies vacant and nearly all the buildings have been demolished. Only a shell remains as a façade of the headquarters' building, together with the walls of a church. Both of these structures appear to be protected in terms of the heritage legislation. As a result of the position adopted by the Department of Defence, borne from its stance that it still requires the property for defence purposes at some stage in the future and that it intends to use the property when it has the necessary funds to do so, the municipality has been unable to take transfer of the property and consequently unable to honour its contractual obligations to the applicant in terms of the contract of sale.

[12] As a result of, what by all accounts, has been an inordinate delay in securing the transfer of the property, the applicant launched this application in June 2019, in which it is supported by the municipality, in respect of the following relief:

'1. It is declared that the Special Conditions contained in the Deed of Transfer No. T565/1937, for the property described as Remainder of Erf 11543 Durban and in Deed of Transfer No. T9182/1962 for the property described as Erf 11545 Durban, and known as

the Natal Command Property, for the retransfer of those properties to the eThekweni Municipality, have been met.

2. It is declared that the Minister of Public Works, as the custodian of all land vesting in the National Government of the Republic of South Africa, is obliged to transfer the Natal Command Property to the eThekweni Municipality.

3. It is directed that this Court Order shall constitute the authorisation on behalf of the First, Second and Third Respondents for the transfer of the Natal Command Property from the Department of Public Works to the eThekweni municipality.

4. That the eThekweni Municipality be and is hereby directed, within a period of 10 (ten) days after service on it of this Order, to appoint a conveyancer to attend to the preparation and registration of the transfer of the Natal Command Property into its name.

5. That the First Respondent be and he is hereby directed, within a period of 14 (fourteen) days after receipt by him from the conveyancer of the documentation necessary to give transfer of the Natal Command Property to the eThekweni Municipality, to sign and return same to the conveyancer.

6. It is directed that the costs relating to the transfer shall be paid by the First Respondent who shall pay the conveyancer's pro forma account on presentation.

7. That the Sheriff of this Court is directed and authorised to sign and complete any conveyancing documentation necessary to transfer the Natal Command Property, from the Minister or Department of Public Works to the eThekweni Municipality in the event that the First Respondent fails timeously to sign all such documentation delivered to him by the conveyancer in terms of paragraph 5 of this Order to give transfer of the Natal Command Property to the Applicant.

8. That the eThekweni Municipality be and is hereby directed after receiving transfer of the Natal Command Property, from the Department of Public Works, to transfer such property to the Applicant, in accordance with the agreement of sale concluded between these parties on 12 December 2003 and as amended thereafter on 6 May 2005.

9. Directing the Minister of Defence and the Minister of Public Works to pay the costs of this application jointly and severally, if they oppose this application, with such costs to be paid:

(a) on the attorney and client scale;

(b) including the costs of two counsel where so employed; and

(c) which costs are to be paid jointly and severally with any other respondent opposing this application.'

[13] In a nutshell, the applicant seeks relief which will result in the property being

transferred back to the municipality, with the result that the suspensive condition in the sale agreement between the applicant and the municipality will be fulfilled, allowing the property to be transferred to the applicant. Prior to the sale agreement being concluded, the Department of Defence, on its own version in earlier litigation, accepted that the Department of Public Works was the ‘custodian’ of the property and the Department of Defence was the ‘user’. When the objection by Giant to the sale of the property to the applicant came before the KwaZulu-Natal High Court, Pietermaritzburg⁹ an affidavit was deposed by Ms Ntsoaki Kunene who, in November 2008, was the Head of Property Management at the Durban office of the Department of Public Works. Ms Kunene pointed out that at the time of deposing to her affidavit, the property was still being used by the Department of Defence and no sale agreement regarding the property had been concluded with any purchaser. The deponent further states in her affidavit that:

‘. . . prior to and subsequent to 2003 the Fifth Respondent [Minister of Defence] had indicated its intention to relocate its activities at Natal Command to Salisbury Island and/or other suitable sites but this would be dependent on various logistical and cost factors as well as Ministerial approval. I annex hereto marked “B” a copy of a letter directed to the Second Respondent [eThekweni Municipality] concerning the proposed relocation. Various aspects concerning a proposed relocation of the Fifth Respondent [Minister of Defence] have still not been resolved as at the time of the conclusion of the Sale Agreement dated 12 December 2003 and concluded between the 2nd and 3rd Respondents [eThekweni Municipality and Rinaldo Investments (Pty) Ltd] and I annex hereto marked “C” a letter from the Second Respondent dated 12 December 2003 to the National Department of Public Works regarding the relocation of the Fifth Respondent.’

[14] The high-water mark of the Minister of Defence’s response to Ms Kunene’s affidavit is that she does not say that the Department of Defence will not require the property at some time in the future and her acknowledgement that the transfer was contingent on ‘Ministerial approval’.

[15] Consistent with the views expressed by Ms Kunene in the previous paragraphs, the applicant substantiated its contention that the military had moved off the property with reference to an article in a local newspaper, The Natal Mercury,

⁹ *Giant Concerts CC* (supra fn 1).

dated 29 March 2007 entitled 'Marching Orders for Army base after many years'. The article notes that the closure of the military's general support base occurred after a controversial sale of the property by the municipality to the applicant, headed by Durban filmmaker, Mr Anant Singh. The article goes on to state that:

'The closure of the unit was marked by the handing over of the base flag by the last commanding officer, Col Peter Kobbie, to Maj-Gen Robert Madita. "This move was necessary to meet the needs of a dynamically changing South African National Defence Force, and the South African Army's 2020 vision of repositioning itself within the SANDF as a self-supportive force preparation organisation," said Kobbie.'

[16] In response, Lt. General Mbuli, who deposed to the opposing affidavit on behalf of the Minister of Defence (absent any proof of his authority to do so despite his assertion to the contrary),¹⁰ does not deny the accuracy of the newspaper article, which he refers to somewhat disparagingly as a 'tabloid'.¹¹ He however acknowledges that Col. Kobbie was the last Commanding Officer of the Army's Support Base at Battery Beach (ie the property), and who currently works under his Command in the Logistics Division. No attempt was made to have Col. Kobbie clarify, through a supporting affidavit, the circumstances leading to the Army's departure from the property in 2007 and any reasons for such decision. As the Commanding Officer of the base, one would assume that he had intricate knowledge of these decisions. In any event, Lt. General Mbuli submits that where he relies on hearsay evidence, this should be admitted in terms of s 3(1) of the Law of Evidence Amendment Act 45 of 1988. The Constitutional Court in *S v Molimi* 2008 (3) SA 608 (CC) para 35, cited with approval the statement in *S v Shaik & others* 2007 (1) SA 240 (SCA) para 170 that a court making a determination whether it is in the interests of justice to admit hearsay evidence must:

'... have regard to every factor that should be taken into account, more specifically, to have regard to the factors mentioned in s 3(1)(c). Only if, having regard to all these factors cumulatively, it would be in the interests of justice to admit the hearsay evidence, should it be admitted.'

¹⁰ The Minister of Defence signed a letter bearing the SANDF emblem in which she indicated her awareness of the present litigation and authorised Lt. General Mbuli and 'any other Department official, as may be necessary' to depose to court papers as may be required. The letter indicates that the designation of Lt General Mbuli is that of Chief of Logistics.

¹¹ The Natal Mercury was first issued in 1852.

[17] Support for the contention of the applicant that the Department of Defence intended to vacate the property and no longer required its use is evidenced in a letter dated 8 October 2009 from the General Officer Commanding, Department of Defence Logistic Support Formation, signed by Mr Hornby, and addressed to the regional office of the Department of Public Works, Durban where the following is said:

‘SANDF Establishments: Withdrawal from Battery Beach

1. Notice is hereby given that the tentative date to vacate Battery Beach is Friday, 16 October 2009.
2. This date or alternate arrangement will be confirmed by Col van der Lingen on his return to duty on Monday 12 October 2009.
3. Kindly make the necessary arrangements for the electricity and water meter readings to be done.
4. It is suggested that it would be prudent to advise Durban Metro of this tentative arrangement in order for them to plan for the handing over of the property.
5. Your assistance in this regard will be appreciated.’

[18] The response of Lt. General Mbuli to this letter is that it was written by Mr Hornby, who is not a Major-General in the SANDF, that he appeared to have signed the letter on behalf of the General Officer Commanding and that Mr Hornby did not have the authority to assert that the Minister of Defence no longer required the property for defence purposes. Accordingly, Lt. General Mbuli submits that this letter cannot be relied on as proof that the Minister of Defence returned the property to the municipality. This response in my view is shallow and an attempt to distance the Minister of Defence from a letter written by a member of the SANDF, on which the applicant, the municipality and the Department of Public Works were entitled to place reliance. Moreover, the letter when viewed as part of the overall mosaic of correspondence and factual occurrences spanning more than a decade, is consistent with the submission of the applicant that the Minister of Defence gave notice of his/her intention at the time to move off the property and relocate the Army headquarters elsewhere in Durban. It is also deeply ironic that while Lt. General Mbuli accuses Mr Hornby of not having authority to write a letter and of not being a Major-General at the time, he himself as not put up any authority to make the allegations he does on behalf of the Minister of Defence. It is the Minister of

Defence herself who is the second respondent and who must depose to an affidavit under oath, not a functionary who only describes himself as being in the employ of the SANDF.

