REPORTABLE

CASE NO.: SA 20/2006

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE MUNICIPALITY OF WALVIS BAY **FIRST APPELLANT**

THE COUNCIL OF THE MUNICIPALITY OF WALVIS BAY **SECOND APPELLANT**

And

THE RESPONDENTS SET OUT IN ANNEXURE "A" TO THE NOTICE OF MOTION – BEING THE OCCUPIERS OF THE CARAVAN SITES AT LONG BEACH CARAVAN PARK, WALVIS BAY, REPUBLIC OF NAMIBIA. **RESPONDENTS**

CORAM: Shivute, C.J., Strydom, A.J.A. *et* Chomba, A.J.A.

Heard on: 2007/04/10

Delivered on: 2007/11/19

APPEAL JUDGMENT

STRYDOM A.J.A: [1] This is a matter which was brought on Notice of Motion by the 1st Appellant in the High Court of Namibia. Before the matter was heard objection was raised by some of the respondents against the *locus standi* of the 1st appellant to bring the application. Application was then made to join the 2nd appellant as 2nd applicant in the proceedings before the Court *a quo.* This application was successful.

[2] The relief claimed by the appellants, in their amended Notice of Motion, concerns certain lease agreements, concluded by them during 1993 and 1994 and is set out as follows:

> "(1) Declaring each of the agreements of lease purportedly entered into between the first and/or second applicants and respondents (jointly and severally) in and during 1993 and 1994 in respect of certain caravan sites at the Long Beach Caravan Park, Walvis Bay, to be *ultra vires* the powers of the first and/or second applicants, and accordingly null and void, and of

no force and/or effect;

(2) Declaring that the option to renew clauses in each of the agreements of lease entered into between the first and/or second applicants and the respondents (jointly and severally), in and during 1993 and 1994 in respect of the caravan sites at the Long Beach Caravan Park, Walvis Bay to be *ultra vires* the powers of the first and/or second applicants, and accordingly null and void, and of no force and/or effect;

(3) In the alternative to paragraphs 1 and 2 above, declaring that the option to renew clauses in each of the agreements of lease entered into between the first and/or second applicants and respondents (jointly and severally), in and during 1993 and 1994 in respect of the caravan sites at the Long Beach Caravan Park, Walvis Bay to be against public policy, and accordingly null and void, and of no force and/or effect:

(4) In the alternative to paragraphs 1, 2 and 3 above, declaring that the first and/or second applicants are, in terms of a tacit term in the agreements of lease entered into between the first and/or second applicants and the respondents (jointly and severally), in and during 1993 and 1994 in respect of caravan sites at Long Beach Caravan Park, Walvis Bay, entitled to review and rescind (and not renew) the leases for a further period, and further, that the first and/or second applicants have reviewed and rescinded the leases, and not renewed them, and that the continued occupation

of the caravan sites aforementioned are unlawful;

(5) Ordering the respondents (jointly and severally), to vacate the caravan sites at Long Beach Caravan Park, Walvis Bay within one month of the date of the order of this Court, failing which the Sheriff of this Court shall be authorised to evict them, if necessary , with the assistance of the Police;

(6) Permitting the first and/or second applicants to demolish and remove the said caravan sites once they have been vacated, and ordering that the costs of such demolition and removal be paid for by the respondents, jointly and severally;

(7) Directing that those of the respondents who oppose this application bear the costs thereof, jointly and severally, the one paying the other absolved;

(8) Granting such further and/or alternative relief as may be necessary."

[3] The Court *a quo* dismissed the application and ordered the appellants to pay the costs of those respondents who opposed the application. The appeal of the appellants is against the whole order of the Court *a quo* and the order of costs. Mr. Arendse SC, assisted by Mr. Borgström, instructed by Conradie and Damaseb, appeared for the appellants (the Council). Mr. Wepener SC, instructed by

Erasmus Associates, appeared for 5th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 35th, 38th, 40th, 41st, 42nd, 43rd, 45th, 49th, 46th, 47th and 51st respondents.

[4] At the time when the application was launched some of the respondents did not enter appearance to defend and the Council was able to obtain judgment by default against them. They were the 1st, 4th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 24th, 3 3rd, 36th and 39th respondents.

[5] The background to the dispute with the various respondents, and how it came about that an Ordinance of the Cape Province of South Africa applied to regulate the rights of

the parties, is set out in the affidavit of Mr. Augustinus Katiti, the Town Clerk of the Council, and who deposed on its behalf. Although the 17th respondent, who filed an affidavit on behalf of some of the respondents, did not admit these facts he did not seriously, or at all, dispute the historical data set out by Mr. Katiti.

[6] According to the historical facts as set out by Mr. Katiti Walvis Bay was annexed by Great Britain in 1840 and became part of the Union of South Africa in 1910. In 1921 it became part of South West Africa and in 1971 it was transferred to the Cape Province of South Africa. The Municipal Ordinance, 1978, Ordinance 26 of 1978, of the Province of the Cape of Good Hope of South Africa applied henceforth to Walvis Bay.

[7] In 1993 a combined local authority comprising Walvis Bay Municipality, Narraville Management Committee, Kuisebmond Town Council and Walvis Bay Regional Services Council was established by paragraph 1 of Proclamation No 122 of l993 by the Administrator of the Province of the Cape of Good Hope of South Africa. The combined authority was known as the Walvis Bay Municipality.

[8] However, at midnight on 28th February 1994 Walvis Bay was re-integrated into Namibia and on 16 August 1994 the Municipal Ordinance, 1978, Ordinance 26 of 1978 of the Cape of Good Hope, ceased to apply to Walvis Bay. After re-integration the Local Authorities Act of Namibia, Act 23 of 1992, applied to Walvis Bay.

[9] When the various lease agreements were entered into with the respondents in 1993 and 1994 Walvis Bay was still

administered as part of the Cape Province of South Africa and hence Ordinance 26 of 1978 (the Ordinance) applied to the relationship between the Council and the respondents. This is common cause between the parties.

