

REPORTABLE

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

Case Number: 5188/2016P

In the matter between:

GREEN MILE INVESTMENTS 340 CC

Applicant

and

KHUTHALA PROPERTY CONSORTIUM (PTY) LIMITED

First Respondent

MTUBATUBA MUNICIPALITY

Second Respondent

Case Number 5434/2017P

KHUTHALA PROPERTY CONSORTIUM (PTY) LIMITED

Applicant

and

MTUBATUBA MUNICIPALITY

First Respondent

BAMBA NDWANDWE

Second Respondent

SIPHO R. MATHOBELA

Third Respondent

MGA MBATHA

Fourth Respondent

N.Q. MZIMELA

Fifth Respondent

GREEN MILE INVESTMENTS 340 CC

Sixth Respondent

Case Number 429/2016D

KHUTHALA PROPERTY CONSORTIUM (PTY) LIMITED

Applicant

and

MTUBATUBA MUNICIPALITY

First Respondent

BAMBA NDWANDWE

Second Respondent

SIPHO R. MATHOBELA

Third Respondent

MGA MBATHA

Fourth Respondent

N.Q. MZIMELA

Fifth Respondent

JUDGMENT

Delivered on 18 May 2018

MBATHA J

Legal issue for determination

[1] The main issue before this court, referred for the hearing of oral evidence is whether the notarial lease dated 16 September 2011 and held under protocol number 1535/2011 of Robin Peter Westley, notary public, as between Mtubatuba Municipality and Khuthala Property Consortium (Pty) Limited, is valid or invalid? Three matters were consolidated and the MEC for Co-Operative Governance of Traditional Affairs, KwaZulu-Natal (MEC) was joined as a party to the proceedings.

The MEC filed statements of two witnesses and elected to abide by the decision of the court.

History of the matter

[2] The following issues are common cause. During November 2010 the Mtubatuba Municipality invited bids for a tender for the long term lease and development of the commercial site described as Erf 1[...] M[...], registration division GV Province of KwaZulu-Natal, in extent of eight thousand four hundred and fourteen square meters (8414 m²), commonly known as the 'old taxi rank', (the property).

[3] It envisaged that the successful bidder would be granted a long term lease of no less than 30 years, provided that the property would be developed as a commercial entity, which would benefit the municipality and the bidder.

[4] After the close of the bid, the municipality, on 29 January 2010, at a special Council meeting, in terms of Resolution MTMC 462/2010, accepted the proposal by Alliance Property Group (Pty) Limited (Alliance Property Group), which had a draft lease attached to it. Council resolved that the Municipal Manager be authorised to sign the lease agreement on behalf of the Council, that the consideration of the proposal outside the Land Disposal Policy be condoned and that the Municipal Manager facilitate the development of the Land Disposal Policy. A counter-proposal was made that the lease agreement not be entered into subject to legal advice from the MEC.

[5] The Municipal Manager, Mr Ntombela, purported to delegate his authority to sign the lease agreement to the Chief Financial Officer, Mr Dludla (the CFO). This process took place while the CFO was an acting Municipal Manager.

[6] Legal opinion was sought as to whether the CFO could sign the lease on behalf of the Council. The attorneys for the Council, Messrs Scheepers Spies & Mdaki in their letter of 17 February 2010 gave the following legal advice:

(a) That in terms of s 60(1)(a) of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act), decisions to expropriate immovable property or

rights in respect of immovable property, may only be delegated to an Executive Committee or Executive Mayor;

- (b) In terms of the delegated powers of the municipality under the heading Delegations to the Executive Committee, it is recorded that decisions to expropriate immovable property or rights in or to immovable property is delegated to the Executive Committee and may not be sub-delegated by it to other committees or officials;
- (c) Only the Executive Committee may sign the lease agreement. The Executive Committee would authorise one of its members to sign such an agreement on behalf of the Executive Committee; and
- (d) In terms of the delegated powers, not even the Municipal Manager as an official may be delegated to sign such an agreement, unless he is authorised to do so on behalf of the Executive Committee. If that is the case there must be a resolution to that effect.

In the light of the aforementioned, they advised that the CFO may not sign the lease agreement because he cannot be delegated to sign such an agreement. If he signs, it will be void as he does not have the authority to do so.

