REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: **HC-MD-CIV-MOT-REV-2020/00586**

In the matter between

LADY POHAMBA PRIVATE HOSPITAL OPERATIONS (PTY) LTD	**APPLICANT**
and	
MUNICIPAL COUNCIL OF THE MUNICIPALITY OF WINDHOEK	**1ST RESPONDENT**
ENVIRONMENTAL COMMISSIONER OF NAMIBIA	**2ND RESPONDENT**
MINISTER OF HEALTH AND SOCIAL SERVICES	**3RD RESPONDENT**
ATTORNEY GENERAL OF THE REPUBLIC OF NAMIBIA	**4TH RESPONDENT**

Neutral citation: *Lady Pohamba Private Hospital Operations (Pty) Ltd v Municipal Council of the Municipality of Windhoek* (HC-MD-CIV-MOT-REV-2020/00586) [2022] NAHCMD 579 (21 October 2022)

Coram: Schimming-Chase J
Heard: 6 June 2022
Delivered: 21 October 2022

Flynote: Administrative law – Administrative action – Invalidity – Consequences of invalidity – Administrative body fettered its own discretion via a resolution made on 31 August 2011 – on which resolution the first respondent relied for its later decision

of 6 November 2020 – Resolution of 31 August 2011 not before court – first respondent relying on resolution to defend application to set consequent decision aside. Whether *Oudekraal* rule applicable, so that the invalid decision of 6 November 2020 must stand in the absence of a challenge to the decision of 31 August 2011-resolution dated 6 November 2020 set aside and referred back for reconsideration.

Summary: The applicant is a private hospital and, as part of its operations, a generator of hazardous health care risk waste as defined in the Waste Management Regulations made by the first respondent (with the approval of the Minister of Regional Local Government, Housing and Rural Development) in terms of section 94(1) of the Local Authorities Act 23 of 1992. In terms of regulation 39, the first respondent is responsible for the designation of waste disposal sites of various types of waste within a particular municipal area. At all material times, the applicant disposed of its hazardous health care risk waste in accordance with the Waste Management regulations, through a waste operator, at a site designated by and at an incinerator owned and managed by the applicant.

The applicant obtained an apparatus that according to the applicant, treated the health care risk waste on site, rendering it non-toxic (as general municipal waste) and suitable for collection and disposal by municipal services or private transport. After obtaining an environmental clearance certificate, the applicant *ex post facto* applied to the first respondent in terms of regulation 35(2) of the Waste Management Regulations for permission to handle, store and otherwise deal with their health care risk waste in a manner different from the requirements set out in the sub-regulation (1), and for approval of the use of the apparatus obtained by the applicant. The first respondent refused the application for approval on 6 November 2020. Its decision was premised on a formal resolution taken at a consultative workshop on 31 August 2011. In terms of the said resolution, the incineration facility established 'by the City of Windhoek would be the only approved facility for the treatment of healthcare risk waste'.

The applicant challenged the first respondent's decision of 6 November 2020, and sought in addition a declarator that the substance produced by the applicant's apparatus after treating its health care risk waste does not constitute hazardous waste, or health care risk waste, as defined in the Waste Management Regulations.

The basis for the relief was that the first respondent unlawfully fettered its discretion provided by the Waste Management Regulations, to properly consider the applicant's application by resolution dated 31 August 2011, which was *ultra vires* and invalid, resulting in the decision of 6 November 2020 being invalid.

The resolution dated 31 August 2011 was not sought to be reviewed and set aside, and is not before court. Neither the applicant nor the first respondent applied to set this resolution aside either, each placing the responsibility on the other to have done so.

The first respondent's defences included an argument that the Waste Management Regulations do not authorise the first respondent to grant permission to a health care risk generator. The first respondent also relied on the decision of 31 August 2011, arguing that as this decision was not set aside, it remained binding on the first respondent in terms of the *Oudekraal* principle, and accordingly the decision of 6 November 2020 remained equally binding. In response to the declaratory order sought, the first respondent argued that this was premature and in any event, the substance produced by the applicant's apparatus remained hazardous waste after treatment by the applicant's apparatus. In the event that the court set aside the decision of 6 November 2020, the appropriate order would be to refer the decision back to the first respondent for reconsideration.

Held that, the phrase 'otherwise deal with' in regulation 35(2)(*a*) made it clear that the first respondent was imbued with a discretion to objectively consider the application for approval of the applicant's health care risk waste apparatus. The resolution made on 31 August 2011, unlawfully fettered the first respondent's discretion and was accordingly invalid for that reason. Effectively, the first respondent created for itself the only treatment facility in terms of the resolution of 31 August 2011, thereby preventing anyone else from having the opportunity to even apply for this permission. As a result, the first respondent did not exercise its discretion within the legal framework provided.

