



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 2150/2016

In the matter between:

ORANJE WATERSPORT CC

Applicant

and

DAWID KRUIPER LOCAL MUNICIPALITY

1st Respondent

UPINGTON HOTEL (PTY) LTD

2nd Respondent

THE REGISTRAR OF DEEDS, VRYBURG

3rd Respondent

Coram: Phatsoane ADJP *et* Lever AJ

JUDGMENT

Lever AJ

1. This is an application to review and set aside: the resolution of first respondent, Dawid Kruiper Local Municipality, to sell a property described as Erf 15747, Olivier

Park, Upington (the property) by way of a public tender; the decision of its tender adjudication committee to award the said tender to the second respondent, Upington Hotel (Pty) Ltd. Further, to set aside any contract of sale entered into as a result of the award of the said tender to the second respondent. Plus, ancillary relief related to costs.

2. The issues raised by the parties were far ranging. At this point it would be useful to distil and set out the disputes between the parties.
3. In the applicant's view there were 3 issues to be resolved. These were: was there any effective internal remedy that ought to have been pursued by the applicant before it launched the present review application; did the provisions of s124 of Ordinance 20 of 1974 still apply at the time that the first respondent took the decision to sell the relevant property; and had the first respondent complied with the provisions of s14 of the Local Government: Municipal Finance Management Act, 56 of 2004 ("the MFMA") when it took the decision to sell the relevant property.
4. In the first respondent's view there were 5 issues to be resolved. These were: whether the applicant had exhausted all the internal remedies available to it before it launched the present review application; whether the resolution taken by the first respondent complied with the provisions of s14 of the MFMA; whether the first respondent was obliged to comply with the provisions of s124 of Ordinance 20 of 1974; whether the applicant had established any of the grounds for review contemplated in s6(2) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"); and whether applicant's tender was in fact responsive and whether it had been correctly excluded.
5. When researching the law to prepare this judgment the regulations promulgated under the MFMA were discovered. It was plainly evident that neither the applicant nor the first respondent had considered the effect or the potential effect of these regulations on the outcome of the present application. Accordingly, we entered into correspondence with the applicant and first respondent.

6. On the 10 January 2018, the following letter was sent to the attorneys for both the applicant and the first respondent:

“Re: ORANJE WATERSPORT CC v DAWID KUIPER LOCAL MUNICIPALITY & 1 OTHER

This matter was heard as a review before Acting Deputy Judge President Phatshoane and myself on the 13 November 2017. In this matter Adv M Snyman appeared for the applicant and Adv JS Rautenbach appeared for the first respondent.

One of the issues before this court was to decide whether the old Cape Ordinance 20 of 1974 was still applicable. On this issue Mr Snyman referred the court to the Supreme Court of Appeal (SCA) decision in the case of *Majomatic Limited v Kouga Municipality* (303/09)[2010] ZASCA 17 (18 March 2010). It appears from this judgment that the SCA found: Firstly, that portions of s 124 of Ordinance 20 of 1974 that did not offend the new constitutional dispensation survived; and Secondly, that the statutory law as then existed at the material time did not by implication repeal the remainder of s 124 of Ordinance 20 of 1974.

In response to this, Mr Rautenbach referred the court to the case of *Sundays River Valley Municipality v Cinzano 180 (Pty) Ltd* (2864/12)[2013] ZAECPHC (14 March 2013) and on the authority of that case argued that the MFMA (Act 32 of 2000) only came into existence after the decision of the SCA in the *Majomatic* case. Accordingly, he argued that the current legislation with specific reference to the MFMA impliedly repealed Ordinance 20 of 1974.

On researching this question, it came to our attention that at least 3 sets of regulations apply to the MFMA. The regulations published by the Treasury with the concurrence of the Minister of Provincial and Local Government under No: R. 878 (22 August 2008), *prima facie* supports Mr Rautenbach's argument in respect of an implied repeal of the relevant Ordinance.

As far as can be established these regulations were not referred to by any of the parties in the papers. They certainly did not form the factual basis of any ground of review raised by the applicant. Also, they certainly were not referred to by any of the parties in oral argument before this court.