[19] I accordingly find no merit in the argument advanced by Lt. General Mbuli and find that the statement by Mr Hornby could not have been unauthorised, and that it was consistent with the proved facts. In my view, the only reason for Lt. General Mbuli raising an obstacle in the way of such correspondence being admitted is that when it is viewed as part of the pieces of the jigsaw, over a period of more than a decade, the letters written by officials in the municipality, the Department of Public Works and the SANDF give credence to the version that the municipality and the applicant have all along espoused – that the Army gave the municipality the assurance it was vacating the property and the municipality believed that it was entitled to act on the basis of that undertaking. That conclusion is damning for the case of the Minister of Defence.

[20] The approach of Lt. General Mbuli to the correspondence written by Mr Hornby should not be seen in isolation. A similar theme is played out in his answering affidavit, an extract of which appears below:

‘However by 5 March 2008 Brigadier General Navratil, the Director Facilities in the Logistics Division, reacted to the concerns about the breakdown in security at Battery Beach [the property]. He indicated that the Chief of the Army had confirmed that he was supporting the efforts to vacate the various occupants from Battery Beach and in line with a commitment given to the Chief of the South African National Defence Force which set out 30 June 2008 as the final date for relocation.

He also confirmed that a concerted effort was being made to relocate from Battery Beach *but he did not indicate in the letter that the SANDF had no future defence purpose for the property in question.*’ (my emphasis).

[21] Lt. General Mbuli appears to operate from the premise that notwithstanding any statement from the SANDF that it was vacating the property, this must be interpreted as a temporal decision, as there is no statement that the decision to vacate excluded the possibility of a return, at whatever time in the future. I can only

assume that this strategy has been embarked on out of desperation to bolster what are otherwise flimsy grounds of opposition.

[22] On 16 October 2009 a letter was addressed by the Director-General of the Department of Public Works to the Head: Real Estate at the municipality stating the following:

'HANDOVER OF BATTERY BEACH MILITARY BASE TO THE eTHEKWINI MUNICIPALITY

The Natal Command Military base situated at Battery Beach, Durban consisted initially of Rem of Erf 11543, Erf 11545 and Rem of Erf 11546 Durban. Portion of Rem of Erf 11543 and Rem of Erf 11546 (on the western side of the M4) were vacated by the Military some time ago already and have been handed back to the Municipality. Recently a portion of the Military Base on the eastern side of the M4 was released to the Municipality to enable contractors to take occupation.

Today, 16 October 2009, what remains of the Military Base is being handed over to your Municipality (i.e. Erf 11545 and Rem of Erf 11543 Durban) This handover is in compliance with the condition on which the land was donated to the State by the Municipality in 1937, which requires that ownership be returned to the Municipality if the land is no longer required for Military purposes.

Effective 16 October 2009, the eThekweni Municipality accepts ownership of the property at Battery Beach and will assume all benefits, risks and responsibilities attached thereto, including payment of rates and services. The transfer of the properties to the Municipality will be effected by the State Attorney and the costs thereof will be paid by the State.

I request that special thanks be conveyed to the Municipal Council for their generosity in making this land available to the Military over this prolonged period. . . '.

[23] In line with his stance to the letter by Mr Hornby, Lt. General Mbuli contends that the author of the letter, whom he surmises to be a Mr Young from the Department of Public Works, is unable to make assertions that bind the Minister of Defence, particularly concerning the view expressed in the letter that the 'land is no longer required for Military purposes'. Lt. General Mbuli suggests that the applicant is attempting to 'derive mileage' out of the exchange of correspondence between the Department of Public Works and the municipality, for the obvious reason that if

such communication is accepted by the court, it is indicative of the position as all role players interpreted it at the time, save for the Minister of Defence, who only uttered her objection almost ten years after the fact. Lt. General Mbuli submits that if the letters are a correct reflection of the position then it was incumbent on the municipality to have brought an application or action for an order declaring that the property vests in it and that it is entitled to pass transfer. Instead, it is contended that the municipality hopes to secure the same result through a circuitous procedure of the applicant seeking a declaratory order.

[24] The vexed question of the sale of the property was raised in the National Council of Provinces. The response of the Minister of Defence and Military Veterans as recorded in an official transcript is as follows:

‘The property referred to is commonly known as the Natal Command Site and was leased by the national Department of Public Works for the South African National Defence Force on a 99 year lease from the erstwhile Durban Corporation, now known as the Ethekewini Municipality. As a result of the consolidation the facilities (sic) footprint in Durban, the facility became superfluous and the South African National Defence Force had handed the facility back to the national Department of Public Works and the Ethekewini Municipality on 16 October 2009.’

[25] The response of the Minister of Defence to the reliance by the applicant on what is contained in the transcript is that the response does not indicate that the Minister of Defence ‘does not have a defence purpose for the property’. As I understand this ground of opposition, which appears to be a central theme running through the Minister of Defence’s (or Lt. General Mbuli’s) affidavit is that even if the property is no longer presently required for defence purposes, there is no unequivocal statement from the Minister of Defence that the property will never be required, at any time in the future, for defence purposes. For that reason, unless there is an indication to permanently terminate the Army’s use of the base, the court and the municipality must construe the marching off the base as a ‘temporary cessation of activities’. I will consider this ground of opposition in further detail below when it is examined in the context of the terms of the donation of the site.

[26] Although Lt. General Mbuli submits that the factual position of the property is

irrelevant to the issue in dispute, I take a different view. The factual position (which the Minister of Defence is unable to refute) is that since the Army marched off the property on 16 October 2009, it has no longer been in occupation of the property. As stated earlier, the former Army headquarters is now a shell with only two heritage components of the former structures surviving. Acting on the basis that Department of Defence had relinquished its use and possession of the property and returned it in accordance with the Deed of Transfer, the municipality entered into the agreement of sale with the applicant. This view is supported by the contents of a letter from the Army dated 25 November 2016 in which it requested permission from the municipality to lease the property for a short period in February 2017 during which it was to host the Armed Forces Day, 2017.

[27] While Lt. General Mbuli insists that above-mentioned letter was written by a Brigadier General HJ Stroebel without the necessary authorisation and that no monies were ultimately paid to the municipality in terms of the lease of the property, the ineluctable conclusion is that the Minister of Defence would have had no need to ask permission to use the property if the Department of Defence had never ceased control, possession or occupation of it in the first place. The common refrain of Lt. General Mbuli is to suggest that where an author of a document contradicts the Minister of Defence's current position, such document is unauthorized. There was no attempt by him to obtain an affidavit from Brigadier General Stroebel despite the latter still being in the Army and Lt. General Mbuli and his counsel consulting with him on this issue in preparing the opposing affidavit in this matter. This court is not prepared to allow the continuous reference to hearsay evidence in circumstances where the persons with personal knowledge of the facts could have confirmed these. Moreover, Lt. General Mbuli fails to indicate what steps, if any, he took against Brigadier General Stroebel for engaging in what he terms a 'farce'. He does not say whether the Army did in fact proceed to use the property for the Armed Forces Day in 2017. Lt. General Mbuli further contends that only he had the authority to have entered into such an agreement with the municipality as the Chief of Logistics. He fails to indicate the specific authority under which he would have acted, and why he would have been in any different a position to Brigadier General Stroebel.

[28] On 18 January 2016, Ms. Hlengwa, the Acting Director of Property Management at the Department of Public Works, wrote to the municipality, recording that the transfer had been approved by the Minister of Public Works on 22 December 2015, and that she would be contacting the transferring attorneys. A subsequent letter from Ms. Hlengwa, dated 25 January 2016, which was addressed to the conveyancers appointed by the municipality to effect the transfer, attaches as proof of the necessary authority for the transfer, a document referred to as a 'Route Form' as well as a detailed internal memorandum. The internal memorandum, authored by the Acting Director-General of the Real Estate Investment Management department of the Department of Public Works, is addressed to the Minister of Public Works, in terms of which the history of the property and the basis on which it is being returned to the municipality, is set out ('the memorandum'). The last page of the memorandum reflects what the applicant and the municipality contend to be the approval by the Minister of Public Works for the transfer of the property to the municipality ('the 2015 ministerial authorisation'), and the Route Form, being signed by all the relevant role players in the Department of Public Works (save for the Deputy Minister Cronin), reflects the internal approvals necessary for such transfer.

[29] While the memorandum does not refer to an express instruction or consent by the user of the property, being the Department of Defence, regarding the transfer of the property, it refers in some detail to the Army vacating the property and the Department of Public Works returning the property to the municipality on 16 October 2009. This is consistent with the applicant's version of events as set out in its founding papers. What emerges from the memorandum is the non-responsive attitude of the Department of Defence to the various documents sent to it by the Department of Public Works. What is abundantly clear is that at no stage prior to the decision to transfer the property had the Department of Defence uttered a word in protest against the decision made by another government department. The memorandum recommends the handing back of the property to the municipality in accordance with the Deeds of Transfer.

[30] Lt. General Mbuli takes issue with the memorandum and submits that the Department of Public Works cannot bind the Department of Defence to any

agreement to which the Minister of Defence was not party. Much is made of the absence of the signature of the Deputy Minister from the memorandum. I see no reason why the absence of the Deputy Minister's signature invalidates the agreement to transfer the property to the municipality. In any event, no legal argument has been advanced as to why this would be so and I cannot conceive of one. Again, the contents of the memorandum are consistent with the factual matrix as set out by the applicant.