[10] Mr. Katiti went on to state that a caravan park was established by the Council at Long Beach. In June 1989 the Town Clerk at the time, Mr. J. Wilken, and the Town Engineer, recommended to the Council that four stands in the park be provided for the occupation of permanent caravan sites.

[11] At a council meeting, held on 6 December 1989, it was resolved that mobile homes for permanent occupation would be allowed and let subject to certain conditions. One such condition was that the lease would only run for one year and could be renewed only after the lease was reviewed by the Council.

[12] Mr. Katiti alleged that during the latter half of 1993 the Council received and approved lease agreements in regard to the 32nd to the 51st respondents. All the leases were in Afrikaans and a duly translated copy was attached by the Council to its papers. From this it appeared that the agreements were signed on behalf of the Council by the Town Clerk, at the time a Mr. Du Preez, and the Mayor, at the time, a Mr. Edwards. The lease was now for a period of 9 years and 11 months. The agreements further contained a renewal clause for one further period of 9 years and 11 months.

[13] Mr. Katiti stated that in respect of these leases it is the Council's case that only some of the leases were approved by the Council and that none of the renewal clauses, contained

in the agreements, were approved. Consequently it would be argued that these clauses were *ultra vires* the powers of the Council.

[14] In regard to the agreements entered into by the 32nd to the 51st respondents it was argued that they were null and void and *ultra vires* the powers of the Council because they contained the renewal clause and a cancellation clause by the lessee which it is alleged to have been unauthorised. I will therefore deal with these leases as a group only in regard to the stated grounds.

[15] In regard to lease agreements entered into between the Council and the 1st to 31st respondents, Mr. Katiti alleged that no approval to enter into such agreements was given by the Council and consequently the Town Clerk and Mayor, who

signed the contracts on behalf of it, were not authorised to do so. As, in terms of sec. 152(1) of the Ordinance, the power to enter into such contracts was that of the Council, it followed that the agreements were *ultra vires* those powers and null and void.

[16] In the Court *a quo* the agreements were also attacked on the basis that they were against public policy and therefore void and, in the alternative, a declaratory order was sought to the effect that the leases contained a tacit term that the agreements would only be renewed subject to council's approval. In argument before us Mr. Arendse informed us that he was only persisting in the *ultra vires* argument.

[17] In his affidavit Mr. Katiti stated that the income derived from these leases were paltry. He stated that the land on which the caravan park is situated is prime property which could

be sold for more than N$ 3 million. He maintained that the development of the land in question would not only generate income for the municipality, but also create jobs and other benefits for "a greater number of people".

[18] The respondents opposed the application and affidavits were filed by the 17th, 18th and 45th respondents. In his affidavit the 17th respondent raised various defences. He, *inter alia,* objected first of all to the prayers of the Council's Notice of Motion in which the relief is claimed jointly and severally against all the respondents. The deponent also raised the defence of misjoinder and pointed out that many of the sites were no longer occupied by the original leaseholders and submitted that the new occupiers should have been joined.

[19] Mr. van der Westhuizen, the 17th respondent, disputed various issues raised by Mr. Katiti. He pointed out that at the time when the Council considered the leasing of permanent sites to the public, the caravan park was under utilized and that the leasing out of these sites brought a regular income for the Council. At the time a proper study was made of the market value of the sites in order to determine a market related rental and he submitted that the rental was still appropriate.

[20] The deponent further submitted that all the agreements were duly and properly entered into and that the renewal clauses contained in the various contracts were standard and were properly so included. He further complained that there were big gaps between the minutes annexed by the Council and that it was therefore impossible to determine what

resolutions and recommendations were taken by the Council concerning the sites.

[21] Confirmatory affidavits, to that of Mr. Van der Westhuizen, were filed by the 18th and 45th respondents.

[22] An affidavit was also filed by the 29th respondent, one Karel Konrad Grunschloss. According to him it became generally known during 1993 that leases of caravan sites at Long Beach were being offered by the Council. At the time he did not know any of the members of the Council nor any of its employees. He made telephonic enquiries and his particulars were taken and he was told that his name, and that of his co-lessee, the 28th respondent, Mr. P.A. Simon, would be entered onto the list of applicants.

[23] They were subsequently informed, again by telephone, that a contract of the lease was ready for them to sign. The deponent stated that when he received the signed lease he was not aware of any of the resolutions taken by the Council nor what the rules of internal administration of the Council was. He pointed out that he had no control over such matters and assumed that everything was regular and in order. Confirmatory affidavits, including such from the then Mayor and Town Clerk, were also filed.

[24] An affidavit was also deposed to by one Rudolf Nechvile, the 23rd respondent. He stated that he was duly authorised to act on behalf of the 19th, 20th, 22nd, 31st. 41st and the Executor of the estate of the 21st respondent. They, at the time, also made enquiries about the Long Beach Caravan

Park and were later telephonically informed to sign agreements. They accepted that everything was regular and each was not aware of any resolutions necessary to be taken by the Council or what the rules of internal administration was. He also pointed out that he and the other respondents were regularly invoiced monthly with the rent payable by them and that they have paid such rental.

[25] Mr. Nechvile also referred to many meetings between the Council, or representatives of the Council and the respondents, where the respondents were given the assurance that their rights would be respected and where there was no indication given that the Council was considering setting aside the agreements of lease.

[26] Mr. Nechvile now also attached a more complete affidavit by the then mayor of Walvis Bay, Mr. B.G. Edwards, who was

a co-signatory of the various lease agreements, together with the then Town Clerk, Mr. F.J. Du Preez.

[27] This deponent, Mr. Edwards, stated that the minutes of meetings, attached by the Council, did not reflect the whole picture concerning the leases of caravan sites at Long Beach. He stated that the inclusion of option clauses in the agreements was something which, as a matter of course, was debated and discussed by Council. He also believed that the members of the Council were aware of the contents of these agreements and would have raised the issue at meetings if there were any difficulties. No such matters were raised.