As indicated above, at least *prima facie* these regulations support the implied repeal argument. However, if this is so, this court must consider if this is the end of the matter, or if, for the purposes of this review this court should consider if there has been compliance with the said regulations by the first respondent.

In the event that this court must consider if the first respondent has complied with these regulations, certain questions arise from such regulations. The pertinent portions of such regulations appear to be: the definitions of “capital asset”, specifically portion (a) of such definition; “high value” specifically portions (b) and (c) of such definition; read with regulations 2(1)(a), 4, 5 and 6.

Regulation 5(1)(a) contemplates a public participation process as set out in regulation 6. However, regulation 5(2) determines that a public participation process is only applicable when transfer of a “high value” asset is involved, or if the combined value of all assets the municipality intends to transfer in any financial year exceeds five per cent of the total

value of its assets as disclosed in its latest available audited financial statement. None of this information is disclosed in the papers currently before this court.

The parties are invited to make written submissions on the questions raised above. Where this court is not currently in possession of the information necessary to make its decision, the parties are invited to make representations on how the matter should be dealt with and if it becomes necessary to place further evidence before the court how this can be done in the most expedient, cost effective and equitable manner. If the parties are advised to take any particular steps in this regard, to liaise with the court through the Registrar as the presiding judicial officers' availability is always a pertinent issue.

The invitation to make written representations as contemplated herein is open to the parties until the close of business on the 31 January 2018."

7. Both respective sets of attorneys wrote back to us, the applicant wanted to reopen the matter for new evidence. After considering the issues, Judge Phatshoane and I wrote a further letter to the attorneys representing the applicant and the first respondent on the 30 January 2018 as follows:

"Re: ORANJE WATERSPORT CC v DAWID KUIPER LOCAL MUNICIPALITY & 1 OTHER

I have received a response to my letter of 10 January 2018 from both the applicant and the first respondent. I have forwarded these responses to Judge Phatshoane. I have also discussed these responses telephonically with Judge Phatshoane.

Both Judge Phatshoane and I agree that the matter cannot simply be opened up for new evidence and for the applicant to make out a new case without a substantive application to do so being launched and the applicant succeeding in such application.

My letter of the 10 January 2018, while alive to this possibility cannot short circuit such application. Neither can an agreement between the parties short circuit such application, even if such agreement has indeed been reached. In short, the applicant must stand or fall by the case made out in the founding affidavit unless the applicant can convince the court that special circumstances exist to decide otherwise in the substantive application contemplated above.

In these circumstances and in the absence of a substantive application to admit new evidence further affidavits will not be allowed.

While the MFMA was raised by the first respondent, we believe that the regulations to the MFMA were not pertinently referred to by either side in oral argument.

The position of Judge Phatshoane and myself is that no further affidavits will be allowed in the absence of a successful substantive application for such relief. Both the applicant and the first respondent will be allowed to make written representations as to the effect of the regulations referred to in my letter of the 10 January 2018. Such written representations to reach us by no later than close of business on the 15 February 2018."

8. There was no substantive application to reopen the matter for further evidence. However, both parties did make written submissions as contemplated in the letter referred to above. These written submissions will be considered when the applicability of Ordinance 20 of 1974 is dealt with.
9. At this point in time, it is appropriate to deal with the point *in limine* raised by the first respondent, being that applicant had not exhausted its internal remedies before launching the present application.
10. The applicability of two potential internal remedies were raised and/or debated in front of us by first respondent. The first was the process contemplated by the first respondent's supply chain management policy and the second was that contemplated by s62 of Local Government: Municipal Systems Act¹ (the Systems Act).
11. The relevant item contained in the first respondent's supply chain management policy is item 52, the relevant portions of which read as follows:

"52(1)The accounting officer must appoint an independent and impartial person, not directly involved in the supply chain management processes –

- (a) to assist in the resolution of disputes between the //Khara Hais Municipality and other persons regarding-
 - (i) any decisions or actions taken in the implementation of the supply chain management system; or
 - (ii) any matter arising from a contract awarded in the course of the supply chain management system; or
- (b) to deal with objections complaints or queries regarding any such decisions or actions or any matters arising from such contract.