[31] By letter dated 5 April 2017 the Director-General of the Department of Public Works wrote to the Acting City Manager of the municipality regarding the proposed transfer of the property. Importantly, the letter recorded that the donation of the property was subject to the following conditions: '(a) that the land shall be used for defence purposes only, and (b) in the event of it not being so required or used, it shall revert to and become the absolute property of the corporation (Municipality)'. The letter went on to note the following:

'Whilst there have been numerous discussions in recent years on the possible return of the properties to the Municipality, you are advised that the Department of Defence has reaffirmed its need to retain the use of the above-mentioned properties for Defence purposes moving forwards. For this reason, the Department cannot accede to the request for the return of the subject properties.'

[32] It is noteworthy that neither the Minister of Defence nor Lt. General Mbuli questioned the authority of the author of the above letter, or whether the letter was written with the concurrence of the Minister of Public Works. What is equally revealing is that the author of the letter was also a signatory to the 2015 ministerial authorisation, approving the transfer of the property to the municipality. It is therefore not surprising that Lt. General Mbuli and/or the Minister of Defence have sprung to the defence of the Director-General of Public Works in conveying his decision that his department is unable to authorise the transfer of the property in light of the position adopted by the Department of Defence.

[33] As a consequence of the decision of the Department of Defence, conveyed via the Department of Public Works in the letter dated 5 April 2017, the municipality

is unable to pass transfer of the properties in question to the applicant, despite its willingness to do so.

[34] The applicant has set out in detail the prejudice that it has suffered as a result of the delay in obtaining transfer of the property since the dismissal of the appeal by Giant in the Constitutional Court in November 2012.¹² The delay over that long a period is manifest and it can hardly be in the interests of both the municipality and the province of KwaZulu-Natal for a valuable tract of land to lie vacant without generating any revenue either for the applicant in terms of the proposed Durban Film City, or for the municipality in the form of revenue collection. To enhance its point as regards the prejudice suffered, the applicant points to another development which commenced around the same time it concluded the agreement of sale of the Natal Command property. That development, known as the Pearls, was constructed at a cost of approximately R3.5 billion, securing a revenue generation for the municipality of almost R40 million per annum. These submissions by the applicant of the prejudice it has suffered are uncontested.

[35] The applicant contends that it is unfathomable that the Department of Defence, having vacated the property in October 2009, to assert eight years later that it still requires the property 'for defence purposes moving forward'. It is equally true that since the period when the agreement of sale was signed and the decision was taken by the Minister of Public Works to authorise the transfer, new Ministers may have taken over the portfolios that are relevant to the present dispute. However, the applicant submits that to the extent that the transfer of the property was authorised by the Minister of Public Works in terms of the 2015 ministerial authorisation, the Minister of Defence is bound thereby until that decision is set aside by a competent court. Where any dispute exists between the Minister of Public Works and the Minister of Defence as to whether the 2015 ministerial authorisation was valid and enforceable, s 41 of the Constitution provides a mechanism for the resolution of such inter-departmental disputes, obliging the co-operation of the respective spheres of government in order to provide effective, transparent and accountable government, and to ensure that state departments

¹² *Giant Concerts CC v Rinaldo Investments* (supra fn 3).

exercise their powers in a way that does not encroach on the functional or institutional integrity of other arms of government, in this case the municipality.

[36] The municipality has filed a notice to abide and has delivered an explanatory affidavit in order that the court may arrive at a just and proper decision. Mr *Nxusani* SC, who appeared together with Mr *Kadungure* on behalf of the Minister of Defence, took issue with the municipality's position in the matter, contending that while the municipality enters the fray as a neutral party, it is 'partisan' in its approach to the matter. To the extent that the municipality filed a late replying affidavit, I am not persuaded that the Minister of Defence is prejudiced in any manner. Moreover, counsel for the Minister of Defence was late in filing its heads of argument, and the joint statement was prepared without the participation of the Minister of Defence. That apart, I see no reason for the objection to the participation of the municipality and the stance that it has adopted, namely that the Ministers of Public Works and Defence are bound by the 2015 ministerial authorisation as an administrative act which may not simply be ignored by the Minister of Defence. In any event, the municipality has a direct interest in the matter as it is a party to the sale agreement concluded with the applicant. Like the applicant, the municipality too has lost revenue on the site as it has been unable to collect taxes on the property for more than a decade.¹³

[37] I now turn to deal with the Minister of Defence's challenge to the locus standi of the applicant to bring these proceedings in which it seeks a declaration of rights. The contention is that the applicant does not have a direct and substantial legal interest in regard to whether the special conditions in the Deeds of Transfer have been 'breached'.¹⁴ The applicant relies on the decision in the Constitutional Court judgment of *Giant Concerts CC v Rinaldo Investments*¹⁵ for its submission

¹³ According to the applicant, the film studio would generate an estimated R100 million per annum when completed.

¹⁴ The Minister of Defence contends that the applicant lacks locus standi because (a) the applicant is not a party to the original contract of donation in 1937, in respect of the property, (b) the sale agreement the applicant concluded with the municipality is subject to a suspensive condition, requiring the municipality to acquire the property, and thus it is the municipality, not the applicant, who ought to have brought this application, and that applicant does not have a direct and substantial interest as to whether the conditions stipulated in the Deeds of Transfer have been 'breached', thus entitling the municipality to transfer of the property into its name.

¹⁵ *Giant Concerts CC v Rinaldo Investments* (supra fn 3).

that the applicant has established locus standi. Giant based its standing, albeit unsuccessfully, on s 33 and 38(a) of the Constitution. Although the issue before the Constitutional Court concerned a challenge to the lawfulness of the municipality's decision to conclude the contract of sale with Rinaldo, Giant's interest was based on its assertion that it wished to develop its own film studio on the property, and it offered to pay more for the property than Rinaldo. Giant was, however, unable to substantiate its assertion and it also refused to disclose how much it was willing to pay. It was due to this lack of detail that the Constitutional Court found that Giant lacked standing, holding that it was unable to demonstrate how its interests 'were capable of being directly affected'.¹⁶ The court stated that:

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

. . .

Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed.'¹⁷

[38] The court concluded that 'a commercial interest in the subject matter of the transaction will be sufficient to establish own-interest standing to challenge it',¹⁸ however Giant had not even established that it had a commercial interest, which led the court to conclude that it did not meet the 'minimal own-interest threshold'¹⁹ requirement.

[39] By way of contrast, the applicant in the present matter contends that, in addition to approaching this court in order to assert its private law contractual interest in terms of its plans to develop a film studio on the property, its challenge is also based on public law constitutional and administrative law grounds.

¹⁶ Ibid, para 51.

¹⁷ Ibid, para 41(a) and (f).

¹⁸ Ibid, para 51.

¹⁹ Ibid, para 53.

[40] In this regard, the applicant submits that the application is underpinned by holding the Department of Defence to the principles of accountability, certainty and rationality in honouring its obligation to agree to transfer of the property back to the municipality, thereby paving the way for the applicant to acquire its long overdue ownership. In doing so, as I understood the argument, the applicant submits that the application has both private and public law implications, and relied on *Economic Freedom Fighters v Speaker, National Assembly & others* 2016 (3) SA 580 (CC) para 75 where the court stated that:

‘Our foundational value of the rule of law demands of us, as law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else to approach courts of law to set them aside, so we may validly escape their binding force.’

[41] To the extent that there may be some doubt that the applicant has identified a particular right in the Bill of Rights that has been infringed, or that its rights have not been directly infringed, the decision in *Kruger v President of Republic of South Africa & others* 2009 (1) SA 417 (CC) demonstrates that ‘a generous approach to standing’²⁰ should be adopted in Constitutional litigation, even where s 38 of the Constitution is not directly applicable. The court held that an ‘expanded understanding of what constitutes a direct and personal interest should be adopted in this case.’²¹ In the present matter, if the applicant is successful in its relief which triggers the suspensive condition in the agreement of sale, it sets in motion of series of events, both in the private and public sphere. It is not necessary for the purposes of the present litigation to make any finding as to whether the litigation was embarked on in the public interest.

[42] It was further contended that the principles of reliance, accountability and rationality, as referred to in *Pretorius & another v Transport Pension Fund & others* 2019 (2) SA 37 (CC) favour the duty of the Department of Defence not doing anything to retard the re-transfer of the property to the municipality. In *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal & others* 2013 (4) SA 262 (CC) the applicant ‘brought proceedings to enforce what it said were the

²⁰ *Kruger v President of Republic of South Africa & others* 2009 (1) SA 417 (CC), para 23.

²¹ *Ibid*, para 24.

“promises”²² in a notice which specified the subsidies that would be paid to independent schools. The applicant relied on that notice as constituting an enforceable obligation to pay. The court found that the ‘undertaking’ to pay did not amount to a contractual agreement to pay, however, that it was nevertheless enforceable. The court held in relation to the duty to act rationally that:

‘Government officials must, in dealing with those who act in reliance on their undertakings, act rationally. . . But it is impossible to tailor behaviour and expectations to a promise made in relation to a period that has already passed. Revoking a promise when the time for its fulfilment has already expired does not constitute rational treatment of those affected by it.’²³

[43] The applicant’s case, which is supported by the municipality, is essentially that the Department of Defence must be held to the promise which it made when it vacated the property in 2009, and which later received the legislative authorisation in terms of the 2015 ministerial authorisation. By way of analogy, the court in *KwaZulu-Natal Joint Liaison Committee* recognised that the State department’s ‘promise’ to pay subsidies to independent schools was legally enforceable because the promise was a part of the department’s constitutional duty, and impacted on the Constitutional right to basic education. In *Pretorius*, a ‘promise’ had been made by the State that its employees’ pension benefits would remain the same when a new commercial entity took over, and this promise was endorsed by the Transport Minister. The promise was broken a decade later and in a challenge mounted against the decision, it was contended that the conduct was ‘unconscionable when measured against the constitutional standards of reliance, accountability and rationality’.²⁴

[44] When the applicant’s relief, inter alia, for an order that the Department of Defence is obliged to sign and complete any documents necessary to re-transfer the said land to the municipality is measured against *KwaZulu-Natal Joint Liaison Committee* and *Pretorius* the difference is that in those cases the ‘promise’ was rooted in the constitutional rights of education and social security, respectively. The

²² *KwaZulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal & others* 2013 (4) SA 262 (CC), para 8.