Held that, on the facts presented, the resolution dated 31 August 2011 was a clear fettering by the respondent, of its own discretionary power as provided for in the Waste Management Regulations. Neither party had sought to set it aside in these

proceedings or any other. Each party blamed the other for that failure. The court was accordingly faced with the decision of 6 November 2020 only, together with the declaratory relief sought.

Held that, the first respondent would, and for purposes of the principle established in *Oudekraal,* be entitled to rely on the earlier resolution for purposes of its decision. However, *Oudekraal* did not decide that the first respondent would be entitled in the particular circumstances of this case, to rely on the invalid resolution as a defence to a challenge to the validity of the consequent act, without more.

Further held that, the decision in *Oudekraal* also did not expressly exclude the possibility that there might be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. The decision in *Oudekraal* similarly did not expressly circumscribe the circumstances in which an administrative decision could be attacked reactively as invalid. Further it did not imply or entail that, unless they bring court proceedings to challenge the administrative decision, public authorities were obliged to accept it as valid. Neither did they impose an absolute duty of proactivity on public authorities. It all depended on the circumstances.

Held that, the invalidity of the decision of 6 November 2020 could not be ignored by the court given its constitutional responsibility to enforce the provisions of Article 18, even if the 31 August 2011 resolution remained factually valid until set aside. In the particular circumstances of the case, given the failure of both parties to apply to set the earlier decision aside, the first respondent could not rest on its laurels and seek an order to confirm its unlawful action without more, given its own mandate as an organ of state.

Held that, the first respondent had not applied its mind when it made its decision dated 6 November 2020. It was accordingly invalid, because it was irrational, unreasonable and *ultra vires* its responsibilities contained in the Regulations and was based on an unlawful fettering of the first respondent's discretion. The court exercised its discretion to set it aside in the particular circumstances and context of the case.

Held that, the declaratory relief sought was premature. The dispute on the opinion evidence was raised by the first respondent for purposes of the declaratory relief sought, and therefore the first respondent had an opportunity to fully consider the applicant's application – applying the constitutional responsibility that was placed on it.

In the result, the applicant's application substantially succeeded.

ORDER

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1. The decision taken by the first respondent dated 6 November 2020 disallowing the applicant from utilising the 'Sterilwave 250 Series' medical waste management system is hereby reviewed and set aside.

2. The matter is referred back to the first respondent, to reconsider and decide upon.

3. The first respondent is directed the pay the applicant's costs of suit, such costs to include the costs of one instructing and two instructed counsel.

4. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

Introduction

[1] The applicant, a private hospital and generator of anatomical and medical waste, seeks an order reviewing and setting aside the decision of the first respondent, the Council for the Municipality of Windhoek taken on 6 November 2020, refusing the applicant leave to use its Sterilwave 250[1] Series medical waste management system to treat, sterilise and destroy the medical waste on site.

[1] Hereinafter referred to as 'Sterilwave 250'.

[2] The applicant also seeks an order declaring that the substance produced after the medical waste is treated with the Sterilwave 250 does not constitute hazardous waste or health care risk waste, as defined in the Regulations referred to below.

[3] The applicant is represented by M Heathcote SC, assisted by Ms Ambunda-Nashilundo, and the first respondent is represented by Mr Nekwaya, assisted by Mrs E Angula.

[4] The applicant's classification as a generator of anatomical and medical waste is derived from the Windhoek Municipality: Waste Management Regulations (GG 4650 of 15 February 2011) made in terms of section 94 of the Local Authorities Act 23 of 1992 (hereinafter referred to as 'the Regulations' and 'the Act' where applicable).

[5] These Regulations govern in essence the storage, collection, transportation, treatment and disposal of different categories of waste, under the supervision and control of the first respondent, as part of its local governance powers and duties. The first respondent is also the author of the Regulations, which were made with the approval of the Minister of Regional and Local Government, Housing and Rural Development, as prescribed by section 94 of the Act.

[6] The provisions of these regulations form the core of the dispute between the parties. I therefore summarise the relevant provisions for purposes of this judgment at the outset.

Regulatory Framework

[7] In terms of regulation 39, the first respondent is responsible for the designation of waste disposal sites of various types of waste within a particular municipal area. In essence, waste may only be disposed of at a waste disposal site, set aside and designated by the first respondent.

[8] The regulation provides for the treatment and disposal of different types of waste generated within Windhoek. The waste produced/generated by the applicant

as part of its day-to-day operations is defined in regulation 1, as ‘hazardous waste’ and ‘health care risk waste’.

[9] Hazardous waste refers to:

> (a) waste containing, or contaminated by, poison, any corrosive agent, any flammable substance having an open flash-point of less than 90 degree Celsius, an explosive, radioactive material, any chemical or any other waste that has the potential even in low concentrations to have a significant adverse effect on public health or the environment because of its inherent toxicological, chemical and physical characteristics;
>
> (b) the carcass of a dead animal; and
>
> (c) any other waste which may be declared as such by first respondent, or in terms of any other applicable law, but excludes household hazardous waste.