(2) ...

(3) ...

(4) A dispute, objection, complaint or query may be referred to the relevant provincial treasury if –

- (a) the dispute, objection, complaint or query is not resolved within 60 days; or
- (b) no response is forthcoming in 60 days.

(5) If the provincial treasury does not or cannot resolve the matter, the dispute, objection, complaint or query may be referred to the National Treasury for resolution.

(6) This paragraph must not be read as affecting a person's right to approach a court at any time."

¹ Act 32 of 2000.

12. I would have thought that the applicability of item 54 of the first respondent's supply chain management policy to the first respondent's point *in limine* would in fact be evident from the terms of the said item itself. However, it was raised by the first respondent in the papers filed on its behalf in this matter. In the circumstances, I only need to deal with one aspect relating to the process contemplated by item 54 of the supply chain management policy.
13. The applicant indicated to the first respondent in writing that it was invoking the provisions of item 54 of the Supply Chain Management Policy and requested the record of decision relating to the sale of the relevant land, in order for applicant to be placed in a position to properly formulate its complaint. This record was never forthcoming and in fact applicant never received any meaningful reply to the first letter and the several written enquiries that followed. The first respondent's attorneys wrote two letters informing applicant's attorney that they were awaiting instructions from their client.
14. The explanation for failing to attend to applicant's request for the record of decision to be provided was that at that time the //Khara Hais municipality was being merged with another municipality that had no viable source of income as it covered a very large geographical area with a very sparse population. The merged municipality was to become the Dawid Kruiper Local Municipality, the first respondent herein and the successor in title to the //Khara Hais local municipality.
15. Even if the administrative difficulties being experienced in this merger were not exaggerated, it is not sufficient for the first respondent to simply ignore the request from the applicant for the record of decision. It is expected of the first respondent to have systems in place to deal with such issues even amidst the complexities of merging two local municipalities. The first respondent cannot on these grounds escape its obligation to be responsive to the public which it serves. The applicant was entitled to a meaningful response to give substance to its rights under the Supply Chain Management Policy. The first respondent failed in this regard.
16. The first respondent in fact argued that the applicant now has the record of decision even though it was only filed in response to the present review application and yet it

persisted in the point *in limine* that the applicant should have exhausted its internal remedies before launching the present review. To uphold the point *in limine* in relation to item 54 of the said Supply Chain Management Policy, would in these circumstances not be dispensing justice to the parties.

17. Admittedly, the main argument on the point *in limine* revolved around the process contemplated by s62 of the Systems Act.

18. Section 62 of the Systems Act reads as follows:

“62. Appeals.-(1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.

(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).

(3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

(4) When the appeal is against a decision taken by-

(a) a staff member other than the municipal manager, the municipal manager is the appeal authority;

(b) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or

(c) a political structure or political office bearer, or a councillor-

(i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or

(ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.

(5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.

(6) The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law.”

19. The debate before us revolved around how the provisions of s62(3) of the Systems Act should be interpreted. We know from the facts placed before us that a written deed of sale was entered into between the first and the second respondent. We also know that the second respondent has paid the full purchase price to the first respondent. It is against this factual background that we should interpret s62(3) of the Systems Act. In this context, it is apparent that the second respondent had accrued rights as a result of the relevant decision. Again, in this context, the provisions of s62 of the Systems Act would not assist the applicant to deal with the consequences of the decision to sell the property to the second respondent. Accordingly, I cannot uphold the point *in limine* on either of the grounds raised before us.
20. It would now be convenient to turn to the question of whether s124 of Ordinance 20 of 1974 was in force and applicable at the time that the first respondent decided to sell the property. This is an old Cape Province provincial ordinance that was made applicable to the Northern Cape in the circumstances set out below. Section 124 of the said Ordinance reads as follows:

“124. Alienation and letting of municipal property.-(1) Subject to the provisions of subsection (2) and such directions as the Administrator may from time to time determine, a council may-

(a) alienate, let or permit to be built upon, occupied, enclosed or cultivated any immovable property owned by the municipality unless it is precluded from so doing by law or the conditions under which such property was acquired by the municipality, and

(b) with the consent of the owner thereof or for the purposes of section 127 (1) let or permit to be built upon, occupied, enclosed or cultivated any immovable property under its control or management;

provided that the Administrator may, either specifically in respect of any particular action contemplated in paragraph (a) or (b) or generally in respect of a category of actions so contemplated, by notice in the *Official Gazette* determine that such action shall be subject to his prior approval.