²³ *Ibid* para 65.

²⁴ *Pretorius & another v Transport Pension Fund & others* 2019 (2) SA 37 (CC), para 30.

applicant's case, by contrast, is contained in the fulfilment of the special conditions in the Deeds of Transfer. Mr *Nxusani* for the Minister of Defence questioned the need for a declaratory order (albeit for other reasons) given the facts of the case. In addition, counsel raised the issue that locus standi is lacking in respect of the applicant because it 'has not brought a constitutional challenge. It has brought a declarator.'

[45] In dealing with this aspect, the issue arises whether the applicant is obliged, in seeking a declaratory order, to source its right in something additional to the Department of Defence's obligation to give effect to the principles of 'reliance, accountability and rationality'? The applicant has not brought an application based on administrative action (s 33 of the Constitution), nor has it isolated another constitutional right. The answer in my view lies in the contention on behalf of the municipality that the stance adopted by the Department of Defence is unlawful, not only because it ignores the valid and extant 2015 ministerial authorisation, but also because its refusal is inconsistent with the objects of GIAMA (in s 3(b)) to 'ensure effective immovable asset management within government'. The municipality submitted that the Department of Defence's 'defiant stance has resulted in the property sitting vacant and unused, and in a state of dereliction.'

[46] I am satisfied that the applicant has established a sufficiently broad factual and legal basis for the assertion of its right to a declarator, a critical component of which is holding government departments accountable for their conduct, through which citizens order their lives and the basis on which juristic persons make business decisions that impact on their viability, and on which municipalities plan for the orderly development of their cities and districts. These values find expression in *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) ('*Kirland*'), para 103, where the court explained that:

'The fundamental notion — that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside — springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality.'

[47] In endorsing *Kirland and Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA), the court in *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC), paras 41-42, emphasised that government officials cannot simply ignore an invalid administrative decision. It stated the following:

‘[41] The import of *Oudekraal* and *Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.

[42] The underlying principles are that the courts' role in determining legality is pre-eminent and exclusive; government officials, or anyone else for that matter, may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them; and, unless set aside, a decision erroneously taken may well continue to have lawful consequences.’

[48] In any event, although the municipality is cited as a respondent, it is in fact, not. It has a direct and substantial interest in the outcome of the litigation. It cannot pass transfer of the properties to the applicant because of the decision taken by the Ministers of Public Works and Defence. To the extent that it presents argument in advancement of a decision that is just and proper, its position is similar to that of an amicus – not in the usual sense of the word – but possibly in the sense of what the Constitutional Court had in mind in *AmaBhungane Centre for Investigative Journalism NPC & another v Minister of Justice and Correctional Services & others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC & others* (CCT 278/19) [2021] ZACC 3 (4 February 2021), paras 111-112, where it said the following:

‘[110] Essentially, the third amicus is lodging its own appeal. Ordinarily (and I use this word guardedly), an amicus participates in proceedings to raise “new contentions which *may be useful to the Court*”. This same idea was captured by this Court in *In re Certain Amicus Curiae Applications* where it held that “the special duty” of an amicus to the court “is to provide cogent and helpful submissions that *assist the court*”. . . A court’s task is to determine the dispute presented to it by the parties. It stands to reason then that assistance to it must relate to the determination of that dispute. Adding a different dispute – like an additional appeal – not litigated by the parties is not assistance with the dispute

before the court. If anything, that amounts to burdening the Court with something else to determine. That is not what rule 10 and the *In re Certain Amicus Curiae Applications* statement of law envisage.

[111] Therefore, it seems to me that it is not in the interests of justice to entertain the issue raised by the third amicus. That said, I will not categorically decide the question whether an amicus may lodge an appeal outside of the application or appeal being litigated by the parties. That is not necessary here. I limit what I say to a conclusion that is based on the interests of justice in the circumstances of this case; interests of justice do not dictate that the additional appeal of the third amicus be entertained. It is so that in our age of mass data surveillance, private actors arguably pose a comparable threat to privacy as does the state. So, one cannot make light of the issues raised in the appeal by the third amicus. Although the arguments of the third amicus on the issues are compelling, they were not adequately ventilated by the parties. That is understandable because they do not relate to the issues in dispute between the parties.'

In the result, I am satisfied that the criticism of the stance taken by the municipality was unwarranted.

[49] In their explanatory affidavit, the municipality explain that they consider the development of the property into a film studio as a 'catalytic project' in terms of the overall planning for the city, one which would generate a significant impact and contribution to the overall vision for the city, and consistent with its long-term development plans as incorporated into its Integrated Development Plan. The context of the sale between the applicant and the municipality should also not be overlooked. It was always recognised that before the municipality could sell the property to anyone, it first had to take transfer. This is consistent with the Deeds of Transfer. At the time when the sale agreement was concluded between the municipality and the applicant, the Army had already marched off the premises and it was left vacant.²⁵ On the basis of these uncontroverted facts, the Minister of Public Works agreed to the transfer of the properties to the municipality. A careful perusal of the memorandum, and the basis of which the Minister of Public Works granted his approval, indicates the following:

'3.17 DOD did not respond within the requested timeframe. An email with attachments indicating a draft DOD submission to retain the property for their continued use was only

²⁵ The property was vacated formally on 16 October 2009 although the applicant contends that this began in 2007.

received on 11 December 2015. Despite follow up, it is not known whether this will receive the support of the Executive Authority and the Accounting officer of the DOD.

3.18 In the face of mounting pressure from the Local and Provincial Authorities, and in light of the insufficient response from DOD to date, it is recommended that the Department hand the property back to the eThekweni Municipality.’

[50] The memorandum to the Minister of Public Works indicates that not only were the views of the Department of Defence solicited, but that despite its views, the Minister decided to proceed with the transfer. It bears noting that a period of six years had elapsed between the time when the Army vacated the property to the date when the Minister of Public Works granted approval for the transfer back to the municipality. During all of that time, the Department of Defence made no mention of the property still being required ‘for defence purposes moving forward’.

[51] It was recommended to the Minister of Public Works that he grant approval in terms of s 2 the State Land Disposal Act, 48 of 1961 for the transfer of the property subject to certain conditions, which are not the subject of any debate in this application. The approval for the transfer was therefore made by a public official in terms of a public law duty in accordance with a national statute. On this basis, it was submitted by Mr *du Plessis SC*, who appeared together with Ms *Palmer* for the municipality, that the decision of the Minister of Public Works constituted an administrative act as clearly set out in *Grey’s Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* 2005 (6) SA 313 (SCA) para 27, where the court said the following with regard to disposal of property:

‘In *Bullock NO and Others v Provincial Government, North West Province and Another* it was held by this Court that the disposal of a right in State property (the right in that case was a servitude) constituted administrative action for purposes of s 33 of the Constitution (as it then read). It was submitted on behalf of the Minister that *Bullock’s* case is distinguishable because in that case the rights were alienated in the belief that the provincial government was obliged to do so, whereas in the present case the impugned decision “amounts to a policy decision” (the words are taken from the heads of argument). There will be few administrative acts that are devoid of underlying policy – indeed, administrative action is most often the implementation of policy that has been given legal effect – but the execution of policy is not equivalent to its formulation. The decision in the present case was not one of policy formulation but of execution. No matter that the

motivation for making the decision differed from that in *Bullock*, I do not think that the decisions in each case are materially distinguishable.’ (footnotes omitted)

[52] The contention of the municipality is that the decision to transfer the property, as evinced by the 2015 ministerial authorisation, has the effect of the transfer being a *fait accompli*. What remains is the implementation of that decision by other departments of the state. The subsequent change of attitude by the Department of Defence, it was submitted, cannot automatically result in the decision of the Minister of Public Works being expunged, and particularly where the decision has not been revoked or set aside in court.²⁶ This principle was first enunciated in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA), para 26 where the court stated:

‘Until the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question.’

It is an additional hurdle for the Minister of Defence that, even if an application were now made to review and set aside the 2015 ministerial authorisation, the failure to do so timeously may well be an absolute bar to the successful granting of that relief.²⁷

[53] Only as a consequence of the Department of Defence’s stance has the National Treasury held back its approval for the transfer. As the Department of Public Works recognised, it has been caught in an ‘awkward position’ of having authorized the transfer, and, not having taken any steps to have the decision reversed, is bound by it. By all accounts, the undisputed obstructionist in the transfer is the Department of Defence.

[54] It is also necessary to have regard to the consequences which the Minister of Public Works’ decision has had for other role players in the matter. As a starting

²⁶ *Department of Transport & others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC); *Economic Freedom Fighters v Speaker, National Assembly & others* 2016 (3) SA 580 (CC).