[7] The diligence of the municipality's attorneys also picked up that the agreement was to be between Mtubatuba Municipality and Alliance Property Group, but that the draft document which was delegated to be signed by the CFO was between the municipality and a different entity, Crowned Cormorant Investments 38 (Pty) Limited (Crowned Cormorant), an entity unknown to the municipality. The attorneys pointed out that the agreement with this unknown entity, gives it the right to cede and assign its rights, title, interest and obligations in the lease agreement to a third party and that the landlord (the municipality) consents thereto. It was explained that this would have the effect that as soon as the municipality concluded the agreement, it would have no say in the matter as it could immediately be ceded by the tenant to any third party. They also found that in terms of clause 20 of the agreement, the municipality grants an option to the tenant or its nominee, the sole right to purchase the property, which option is valid for a period of five years from date of concluding the agreement,

the implication being that immediately after the signing of the agreement the tenant can execute the option to purchase the property for a nominal amount of R1 million, whereas the property was estimated to be worth between R5 million and R6 million.

[8] It is common cause that the agreement falls within the category of s 60(1)(a) of the Systems Act which does not cater for the Municipal Manager or CFO to sign the agreement. Apart from this the attorneys cautioned the municipality to reconsider clauses 4 (rent), 6 (cession) and 20 (option to purchase the property), to have attorneys revisit the agreement and that a proper valuation of the property be obtained.

[9] At the Council meeting on 1 March 2010, the Council considered the aforementioned proposals by the attorneys. It then resolved in terms of Resolution MTMSC 463/2010 that prior to the implementation of their decision to dispose the property, the MEC be approached for comment on the nature of the immovable property disposed of, the market related value of the said immovable property, the reasons for the disposal of the property and the anticipated cost to Mtubatuba Municipality in disposing of the property. The Municipal Manager was authorised to sign the agreement with Alliance Property Group and the Municipal Manager and the CFO were mandated to discuss clause 5.3 on the legal advice from Scheepers Spies & Mdaki Attorneys.

[10] On 25 March 2010 the Municipal Manager addressed a letter to Alliance Property Group, the preferred bidder, indicating to them that the disposal of immovable property will be subject to approval from the MEC and further consultations with the MEC. On 3 May 2010 the MEC informed the municipality that she will investigate the matter. She cautioned that pending legal opinion the municipality must not conclude the agreement for letting of the property. The same message was communicated to Alliance Property Group.

[11] It is noted that minutes from the meeting of 8 April 2010 of the company Alliance Property Developments (Pty) Limited 2004/00860/70 reflect that it resolved to enter into a lease agreement with the municipality. Minutes of the meeting on 9 April 2010 of the company Alliance Property Group (Pty) Limited registration no. 1997/003121/07 reflect that it resolved that its wholly owned subsidiary, Alliance

Property Developments (Pty) Limited will enter into the agreement with the municipality as the nominated development company for Erf 1[...] M[...]. It is noted that there is no reference to the applicant Khuthala Property Consortium (Pty) Limited registration no. M[...]7 in Alliance Property Group (Pty) Limited resolution.

[12] On 3 May 2010 the MEC addressed a letter to the municipality, noting the resolutions made under Resolution MTMC 462/2010 authorising the Municipal Manager to sign the lease with Alliance Property Group and that the consideration of the proposal outside the Land Disposal Policy be condoned. She cautioned against the conclusion of any agreement with the other party, pending her obtaining legal opinion.¹ The municipality and Alliance Property Group received this correspondence on 13 and 14 May 2010 respectively.

[13] Besides the caution given by the MEC, on 19 May 2010 attorneys Cox & Yates wrote to the municipality requesting to engage with the MEC to procure her approval for the transaction to enable the lease to be registered. The Power of Attorney and the draft Notarial Deed of Lease signed by the CFO, Mr Dlodla, was already in place as Cox & Yates had requested a copy of the resolution authorising the CFO to sign. The MEC requested further documentation from the municipality on 2 July 2010 and cautioned that no agreement for the letting of the property should be concluded.² Ms Govender (née Maharaj) was part of the legal team from the MEC's office that was assigned to this matter. Mr Westley from Cox & Yates and Mr Talbot represented Khuthala. The municipality appears to have been represented by Messrs Dlodla and Dlomo. It appears from the notes of Mr Westley that no finality was reached.