(2) No council shall act in terms of subsection (1) unless it has-

(a) advertised its intention so to act, and

(b) considered the objections (if any) lodged in accordance with the advertisement contemplated by paragraph (a);

provided that the foregoing provisions of this subsection shall not apply where the proposed letting will be for a period not exceeding twelve months without an option to renew.

(3) No lessee of or person permitted to build upon, occupy, enclose or cultivate any immovable property referred to in subsection (1) shall, without the prior consent in writing of the council, sublet such property or any portion thereof or assign any right acquired by him in respect thereof and any such subletting or assignment without such consent shall, as against the council, be null and void...”

21. It was common cause between the applicant and the first respondent that, in the event that s124 of Ordinance 20 of 1974 was applicable to the decision to sell the property, it had not been complied with. The first respondent, in the first instance, argued that Ordinance 20 of 1974 had been repealed. Secondly, the first respondent argued that if such ordinance had not been expressly repealed, that it had been impliedly repealed by s14 of the MFMA.
22. The first respondent's argument that the said ordinance had been repealed was raised on the papers, but it was not pursued at the hearing, because it had been shown by the applicant in its reply that, by virtue of Proclamation No. 108 of 1994 published in Government Gazette No. 15813 on the 17 June 1994, the said Ordinance had been assigned to the province of the Northern Cape. That, whilst it had been repealed in the province of the Western Cape, it had not been repealed in the Northern Cape. Accordingly, this argument need not enjoy any further attention.
23. The question whether s14 of the MFMA impliedly repealed the said Ordinance, is an issue that will require close examination. Section 14 of the MFMA reads as follows:

“14. Disposal of capital assets.”(1) A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.

(2) A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public-

 - (a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and
 - (b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.

(3) A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services, may not be reversed by the municipality after that asset has been sold, transferred or otherwise disposed of.

(4) A municipal council may delegate to the accounting officer of the municipality its power to make the determinations referred to in subsection (2) (a) and (b) in respect of movable capital assets below a value determined by the council.

(5) Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the supply chain management policy which the municipality must have and maintain in terms of section 111.

(6) This section does not apply to the transfer of a capital asset to another municipality or to a municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework.”

24. The MFMA contemplated that the Minister of Finance in conjunction with the Minister of Local Government would make regulations in relation to the processes required in relation to the alienation and disposal of assets belonging to municipalities. This was provided for in s168 of the MFMA. The relevant portions of s168 of the MFMA, provide:

“168. Treasury regulations and guidelines.-(1) The Minister, acting with the concurrence of the Cabinet member responsible for local government, may make regulations or guidelines applicable to municipalities and municipal entities, regarding-

- (a) any matter that may be prescribed in terms of this Act;
- (b) ...;
- (g) the alienation, letting or disposal of assets by municipalities or municipal entities;
- (h) ...;
- (o) ...; and
- (p) any other matter that may facilitate the enforcement and administration of this Act.”

25. In response to the invitation set out in the letters quoted above, both the applicant and the first respondent made written representations on the effect or potential effect of the regulations referred to in such letters. They also made representations in oral argument before us on the applicability of s124 of Ordinance of 1974 to the present matter. We have considered both the written representations and oral arguments placed before us and in the present circumstances, there is no need to deal with them separately.

26. Mr Snyman, who appeared for the applicant, essentially relied on the authority of the decision of the Supreme Court of Appeal (SCA) in the case of *Majomatic 115 (Pty) Ltd v Kouga Municipality and 2 Others*² (the *Majomatic* case) as authority for the proposition that s124 of Ordinance 20 of 1974 lives on and is applicable to the

² (303/09)[2010] ZASCA 17 (18 March 2010).

present matter. Mr J S Rautenbach, who appeared for the first respondent herein, referred us to an unreported decision of the Eastern Cape Division of the High Court sitting in Port Elizabeth in the matter of *Sundays River Valley Municipality v Cinzano 180 (Pty) Ltd*³ (the *Sundays River* case).