[28] Mr. Edwards referred to the fact that the lease agreements were drafted by the department which was under the control of Mr. Jan Kruger, who deposed to a supporting affidavit on

behalf of the Council. He, however, nowhere stated that he included clauses in the agreements which he was not authorised to so include. In this regard Mr. Edwards said that Mr. Kruger followed the instructions of the Council whose policy did not exclude option clauses and such clauses were in fact included in many other lease agreements entered into by the Council.

[29] Various other supporting affidavits, to that of Mr. Nechvile, were also attached.

[30] In his replying affidavit Mr. Katiti pointed out that Mr. Edwards and Du Preez did not have blanket authority to act on behalf of the appellants. As regards the position of Mr. Kruger, the deponent pointed out that he was merely a functionary acting on the instructions of Du Preez. He, that is Kruger, questioned, at some time, the authority of Du

Preez and the preparation of the agreements was then given to one van Zyl, a subordinate of Kruger.

[31] In answer to the affidavit of the 23rd respondent Mr. Katiti alleged that even if authority to act on behalf of the Council was purportedly given to the mayor and town clerk, such action would still be *ultra vires* the powers of the Council. It is now stated that it is correct that Kruger was not authorised to include the clauses complained of, he only acted on behalf of the Town Clerk, one de Jager.

[32] By the time this application was filed most, if not all, of the lease agreements had run their initial 9 years and 11 months and written notices were given by the lessees whereby they had exercised their options to renew the leases for a further period of 9 years and 11 months. However, the Council, in writing, informed the lessees that it did not recognise their

right to lease the sites for a further period of 9 years and 11 months as the Council did not regard the renewal clause as binding on it.

[33] The Council divided the respondents into two groups namely the 1st to 31st respondents into one group and the 32nd to 51st into another group. In respect of the first group Mr. Arendse submitted that the appellants never approved their applications to rent sites in the caravan park. Furthermore that those agreements also contained an option whereby the lessees could, after the lapse of the first period of 9 years and 11 months, renew the lease for a further period of 9 years and 11 months. This renewal clause was also never considered and approved by the Council and consequently the Mayor and Town Clerk, who signed these contracts on behalf of the Council, acted *ultra vires* their

powers and the agreements were therefore void and of no force and effect.

[34] In regard to the second group of respondents it was submitted that although their applications to rent sites were considered by the Council and approved these agreements, like those of the first group, also contained an option to renew the lease for a further period of 9 years and 11 months which option was likewise *ultra vires* the powers of the Mayor and Town Clerk and consequently also void and of no force and effect.

[35] It is common cause that the leasing of permanent stands in the Long Beach Caravan Park came about when a Mr. H.J. Bause, respondent no 32nd, wrote to the municipality of Walvis Bay and requested that a permanent site be allocated

to him at the Long Beach Caravan Park. At a meeting held on the 6th December 1989 the Council discussed such possibility and by a majority of 6 votes to 3 resolved:

"(a) That mobile homes for permanent placing will indeed be allowed in the caravan park at Long Beach.

(b) That the following differentiated tariffs regarding mobile caravan stands be approved;

(i)……
(ii)……..
(iii)…..
(iv)…..
(v)…...
(vi)…..

(c) That provision be made for the adjustment of the rental once every 12 months.

(d) That water, electricity, sewage and refuse removal services be paid for separately.

(e) That a written agreement regarding the lease of the stand be compiled and submitted for approval.

(f) That it will be stipulated in the agreement that the term of appropriation will expire after 1 year and that a further lease for a further term will then be

reconsidered by the Council."

[36] This resolution was taken after various persons such as the Town Engineer, the Parks Superintendent and the Town Clerk made recommendations to the Council.

[37] Then there is a big gap and the first meeting by the Council where mobile homes in the Long Beach Caravan Park came again before the Council, was held on 29 July 1993 when an application by one H.M. Dixon was considered by it. On this occasion the following resolution was made:

> "(a) That the application of Mr. H.M. Dixon for the allocation of a stand for a mobile home at Long Beach be approved.
>
> (b) That the increase of tariffs for the existing stands be referred back to the Management Committee.
>
> (c) That the Town Engineer be requested to investigate the expansion of the stands."

[38] Mr. Wepener complained about the fact that there was such a big gap between the minutes of the Council when the first resolution was taken and the above one, a period of almost 4 years, and he submitted that the appellants were selective in their choice of what to put before the Court and what not. However it seems that a Rule 35 (12) notice was served on the Council and that the respondents had an opportunity to, and then did inspect, all the minutes in between and found that none of these minutes reflected anything relevant to the present issues. Moreover, if there was any document that the respondents found relevant or useful, they should have brought it to the attention of the Court.

[39] At a meeting dated 8th October 1993 the Management Committee dealt with the matter referred to it in terms of the

above resolution (para (b)) and also considered recommendations made by the Town Engineer as per para. (c) of the resolution. It also included a list of names of 18 new applicants for permanent stands in the Long Beach Caravan Park.

[40] The recommendations of the Management Committee were considered by the Council at its meeting on 26 October 1993 and the following resolution was taken:

> "(a) That a rent of R150,00 per new stand for mobile units per month be charged.
>
> (b) That the rent for all existing contracts be increased to R150,00 per month as from 1 November 1993.
>
> (c) That an escalation clause of 10% per annum on the lease be included in all contracts entered into in the future.
>
> (d) That a lease period of 9 years and 11 months per stand be entered into for all stands.
>
> (e) That the possibility to allocate more stands be investigated."

[41] The argument of Counsel for the Council is based on the

first and last resolutions set out above. In regard to the first resolution Mr. Arendse submitted that there was a clear indication that the Council did not want an option to renew the lease as part of its lease contracts. This is further supported by the last resolution in that there was no authority, set out therein, to include such a clause in the contracts.

[42] Central to this argument stands sec, 49 of the Ordinance which provides as follows:

> "49. Every Council shall determine the policy and principles to be adopted and applied in regard to the exercise and performance of all powers, duties and functions conferred and imposed on it by this ordinance and any other law and shall at its meetings consider and decide upon –
>
> (a) all motions and questions raised at such meeting;
>
> (b) the matters contemplated by section 50 (1) (b), (c) and (f);
>
> (c) the reports and recommendations submitted by any advisory committee;

(d) proposed by-laws, fees and charges or tariffs of fees and charges, and

(e) any other matter which requires consideration and decision."