[14] Whilst the matter was still pending before the MEC, Mr Dlomo, the acting Municipal Manager, signed the Power of Attorney to authorise certain persons to act as agents of the notary to execute the aforesaid notarial agreement of lease. This Power of Attorney was signed against the backdrop that he lacked authority to conclude a lease agreement at the time. This indicates that it was signed despite the legal opinion from Scheepers Spies & Mdaki and caution from the MEC. The Power of Attorney is dated 22 February 2011.

¹ My emphasis.

² My emphasis.

[15] A week later the MEC gave directions as to what needed to be changed in the lease agreement and directed that the final draft be handed over to the Council for consideration and approval.³ The letter reached the municipality on 7 March 2011. By then Mr Dlomo had already signed the Power of Attorney.

[16] Copies of two documents appear from the notary's protocol. They both record that the authority to act on behalf of the municipality emanates from the resolution of 22 February 2011 taken before the decision of the MEC was received by the Council. The notary relies upon this Power of Attorney and the letter of 1 March 2010 addressed 'to whom it may concern' as being the authority that gave him powers to act. He also relies on a resolution of 15 September 2010 which was signed by a different company to the bidder. It bears the name of the applicant which had recently changed from Crowned Cormorant bearing the registration number of the 100 per cent subsidiary nominated by Alliance Property Group. The document on the municipality's letterhead addressed 'to whom it may concern' appears in the notary's protocol referring to Resolution 463 of 1 March 2010, but does not accord with the terms of the resolution. It refers to a resolution taken on 31 March 2010. It also refers to the Allied Property Group (Pty) Limited as against the Alliance Property Group (Pty) Limited and was signed by the acting Municipal Manager, Mr Dlomo. It purported to be an extract of Resolution 463. The notary relies on this document as authority for his mandate to register the lease in favour of Khuthala Property Consortium (Pty) Limited (Khuthala), which does not correctly reflect the terms of the resolution.

[17] On the other hand a company called Alliance Property Developments (Pty) Limited resolved to enter into a lease agreement with the municipality on 8 April 2010. A day later, a resolution by Alliance Property Group, which is the company whose bid was accepted, resolved that Alliance Property Developments (Pty) Limited, a 100 per cent subsidiary was entered in place of the company as the nominated development company.

[18] On 30 August 2011, Crowned Cormorant changed its name to that of the applicant, Khuthala Property Consortium (Pty) Limited registration no. M[...]7. It

³ My emphasis.

relied on the resolution of 15 September 2010, which resolution the notary relies upon as the authority from the transactions which he executed.

[19] On 20 October 2011 a notarial lease was registered in favour of Khuthala, despite that the issues raised by the MEC relating to the cession clause were not changed, it was never presented to the Council for approval, it was executed on the strength of an authority given before the approval by the Council and executed after Mr Dlomo was no longer the Municipal Manager on 31 August 2011. Since February 2011, the notary never bothered to follow up whether the MEC had given any directions regarding the lease.

[20] It is therefore against this backdrop of information that the validity of the lease is challenged by the Mtubatuba Municipality and Green Mile Investments 340 CC in that it was not properly authorised, the Power of Attorney was given without the mandate of the MEC and approval by the Council and the notary relied on inaccurate documents.

Summary of evidence

[21] Oral evidence was led to determine whether or not the lease agreement was valid or not. Ms Davies, a Councillor and Speaker of the Mtubatuba Council gave a detailed background as to the passing of the Resolutions MTMC 462/2010 and MTMSC 463/2010 relating to the lease and how she sought the intervention of the MEC.

[22] Khuthala led the evidence of Messrs Ndlela, Palkowski and Westley. Mr Ndlela described their consortium as a group of different companies that are involved in different types of professional services, who formed a consortium known as Khuthala Property Consortium. He testified that this group assigned duties to Alliance Property Group to look for land for development. When the invitation for bids came from the Mtubatuba Municipality, they assigned Alliance Property Group to tender on their behalf. They had agreed at that stage to use Crowned Cormorant as their vehicle for development of the project, if successful. He emphasised that the choice of Crowned Cormorant related to the issue of 'cleanliness' and that it was to be an all-inclusive entity. He stated that they were all surprised when they saw that the letter of appointment was made out to Alliance Group because they were actually

coming in as Khuthala Consortium, which was the development entity that they were hoping to use. When it dawned on him that Khuthala was unknown to the then administration of the municipality, they tried to resolve issues amicably with various officials of the municipality.