²⁷ See *Associated Institutions Pension Fund & others v Van Zyl & others* [2004] 4 All SA 133 (SCA), paras 49 to 51; *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC), para 44.

point, if one recognizes that the Minister's decision was lawful, and there is nothing to suggest otherwise, then rights accrue as a result. In this regard, both the applicant and the municipality, having relied in good faith on the Minister's decision that the transfer had been approved, entered into an agreement of sale with the municipality believing that the sale would be aligned to its strategic plans to develop the city in accordance with its Integrated Development Plan. It also believed that it was entitled to rely on the decision of a government department as having been rationally made. On the contrary, the Department of Defence has refused to recognize the decision of another department of state, which the municipality contends undermines the rule of law.

[55] It was only on 5 April 2017, when the Director-General of the Department of Public Works wrote to the municipality advising that the Department of Defence had 'reaffirmed its need to retain the use of . . . [the property] for Defence purposes moving forwards' that the ground of opposition by the Department of Defence became known. In an email from Ms. Poee of the Department of Public Works to Mr Angelos of the municipality dated 28 June 2018, the Department of Public Works appears to backtrack from the 2015 ministerial authorisation granted almost two and half years earlier. The email reads, in part:

' . . . [t]he Department was informed this morning by DOD that [there] are planned engagements with their Minister regarding the disposal of the subject property.

The Municipality is requested to note that, the Government Immovable Asset Management Act compels custodians to engage user department on disposal of properties, and in fact, it is the user that is supposed to render the property superfluous to its use prior to any disposal being undertaken by the custodian, hence we need to engage our DOD.

To address the issue of the handing back [of] the property by Defence and DPW in 2009, the Municipality should further note that, both officials of the Departments did not have authority or delegations to take such decisions. The handing back of a property is governed by the State Land Disposal Act, and in line with this Act, only the Minister of Public Works has the authority to approve such decisions. And from the DOD side, the power to approve that [the] properties be handed back to DPW for disposal sits with the Minister and the Secretary of Defence.

It is however regrettable that these errors happened, and that they have created a challenge for the Municipality, but the Department cannot contravene the law (GIAMA and PFMA) by processing this transfer without righting the wrongs that were done in 2009. . . '.

[56] Mr *du Plessis* correctly submitted that the correspondence from the Department of Public Works above overlooks and ignores the fundamental issue of the Minister of Public Works having issued a written authorisation for the transfer of the property on 22 December 2015. If in hindsight the Minister of Public Works was of the view that 2015 ministerial authorisation granting approval for the transfer, was wrong in law, the Minister should have approached a court to have that decision reviewed and set aside. This has not happened to date. That authorisation, as stated earlier, was granted while the Minister was cognisant of the provisions of the State Land Disposal Act 48 of 1961, as well as the provisions of Government Immovable Asset Management Act, 19 of 2007 ('GIAMA'). In addition, the memorandum, which formed the basis for the Minister's decision, clearly indicates that no response had been forthcoming from the Department of Defence to the correspondence which had been sent to it. In resisting the transfer, much has been made of the Minister of Defence and the Secretary of Defence not having sanctioned the transfer of the property. Following on that course of resistance, National Treasury also withholds its consent. However, if one has careful regard to the provisions of GIAMA it will be noted that in s 1, the term '*custodian*' is defined as a national or provincial department as referred to in s 4. The term '*Minister*' means the Minister responsible for Public Works. Section 4(2) of GIAMA reads as follows :
 '(2) A custodian—
 (a) acts as the caretaker in relation to an immovable asset of which it is the custodian;
 (b) may—
 (i) in the case of a national department, acquire and manage an immovable asset as contemplated in section 13 and, subject to the State Land Disposal Act, 1961 (Act No. 48 of 1961), or any other Act regulating the disposal of state land, dispose of that immovable asset.'

[57] Section 4 of GIAMA does not permit of any interpretation that before an immovable asset, like the Natal Command property, could be transferred back to the municipality, the Minister of Public Works has to obtain the consent of the user, being the Department of Defence. As pointed out earlier, the Minister of Public Works was presented with the memorandum setting out in great detail the basis on which it was recommended that transfer of the property be authorised. The

memorandum also noted the objection raised by the Department of Defence. Having considered the contents of the memorandum, the Minister of Public Works granted the 2015 ministerial authorisation. That decision remains extant.

[58] In light of the approach taken by the Department of Defence, and the reneging of reliance on the 2015 ministerial authorisation, counsel for the municipality described the Department of Defence's conduct as being 'the opposite of good constitutional citizenship', borrowing from *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC), paras 59-60, where Cameron J pointed out:

' . . . First, as a matter of practice, and good constitutional citizenship, it is undoubtedly so that Merafong should have gone to court to set aside the Minister's ruling. As a state organ, Merafong had the resources, and the responsibility, to obtain judicial clarity in its dispute with AngloGold about the ruling. Instead of doing so, it threatened to cut off AngloGold's water. That was not nice. Worse, it was not good constitutional citizenship. . . As a good constitutional citizen, Merafong should either have accepted the Minister's ruling as valid, or gone to court to challenge it head-on. . . '

[59] Even assuming that the Department of Defence wished to challenge the basis on which the 2015 ministerial authorisation was taken, it had a remedy provided for in s 4(4) of GIAMA which provides that '[a] custodian and user must settle any dispute between them in the manner contemplated in the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005).'

[60] There is no evidence of the Minister of Defence having resorted to a remedy easily available to her in GIAMA, let alone a judicial review. Accordingly, the Department of Defence is bound by the decision of the Minister of Public Works. This much has been authoritatively stated by the Constitutional Court in *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC), paras 102-103, where the court held:

'[102] . . . In doing so, the court acted in accordance with the stature *Oudekraal* has acquired over the last decade. It has been consistently applied by the Supreme Court of Appeal, as well as by this court. The underlying principle, that public officials may not take the law into their own hands when seeking to override conduct with which they disagree, has also been given effect in three cases involving schools' policies on admission of learners.

[103] The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in *Welkom* – “(t)he rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.” For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid.’ (footnotes omitted)

[61] The principles discussed in *Kirland and Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) have been restated by the Constitutional Court in subsequent decisions including *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC), *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC).

[62] I turn now to analyse the position of the Department of Defence, based on its submission that it needs the property at some time in the future, and that the Minister of Public Works could not have unilaterally taken a decision to transfer the property back to the municipality. The Department of Defence’s position is captured in the following extract from its answering affidavit:

‘The SANDF intends to utilize the property in question for defence purposes. This has always been the intention even though the SA Army vacated the premises in question and they have been so vacant.

The special conditions registered in the Deeds Office, and which constitutes the contract of donation do not specify that the SANDF must have an ongoing military presence at the facility. The special conditions also do not impose a time for the recommencement of the defensive use of the property in question.’ (emphasis in original).

It contends that the Minister of Public Works was bound in terms of s 4(2) of GIAMA to have consulted first with the Department of Defence and the Secretary of Defence. Section 14(2) of GIAMA provides that ‘[t]he accounting officer of a user must surrender a surplus immovable asset under its control to the relevant

custodian.’ It is common cause that the Department of Defence was the ‘user’ of the property and the ‘custodian’ was the Department of Public Works. According to Lt. General Mbuli he conducted a thorough search of the department’s files and was unable to find a decision by either the Minister of Defence, or the Secretary of Defence, agreeing to the transfer.

[63] The Minister of Defence contends, correctly so, that there is no time period stipulated within which to use the property for a defensive purpose. On that ground, the Minister of Defence submits that it is illogical to suggest that the time period the applicant selects has triggered the special conditions. In other words, it cannot be interpreted to mean that because the property has not been *used* for a defence purpose, no regard must be had to whether the property is *required* for a defensive purpose. As I understand the position of the Department of Defence, even though the property is vacant, with all buildings having disappeared from the property, save for two heritage structures, it still intends to use the land at some time in the future. The argument advanced is that it is sufficient that the property is *required* for defence purposes - it is not a condition that it must be *continuously used* for such a purpose.

[64] Mr *Nxusani* submitted in his heads of argument that if the probable explanation for the Corporation donating the property was to bolster the union government between the period of the First and the Second World War, it must perforce have been within the contemplation of the parties that the property may not be actually used for a long period during times of peace or when there is no money to carry out the defence activity. If one accepts that to be a correct interpretation it would mean that for so long as there remains a prospect of the world breaking out into a war, the property (even if it is derelict and abandoned for decades) could not revert to the municipality despite it no longer being in use. I am not persuaded by this argument and the Minister of Defence’s reliance on *Benoni Town Council v Minister of Agricultural Credit and Land Tenure* 1978 (1) AD 978²⁸ does not assist

²⁸ The issue in *Benoni Town Council v Minister of Agricultural Credit and Land Tenure* 1978 (1) AD 978 was prescription – that is, whether the claim for reversion of certain land had prescribed. The court found that, since there was no time period specified for the performance of the *modus* which was in the form of a negative obligation (ie that certain land only be used for educational purposes) that prescription only began to run once the debtor had been placed in *mora*.

as it is not, in my view, authority for the submission that the words '*so required*' in the special conditions mean that it is sufficient for the Minister of Defence to merely allege that it still requires the property for use some time in the unspecified future.

[65] It is undisputed that the Department of Defence marched off the property in October 2009. The rationale for that decision is stated in Lt General Mbuli's 'founding' affidavit to be:

' . . . because of the transformation within the SANDF and the downsizing of the naval facility at Salisbury Island. This meant that it did not make economic sense to maintain military personnel at the facility but it is not the same as a conclusion that the SANDF no longer requires the property in question for a defence purpose...

. . .