[43] In regard to the Council's powers to enter into contracts, Mr. Arendse referred the Court to sec. 152 of the Ordinance. This section provides as follows:

> "152.(1)A council may in the name and on behalf of the municipality enter into contracts for any municipal purposes and for any purpose necessary or desirable for or incidental, supplementary or ancillary to any such purpose or contract: provided that any contract for the provision of supply of municipal services –
>
> (a) outside the municipal area concerned, or
>
> (b) within or outside the municipal area concerned, at charges, fees or tariffs or charges and fees other than those contemplated by section 167(1),
>
> and any amendment or variation of such contract shall not be of force unless and until the Administrator has approved such contract, amendment or variation.
>
> (2) Any contract entered into by a council shall, if in writing, be signed by the mayor and the town clerk and any contract so signed shall be deemed to have been duly executed on behalf of the municipality."

[44] On the strength of these provisions Counsel submitted that only the Council could determine issues concerning policy, that the renewal clause, amongst others, was such an issue and because it was not determined and approved by the Council the Mayor and Town Clerk acted *ultra vires.* This concerns all the contracts. In regard to the 1st to 31st respondents' counsel argued that the Council at no point authorized the increase in the number of sites to accommodate those respondents or the allocation of those sites to them individually as a result of which the Mayor and Town Clerk should not have entered into those contracts as they had no authority to do so and therefore acted *ultra vires* their powers. Mr. Arendse submitted that a functionary purportedly acting on behalf of the government must act within the scope of the powers conferred upon him or her. Where individuals, purporting to act on behalf of a public body,

exceed the limits of their authority as, for example, set out in a resolution by such public body, such action would be *ultra vires.*

[45] Because the actions were *ultra vires* the powers of the Mayor and Town Clerk defences such as waiver, estoppel and the principle established in the *Turquand- case* cannot apply as it would perpetuate an illegality.

[46] In support of these contentions Mr. Arendse referred the Court to various authorities to which I shall refer at a later stage.

[47] It seems that Counsel for the Council and Counsel for the respondents parted company at the very beginning, namely on the issue of whether the Mayor and Town Clerk acted legally or not. Mr. Wepener submitted that there was no duty on the Mayor and the Town Clerk, once they were armed with the

resolution taken on 26 October 1993, to revert back to the Council or to put the various contracts before the Council for its approval. Counsel referred to the affidavit of Mr. Edwards which is to the effect that the minutes placed before the Court did not reflect what transpired, in this regard, in the Council.

[48] Counsel further submitted that the contracts fell within the ambit of sec. 152(1) of the Ordinance. Counsel submitted that sec. 152(2) is a prescription standing on its own and not needing any resolution by the Council. It is also nowhere stipulated that the agreements, once signed by the Mayor and the Town Clerk, were to be approved by Council. Council, by its discussion on 26 October, 1993, was fully aware of the contents of the contracts and left the day-to-day running of its affairs in the hands of its officials. Kruger, who made an affidavit in support of the Council, nowhere stated that he was

not authorised to draft the agreements in their current terms.

[49] Counsel for the respondents also raised various other defences. It was argued that the present application was in fact an administrative review and that, on the facts, as stated by the Council, it could not ask the Court to set aside its own actions. Being a review, there was an unreasonable delay by the Council in bringing the matter before the Court. Counsel also raised the defences of waiver, estoppel and the rule in *Royal British Bank v Turquand,* (1856) 119 All ER 886.

[50] Before dealing with the arguments presented by Counsel it is in my opinion necessary to place certain facts and issues in perspective. When in 1989, the first application was made by a private individual to be allowed the facility of a permanent stand the income of the Council from the caravan park at Long Beach was only sporadic. (See Record p 53.) That was mostly from

holidaymakers during the holiday season. The increase in value of the land, of which Mr. Katiti deposed, seems to have come only after 1993/1994. There is no indication by him when that was established.

[51] The first applicant for a permanent stand, Mr. Bause, had nothing more in mind than to leave a caravan at his stand. (See Record p 59 and 60). That was something which, at the end of the period of lease, could be hooked onto a motor vehicle and driven away.

[52] It is clear that the question whether the Council should allow persons to lease stands on a more permanent basis was discussed and agreed on at its meeting of 6th December 1989. This was preceded by investigation by various officials of the Council which is further proof that the matter was properly and

conscientiously considered by the Council.

[53] This then led to the above resolution where it was resolved that a contract of lease would only be for a year and would then be reviewed by the Council. This seemingly was because certain members of the Council were concerned that the letting of permanent stands could lead to the development of a squatter's camp. Which, so it seems to me, was a real concern especially if permanent stands were to be occupied by caravans. However it is also clear that sec. 113 of the Ordinance, at the time, required the Council to comply with certain prerequisites before it could let any immovable property unless the rent period was not longer than 12 months without an option to renew. This is precisely the resolution that was taken by Council on this occasion.

[54] At its meeting dated 29th July 1993, the Council, without

any dissenting vote, allowed Mr. Dixon (respondent No. 38) a stand to erect a mobile home at Long Beach. The Council further resolved to refer the issue of tariffs back to the Management Committee and further requested the Town Engineer to investigate a possible further extension of such stands.

[55] Then at its meeting of 26 October 1993 the Council, again without any dissenting vote, discussed the issue of mobile homes. On this occasion it was, *inter alia,* decided to increase the lease period to 9 years and 11 months per stand and to further investigate the possibility of allocating more stands.

[56] From the above it can be concluded that although at the start some council members were skeptical about the advisability to make permanent stands available to members of the public, by July 1993 this was no longer the position.