[23] When Ndlela was cross-examined by Mr *Pillemer* SC for Mtubatuba Municipality, he acknowledged that he was aware that Crowned Cormorant was a shelf company with no assets and liabilities. He gave the impression that the municipality would have concluded a lease with a company with no business records whatsoever. He insisted that Alliance Property Group was an agent acting on their behalf as Khuthala, which I understand to mean that the Alliance Company profile was to be used to gain Khuthala the bid, which they could not have qualified to get through their shelf company. This was said against the backdrop of two resolutions already passed in the name of Alliance Property Group in January and March 2010. He acknowledged that he was aware of the decision of the MEC that nothing was to be done pending her recommendations, but that they continued to register the lease in favour of Khuthala.

[24] It is accepted by this court that the lease was registered, despite the MEC and the attorneys for the municipality having pointed out that the Council resolved to accept the offer of Alliance Property Group and will conclude the lease agreement based on the proposal made by Alliance and the lease agreement as negotiated by the parties. Any cession right title in respect of the lease is contrary to resolution of Council to contract with Alliance.⁴ And that the amended lease must be submitted to Council for consideration and approval.⁵ Ndlela could not explain why Khuthala does not feature in the Council's resolutions and correspondence from the MEC and why it was not referred to Council for consideration and approval.

[25] Richard Palkowski also came with the same story that Alliance Property Group were agents of Khuthala, though the specimen lease attached to the bid documents referred to Crowned Cormorant. He referred to themselves, Khuthala, as an association of likeminded individuals working together to look at development of projects in KwaZulu-Natal and Eastern Cape and to a certain extent were involved

⁴ Mtubatuba Resolutions MTMC 462/2010 and MTMSC 463/2010.

⁵ Letter from Ministry of Co-Operative Governance and Traditional Affairs, KwaZulu-Natal Provincial Government dated 01 July 2010.

with members of the Alliance Group. His version is that the members of the consortium had agreed to use Crowned Cormorant as a development vehicle in the Mtubatuba project.

[26] He was very evasive when he was asked if the likeminded persons had agreed that Crowned Cormorant was to be used as the vehicle. On being asked if they were going to put up sureties for the shelf company, his answer was that it was not a requirement. This was with full knowledge that Crowned Cormorant had no assets, had not traded and had a minimal capital of no more than R1 000. His evidence was that the idea of name change came from their attorneys and it was changed from Crowned Cormorant to Khuthala in August 2011. He could not explain why the specimen lease was not in the name of Crowned Cormorant, if indeed Alliance Property Group had acted as their agents in 2009. The change from Crowned Cormorant to Khuthala occurred in August 2011.

[27] It was pointed out to Palkowski that as of 13 November 2009, Crowned Cormorant was in deregistration for non-compliance with statutory requirements and was placed under final deregistration on 16 July 2010. It was only registered into business in June 2011. Palkowski wants the court to accept that a non-registered company would have validly and legally entered into a contract with the municipality. The cross-examination also elicited that he only came in as a director in 2013, long after the bid. Khuthala only came into existence in September 2011.

[28] Mr Westley, the notary that caused the notarial lease to be registered in favour of Khuthala, informed the court that he was instructed in early 2010 by Mr Talbot of Alliance Property Group, to do a draft lease in the name of Alliance Property Developments (Pty) Limited. He alluded to a meeting with COGTA Legal Advisors, including Ms Govender and Mr Pienaar, where he alleges that it was agreed that in fact Crowned Cormorant, a shelf entity, was the actual entity entitled to the tender. As a result thereof changes and amendments were made and the lease was registered in 2011 on the strength of the Power of Attorney dated 22 February 2011 signed by Mr Dlomo on behalf of the municipality. It is common cause that this was premature as the MEC had not given further directions to the issue. He could not explain why a new resolution was not obtained to reflect Crowned Cormorant or Khuthala if they were entitled to the award of the bid.