[10] Health care risk waste is hazardous waste generated at any health care facility such as a hospital, clinic, laboratory, medical research institution, dental or medical research institution, dental or medical practitioner or veterinarian.

[11] Regulation 34 provides that unless the first respondent determines otherwise, a generator of health care risk waste and an owner or occupier of premises on which health care risk waste is generated, must give prior notice to the first respondent for such waste generation. Such written notice must include particulars of the nature, composition, type, quality, quantity, and volume of health care risk waste generated or expected to be generated; written or other proof of the manner in which and place where such health care risk waste is to be collected, stored or disposed; the proposed duration of storage; the particulars and identity of the waste contractor who is to collect and dispose such health care risk waste, and particulars of measures or steps taken to satisfy any possible requirements imposed by the first respondent in terms of regulation 37(4).

[12] In terms of regulation 35(1), the generator of health care risk waste or the

owner or occupier of premises on which health care risk waste is generated must –

(a) handle and store health care risk waste in a manner that does not pose a threat to human health or the environment;

(b) separate health care risk waste from all other waste at the point at which it is generated;

(c) store health care risk waste in stipulated leak-proof, sealable containers or receptacles and ensure that containers or receptacles which are used for the storage of sharps and other clinical items which can cause cuts, punctures or injections are, in addition, rigid and puncture-resistant;

(d) label health care risk waste containers or receptacles in large, legible lettering with – (i) the name and address of the generator; (ii) the words “Danger: Health Care Risk Waste” and “Gevaar: Mediese Afval”, and the international bio-hazard logo; and (iii) the date on which the containers or receptacles are removed from the generator’s premises;

(e) prevent public access to health care risk waste containers or receptacles which are in use;

(f) store filled health care risk waste containers or receptacles in controlled, secure areas which are reserved for the storage of health care risk waste;

(g) provide for proper cooling facilities within which health care risk waste is stored while awaiting collection for treatment or disposal. The cooling facilities must comply with any standard publication adopted by the first respondent in terms of section 94B of the Act; and

(h) make arrangements, as soon as possible, for the collection, treatment or disposal of health care risk waste from their premises to an approved disposal site by a waste contractor.

[13] Regulation 35(2) provides that 'subject to the provisions of the regulations and any other applicable law, generators of health care risk waste may apply in writing to the Council for permission to –

(a) handle, store and otherwise deal with their health care risk waste in a manner different from the requirements set out in subregulation (1);[2] or

(b) transport and deliver their health care risk waste for purposes of treatment or disposal in terms of these regulations.

The first respondent may in terms of subregulation (3), and in writing, grant the permission referred to in subregulation (2) and may also impose conditions. (emphasis supplied)

[14] Regulation 36 deals with the collection of health care risk waste. It provides inter alia that, the first respondent is not responsible for collecting health care risk waste, unless it determines otherwise. It further provides that where the first respondent has not given its permission (in terms of regulation 35(3)), health care risk waste may only be collected and disposed of by a waste contractor, subject to any conditions or limitations that the first respondent may impose from time to time.

[15] For ease of reference, a waste contractor is defined in regulation 1,[3] as a licensed person who collects, stores, transports, deposits, disposes, treats, handles or cleans up any waste generated by any other person, but does not include any person who collects, deposits or disposes any garden, bulky, household hazardous and builder's waste; deposits or disposes of any waste for the purposes of recovery for reuse or recycling (unless such person does so for commercial gain or as core business); or is exempted by the first respondent from obtaining a waste contractor's license.

[16] In terms of regulation 36(2), a waste contractor must remove health care risk waste from the premises of a generator and must transport, store and deliver such health care risk waste to a site approved by the first respondent without delay and in

[2] Referred to in para 11 above.

[3] In terms of Chapter 6 - Regulations 51-59.

a manner which does not pose a threat to human health or the environment.

[17] A waste contractor may not remove health care risk waste from the containers in which the waste is stored and must transport and store health care risk waste in such a way that the public does not gain access to such waste or the containers in which it is stored. A waste contractor is further required to transport health care risk waste in vehicles which are capable of containing such waste, designed to prevent spillage, constructed of materials which are easy to clean and to disinfect, capable of being secured in order to prevent unauthorised access; and must provide for proper cooling facilities within which health care risk waste is stored while awaiting treatment or disposal. A waste contractor may apply in writing to the first respondent for permission to collect, transport, store, and deliver health care risk waste in a manner which does not comply with the requirements set out above, and the first respondent may in writing grant such permission as well as impose conditions.

[18] As regards disposal of health care risk waste, the regulations define 'disposal' as the discharge, depositing, dumping, spilling, leaking, placing of waste on or at any premises or place set aside by the first respondent for such purposes. The word 'depositing' is defined as including leaving, placing, throwing, or dropping onto land.