[57] Before the Council embarked upon this venture various officials, such as the Town Engineer and the Superintendent of Parks, were required to investigate and to report to the Council about the suitability to undertake such a venture. The decision to make permanent stands available at Long Beach was not arbitrarily taken or at a whim of one or other of the councilors, nor was the Council tricked into making those decisions.

[58] It would seem that the endeavour only really took off after the meeting of the 26th October 1993 when the longer rental period ensured more permanency to lessees bearing in mind the difficulty of putting in place and removing mobile homes and the costs involved.

[59] The resolution of 26 October 1993, in my opinion, replaced the resolution of 6 December 1989. The resolution of

26 October 1993 differed, more particularly, in two important respects from the one taken in 1989. It firstly did not require that the written agreement concluded with lessees again be put before the Council for its approval and it secondly did not require that, at the end of the lease period, the matter should come up for review before the Council before the lease period could be extended.

[60] The option to extend the lease for a further period, subject to escalation of the rent, is set out in clause 16 of the agreement. Such a clause is contained in most contracts of lease and is a normal feature of a rental contract. After all if the purpose is to rent out a property, and the lessor is otherwise protected by his contract against abuse of the property by the lessee or against non-payment of the rent, it will only serve his purpose to include such a clause in the contract. Mr. Arendse

submitted that the clause was not normal and argued that it would fetter the discretion of the Council to deal with the property. I do not agree. At the time when the contracts were concluded the purpose was to rent out certain stands on a permanent basis. These stands were in a caravan park which was a public facility created by the Council. At the time these stands would provide a regular income for the Council where previously the income was sporadic. There is no indication that the Council wanted to utilise the property for any other purpose than a caravan park and that at that stage the value of the property was regarded to be in excess of N$3 million.

[61] The contract of lease contains 24 clauses which, in my opinion adequately protected the lessor. Apart from containing the various points set out in the resolution of the Council it provided, in addition, that a mobile dwelling shall be approved

by the City Engineer before it was placed on the site and was to be painted in certain specific colours (Clause 6); it provided for certain safety measures to be taken (Clauses 7 and 8); it prohibited the hanging out of laundry in the open and the erecting of structures without prior approval (Clauses 9 and 10); the mobile home had to be maintained in proper order and provided for the right of the lessor to enter the site for inspection (Clause 12); the Municipal health and building regulations were applied to the site and the lessee was warned that further and other regulations might apply to the site, violation of any of these regulations to be regarded as a breach of the contract. (Clause 13); the lessee could not sublet the site without the written consent of the lessor (Clause 15); it provided for the removal of the mobile home at the expiration of the lease and cleaning of the site and afforded the lessor the right to remove the mobile home if the lessee should not do so within a period of

time prescribed by the lessor (Clauses 18, 19 and 20); in the case of non-payment or in the event of the lessee breaching any of the provisions of the agreement, the lessor had the right to require the lessee to pay the rent or remedy the breach within a period of 14 days failure of which would entitle the Council to cancel the lease. (Clause 23) and Clause 24 contained an indemnification in favour of the lessor against any legal proceedings, claims, losses, prejudice or damage which the lessor or any third party might suffer or might become involved in directly or indirectly on account of the occupation of the property by the lessee or his employees.

[62] The above excerpt shows a complete and comprehensive contract of lease protecting the Council against most eventualities that may arise and protecting its rights by providing for a right to cancel on breach of any of the provisions of the

lease and failure to rectify such breach after notice of 14 days. In my opinion many of the other clauses, other than clauses 16 and 17, also contain matters of policy, *inter alia* clauses 23 and 24. However the Council was content to leave these matters in the hands of its management personnel. Although it cannot be said that clause 17, granting to the lessee the right to cancel the lease on notice, is a standard clause it did not diminish the powers of the Council and was, it seems, never implemented by any of the lessees. However if the inclusion of a cancellation clause for the lessee is a matter of policy, as was argued by Mr. Arendse, then the inclusion of such a clause, on behalf of the lessor, and more specifically the grounds for cancellation, must likewise be a matter of policy. And yet one could hardly envisage a situation where a lessor would be content to forego such a clause.

[63] Clauses 16 and 24, and variations thereof, are standard clauses which one will find in almost every contract of lease and the fact that there was no specific or express resolution taken in connection therewith by the Council, together with the other provisions which are in my opinion matters concerning policy, clearly showed that the Council was content to leave that in the hands of its personnel who drafted the agreements. After all the Mayor and the Town Clerk were signatories to all the agreements and it is highly unlikely that the Council was left in the dark concerning the agreements. See also the evidence of Edwards who was then Mayor. (P 326 of the record.) Bearing in mind the aforegoing, one cannot but conclude that Mr. Arendse accepted that, at least in regard to the agreements of the 32nd to 51st respondents, there was some instruction or authority given by the Council to its personnel to draw up a lease agreement which would not only contain the issues

resolved by the Council.

[64] On the strength of sec. 49 of the Ordinance Mr. Arendse submitted that it was only the Council which could determine policy such as the matters contained in clauses 16 and 17.

[65] If Counsel thereby meant that it was only the Council, i.e. the nine elected members, which could determine policy, then one need only to look at the definition of the word ‘council’ in the Ordinance to see that that was not correct.

[66] Section 2(xviii) contains a definition of the word “council” and it states as follows:

> “council” means the council of a municipality and includes any committee or employee of the council exercising powers or performing duties or functions delegated to it or him by the council; (lx)

[67] Section 52 of the Ordinance makes it clear that, with the

exception of the items set out in sub. sec. 1(a) (i) to (v), the Council could delegate any of its powers and functions to the management committee or an employee and such employee "shall… have the powers and perform the duties and functions of the council." The items reserved for the exclusive attention of the Council and as set out in sec 52(1)(a)(i) to (v) do not appear to specifically include matters of policy.

[68] It follows therefore that in this instance there is express power to delegate all functions and duties of the Council except those specifically excluded as set out above. No specific formalities are prescribed by the Ordinance of how a delegation should take place and whether in the circumstances delegation took place can also be a matter for construction.