[29] Though admitting that certain changes were effected in the lease, he said he was not aware that it had to be resubmitted to the Council for consideration and approval. The evidence was that had he been made aware of these conditions he would have queried it. He did not have sight of the entire minutes which refer to the Alliance Property Group as the bid winner.

Evaluation of the evidence

[30] Section 217 of the Constitution of the Republic of South Africa, 1996 provides that when government entities engage in any procurement, it must be equitable, transparent, fair, competitive and must also be cost-effective for that public institution. The regulations allow government entities to evaluate bids or tenders on their technical ability to undertake the services of the government contract. There must be an assessment of the bidders past experience and financial strengths to ascertain if they have the ability to perform the work that is procured. The 2011 Regulations to the Public Finance Management Act 1 of 1999 apply to all major entities in their procurement.

[31] In the Constitutional Court decision of *Steenkamp NO v Provincial Tender Board, Eastern Cape*⁶ Moseneke DCJ stated that:

‘Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of state in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of the government. However the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1).’ (Footnote omitted) (My emphasis)

The same sentiments were echoed by the Supreme Court of Appeal in *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province & others*.⁷

⁶ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300 (CC) para 33.

[32] It is common cause that the issue before court relates to the letting of the municipality property, which is subject to regulation 40 of the Municipal Supply Chain Regulations. Transparency is a requirement in tender processes. One cannot use the 'strengths' of a different company to bid for a tender and not disclose that to the organ of State. The Council's resolutions resolved to award the bid to Alliance Property Group, on the strength of their technical, financial and other considerations, not on an 'empty shell', which was Crowned Cormorant or the non-existent Khuthala.

[33] This issue has come up in various cases. In *Steenkamp NO v Provincial Tender Board, Eastern Cape*⁸ the court stated as follows:

' . . . a company is, prior to incorporation, not yet in existence and cannot perform a juristic act such as submitting a tender, and . . . no one can at that stage act as its agent because one cannot act as the agent of a non-existent principal unless a pre-incorporation agreement is concluded, which is later ratified. . . .' (Footnote omitted)

[34] In *Westinghouse Electric Belgium Société Anonyme v Eskom Holdings (SOC) Ltd & another*,⁹ the SCA held that:

'The challenge to Eskom's decision was based on lawfulness. Eskom's decision was based on what it referred to as "strategic considerations", which it conceded, were not part of the specified tender criteria. As an organ of State, Eskom was required to adopt a Supply Chain Management ("SCM") procedure and to follow a system that was fair, equitable, transparent, complete and cost-effective. The SCM procedure obliged Eskom to formulate tender criteria clearly and without ambiguity; to attach weightings to each criterion and to evaluate and rank bidders on the basis of their total points allocated in respect of each criterion.'¹⁰

In this matter the considerations relied upon by the Board Tender Committee ("BTC") in making its decision, were not expressly part of the bid evaluation criteria. The

⁷ *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA).

⁸ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 48.

⁹ *Westinghouse Electric Belgium Société Anonyme v Eskom Holdings (SOC) Ltd & another* [2016] 1 All SA 483 (SCA).

¹⁰ *Westinghouse Electric Belgium Société Anonyme* above at 483.

court further held that the 'tender invitation, which sets out the evaluation criteria, together with constitutional and legislative procurement provisions, constitute the legally binding framework within which tenders have to be submitted, evaluated and awarded. There is no room for departure from these provisions.'¹¹

[35] The Constitutional Court in *Areva NP Incorporated in France v Eskom Holdings Soc Ltd & another*¹² and *Westinghouse* above, the majority judgment held that Westinghouse Electric Belgium Société Anonyme (WEBSA) did not have locus standi to seek an order setting aside the award of the tender to the applicant Areva and have the tender awarded to it. The tender that was submitted to Eskom was not one coming from WEBSA but a different, separate company, namely, Westinghouse USA. WEBSA had stated that the tender had been submitted on behalf of Westinghouse USA and not in its own right. Therefore the assertion submitted by WEBSA that it had submitted a bid in respect of the tender had to be rejected. The court held that WEBSA and Westinghouse USA were two different entities even though they belonged to the same group of companies. It did not give any one of them locus standi to institute court proceedings in its own right in a matter that only directly affected the other company.