[19] The first respondent is similarly not responsible for disposing of health care risk waste, unless it determines otherwise. In terms of regulation 37(2), health care risk waste may only be disposed of by a person in accordance with the provisions of regulation 20,[4] or at any other place set aside or approved by the first respondent, but the disposal may only take place in a manner or by a method approved by it. The first respondent may also adopt any standard publication in terms of section 94B of the Act, regulating the disposal and treatment of health care risk waste.

[20] The statutory framework having been summarised, I now deal with summarising the relevant facts leading up to the application. In this regard, it is not in dispute that preceding the application, health care risk waste is properly stored at the

[4] Regulation 20 restricts the burning of waste on premises or land for the purposes of disposing of such waste without prior written authorisation, and restricts the incineration of waste except if authorised or permitted, and subject to any terms and conditions contained in any authorisation or permit.

applicant's site in accordance with the provisions of regulation 35(1), and was transported to the first respondent's approved site where an autoclave is used for medical waste, and an incinerator for the anatomical waste.

Background facts

[21] On or about April 2020, the applicant ordered the Sterilwave 250 medical waste management system from France. In July 2020, the Sterilwave 250 system was delivered to and installed at the applicant's premises – as the applicant states – in order to destroy the healthcare risk waste generated in the course of its operations. The applicant describes the Sterilwave 250 system as a compact medical waste management system that makes use of a shredding system and microwave technology to sterilise any kind of solid biohazardous waste into a very thin, safe and unrecognisable final ordinary municipal waste. According to the applicant, the end product reduces the weight of waste by up to 25 per cent and the volume of waste by up to 85 per cent.

[22] The applicant adopted the Sterilwave 250 system as an alternative to autoclave, and incineration for the management of its healthcare risk waste, ensuring that the waste is safely destroyed on site at the applicant's premises, instead of being transported to the first respondent's waste disposal site. In this regard, the applicant averred that once the waste has been treated and converted from healthcare risk waste to general waste, it is collected by an accredited waste disposal company for disposal at the first respondent's approved site.

[23] During or about 12 June 2020, the applicant was issued with an Environmental Clearance Certificate in accordance with section 37(2) of the Environmental Management Act 7 of 2007, by the Environmental Commissioner (the second respondent),[5] for the use of the Sterilwave 250 system for treatment of healthcare risk waste at the applicant's premises.

[24] On 18 August 2020, the Ministry of Health and Social Services (the third respondent) also conducted an inspection of the Sterilwave 250 system at the applicant's premises. The inspection was conducted in order to assess compliance

[5] No relief was sought against the second respondent.

with the standards and specifications of the World Health Organisation and the Centre for Disease Control, and to ascertain whether the system was in line with the Public Environmental Health Act 1 of 2015. In this regard and on 4 September 2020, the Executive Director of the third respondent addressed a letter to the applicant with a summary of the findings of the Ministry of the inspection referred to and confirmed that:

> (a) the Sterilwave 250 system was found to meet the standards and specification for on-site hospital biohazardous waste management; and
>
> (b) it was feasible and ready for use at points of waste generation thus minimising the probability of environmental contamination and infection of health staff and the general public during transportation of soiled hospital waste.

[25] Since receipt of the above correspondence on 18 August 2020, the applicant has utilised the Sterilwave 250 system to treat, sterilise, and destroy healthcare risk waste on site. What is produced by the Sterilwave 250 is, according to the applicant, a non-toxic fluffy white substance that can be collected and disposed of by the local authority waste collection services, alternatively Rent-a-Drum.

[26] On 20 August 2020, and after receipt of the Environment Clearance Certificate and correspondence from the third respondent, the applicant received a letter from the first respondent alleging that the applicant was not complying with its obligations in terms of regulation 35(1), and regulation 37(2)(*a*) and (*b*) of the Waste Management Regulations, summarised above in this judgment. The letter stated further that the healthcare risk waste treatment facility of the City of Windhoek is and remains the only approved facility for the treatment or disposal of healthcare risk waste and that the applicant must comply with its obligations in terms of the said regulations.

[27] The first respondent's chief executive officer further advised that should the applicant wish to treat healthcare risk waste on site, it is required to consult with the first respondent on the matter, and that the applicant can only conduct the actual treatment of healthcare risk waste after the first respondent is satisfied that the

manner and method used is appropriate and subsequent to approval being granted by the first respondent. The applicant was requested to provide information relating to:

(a) the manner of disposal and treatment of the waste;

(b) the manner in which waste was contained and transported;

(c) details of the transporting contractor; and

(d) the waste disposal site used for the final disposal of treated waste and quantities.

[28] On 8 September 2020, the applicant informed the first respondent that by virtue of the Environmental Clearance Certificate it had already been provided with an operational licence and that the first respondent would not have a problem to grant the necessary approval. The first respondent was also informed that the applicant treats its waste according to environmental safety standards approved by the Ministry of Environment, Forestry and Tourism, further that contaminated medical instruments are also sterilised on-site using autoclaves. By virtue of having been granted an operational licence by the Ministry of Health and Social Services, the applicant indicated that it was competent to deal with its healthcare risk waste in such manner.