27. Mr Snyman submitted that the *Sundays River* case ran counter to the SCA decision in the *Majomatic* case. That accordingly, the *Majomatic* case must prevail and flowing from that we must find that s124 of Ordinance 20 of 1974 was still applicable to the manner in which the first respondent was required to dispose of the relevant property.
28. The matter is not that simple and cannot be dealt with in the manner contemplated by Mr Snyman in this submission. The SCA in the *Majomatic* case was dealing with the position that prevailed during November 2003. At that time, the MFMA had not yet been promulgated and was not yet in force. The MFMA came into effect on the 01 July 2004. The question that was before the SCA in the *Majomatic* case was whether, given the new and constitutionally defined status of local government in the 1996 Constitution⁴ (the Constitution) that s124 of Ordinance 20 of 1974 had been impliedly repealed in its entirety. The SCA answered this question in the negative on the basis that at that time the only legislation that was in place governing local government was interim legislation which did not make provision for the procedure by which the municipality would dispose of land or other capital assets. That this interim legislation did not repeal or impliedly repeal the said ordinance.
29. The SCA in the *Majomatic* case, relying on its earlier decision in the case of *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality and Others*⁵, ruled that only the portions of s124 of Ordinance 20 of 1974 that were repugnant to the Constitution were repealed by implication. That the rest of s124 of Ordinance 20 of 1974 remained in effect as the then existing legislation had not by implication repealed the remaining provisions of the said s124 of such Ordinance.

³ A decision of Lowe J delivered on the 14 March 2013.

⁴ Act 108 of 1996.

⁵ 2007 (4) 276 (SCA).

30. Lowe J in the *Sundays River* case was dealing with the situation that prevailed after the MFMA and its associated regulations came into effect. Analogous to the situation that we are dealing with in the present matter. In the *Sundays River* case, Lowe J concluded that the said Ordinance had been impliedly repealed by the MFMA. Lowe J reasoned that, "...Although the power to transfer property is subject to a specific regulatory framework the basis of the MFMA and that framework is that the power to dispose of an asset is an aspect of state power exercised by (sic) Municipality."⁶ Implicit in the reasoning of Lowe J is the fact that the continued existence of s124 of Ordinance 20 of 1974 would offend against and be incompatible with the power that a municipality now enjoys and that in any event the process was now covered by the MFMA and its associated regulations. I respectfully agree with the reasoning of Lowe J.
31. Accordingly, I find that s124 of Ordinance 20 of 1974 has impliedly been repealed by the MFMA.
32. The next question to be considered is whether the resolution to dispose of the relevant property complied with the requirements of s14 of the MFMA. Put differently, whether applicant has established a factual basis to show that the requirements of s14 of the MFMA were not complied with.
33. On this aspect, Mr Snyman raised 3 issues to be considered to determine whether the first respondent had complied with the requirements of s14 of the MFMA. Mr Snyman submitted that: Firstly, it was implicit in the phrase "..., in a meeting open to the public-..." set out in s14(2) of the MFMA that the first respondent was obligated to advertise such meeting, set out that it was proposed to consider the sale of the relevant property and call for objections before it can be said that there had been compliance with the MFMA; Secondly, that the provision of parks and recreational facilities was in fact a 'basic municipal service', accordingly there was no legitimate basis upon which the first respondent could reach a decision that the relevant property was not required to deliver a basic municipal service as contemplated in s14(2)(a); and Thirdly, that the first respondent could not have considered 'the

⁶ Para [45] in the *Sundays River* case, above.

market value' of the property at the time the decision was taken in favour of the relevant resolution as the valuation of the said property was only acquired after such decision was taken.