The SANDF intends to utilize the property in question for defence purposes. This has always been the intention even though the SA Army vacated the premises in question and they have been so vacant.'

[66] The current position of the Department of Defence flies in the face of the stated reason why the Department of Defence vacated the property the first place; it offends against a common sense interpretation as to why an entity would march off an Army base in March 2007, hand over the ownership, risk and control thereof in October 2009, not use it for over a decade, but yet contend that it hopes to do so at some time in the future. On that basis, and for no matter how long the Army ponders on what to do with the site, or if ever to use it at some distant point in the future, it should lay vacant until the Minister of Defence and the Secretary of Defence decide otherwise. Taken to the extreme, it would be the equivalent of someone not standing trial but, when apprehended, contending that they always had the intention to stand trial, whenever that may be in the future.

[67] The contention advanced by Lt. General Mbuli is also inconsistent with the reply proffered by the Minister of Defence in Parliament where she reported that the property had become superfluous to the use of the Army and that it would be handed back to the municipality. The averments by Lt. General Mbuli are also inconsistent with the position of the Minister of Public Works as well as the Officer Commanding at the property at the time when the property was vacated. All of those persons are consistent in their view that it was the intention of the Army to

transfer the property to the municipality. The only contrary interpretation is the *ex post facto* assertion by Lt. General Mbuli based on the Army wishing to use the property at some time in the future.

[68] The view expressed by Lt. General Mbuli of wanting to hold onto the property for some uncertain event that would enable the SANDF to use the site again operates on a false premise as GIAMA regulates the basis on which immovable property registered in the name of the State should be disposed. It is not disputed that the site no longer has any of its former structures which housed the headquarters of the Army. Section 5 of GIAMA, dealing with the principles of immovable asset management provides:

‘(1) The following are principles of immovable asset management:

(a) An immovable asset *must be used efficiently and becomes surplus to a user if it does not support its service delivery objectives at an efficient level* and if it cannot be upgraded to that level.

.....

(d) immovable assets that are currently used must be *kept operational to function* in a manner that supports efficient service delivery; . . .’ (my emphasis).

GIAMA contemplates that an asset becomes ‘surplus’ if it does not support its service delivery objectives. The Minister of Defence is yet to demonstrate how holding on to a barren piece of land, which the Army vacated over a decade ago, enhances the efficiency of the SANDF or advances its objectives.

[69] The next issue is the rationality of the proposition advanced by the Department of Defence that it may require the property going forward. The starting point must be the wording of the contract. In this case both Deeds of Transfer provide that ‘[t]he land shall be *used* for defence purposes *only*, and in the event of its not being *so required or used*, it shall revert’. Ms *Gabriel SC*, who appeared with Ms *Olsen* for the applicant, submitted that a proper interpretation of this crucial aspect of the contract must mean that the property must not only be ‘*required*’ for defence purposes, but also that it must be so ‘*used*’ for such purposes. For example, if the SANDF applied to use the property as a convention centre, this would be a use contrary to that contemplated by the Deeds of Transfer. When *either* of these conditions of it not being used or required exists, the property must

be transferred back to the Municipality. Mr *Nxusani* made the following submission in his heads of argument, citing *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (*'Endumeni'*) as authority for his view:

'The word "and" separated by the comma after the word "only" is used conjunctively. It places a restriction on the usage of the property and is not used disjunctively to create two separate conditions. Interpreted in this way the clause gives the language their ordinary grammatical meaning and in their proper syntax. In this way, a well-formed sentence is derived and it gives rise to a sensible meaning as opposed to an insensible or unbusinesslike result or one that undermines the apparent purpose of the document.'

[70] The conditions and wording contained in the Deeds of Transfer are unambiguous. The special conditions are structured in such a way that they stipulate first that the 'land shall be used for defence purposes only'. Thereafter, it is stated that, if the land it is not 'so required or used' then it shall 'revert'. Thus, what is triggered is a negative state of affairs of the land '*not* being so required or used'. The phrase '*so required or used*' requires closer consideration and must be read in the context of the special conditions as a whole. In my view, the first part of the special conditions function to specify what *purposes* the property may be used for (defence purposes only) and the second part functions to specify in what *event* the property will revert (not being used, or not required).

[71] As stated above, the applicant's interpretation requires the word 'or' to be interpreted disjunctively, in accordance with its ordinary meaning. As stated in *Preddy & another v Health Professions Council of South Africa* 2008 (4) SA 434 (SCA), paras 10-11:

'[10] There is no doubt that there are cases where the word "or" has been read as "and", but this occurs in cases where to give the word "or" its natural meaning would give rise to an interpretation that is unreasonable, inconsistent or unjust. (See *Gorman v Knight Central GM Co Ltd*.)

. . . .

[11] Reading "or" as "and" has been described as a violent expedient which ought not to be adopted, except in the last resort, for the simple reason that "or" does not mean "and", and when the legislature uses "or" it must *prima facie* at all events be taken to mean "or" and not "and" (*Colonial Treasurer v Great Eastern Collieries Ltd* 1904 TS 716 at 719).'

[72] The words, in my view, and having regard to the dictum in *Endumeni*, do not permit an interpretation that only if the property is not used *and* not required, does it revert to the Municipality. As stated earlier, such an interpretation as suggested by Lt. General Mbuli would mean that the Army could vacate prime real estate on the Durban beachfront, allow the property to become derelict and leave it unattended, only to contend that although it has no current use for it, this may change sometime in the future. It is doubtful that that was the intention of the drafters of the special conditions in the Deeds of Transfer at the time when the municipality entrusted a strategic site on the coastline to the Army. I am not persuaded by the argument that it is sufficient for the Department of Defence to say that it needs the property for defence purposes, without continuously putting it to use for such purpose. A sensible interpretation of the special conditions must mean that when the property, being a strategic site on the coastline, is no longer being used for its intended purpose, it should revert to the municipality.

[73] I accordingly am not persuaded by the Department of Defence's submission that the interpretation relied on by the applicant pays lip service to the dictum in *Endumeni*. Contrary to the contention of the Department of Defence, I am of the view that the interpretation relied on by the applicant and the municipality is more consistent with the context of the document, read as a whole. The drafters of the document used the words '*required or used*'. A court interpreting the words must do so objectively. *Endumeni*, para 18, stated:

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. . . The process is objective, not subjective.'

[74] During the course of the hearing I informed counsel that I had come across the decision of the Supreme Court of Appeal in *Municipality of Mossel Bay v Evangelical Lutheran Church* 2013 JDR 1053 (SCA) which none of the counsel had referred to in their heads. I granted all parties an opportunity to make written submissions to me, post the hearing, on the dictum. In *Mossel Bay* the court was asked to interpret certain 'restrictive conditions' in title deeds that are remarkably similar to the conditions in the present matter. The facts in that matter were that a

church was the registered owner of certain property in Mossel Bay however the title deeds in respect of the property had certain restrictive conditions in favour of the municipality. The conditions provided that the land had to be used '*solely for church or educational purposes*' and that if '*at any time it ceases to be used for such purpose, or is no longer required for such purpose*' it would '*revert to the Council*'.²⁹ It was common cause that the property had not been used as a school since 2006 and the buildings were vacant, and derelict. The municipality sought an order re-transferring the properties on the basis of non-compliance by the church of the restrictive conditions. The church's defence was set out to be the following:

'... it has always used and intends to continue using the properties for church or educational purposes and its temporary cessation of schooling activities there is purely as a consequence of its temporary impecuniosity. It expressed a firm belief that it would, with time, succeed in obtaining adequate financial assistance to overcome its difficulties and to recommence schooling on the properties.'³⁰

[75] In interpreting the restrictive condition, the Supreme Court of Appeal criticised the court a quo's interpretation of the restrictive condition as follows:

'[11] The court below misconstrued the restrictive conditions, in particular the words "... or is no longer required for such purpose". It is not proper for a court to excise from a clause containing restrictive conditions one part thereof and to use the excised portion to interpret the entire clause. The conditions had to be viewed holistically by the court a quo in determining their meaning. The words in the relevant restrictive conditions are clear and unambiguous. It is by now well-established that, in interpreting these conditions, the words must be given their ordinary grammatical meaning unless this would lead to absurdity, repugnancy or inconsistency with the rest of the title deeds' conditions. . .

[12] The court below completely ignored the first part of the condition . . . namely "(i)f at any time it [the land] ceases to be used for such purpose [i.e. church or educational purposes] . . ." and chose to restrict its enquiry to the latter part of the condition, namely "... or is no longer required for such purpose". As stated, the court below held that the church's stated intent (which the court accepted) was that it planned to recommence schooling once its finances permitted it to do so and the church consequently still required the land for such (educational) purpose. Apart from the problem with the impermissible excision, pointed out above, the court below also misconstrued the use of the word "or" in

²⁹ *Municipality of Mossel Bay v Evangelical Lutheran Church* 2013 JDR 1053 (SCA) para 2.