[36] The Preferential Procurement Policy Framework Act 5 of 2000, which applies to municipalities, provides that an acceptable tender is 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'. Alliance Property Group complied with those specifications and not the shelf company.

[37] In *CShell 271 (Pty) Ltd v Oudtshoorn Municipality*¹³ the municipality awarded the tender to a company to be formed, described as 'Newco' in the papers. Its tender to the municipality contained a specified profile of natural persons, who were to be its shareholders. The appellant, CShell 271 (Pty) Limited sought to enforce the tender. The issue raised was that the alteration was that the constituent profile of shareholders as contained in the bid significantly altered the black empowerment position of the company. Similarly to this case, a letter had been sent to the municipality to grant written consent for CShell 271 (Pty) Limited to change the legal

¹¹ My emphasis. *Westinghouse Electric Belgium Société Anonyme* above at 483-484.

¹² *Areva NP Incorporated in France v Eskom Holdings Soc Ltd & another* 2017 (6) BCLR 675 (CC).

¹³ *CShell v Oudtshoorn Municipality* (481/2012) [2013] ZASCA 62 (24 May 2013).

entity registered with the Council to a new entity to be formed. The reason being that 'to fulfil the tender requirements we registered a shelf company, *CShell 271 (Pty) LTD. as legal entity with the local authority*.'¹⁴ They asserted that the shelf company having no assets or substance could or would never have been able to provide the necessary surety for a large development. 'In order to meet the financial requirements we obtained the interest of a large fund management comp. . . .'¹⁵

[38] Section 105 of the Systems Act sets out the role of the MEC. It provides for the MEC for local government in a province to establish mechanisms, process and procedures in terms of s 155(6) of the Constitution to

- (a) monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions;
- (b) monitor the development of local government capacity in the province; and
- (c) assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.

[39] In exercising its monitoring function the MEC may require the municipality to submit information to the Provincial Government. Section 106(1) of the Systems Act gives the MEC powers to conduct an investigation into the municipality. Section 154(1) of the Constitution compels National and Provincial Governments to 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions'. It may intervene, as a form of supervision.

[40] Mr *Dickson SC*, representing the MEC referred us to Exhibit F of the Bundle, which is a transcript of the KwaZulu-Natal Gazette No 1369/2006 issued by the former MEC, Mr Mabuyakhulu, MPL, which states as follows:

'1. Prior to the implementation of any decision to dispose of immovable property, each Municipality must submit the following information to the MEC for his comment:

¹⁴ *CShell v Oudtshoorn Municipality* above para 13.

¹⁵ *CShell v Oudtshoorn Municipality* above para 13

- (a) The nature of the immovable property to be disposed of;
- (b) The market related value of the said immovable property;
- (c) The reasons for the disposal of the said immovable property; and
- (d) The anticipated cost to the Municipality in disposing of the said immovable property.'

[41] In this case, the oversight role of the MEC and her recommendations were ignored. Therefore the failure to abide by the directions of the MEC cannot be treated as inconsequential irregularities. They impact on the validity of the lease registered in favour of Khuthala.

[42] Section 14(2)(b) of the Municipal Financial Management Act read with the Municipal Supply Chain Management Regulations issued in terms of the Municipal Financial management Act Regulations, provides that in the disposal of capital assets owned by municipalities, a municipality may consider transfer of land once it had considered its fair market value, which was not the case in this matter.

Conclusions

[43] It is this court's finding that the municipality resolved to enter into an agreement with Alliance Property Group and no one else. There was a legal opinion as presented on 29 January 2010 that the lease agreement as it stood was invalid. The notary relies on the document addressed 'to whom it may concern' and an unauthorised signature to the Power of Attorney, which does not reflect the entire terms of the resolution, but the notary proceeded to register the lease. The notary had been involved in the negotiations and knew that they all awaited the decision of the MEC, but accepted the Power of Attorney signed before the MEC had given a go ahead, without ascertaining the status of the matter from the MEC. The MEC had given directions that 'the amended lease agreement must be submitted to counsel for consideration and approval'. This was not done. The resolutions to award the lease to Alliance Property Group remained as there were no further amendments to those resolutions and that there was no authority to enter into the agreement with Khuthala.