34. Dealing with the first of the issues, namely whether it was implicit in the wording of s14(2) of the MFMA that the said section required the first respondent to advertise the relevant meeting, together with an indication in such advertisement that it was considering the sale of the property and calling for objections. In my opinion, this cannot be implied in the wording of s14(2) of the MFMA. If this was the intention of the legislature, it would have set this out in express terms as it did when dealing with the provisions of the municipal budget in s22 and s23 of the MFMA. Clearly, the applicant made this submission because it failed to consider the provisions of the regulations referred to above when it formulated its case.
35. Turning to the second of the said issues, being the question whether the provision of parks and recreational facilities was a basic service and whether it can be said that there were reasonable grounds for the resolution adopted by the Council of the first respondent that the property was not required to deliver a basic service.
36. In order to establish what is a 'basic municipal service' in the context of local government, it is important to look at how the Constitution and legislation dealing with local government defines a 'basic municipal service' and related concepts, powers and obligations.
37. The Constitution deals with the obligations of local government, which are set out in s153 in the following terms:

"153. Developmental duties of municipalities.-A municipality must-

 - (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
 - (b) participate in national and provincial development programmes."
38. The relevant definitions in the Systems Act provide:

"basic municipal services" means a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment;"

"municipal service" means a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether-

(a) such a service is provided, or to be provided, by the municipality through an internal mechanism contemplated in section 76 or by engaging an external mechanism contemplated in section 76; and

(b) fees, charges or tariffs are levied in respect of such a service or not;'

39. The Systems Act in s73 and s74(2) provides:

"73. General duty.-(1) A municipality must give effect to the provisions of the Constitution and-

(a) give priority to the basic needs of the local community;

(b) promote the development of the local community; and

(c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.

..."

"74(2) A tariff policy must reflect at least the following principles, namely that-

(a) users of municipal services should be treated equitably in the application of tariffs;

(b) the amount individual users pay for services should generally be in proportion to their use of that service;

(c) poor households must have access to at least basic services through-

(i) tariffs that cover only operating and maintenance costs;

(ii) special tariffs or life line tariffs for low levels of use or consumption of services or for basic levels of service; or

(iii) any other direct or indirect method of subsidisation of tariffs for poor households;

..."

40. The relevant definitions in the MFMA provide:

"basic municipal service" means a municipal service that is necessary to ensure an acceptable and reasonable quality of life and which, if not provided, would endanger public health or safety or the environment;"

"municipal service" has the meaning assigned to it in section 1 of the Municipal Systems Act;'

41. Mr Snyman for the applicant argued that parks and recreation are in fact basic municipal services and that there was no basis to find that in the absence of a public

participation process that the relevant property was not needed to provide a basic municipal service. Mr Rautenbach, on the other hand, argued that there is in both the MFMA and the Systems Act a distinction between a 'basic municipal service' and a 'municipal service'. Mr Rautenbach goes on to submit that municipal parks and recreation are a municipal service but not a basic municipal service. Mr Rautenbach in support of his argument referred to s74(2) of the Systems Act, s9(1) of the Housing Act⁷ and Regulation 14 of the Municipal Budget and Reporting Regulations⁸ to show that the concept of 'basic municipal services' is inextricably linked to the requirement to uplift poor and disadvantaged communities that fall under the jurisdiction of local government. In that context Mr Rautenbach submitted that 'basic municipal services' referred to water, sanitation, electricity, roads, storm water drainage and transport and did not include parks and recreation.

42. On the facts of this matter, the applicant had rented the property concerned for approximately 17 years. He provided a service in the form of recreation to the public at large including portions of the community residing in the first respondent's area of jurisdiction. The applicant charged each person entering the property, a daily fee to use the recreational facility he provided on the said property. This could be construed as a 'municipal service' as contemplated in s76 of the Systems Act.
43. In my view Mr Rautenbach is correct, that there is in fact a distinction between 'basic municipal services' and 'municipal services'. The legislative framework referred to above, supports such distinction. In this context parks and recreation are in fact a 'municipal service' but do not fall under 'basic municipal services'. In such context, 'basic municipal services' includes the provision of water, sanitation, electricity, roads, storm water drainage and transport. I am fortified in this conclusion by the wording of s14(2)(a) which is to the effect that the municipality decided that the asset is not needed "...to provide the minimum level of basic municipal service." (emphasis added) In my view 'parks and recreation', in a different and better time in our shared future may well come to be regarded as a minimum level of basic municipal service. However, in our present context of service delivery protests relating to the continued

⁷ Act 107 of 1997.