³⁰ *Ibid*, para 8.

the condition. That word is plainly used as a disjunctive, ie signifying a substitution or an alternative. It is trite that “or” is to be construed as a conjunctive, ie reading it as “and”, in only the most exceptional of cases where the context demands it.’³¹

[76] The Supreme Court of Appeal concluded as follows:

‘When the restrictive conditions are holistically interpreted by giving the words therein their ordinary grammatical meaning, in their contextual setting, the church is plainly in contravention of the restrictions, it being common cause (for the reasons expounded above) that the properties *are no longer used* for educational or church purposes. *Whatever the stated intent of the church as to its future usage may be, this cannot and does not salvage its breach.* The court below erred in finding to the contrary and the appeal ought therefore to succeed.’ (my emphasis).³²

[77] Thus, in *Mossel Bay*, the court interpreted the word ‘or’ in the restrictive condition disjunctively, with the result that it was irrelevant what the church intended to do on the property in the future. Notably, the church in that matter gave a similar reason to the Department of Defence in the present matter, as to why it was not using the property, which was its lack of funds. In this regard, it is contended by Lt. General Mbuli in the opposing affidavit that while ‘it did not make *economic sense* to maintain military personnel at the facility. . . this is not the same as a conclusion that the SANDF no longer requires the property in question for a defence purpose.’ (my emphasis).

[78] There is no reason why this court should not follow the same approach of the Supreme Court of Appeal in *Mossel Bay* when interpreting the special conditions in the Deeds of Transfer. The factual scenario in *Mossel Bay* mirrors that in the present matter. Applying the ratio of *Mossel Bay*, if the property is not being *used* for the designated purpose, it is irrelevant if the beneficiary intends to use the property at some time in the future. On that basis, the condition for the return of the property has been fulfilled. On this interpretative analysis alone, the applicant must succeed.

³¹ Ibid, paras 11-12.

³² Ibid, para 13.

[79] For the sake of completeness and as this was an important component of the submissions at the hearing, it is necessary that I consider the reliance by the Minister of Defence on the Defence Force's User Immovable Asset Management Plans ('UAMPs'). The reliance on the UAMPs is rooted in s 14(2) of GIAMA to which I have already referred, but in the context of consultation prior to the disposal of immovable property. Apart from the issue of consultation, the Minister of Defence contends that s 14(2) provides that *only* the accounting officer of the South African Defence Force, which is the Secretary of Defence, has the authority to '*surrender a surplus immovable asset under its control*' to the relevant custodian being the Minister of Public Works.

[80] Following upon the Minister of Defence's answering affidavit, the applicant proceeded with an application in terms of Uniform rule 30A to compel the Minister of Defence to disclose various documents referred to in its answering affidavit. Among these documents were the UAMPs as contemplated by GIAMA. One of the defences raised by the Minister of Defence is that the applicant cannot be entitled to an order permitting the transfer of the property on the basis that it still remains on the Department of Defence's asset register, and has never been removed therefrom. In addition, it is contended that the Minister of Defence has never made any statement to the effect that the property was not intended to be used at any time in the future for defence purposes.

[81] In brief, GIAMA regulates the relationship between the Minister of Public Works as the custodian of state assets and the users, being the various state departments. Section 5 of GIAMA requires that immovable property belonging to the State must be used efficiently and it 'becomes surplus to a user if it does not support its service delivery objectives. . .'. Importantly for analysing one of the defences raised by the Minister of Defence is the existence of a UAMP referred to in s 6 of GIAMA, which the Minister of Defence, as a user, was obliged to prepare on a yearly basis. The UAMP must contain the details of all the immovable property used by the respective state department. The UAMPs must also include the details of any assets the department intends to surrender. The UAMPs, which are considered a strategic planning instrument, in terms of s 10 of GIAMA, inform all

decisions taken by the user, and chart a course that the relevant department is obliged to follow.

[82] In seeking to disprove the contention of the Department of Defence that no indication had been given by it to the Department of Public Works referencing an intention to surrender the property (also referred to interchangeably in the UAMPs as the 'Battery Beach' or 'Snell Parade' property) the applicant went through a vigorous exercise of analysing all of the UAMPs dating back to the date on which it alleges the Department of Defence and the SANDF first gave notice of their intention to vacate the property. In doing so, the applicant sought to prove that the vacation of the property was properly authorised; that the property was properly surrendered in the 2015 UAMPs, and despite a belated suggestion that the Army intends to use the property at some time in the future for a hotel, there are no plans nor budget allocated for these aspirations.

[83] I do not intend to recite all of the relevant entries, save for two that illustrate the point. The 2008/2009 UAMP, filed during March 2009 (which date is significant bearing in mind that the property was formally handed over by the Army at the parade on 16 October 2009) contains a consolidated listing of all immovable property under the control and use of the Department of Defence. The list contains a description of the strategic status of property ranked according to colour with red denoting a site that cannot be alienated or moved; yellow reflecting a strategic site whose relocation could be negotiated depending on the availability of land and building; and black which is designated as a non-strategic site being in the process of closure or relocation. The document lists the Battery Beach Military Base on Snell Parade, Durban (ie the property) as being coded in 'black' with the word '*agreement*' in the column alongside. The entry also makes reference to 'RFMI' which I was informed by counsel for the applicant to refer to 'Regional Facilities Integration Manager'. There is the further notation of '*closing down unit*'.

[84] It is significant that the Department of Defence's own UAMP, which is binding as a legislative instrument in terms of GIAMA, indicates that the property is *not* a strategically important site and furthermore that the site is closing down. These entries, it was submitted, are relevant in disproving the contentions relied on

by the Department of Defence, because they show that the property was in fact surrendered in terms of s 14(2) of GIAMA, because it was surplus. The significance of an asset becoming surplus in terms of GIAMA is explained by the court in *Adonisi & others v Minister for Transport and Public Works Western Cape & others; Minister of Human Settlements and Others v Premier of the Western Cape Province & Others* (7908/2017; 12327/2017) [2020] ZAWCHC 87 (31 August 2020), para 125-127:

'[125] . . . once an immovable asset becomes 'surplus' it should be surrendered to the custodian, which becomes its caretaker, and is required to manage it in accordance with its C-AMP [custodian asset management plans]. A custodian may dispose of a surplus immovable asset, either to another user or, alternatively, to a private entity, but before a disposal to a private entity can take place, a two-stage decision-making process is involved.

[126] Firstly, the user of the asset must decide whether the asset is 'surplus', i.e. that it does not support its service delivery objectives at an efficient level and cannot be upgraded to that level. This decision must be made in terms of the U-AMP, which is the principal immovable asset strategic planning instrument and is binding on the user. GIAMA states explicitly that users must conduct immovable asset management in a manner consistent with the Act and their U-AMPs.

[127] Thereafter, the custodian must decide, in terms of its C-AMP, whether the surplus asset can be allocated to another user or jointly to different users, having regard to government's social development initiatives and socio-economic objectives, including land reform.'

[85] To the extent that the regional office of the Minister of Defence, through officers like Mr Hornby and others, had no authority to make statements that bound the Department of Defence, it is clear that the regional office was delegated to deal with the closure or surrender of the property. From the UAMPs discovered in terms of Uniform rule 30, I have been unable to find any reference to the Minister of Defence or the Secretary of Defence indicating an intention to hold onto the property on the basis of any plans for the future or any budget allocations, save for reference in the UAMP for 2013 to the Natal Command site (the property) being listed on Template 10 of the Surrender Plan 2014. The explanation for items on this Template is stated in the Narrative to the UAMP to be the following:

'Template 10 lists immovable assets identified by the DOD, that no longer support the service delivery of the DOD and that should be surrendered for re-allocation or disposal, including possible demolition, as approved by the custodian with an estimated value of R1 421 220.00 of buildings and several leases that should be terminated. . . '.

The Department of Defence has not reflected the property in the UAMPs since 2015.

[86] The Department of Defence avers in its answering affidavit that it intends to establish accommodation and hotel facilities for the Department of Defence on the property in light of piracy and other criminal conduct taking place in the Mozambican channel. This statement is vague and unsubstantiated by any evidence of the need or budget for such a project. As if to justify the vague assertion, the Minister of Defence's affidavit contends that it is not necessary to explain in any detail what its plans for the property are and further that there is no time bar contained in the special conditions and therefor it is sufficient for it to state that it simply has the intention to use the property for defence purposes, sometime in the future.

[87] To the extent that the Department of Defence maintained that there existed no ministerial approval for the transfer of the property to the municipality, it was submitted by counsel for the applicant that a letter from the Chief of the SA Army, signed by Brigadier General Fredericks and dated 25 February 2008, supports the contention of the applicant that the closure of the site was done with ministerial approval. The letter reads as follows:

'Closure of ASB Durban: Migration of offices

1. DOD Administrative Instruction 04/06 dated 03 October 2006 and Ministerial Authority for closure of ASB [army support base] Durban dated 28 August 2006 refers.
2. The facilities at Battery Beach ASB Durban had to be vacated by 1 April 2007 according to the closing plan as accepted by all relevant role players as approved by the Army Council.
3. Unfortunately the premises have not yet been vacated and has a negative impact on the security and maintenance of personnel and equipment.

4. A visit by the SA Army, D M&RS [maintenance and repair services] will be undertaken on 12 March 2006 at Battery Beach OCs office to move all members to other facilities from Battery Beach facilities.
5. GOC SA Army Sup. Fmm gave his consent to intervene in this unsatisfactory situation 20 February 2006.
6. OC Closure ASB Durban to forward a plan to this Directorate for distribution and debate. Target date for final vacation of Battery Beach 16 March 2008.'