[29] The first respondent persisted that the applicant was in breach of the regulations (which the applicant disputes), and was required to apply for permission. Subsequent to a consultative meeting between the applicant and the first respondent on 17 September 2020, the applicant formally sought authorisation from the first respondent to operate the Sterilwave 250 system.

[30] This application was made on 9 October 2020, and was received by the first respondent on 11 October 2020. It is not in dispute that the application contained all the necessary information that the first respondent requested and/or required at the time.

[31] On 6 November 2020, the first respondent communicated its decision to the applicant as follows:

'1. The City of Windhoek (COW) as one of its core mandates is tasked with the responsibility to ensure that all waste generated within its jurisdiction is managed optimally and therefore has the legal mandate to ensure all waste is safely disposed in the manner as prescribed and approved by Council.

2. The Waste Management Regulations 16 of 2011 under 7(g) states that Council may determine the manner and place in which any waste must to stored, contained, handled, collected, treated, disposed or otherwise dealt with.

3. During 2009, the COW took a multi-sectoral approach in the development of healthcare risk waste strategy as both internal and external stakeholders participated in the development of this strategy. This strategy therefore paves the way how such waste will be managed within the City. External stakeholders that participated in the development process were from major healthcare providers (hospital) amongst others at the time.

4. One of the recommendations that came from the strategy formulation process was for a treatment technology based on the amount and types of waste requiring treatment and placed the responsibility on the COW to establish and provide such a facility. The strategy therefore further proposed that a central treatment facility be established and managed by the COW, was not in favour of individual small treatment facilities at various healthcare facilities.

5. Based on these recommendations Council has made the following resolution amongst others on the strategy:

That the Strategic Executive: Infrastructure, Water, and Waste Management be given the mandate to prevent the establishment of small treatment facilities at various healthcare facilities within Windhoek <u>and that the facility established by the COW be the approved facility for the treatment of healthcare risk waste</u>.

6. Several consultative workshops were held with the healthcare waste risk industry specifically generators and transporters during the course of 2017 and 2018, during the establishment and commissioning phase of the healthcare risk waste treatment facility of the COW. At these consultative workshops Lady Pohamba Hospital as a stakeholder was also invited and attended; and the above resolution that no other treatment facilities at various

healthcare facilities within Windhoek would be permitted / established was equally well known.

7. The healthcare risk waste treatment facility of the COW at present still has ample capacity to receive and treat healthcare risk waste from its boundaries for the foreseeable future and thus from a technical and operational view, there exists no justification to support the approval of smaller treatment facilities at various healthcare facilities.

8. Therefore your application for approval to operate a Sterilwave SW250 Series medical waste treatment technology at your premises is denied, as the City is not in agreement that individual facilities be erected in line with its healthcare risk waste strategy. Hence the healthcare risk waste facility of the COW remains the only approved facility and the City calls on you in this regard to continue utilising the current facility.' (emphasis supplied)

[32] The resolution (number 231/08/2011) referred to by the first respondent is dated 31 August 2011.

The review relief sought

[33] The applicant now seeks to set aside the decision of the first respondent dated 6 November 2020, on the grounds that it is unreasonable, irrational, and *ultra vires*. The review relief sought calls upon the first respondent to show why:

> (a) the decision taken by the first respondent on 6 November 2020 to the effect that the applicant should not use the Sterilwave 250 series medical waste management system, should not be reviewed and set aside in terms of rule 76(1);
>
> (b) declaring that the substance which exists after the applicant has treated its healthcare risk waste with the Sterilwave 250 series waste management system does not constitute hazardous waste or healthcare risk waste as defined in the Regulations.

[34] The basis for the review of the decision is the following: Section 94(1)(*c*) of the Act gives power to the first respondent to, in consultation with the Ministry

responsible for local authorities, make regulations for the regulation and control, removal or disposal of various types of waste. The existing waste management regulations were made in accordance with such mandate.

[35] In terms of regulation 35, waste generators such as the applicant may apply in writing to the first respondent for permission to handle, store or otherwise deal with healthcare risk waste in a manner different from the one approved by the first respondent, or to transport and deliver healthcare risk waste for purposes of treatment or disposal in terms of the Regulations.

[36] The first respondent accordingly has a discretion to approve the manner and method as proposed by a waste generator in terms of regulation 35(3) and must apply its mind to such an application. The adoption of a strategy by the first respondent which permits only the first respondent to provide a central treatment facility for the disposal of health care risk waste, to the exclusion of other waste generators, was *ultra vires* the first respondent's mandate in terms of regulation 35(3), irrational, unreasonable, and substantially unfair. This also meant that the proposed Sterilwave 250 series as an alternative method was not even considered by the first respondent on the strength of its resolution dated 31 August 2011. Effectively, the first respondent fettered its own discretion via the resolution dated 31 August 2011.