⁸ MUNICIPAL BUDGET AND REPORTING REGULATIONS, 2009 as promulgated in Government Notice 393 of 17 April 2009 in Government Gazette 32141.

reality of the 'bucket system' for sanitation and the lack of potable water, *inter alia*, being reported on a daily basis in communities all over our country, this is clearly not so.

44. Turning to the third submission in respect of the requirements of s14(2) of the MFMA, being whether the first respondent considered the fair market value of the property in circumstances where the valuation of the property was obtained after the relevant resolution was taken by the first respondent.
45. In my view what is required by s14(2)(b) is not that the first respondent have a valuation before them when they take the resolution, but that they give consideration to the fair market value when they adopt the resolution. To hold otherwise would be impractical and cumbersome. If I am wrong in my understanding of the said section, a municipality would have to hold several meetings open to the public in order to adopt a single resolution to sell a single property.
46. In the resolution concerned, the first respondent's Council did in fact give consideration to the fair market value, in that it resolved that the said property would be sold at or above the fair market value and it put in place a mechanism to have an expert determine the fair market value before the said property could be sold.
47. On the aspect of the municipality considering the economic and community value it received in exchange for the asset in a meeting open to the public. The applicant has not placed any direct evidence before us that this was not done as we only have an extract of the minutes of such meeting which takes the form of a resolution. However, the said meeting must have given consideration to this aspect as well, because paragraph 2 of the said resolution reads: "*Dat Erf 15747 by wyse van die vra van openbare tender, met die indiening van ontwikkelingsvoorstelle vervreem word.*" Which means that the tender adjudication committee would then chose the development that would deliver the most in respect of economic and community value.
48. Furthermore, the tender documents require that the development take place within 2 years of the date of sale. This ensures that the municipality would not only receive

the purchase consideration but after two years it would levy rates on the improvements to the property and that the development would by then be providing the economic and community benefits of employment as well as the economic knock on effects that would then flow from such development.

49. In these circumstances I conclude that the requirements of s14 of the MFMA have been complied with by the first respondent.
50. It is now convenient to turn to the question of whether the applicant's tender was properly excluded for being non-responsive. The invitation to tender appears to have been published on the 11 December 2015. One of the conditions of sale was that: "*1 A guarantee from a registered financial institution, that the bidder does qualify for financing to purchase the land and the development thereof must accompany the bid..*"
51. The applicant, in its papers, sets out that it had been informed by its bankers that it was premature to request a bank guarantee before a formal sale agreement had been concluded. There was no confirmatory affidavit from the applicant's bankers to support this. The applicant submitted its bid before the closing date without this document. The deponent to applicant's affidavit heard from somebody who had information relating to the tender process that the applicant's bid was declared unresponsive because the required 'guarantee' had not been furnished. Upon receiving the said information, the deponent to the applicant's founding affidavit tried to submit the required guarantee after the date on which the tender had closed.
52. Mr Snyman on behalf of the applicant persisted with the argument that the requirement for a 'guarantee' was premature. If one reads the relevant sentence in the 'conditions of sale', as quoted above, in its entirety, it is clear that the conditions of sale did not require a 'guarantee' in the conveyancing sense. A guarantee to provide payment simultaneously with transfer was not what the conditions of sale contemplated. The said conditions of sale require some form of letter of comfort that indicates to the first respondent that if the tender is awarded the successful bidder will not default necessitating starting the process afresh. This is clear because the conditions of sale require not only the purchase price to be covered by the

'guarantee' (letter of comfort) but also the capital needed to develop the property in accordance with the relevant proposal. This view is confirmed when one reads clause 3 with clause 3.2 of the 'conditions of sale'. The said clauses read: "3.

The remainder of the purchase price must be paid: ... 3.2 by means of a bank Guarantee payable on date of deed registration and at an annual rate of interest of 8%, calculated on a daily basis from the date of signing of the Deed of Sale until one day after the date of deed registration."