[44] If, as Khuthala contends, that Alliance Property Group acted as agents for Crowned Cormorant, the resolution had to be amended. If a wrong entity had been named, one wonders why the resolution was not amended. This court can infer from the objective evidence before it that the likeminded persons knew of the status of Crowned Cormorant and that the change to Khuthala was effected for that purpose. Mr Westley correctly conceded that that was no authority to enter into a lease agreement with Khuthala, an entity which was non-existent at the time of the award of the bid.

[45] The Council was for all purposes made to believe that it was dealing with a viable company, Alliance Group. Ndlela's evidence was that they had assigned Alliance Group to tender on their behalf as their agent and that right from the onset they agreed that they needed to go in as Khuthala Group but they were going to have Crowned Cormorant as their developer. At the same time he conceded under cross-examination that Crowned Cormorant did not feature anywhere. This was 'fronting' in its worst form.

[46] No company can act as an agent of another company, more particularly, for a deregistered shelf company, in these circumstances. This would be tantamount to making a misrepresentation. Khuthala has not given an explanation as to why an 'agent' was needed to act for it. Juristic persons in transactions like this are represented by authorised natural persons, not other companies. Khuthala does not feature anywhere in the bid process.

[47] It is trite that the exercise of public power is only legitimate where lawful.¹⁶ The functions carried out by Mr Dlomo in signing the Power of Attorney for the registration of the lease in September 2011 were unlawful, as he was not authorised to do so. The MEC provides oversight to the municipality. Mr Dlomo had been told to await the decision of the MEC but he disregarded her directions and proceeded to sign the Power of Attorney.

[48] I agree with the submissions made on behalf of Green Mile Investments by Mr Pillay that it has been authoritatively stated in *Ferndale Crossroads Share Block*

¹⁶ *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) at 56.

(Pty) Ltd & others v City of Johannesburg Metropolitan Municipality & others¹⁷ as follows:

[22] The effect of non-compliance with the provisions of section 79(18)(b) and (c) of the Ordinance, ie failure by the respondent to cause a notice of its resolution embodying its intention to let the area of land described in the agreement to be affixed to its public notice board and to publish it (the resolution) in a newspaper calling for objections to the proposed lease before exercising the power to let, is that the jurisdictional fact necessary for the exercise of the power was absent. In terms of section 79(18)(c) a council “shall not exercise the power [to let immovable property] . . . unless [it] has considered every objection”. (My underlining.) In the absence of the necessary jurisdictional fact, the respondent could not validly exercise the power,¹⁸ with the result that the lease element of the agreement was *ab initio* invalid.’

In *Theron v MEC of the Department of Transport and Public Works*¹⁹ the same principle was confirmed.

[49] Having considered all the evidence in this case I find that the lease registered in favour of Khuthala to be invalid.

[50] I make the following order:

- (a) The notarial lease dated 16 September 2011 and held under protocol number 1535/2011 of Robin Peter Westley, notary public, as between Mtubatuba Municipality and Khuthala Property Consortium (Pty) Limited is declared to be invalid.
- (b) Khuthala Property Consortium (Pty) Limited is ordered to pay costs to Mtubatuba Municipality, costs to include the costs consequent upon the employment of two counsel.

¹⁷ *Ferndale Crossroads Share Block (Pty) Ltd and others v City of Johannesburg Metropolitan Municipality & others* [2011] 2 All SA 15 (SCA).

¹⁸ See *Paola v Jeeva NO & others* 2004 (1) SA 396 (SCA) paras 14 -16; *Kimberley Junior School v Head, Northern Cape Education Department & others* 2010 (1) SA 217 (SCA) para 11. Compare also *Foundation Estate & Finance Co. (Pty) Ltd v Johannesburg City Council* 1978 (1) SA 92 (W).

¹⁹ *Theron v MEC of the Department of Transport and Public Works* 2014 (2) SA 557 (WCC).

(c) Khuthala Property Consortium (Pty) Limited is ordered to pay costs for Green Mile Investments 340 CC.

MBATHA J

Date of Hearing: 23 March 2018

Date of Judgment: 18 May 2018

Appearances

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