[69] As stated herein before the Council, except for those matters set out in its resolution of 26 October 1993, was

satisfied to leave the other provisions of the contracts of lease in the hands of the relevant officials who, being employees of the Council of a major town, one could accept, were not unfamiliar with the drafting of documents such as a contract of lease. This is aptly demonstrated by the very contract entered into by the Mayor and Town Clerk on the one side, and the various respondents, who were awarded sites, on the other side.

[70] What would qualify as a matter of 'policy' is in my opinion not always clear and what would be regarded as a matter of policy may differ from person to person and almost every decision taken can be elevated or be regarded as a policy decision. Longman's *Dictionary of Contempory English* describes it as a course of action for dealing with a particular matter or situation, or as a course or principle of action. Seen in this way many of the clauses in the lease agreements can be

regarded as dealing with matters of policy. A further example would be the involvement of the City Engineer to give his approval before any mobile home could be installed on a site.

[71] Counsel was astute to limit the complaints of the Council to only two of the clauses. To have objected to all the other clauses as well would have drawn attention to the fallacy of the argument more so because Council's resolution only touched on a few issues and was silent on important policy issues such as pointed out herein before. Issues without which a contract of lease would be incomplete as it involves clauses which are standard in almost every contract of lease and would have left the Council without adequate protection if not imported into the contract.

[72] In my opinion the resolution of 26 October 1993 contained the issues that the Council wanted to be included into

a contract of lease and it left everything else to its management personnel to draw up a document which would in all respects contain the necessary provisions whereby the Council would be protected as one would find in most other contracts of lease. It did not require the contract to be placed before it again to mark its approval because, in all probability, it knew that the personnel to which it was referred would be more knowledgeable of these matters than the Council itself.

[73] By leaving these matters in the hands of the personnel the Council thereby authorised those drafting the contract to deal with all other matters, except those set out in its resolution, also matters of policy, to draw up a contract of lease which would have business efficacy. This the Council could do as I have tried to point out herein before.

[74] In the circumstances the argument of Counsel based on

clauses 16 and 17 of the contracts of lease must be rejected.

[75] That leaves the argument that in respect of the first 31 respondents there was no approval by Council to enter into these lease agreements and consequently the leases were *ultra vires* and null and void.

[76] I agree with the Judge *a quo* that once the principle was established to allow mobile homes on stands on Long Beach Caravan Park the Council gave the green light for further development and left matters in the hands of its personnel such as the City Engineer, the Superintendent of Parks and others. Already in addendum 26, which formed part of the meeting of the Management Committee of 8 October 1993, the recommendation was made that stands be allocated as per the waiting list as set out in its report.

[77] This in fact happened and all the names of lessees who admittedly have approved contracts of lease, appeared on this list. This addendum 26 was dealt with by the Council at its meeting of 26 October 1993 (See Record p 83, line 40, Annexure "AK 4".) Annexures "AK 3" and "AK 4" are also the sources from which Mr. Katiti concluded that those lessees had contracts which were authorised by the Council. (See record p. 43, para 77).

[78] Again this authorisation by the Council was not express and the fact that contracts were entered into with these lessees by the Mayor and Town Clerk, as required by the Ordinance, could only mean that the allocation of the stands and the number of stands to be allowed were left in the hands of management personnel such as the Town Engineer, the Superintendent of Parks and the Town Clerk. Therefore when

the Mayor and Town Clerk signed these contracts they did so on the authority of the Council bearing in mind the extended meaning of that word as set out in the definition clause of the Ordinance.

[79] No objection was ever raised, in the Council as then constituted, to the authority, or lack of authority, of the Mayor and Town Clerk to enter into all these contracts of lease. Both the Mayor and the Town Clerk attended Council meetings and it would hardly be possible for them to conceal what was happening, if they were committing a fraud on the Council. This would then also have involved senior personnel such as the City Engineer and the Superintendent of Parks. Furthermore the Council itself would have been alerted to what was happening by the fact that they were receiving rental far in excess of the number of approved contracts and stands

allocated by them. At some stage the so-called “illegals” were far in excess of those whose names came before the Council at the meeting of 26 October 1993, namely 31 to 20.

[80] All this is further supported by the fact that no further resolutions were taken by the Council in regard to the allocation of stands for the erecting of mobile homes or that any further names served before the Council notwithstanding the fact that the resolution of 26 October 1993 enjoined the personnel of the Council to *further* investigate the possibility to allocate more stands.

[81] It seems that after the meeting of 26 October l993 no further resolutions were taken by the Council concerning permanent stands at Long Beach Caravan Park. Mr. Arendse throughout strongly relied on the absence of formal resolutions taken by the Council. However, although it was accepted that

the lease agreements of the 32nd to 51st respondents were approved by the Council there is no formal resolution to that effect. Nor is there a formal resolution allocating stands to these respondents. The dearth of formal resolutions can therefore not always lead to a conclusion that the Council did not act and one should rather consider all the surrounding circumstances before attributing lack of authority to those executing dealings on behalf of the Council.

[82] Counsel for the appellants also argued that defences such as waiver, estoppel and the rule set out in the *Turquand*-case were not available to the respondents as that would mean the perpetuating of an illegality which, as was shown by the authorities relied upon by Counsel, was not permissible.

[83] Although I rejected the *ultra vires* argument of Counsel I

am satisfied that the appeal should also be dismissed on the principles enunciated in the *Turquand*-case. I say so for the reasons as set out herein below:

[84] The cases referred to by Mr. Arendse are *Hoisan v Town Clerk Wynberg,* 1916 AD 336, *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd,* 2001 (4) SA 142 (SCA); *Western Fish Products Ltd v Penwith DC* 2 All kER 204; *Farren v Sun Service SA Photo Trip Management (Pty) Ltd*, 2004 (2) SA 146 (C); *Khani v Premier, Vrystaat,* 1999 (2) SA (O) and *City of Tswane Metropolitan Municipality v R P M Bricks (Pty) Ltd* [2007] SCA 28 (RSA). See also *Baxter* **Administrative Law** at 401-2.