53. Clauses 3 read with 3.2 of the 'Conditions of Sale' do in fact contemplate a guarantee in the 'conveyancing sense'. The difference in wording of the two provisions of the 'Conditions of Sale' are instructive and are a clear indication that what was envisaged in clause 1 of the 'Conditions of Sale', was some form of letter of comfort. The second respondent provided such document from its bankers in respect of the purchase price and from its auditors in respect of the development of the said property. The applicant failed to provide any such document before the close of the bid. The applicant tried to submit such document well after the tender had closed. This is simply impermissible.
54. Accordingly, I must conclude that the applicant's bid was properly excluded for being non-responsive.
55. There is one further aspect that must be dealt with before I can reach a conclusion on whether the applicant has established any of the grounds for review as contemplated in s6(2) of PAJA. The applicant contended that in the sale of the property to the second respondent the conditions upon which the property had been sold to the second respondent were not in accordance with the 'Conditions of Sale' as published with the tender documents. That accordingly, the sale to the second respondent was unlawful.
56. The complaint revolves around the fact that in the 'Conditions of Sale' published with the tender documents the terms of payment were 10% of the value of the tender to be paid to the Council 14 days after the award of the tender and the remainder of the purchase price to be paid in cash on the date of signature of the deed of sale or by means of a bank guarantee payable on date of registration. Then in a letter dated the

09 May 2016 sent to the applicant there is reference to the decision of the tender adjudication committee. In paragraph 4 of the decision referred to in the letter of the 09 May 2016, the tender committee gives the second respondent two months to finalise payment to the Council.

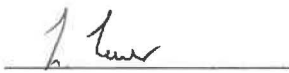
57. There are two problems with this argument that the applicant has failed to deal with. Firstly, he has not established when the deed of sale was in fact signed by the first and second respondents. Secondly, he hasn't established when the full purchase price was paid. In these circumstances, we cannot establish whether there has in fact been a deviation from the 'Conditions of Sale'.
58. Furthermore, this as a ground for review was not pertinently raised in the applicant's founding or supplementary affidavit. It appears for the first time in the Heads of Argument filed on applicant's behalf. Accordingly, the first respondent has not had an opportunity to deal with the contentions as to when the Deed of Sale was signed and when in fact the second respondent paid the full balance of the purchase price. At this point if it is not common cause, it cannot be contested that the full purchase price has been paid.
59. Even if I am wrong in the above approach, it cannot be said to have been unfair to any of the other bidders as second respondent was the only responsive bidder and the amendment is in the circumstances so minor as to be inconsequential and therefore immaterial. This is especially so because it cannot be contested that the full purchase price has been paid and no one has been prejudiced in any way by such variation. The applicant cannot claim to have been prejudiced because its bid was in any event unresponsive.
60. In all of these circumstances and for the reasons set out above, the applicant has not established a basis for the review of the relevant decisions as contemplated by s6(2) of PAJA. In these circumstances the application as set out in part B of the Notice of Motion stands to be dismissed.
61. The last issue to be dealt with is the issue of costs. The applicant and the first respondent can both be criticised for their conduct. The first respondent in the

manner in which it dealt with the applicant's objection under the provisions of its Supply Chain Management Policy. The applicant in the manner in which it tried to interfere with the tender process after the tender had been closed. The applicant sought a punitive costs order. I do not think a basis has been established for such an order. In these circumstances I cannot find a reason to depart from the general rule that costs should follow the event.

ORDER:

In the circumstances the following order is made:

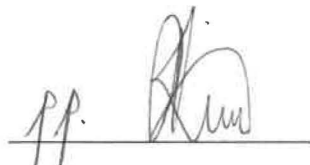
- 1) The application for review as set out in part B of the Notice of Motion dated the 04 October 2016 is dismissed.
- 2) The applicant shall pay the costs of such application on a party and party scale.



Lawrence Lever AJ

Northern Cape High Court, Kimberley

I agree



Phatshoane ADJP

Northern Cape High Court, Kimberley

REPRESENTATION:

Applicant: Adv M Snyman oio Engelsman & Magabane

1st Respondent: Adv JS Rautenbach oio Haarhoffs Inc.

Date of Hearing: 13 November 2017

Date of Judgment: 6 July 2018