[37] As part of its application, and also for the declaratory relief, the applicant attached affidavits of two experts who opined that the end product produced by the Sterilwave 250 series is a substance that is completely safe, and that can be disposed of as general waste.

[38] In opposition to the applicant's application, the first respondent's case is that the application is doomed to fail for four main reasons: Firstly, the regulations do not authorise the first respondent to permit or grant permission to a health care waste generator to treat health care risk waste. It was submitted that properly construed, regulation 35(2) does not authorise the first respondent to grant permission to a healthcare generator for 'treatment' of healthcare risk waste. The permission contemplated in the regulations is limited to 'handle, store, transport and deliver' the healthcare risk waste.

[39] Secondly, even if the court were to find that the first respondent has such powers in terms of the regulations, the refusal to approve the applicant's application is based on a decision that the first respondent made on 31 August 2011, wherein it directed that all health care risk waste be disposed of at a waste care facility designated by it. It is accordingly not open to set aside the refusal of the application in the absence of a challenge to the decision of 31 August 2011, which accordingly still stands. Reliance was placed on the decision in *Oudekraal.*

[40] Thirdly, the first respondent disputed that the substance produced by the Sterilwave 250 is no longer hazardous waste. In this regard, Mr Nekwaya argued that a declaratory order could usurp the powers of the first respondent. To this end the first respondent also produced opinion evidence via affidavit that contradicts the opinion evidence of the applicant.

[41] Finally, even if the court were to review and set aside the decision of the first respondent dated 6 November 2020, the appropriate order would be to refer the decision back to the first respondent to reconsider and not to grant a declaratory order in the circumstances.

[42] The first respondent based its first defence on the provisions of the Regulations that, as argued by Mr Nekwaya, make it clear that the first respondent has the power to determine only the manner and place in which any waste must be stored, contained, handled, collected, treated, deposited, disposed, or otherwise dealt with. Thus the first respondent, as I understood the argument, only has the power to order and direct that certain waste be disposed of at a waste disposal site designated by it.

[43] The first respondent explained in its answering papers that waste disposal in Windhoek is situated at two distinct disposal areas with two categories of waste, the second category being the hazardous waste cell which includes medical waste such as that being produced and generated by the applicant. Relying on its responsibility to ensure adequate management and disposal of this type of waste, the first respondent in 2011 engaged in an extensive consultative process to implement an integrated waste management system. As a result of a comprehensive process for

the development of a solid waste management policy, the first respondent decided to adopt a centralised healthcare waste facility for the treatment and disposal of healthcare risk waste as part of its healthcare waste management strategy.

[44] This strategy would govern all healthcare waste management activities and processes at healthcare facilities within Windhoek. It was accordingly resolved on 31 August 2011 that the Strategic Executive: Infrastructure, Water and Waste Management '… be given the mandate to prevent the establishment of small treatment facilities at various healthcare facilities within Windhoek and that the facility established by the City of Windhoek be the approved facility for the treatment of healthcare waste.'

[45] It is in terms of this particular resolution that the first respondent on 6 November 2020, refused the application of the applicant relating to the authorisation to use the Sterilwave 250 system.

[46] The first respondent maintains that several consultative workshops were held with the industry – specifically generators and transporters – during the course of 2017, and 2018, during the establishment and commissioning of the healthcare risk waste treatment facility of the City of Windhoek. At these consultative workshops the applicant was a stakeholder and was also invited and attended and therefore the above resolution was well known within the treatment facilities located in Windhoek.

[47] The first respondent submits that it exercised its discretion properly, because as explained in its decision of 6 November 2020, it took a multi sectoral approach in the development of healthcare risk waste and in doing so, resolved to establish one facility for disposal of healthcare risk waste and the applicant like any other healthcare risk waste generator within the municipal boundaries was required to use that facility only for the disposal of its health care risk waste.

[48] Reliance was placed on the principle established in *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others,*[6] that since the decision of 31 August 2011, remains unchallenged, the decision of 6 November 2020, may not be set aside

[6] *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2004 (6) SA 222 (SCA); followed in *MEC for Health, Eastern Cape and Another V Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC).

because it is based on a decision that remains valid until set aside by a court of law. The first respondent could not 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. The first respondent itself has no authority to invalidate or ignore the decision. It accordingly remains legally effective until properly set aside.

[49] As regards the Environmental Clearance Certificate of the Ministry of Environment and Tourism, the first respondent expressly differentiates between the clearance certificate and what may or may not be determined hazardous waste as provided for in the Regulations.

Discussion

[50] I deal firstly with the argument raised by the first respondent to the effect that regulation 35(2) does not authorise the first respondent to permit or grant permission to a healthcare waste generator to treat healthcare risk waste.