[88] The response of Lt. General Mbuli on behalf of the Minister of Defence is that he has not seen the documents referred to in the above letter, and if such documents were written, they would have been destroyed in a flooding of the archives of the Army headquarters in Pretoria. Although the author of the letter is stated to be retired, there is no reason why he could not have filed an affidavit clarifying his interpretation of the events at the time. The authorisation given by the Minister of Defence to Lt. General Mbuli allows him to enlist the assistance of any other member of the Department of Defence. He fails to do so not only in regard to Brigadier General Fredericks, but numerous others. As a consequence, the applicant submitted that it is prejudiced, particularly where documents discovered portray a different picture from that painted by the deponent with regard to the decision to hand back the property. It cannot be in the interests of justice to condone such an approach by a litigant especially where no reasons are tendered for why no confirmatory affidavits are produced. That apart, I agree with the submission by the applicant that even if the ministerial authority of August 2006 was destroyed in a flooding, this does not negate its existence, which appears manifest from the letter on behalf of the Chief of the SA Army, which explicitly makes reference to ministerial authority and approval for the closure of the Battery Beach site.

[89] To the extent that both the applicant and the municipality contend that the 2015 ministerial authorisation remains extant, the Minister of Defence argues that it does not need to review or set it aside because it was made *subject to* the terms and conditions specified therein and subject to Regulation 21.3 of the Treasury

Regulations³³ which have not been complied with. The Minister of Defence contends that no application has been made to compel the National Treasury to revoke its decision. As National Treasury did not give its approval for the gratis transfer of the property, the Minister of Defence submits that the 2015 ministerial authorisation has accordingly 'lapsed'.

[90] The applicant argues that the contention that the 2015 ministerial authorisation has lapsed, is without foundation. It is clear from the correspondence that the only apparent reason why National Treasury did not give its approval is because the Department of Defence informed the Department of Public Works and the National Treasury that it still requires the property for defence purposes. If the Department of Defence made an about-turn and announced that it no longer required the property for defence purposes, the way would be clear for Treasury to grant its approval. In the event of this court granting the relief sought in the notice of motion, National Treasury would be obliged to give effect to that order. The argument that such an order would infringe the separation of powers is simply a red-herring.

[91] In conclusion, the interpretation argued for by the applicant and the municipality is that that the word '*or*' in the special conditions must be interpreted disjunctively, meaning if either one of the events occur (either the land is not '*used*', or not '*required*'), the reversionary special conditions in the Deeds of Transfer are triggered. The Minister of Defence's interpretation is that *both* events must occur for the special conditions to be triggered. However, even on this interpretation, it must still be shown that the Department of Defence does *in fact* require the property, and its unsubstantiated claim that a hotel may be built, is not sufficient. The Department of Defence has been unable to mount a credible argument as to why the interpretation by the Supreme Court of Appeal on a similar reversionary condition in *Mossel Bay* is not correct and should not be followed. That decision is binding on this court. Over and above the interpretative exercise is the issue of accountability and government departments being held to their word. The statement by Cameron J, in *Kirland*, para 64, frames the issue eloquently, as follows:

³³ Treasury Regulations, GN R225, GG 27388, 15 March 2005.

'Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials' decisions? That is the question the judgment of Jafta J (main judgment) answers. The answer it gives is Yes. I disagree. Even where the decision is defective — as the evidence here suggests — government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.'

[92] The applicant entered into a contract with the municipality in 2003 to develop the property into a world-class film studio. The applicant and the municipality have extolled the benefits of their plans. It is not for the Minister of Defence to question those ambitions in these proceedings. The Department of Defence, after a slumber of almost decade after it publically announced its intentions to walk away from the Natal Command site in October 2009, changed its stance and refused to allow the transfer of the property to the municipality in order that the latter would in turn pass on ownership to the applicant. The Department of Defence has been the proverbial fly in the ointment, to the prejudice of both the municipality and the applicant.

[93] After considering all of the arguments raised, I am unable to sustain a single one of those contended for by the Minister of Defence. Section 172(1)(b) of the Constitution empowers the court to grant any relief which is just and equitable in order to do justice between the parties. Despite the contention of the second respondent that the applicant has not advanced an argument based on an infringement of its constitutional rights, I am satisfied that the relief sought is an appropriate remedy in the circumstances.³⁴ In the result, I see no reason why the

³⁴ In *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC), para 69 the court held:

'I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'

applicant should not be entitled to the relief it seeks in the notice of motion, and in so doing, bring this saga of almost two decades to finality and permit all parties concerned the benefit of certainty as to their respective interests.

[94] In so far as costs are concerned, I can find no reason to depart from the usual order that costs should follow the result. In this case the applicant was left with little option, all attempts at a negotiated settlement failing, but to institute action to secure the fruits of a long standing contract.³⁵ The Department of Defence could have resorted to the dispute resolution mechanisms in GIAMA to the extent that it contested the 2015 ministerial authorisation. It chose not to. Ms *Gabriel* submitted that in light of the Department of Defence's obstructionist conduct, its disregard for lawful decisions taken at ministerial level, as well as its disregard for compliance with orders of this court with regard to time frames, an adverse cost order is warranted in respect of the main application and the interlocutory applications which were warranted because of the Minister of Defence's refusal to furnish the documents referred to in its answering affidavit. In support of the award of an adverse cost order, Ms *Gabriel* referred to *Kirland*, para 82:

'[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a

See also *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another* 2010 (2) SA 415 (CC) para 97 where the court elaborated on the ambit of relief granted in terms of s172(1)(b):

'It is clear that s 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in s 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under s 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases this court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution'.

³⁵ It bears noting that in *Municipality of Mossel Bay* (supra fn 29), para 9, Majiedt JA said the following of the municipality, which launched the application:

'When all else failed, it launched its application in the court below during February 2010, by which time the properties had been in disuse for over four years already. It was incumbent upon the municipality to act in the interest of its residents, in order to fulfil its constitutional mandate towards them, as set out in s 152 of the Constitution. The municipality can certainly not be faulted for approaching the court as a last resort, when all its compassionate efforts towards attaining an extra-curial solution came to nought.'

That predicament was similar to that faced by the applicant in the present matter.

procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.'

[95] Much has been said about whether the applicant came to court to assert its right in terms of a contractual entitlement or whether there was a tinge of public law character and public importance to the matter. I am satisfied that this application has straddled both legs. The applicant's contractual interests cannot be said to be higher than that of the municipality, who has also been prejudiced as a result of the stagnation of the development on the property. If one adopts a narrow perspective, then the dominant victor is the applicant. However, it is not disputed with any seriousness on the papers that the people of eThekweni and the province of KwaZulu-Natal will also benefit from the overall spin-off that such a development will entail – jobs, added tourism to the city's coffers and perhaps more importantly, added revenue through property rates. This litigation does have a wider public importance as O' Regan J noted in *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC), para 229, 'no bright line can be drawn between private litigation and litigation of a public or constitutional nature.'

[96] Mr *du Plessis* also contended that the Minister of Defence, as the only of the respondents who opposed this application, which the municipality supported, should be obliged to pay not only the costs of the applicant but also that of the municipality, whose litigation costs are ultimately borne by the residents of eThekweni. The municipality, despite offering an 'explanatory affidavit', actively participated in the litigation. As stated earlier, I find nothing objectionable about the municipality's participation. If the Minister of Defence had succeeded, the municipality would have been ordered to share with the applicant in the costs burden. I see no reason why the Minister of Defence should be exempted from paying the costs of another sphere of government, more particularly because those costs of the municipality are funded by its own revenue base, not the national fiscus as in the case of a government department.

[97] The relief sought by the applicant is largely consistent with that granted by the Supreme Court of Appeal in *Mosse/ Bay*. Despite the approach of the Minister of Defence in this litigation, I am unable to conclude that she acted in bad faith or

for ulterior purpose. The papers do not reveal a motive for its stance. Government departments often act on poor advice. This may be one such case. I do not think that this is an instance where attorney and client costs are warranted.

[98] In the result, I make the following order:

1. It is declared that the Special Conditions contained in the Deed of Transfer No. T565/1937, for the property described as Remainder of Erf 11543 Durban and in Deed of Transfer No. T9182/1962 for the property described as Erf 11545 Durban, and known as the Natal Command Property, for the retransfer of those properties to the eThekweni Municipality, have been met.
2. The Minister of Public Works, is ordered to take all steps necessary to effect the transfer the Natal Command Property to the eThekweni Municipality within 30 (thirty) days of this order.
3. This order constitutes the necessary authorisation on behalf of the first, second and third respondents for the transfer of the property from the Department of Public Works to the eThekweni Municipality.
4. The eThekweni Municipality be and is hereby directed, within a period of 10 (ten) days after service on it of this Order, to appoint a conveyancer to attend to the preparation and registration of the transfer of the Natal Command Property into its name.
5. The first respondent be and is hereby directed, within a period of 14 (fourteen) days after receipt by him from the conveyancer of the documentation necessary to give transfer of the Natal Command Property to the eThekweni Municipality, to sign and return same to the conveyancer.
6. The costs relating to the transfer shall be paid by the first respondent, who shall pay the conveyancer's *pro forma* account on presentation.
7. In the event of the first respondent failing to comply with paragraphs (2), (4), (5) and (6) above, the Sheriff of this Court is directed and authorised to sign all the necessary documents on behalf of the first respondent.
8. That the eThekweni Municipality be and is hereby directed after receiving transfer of the Natal Command Property from the Department of Public Works, to transfer such property to the applicant, in accordance with the agreement of sale concluded between these parties on 12 December 2003, and as amended thereafter on 6 May 2005.

9. The second respondent is ordered to pay the costs of the applicant and the fourth respondent on a party and party scale, including the costs of two counsel where so employed, such costs to include all costs reserved and those attendant upon the interlocutory applications.



M R CHETTY

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Date of hearing 17 & 18 September 2020

Post hearing submissions 2 October 2020

Date of Judgment 9 March 2021