[85] The principle established by the above cases is that where a repository of power exceeds its powers in terms of a statute or acted contrary thereto or acted unlawfully the above defences

would not be available if it would uphold an illegality. In the *Eastern Cape* – case the Provincial Government entered directly into a contract of lease without, in terms of the Provincial Tender Board Act, Act 2 of 1994, s 4(1), doing so through the Tender Board. The Court found the contract to be invalid. The Court re-affirmed the principle that "a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance on the doctrine of estoppel." Again in the *City of Tswane* – case, employees of the City altered certain tariffs for the delivery of coal which by statute could only be changed by the Council and in respect of which there was a prohibition to delegate such power to employees. The City refused to pay the new tariff and the respondent's reliance on estoppel was rejected by the Appeal Court on the basis that it would perpetuate an illegality.

[86] In order to bring the present case within the principle

established by the above cases Mr. Arendse argued that only the Council, constituted by its elected members, could enter into these contracts and therefore when the Mayor and Town Clerk signed the contracts they acted *ultra vires* because they firstly did not have the authority to include clauses 16 and 17 into the contract and further, in regard to those contracts where the names of the lessees were not put before the Council, there was no authority to allocate stands or approval of the lessees by the Council. This argument was based on section 49 and l52(1) of the Ordinance.

[87] The statutory scheme in regard to the Ordinance is in my opinion far different from those instances which were germaine to the cases set out above. I have already referred to the definition of the word “council” which includes an employee of the Council to which the Council has delegated certain

functions. As to what functions could be delegated the Court must look at sec. 52 of the Ordinance. This section provides as follows:

"52(1) A Council may –

(a) with the approval of the Administrator by special resolution and subject to such conditions that it may impose, generally or specially delegate to the management committee or any employee of the council any power, duty or function of the council, including a delegated power, duty or function, other than –

(i) one which is required to be exercised or performed by special resolution;

(ii) the power to decide appeals contemplated by subsection (3);

(iii) the approval of the estimates of income and expenditure in terms of section 75;

(iv) the levying of rates, fees and charges, and

(v) the dismissal or alteration of conditions of service of the town clerk and departmental heads,

whether such power, duty of function is conferred or imposed by this or any other ordinance and may in like manner amend such delegation, and

(b) notwithstanding anything to the contrary in section 56 or the rules of procedure of the council, withdraw any such delegation,

and any amendment or withdrawal of any such delegation shall not invalidate anything done in pursuance of a decision lawfully taken by such management committee or the employee concerned.

(2) In respect of any delegation in terms of subsection (1) the management committee or the employee concerned, as the case may be–

(a) shall, subject to the conditions of such delegation, have the powers and perform the duties and functions of the council;

(b) may act thereon through any employee under its control, and

(c) may, instead of exercising or performing any power, duty or function so delegated, submit its or his report and recommendation thereon to the council for its decision in the matter.

(3) Any person who feels aggrieved by a decision of the management committee or of any employee under a delegation in terms of subsection (1) may appeal to the council against such decision by giving notice in writing thereof and of his grounds of appeal to the town clerk."

[88] According to my copy of the Ordinance supplied by Counsel for the Council the power of the Administrator to approve was delegated to the Council by letter 13/88 of 18th April 1988. So the approval of the Administrator is not an issue. What is clear from the section is that the power to delegate was wide enough to include also a delegated power, duty or function.

[89] Apart from the items set out in subsection (1)(a)(i) to (v) the power of the Council to delegate to an employee of the Council is unrestricted. It would in my opinion also include matters concerning policy. The only restriction set out in subsec. (1)(a) which may be applicable to the present matter is (a)(iv), the levying of rates, fees or charges.

[90] In so far as it was necessary the Council determined at its meeting of 6 December 1989, and again at its meeting of 26 October 1993, the tariffs payable in regard to such a stand and further resolved that water, electricity, sewage and refuse removal services shall be paid for separately. The Council did not determine new rates for these services but seemingly applied the existing rates.

[91] The argument by Mr. Arendse that only the Council may, in

terms of sec. 152(1), enter into a contract whereby services are provided, is correct. It is correct in the sense that sec. 52 prohibits the delegation of, *inter alia*, the levying of rates, fees and charges. However, as pointed out previously, the Council by its resolution dated 6 December 1989, and its later resolution of 26 October 1993, determined these issues and they were taken up in the agreement of lease. (See clause 14 of the agreement of lease). As far as the approval by the Administrator was concerned we were informed by Counsel, and that is also the note on my copy of the Ordinance, that that function was also delegated to the Council by letter 3/88 of l8 April 1988.

[92] We are therefore, in the present instance, not dealing with a matter where the Council exceeded its powers or acted contrary thereto or acted unlawfully. This is further also not

an instance where those, acting on behalf of the Council, could not statutorily do so and so that third parties dealing with the Mayor and Town Clerk should have satisfied themselves that these officials had the necessary authority. In fact what third parties saw was a contract signed by the Mayor and Town Clerk as was required by the Ordinance.

[93] If the Council neglected to give the necessary instructions whereby these officials were clothed with authority to act then in my opinion the Council did not comply with its own management rules and it would be prevented by the rule in the *Turquand* – case from avoiding the consequences of its contracts.

[94] The rule in the *Turquand* – case was first formulated in regard to the internal management rules of registered companies where **Jervis, C.J.** stated the following:

> "We may now take it for granted that the dealing with these companies are not like dealings with other partnerships and that the parties dealing with them are bound to read the Statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by resolution, he would have the right to infer the fact of a resolution authorising that which on the face of the document appears to be legitimately done." (See p 437 I)

[95] The above passage was quoted with approval by the South African Appeal Court in the case of *Mine Workers' Union v. Prinsloo,* 1948 (3) SA 83l (AA). The rule was extended to the workings of municipalities in the matter of *Potchefstroomse Stadsraad v Kotze,* 1960 (3) SA 616 (AA). (The case was originally reported in Afrikaans and the Court was handed a translated copy thereof into English. The excerpts quoted by me are from this translated copy.)