[51] Mr Nekwaya submitted that the ambit of the powers granted to the first respondent in terms of regulation 35(2)*(a)* are only to handle and store, and that the words 'otherwise deal with' is confined only to those obligations or duties contained in subregulation (1), none of which grant the power to the first respondent to grant permission to treat healthcare waste. Reliance was placed on the provisions of regulation 35(1)(*h*) which confines the applicant's duties to only make arrangements for the collection, treatment or disposal of healthcare risk waste from their premises to a Council approved disposal site by a waste contractor.

[52] I am not persuaded by the argument. It is plain from a reading of the express provisions contained in the regulations, that regulation 35(2) permits a generator of healthcare risk waste to apply to the first respondent for permission to handle or store or 'otherwise deal with' the healthcare risk waste. My understanding of the 'otherwise deal with' is that a generator of healthcare risk waste can apply to the first respondent for permission to otherwise deal with its healthcare risk waste, whether it is in the treatment, transport, disposal or other management of the healthcare risk

waste that the applicant has generated.

[53] In my considered view, the argument of the first respondent that it does not have power to grant permission to the applicant to treat healthcare waste goes against the discretionary power and responsibility placed upon it in terms of the regulations.

[54] I agree with the argument of Mr Heathcote that the law requires of the first respondent to consider how the applicant proposes to handle, store and otherwise deal with the healthcare risk waste in a manner different from the one required by the first respondent. This is the reason why regulation 35(2) was made. It is only the first respondent that is imbued with such a discretion.

[55] As regards the first respondent's second defence to the applicant's challenge, and based on its reasoning behind the resolution made on 31 August 2011, it is apparent on the facts presented that the first respondent via resolution effectively divested itself of, or fettered its own discretion, and then created for itself the only treatment facility, thereby preventing anyone else from having the opportunity to even apply for this permission. In *Wlotzkasbaken Home Owners Association v Erongo Regional Council,*[7] this court reaffirmed the general principle that an authority may not divest itself of its powers and duties. Where legislation makes it plain that a discretion is to be exercised by an administrative authority, it cannot fetter that discretion. It is clear that the resolution dated 31 August 2011, unlawfully fettered the first respondent's discretion.

[56] Also, in *Rally for democracy and Progress and Others v Electoral Commission of Namibia and Other,*[8] the Supreme Court emphasised that the rule of law and the principle of legality require that public officials and institutions act in accordance with powers conferred on them by law. Once a statutory power is invoked, the repository of the power is required to act within the four corners of the

[7] *Wlotzkasbaken Home Owners Association v Erongo Regional Council* 2007 (2) NR 799 (HC) para 32. This portion of the judgment by learned judge Parker AJ specifically *Birkdale District Electric Supply Co Ltd v Southport Corporation* [1926] AC 355 remain correctly cited although the case was overturned on appeal for the interpretation of the aforesaid authorities.

[8] *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010(2) NR 487 (SC) at 507 C-F.

statute. [9]

[57] The issue is that the decision dated 31 August 2011, is not before court. Only the decision of 6 November 2020. The applicant places the blame for this situation on the first respondent. Mr Heathcote argued that the first respondent effectively conceded that it fettered its discretion via resolution and that it was incumbent on the first respondent to apply for self-review of the resolution dated 31 August 2011. Mr Nekwaya on the other hand argued that the applicant was aware of this decision and the reasons behind it, and that it was the applicant's responsibility to apply to set aside the decision of 31 August 2011. In the absence of such an application, the decision of 6 November 2020 had to stand as valid, because it is based on a decision that has not been set aside by the court. Mr Nekwaya argued that it is settled law that, however anomalous as it may seem, even an unlawful administrative action is capable of producing legally valid consequences for as long as the unlawful act is not set aside by a court of law.[10]

[58] I believe it was incumbent on both parties to apply to set aside the resolution of 31 August 2011. The resolution, as previously advanced clearly fetters the discretion of the respondent in an impermissible manner. However, is it not before court, and thus, it cannot be set aside. The question remaining is whether, on the strength of the decision in *Oudekraal*, the first respondent can utilise its own earlier 'unlawful' decision which is not before court, to justify a later unlawful decision that is sought to be set aside in these proceedings, and whether the court is obliged in the circumstances to uphold the decision that is sought to be set aside in these proceedings on those grounds.

[59] It is apparent that there were compelling reasons to acknowledge the legal consequences of an invalid decision until it is set aside, in the interests of certainty. As was lucidly explained by Howie P and Nugent JA in *Oudekraal:*

'For those reasons it is clear, in our view, that the Administrator's permission was

[9] See *President of the Republic of Namibia v Anhui Foreign Economic Construction Group Corporation Ltd and Another* 2017(2) NR 340 (SC) at 353 F-G.

[10] *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) para 26; *Minister of Finance v Merlus Seafood Processors* 2016(4) NR1042 (SC) at 1051 D-E; *President of the Republic of Namibia v Anhui Economic Construction Group Corp Ltd and Another* 2017(2) NR 340 SC para 43.

unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. 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. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'[11]

[60] In *Merafong City v Anglogold Ashanti Ltd,* [12] the Constitutional Court of South Africa explained the import of the decisions in *Oudekraal* and *Kirland*[13]*,* namely that government could not simply ignore an apparently binding ruling or decision on the basis that it was invalid. The allegedly unlawful action had to be challenged by the right actor in the right proceedings. The sole power to pronounce that the decision was defective, and therefore invalid, lay with the courts. It remained legally effective until properly set aside.[14]

[61] The Constitutional Court made the following important observations:

'[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. Mogoeng CJ explained this forcefully, referring to *Kirland*, in *Economic Freedom Fighters*. He pointed out that our constitutional order hinges on the rule of law:

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[11] *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) para 26.

[12] *Merafong City v Anglogold Ashanti Ltd* 2017(2) SA 211 CC paras 41-44.

[13] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC).

[14] *Merafong City v Anglogold Ashanti Ltd* 2017(2) SA 211 CC para 41.

> "No decision grounded [in] the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help". Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained."

[43] But it is important to note that *Kirland* did not fossilise possibly unlawful — and constitutionally invalid — administrative action as indefinitely effective. It expressly recognised that the *Oudekraal* principle puts a provisional brake on determining invalidity. The brake is imposed for rule-of-law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule-of-law reasons, the decision stands.

[44] Also, *Oudekraal* and *Kirland* did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances.'[15]

[62] I have held that the decision of 31 August 2011 is effectively *ultra vires* the provisions of Article 18 of the Constitution for the reasons mentioned above in this judgment, and therefore, the decision of 6 November 2020 is also to all intents and purposes invalid for the same reasons. However, only one decision is before the court for determination, and it is the decision taken consequent to the initially invalid decision.

[63] I do not understand the *Oudekraal* decision to create a situation where, as is submitted by the first respondent in this matter, the 6 November 2020 decision must

[15] *Merafong City v Anglogold Ashanti Ltd* at paras 41-44.

be determined to be valid in these proceedings, in the absence of the formal setting aside of the 31 August 2011 decision. The decision dated 6 November 2020 is patently wrong. There was no application of the mind in circumstances where it was required. The first respondent has breached the provisions of Article 18 of the Constitution, and requests this court to ignore it, because the decision on which the November decision is based remains valid.

[64] The Constitutional Court in *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO and Others,*[16] explained that the *Oudekraal* decision is firstly about the continued existence of an unlawful administrative act for as long as it has not been set aside by a court. It also focuses on acts that are consequent upon an initial unlawful administrative act (such as the 31 August 2011 decision). In this regard, the court emphasised the principles to be –

'Central to [Forsyth's] analysis is the distinction between what exists in law and what exists in fact. Forsyth points out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words —

". . . an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second."

. . .

(T)he proper enquiry in each case — at least at first — is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.'[17]

[65] I hold the considered view that in the context and particular circumstances of this case, and because reliance is placed by the governmental author of an invalid earlier decision to justify an equally invalid later decision, that the court should exercise its discretion in terms of Article 18 to set the decision of the first respondent dated 6 November 2020 aside. The first respondent did not at all apply its mind, and

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[16] *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO and Others* 2020 (4) SA 375 (CC).

[17] *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO and Others 2020 (4) SA 375 (CC)* para 40.

this court does have a discretion to set the decision aside. I do not believe that this finding opposes the principles set out in *Oudekraal*. The first respondent itself suggested that in the event of a declaration of invalidity, the matter be referred back to it for a proper reconsideration.

[66] In light of the above finding, I do not propose to grant the declaratory relief, as the first respondent has not applied its mind. In so far as the parties request this court to make a *Plascon Evans*[18] determination on the veracity of disputed opinion evidence, this request is declined, and it is assumed that the first respondent raised this challenge to the declaratory relief only, and not to the main relief. (emphasis supplied).

[67] In light of the foregoing, the following order is made.

1. The decision taken by the first respondent dated 6 November 2020 disallowing the applicant from utilising the 'Sterilwave SW250 Series' medical waste management system is hereby reviewed and set aside.

2. The matter is referred back to the first respondent, to reconsider and decide upon.

3. The first respondent is directed the pay the applicant's costs of suit, such costs to include the costs of one instructing and two instructed counsel.

4. The matter is regarded as finalised and removed from the roll.

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EM SCHIMMING-CHASE

Judge

[18] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

APPEARANCES

APPLICANT:	R Heathcote SC (with him L Ambundo-Nashilundo) Instructed by Engling, Stritter & Partners, Windhoek.
FIRST RESPONDENT:	E Nekwaya (with him Mrs E Angula) Instructed by Angula Co, Windhoek.