[96] In the *Potchefstroomse Stadsraad* – case the Town Clerk, by letter, cancelled a lease agreement between the Municipality and the respondent. This cancellation was unauthorised and when the respondent was sued for arrear rental the South African Court of Appeal dismissed the appeal and found for the respondent on the basis of the rule in the *Turquand* – case, *supra.*

[97] After discussing the *Turquand* – case, van Blerk, J.A., who wrote the majority judgment, stated as follows on page 622 namely –

> "The true position is that resolutions of the Council whereby instructions are given to the town clerk are acts regarding the internal managing of the Council. As is obvious from the quotation above from the *Turquand* – case, there is a difference between matters of public nature and acts regarding the internal management of bodies. While knowledge of the former is assumed, the existence of the latter can be deduced and it can be assumed that it has been gratified. This rule is according to Judge of

Appeal GREENBERG in the *Mine Workers' Union case supra,* p. 845:

'…..based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed.'"

[98] The learned Judge of Appeal then applied the rule to Municipalities as follows–

> "The same principle applies here. For the proper execution of its functions the municipality is obliged to enter into transactions with members of the public. From a business point of view it would be impractical if respondent were forced, after he had received the letter from the town clerk, to enquire and make sure that the town clerk was indeed authorised by the Council to make the announcement. It is also difficult to see the use of it because the person from whom he would have to get the assurance would be no one other than the town clerk himself. He is the spokesman of the Council…..
>
> As appears from the by-laws of the Council, the town clerk is the chief administrative and executive officer of the Council. He is responsible for the proper execution of the business of the Council. If authorised by the Council he can legally enter into the agreement of cancellation with respondent, and respondent would be justified to accept without queries that the internal management of the Council took place properly."
> (page 622C to 622H)

[99] The following cautionary note was sounded by the learned Judge –

> "It is a prerequisite here for the enforcement of the *Turquand* rule that the agreement of cancellation is one that the Council could legally make through its town clerk without being bound to the compliance with certain statutory preconditions or directions….."(page 623E)

[100] In conclusion on this issue the learned Judge stated as follows –

> "The fact that the Council had, as a matter of fact, not given an instruction to cancellation, is immaterial and cannot prejudice the respondent. The Council cannot deny the town clerk's authorisation, because, if the letter addressed by the town clerk to respondent contained a statement of cancellation by the Council, the Council is bound by it." (See page 624B)

[101]Similar sentiments were expressed in the earlier case of *National & Overseas Distributors Corporation (Pty) Ltd v Potato Board,* 1958 (2) SA 473 (AA) at page 480 where SCHREINER, J.A. stated the following –

> "The contract being one which the respondent could lawfully enter into and Mr. Rust having been the proper person to make contracts when an approving resolution by the Board had been passed, it seems to follow that so far as the outside world was concerned he bound the respondent when he made a contract without such a resolution (cf. *S.A.I.F. Co-operative Society v Webber,* 1922 T.P.D. 49). The rule in the *Royal British Bank v Turquand, supra,* which was followed in *Mine Workers' Union v J.J. Prinsloo,* 1948 (3) SA 831 (AD), applies and any mistake that may have occurred and led to the appellant's tender being accepted without supporting resolution by the Board could not prejudice the appellant. So far as it was concerned there was a properly made contract binding on the respondent."

[102]The following later cases also re-affirmed the extension of the rule in the *Turquand* – case to municipalities namely, *Jones and Druker, NNO v Durban City Counsel,* 1964 (2) SA 354 (D & C.L.D.) and *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk,* 2004 (3) SA 486 (SCA).

[103]As was pointed out by the learned Judge in the *Potchefstroomse Stadsraad* – case a prerequisite for the

enforcement of the *Turquand* rule is that the Council could legally, through the Mayor and Town Clerk, conclude the agreement of lease without being bound to the compliance with certain statutory preconditions or directions. If I understood him correctly Mr. Arendse conceded that the Council could do so and he also pointed out that the precondition of approval by the Administrator was complied with in that that power was delegated to the Council.

[104]A reading of section 152(1) of the Ordinance, read with the delegation by the Administrator, clearly support this contention. There is therefore no legal impediment on the application of the rule to this case.

[105]All the agreements were signed by the Mayor and the Town Clerk. If any of the lessees had taken the trouble to look at the Ordinance circumscribing the powers of the Council they

would have seen, not only that the Council could enter into contracts of lease, but that written contracts were to be signed by the Mayor and Town Clerk and that in regard to contracts so signed it was deemed that such contracts were duly executed on behalf of the municipality. (Sec. 152(2).) This, in my opinion, makes this case even stronger than the *Potchefstroom*-case.

[106] For purposes of the *Turquand* rule it seems to me to be immaterial whether the deeming clause is rebuttable or not. Furthermore if the Council did not give the necessary instructions to enter into these agreements the Council cannot now deny authorization because if the agreements had been concluded on behalf of the Council, which indeed they were, the Council is bound by it. (See the *Potchefstroomse Stadsraad*-case, *supra,* page 624B.)

[107] I am therefore of the opinion that the rule in the *Turquand* –

case applies to the present instance and that the Council cannot now deny the authority of the Mayor and Town Clerk in regard to the lease agreements which were concluded by these officials on behalf of the Council.

[108] Because of the conclusion to which I have come it is not necessary to deal with the other defences raised by the respondents.

[109] For the above reasons I am of the opinion that the appeal must be dismissed and the Council is ordered to pay the costs of those respondents who opposed the appeal.

_____

STRYDOM A.J.A.

I agree,

_____
SHIVUTE C.J.

I agree,

_____
CHOMBA A.J.A.

COUNSEL ON BEHALF OF THE APPELLANTS: ASSISTED BY:	MR. N. ARENDSE, S.C. MR. D. BORGSTRöM
Instructed by:	Conradie & Damaseb Legal Practitioners
COUNSEL ON BEHALF OF THE RESPONDENTS:	MR. L. WEPENER, S.C.
Instructed by:	Erasmus & Ass.