



**REPORTABLE**

CASE NO: SA 14/2020

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MOUSE PROPERTIES NINETY EIGHT CC**

**Appellant**

and

**MINISTER OF URBAN AND RURAL DEVELOPMENT  
TOWN COUNCIL OF THE MUNICIPALITY OF  
OSHAKATI  
BH PROPERTIES  
FAI SQUARE DEVELOPMENT CONSORTIUM  
KALAHARI HOLDINGS (PTY) LTD  
LYNX DEVELOPERS (PTY) LTD  
OSHIWANA PROPERTY DEVELOPERS  
NDI HOLDINGS (PTY) LTD  
SINCO INVESTMENTS  
SUN INVESTMENT CC  
TECLINK CONSULTANTS  
WATER POWER TRADING CC**

**First Respondent  
Second Respondent  
  
Third Respondent  
Fourth Respondent  
Fifth Respondent  
Sixth Respondent  
Seventh Respondent  
Eighth Respondent  
Ninth Respondent  
Tenth Respondent  
Eleventh Respondent  
Twelfth Respondent**

**Coram:** DAMASEB DCJ, SMUTS JA and FRANK AJA

**Heard:** 11 March 2022

**Delivered:** 11 April 2022

**Summary:** This is an appeal against the decision of the court *a quo* dismissing the appellant's application and upholding the Minister's decision not approving the sale of a prime erf to the appellant. The facts briefly are that the appellant together with ten others (3<sup>rd</sup> to 12<sup>th</sup> respondents) in response to a notice placed in the print media by the Town Council of Oshakati (Town Council) made proposals to the said Town Council for the development of a prime erf (ie Erf No. 1342, Extension 4 (the erf)), belonging to the Town Council, in the town of Oshakati. The Town Council provisionally accepted the proposal of the appellant. One of the conditions was that the approval of the Minister had to be sought for the sale of the relevant property to appellant in terms of ss 63(2) and 30(1)(t) of the Local Authorities Act 23 of 1992 (the Act).

On 9 March 2018, the Minister decided not to approve the sale in terms of s 63(3)(b)(i),(ii) and (c) of the Act and referred the matter back to the Town Council with certain directives and for reconsideration. The appellant maintaining that the approval from the Minister was not necessary and that the Minister in any event did not exercise his discretion fairly and reasonably, approached the High Court to have the Minister's decision reviewed and set aside and for a declaratory order that, as the Minister's assent to the sale of the property was not required, there existed a valid and enforceable sale agreement between the appellant and the Town Council for Oshakati.

The appeal lies against the decision of the court *a quo* and seeks the original relief on appeal.

Appellant's case was that the Minister's approval was not necessary pursuant to s 30(1)(t) and even if s 63 was applicable there was no private transaction and the requirements relating to private transactions stipulated in s 63(2) were not applicable in the present circumstances and hence the approval of the Minister was also not required in terms of this section. Appellant also contended that it was not given an opportunity to make representations on the price of the property before the Town

Council decided to sell it at a price of N\$2,5 or N\$3,5 million and other factual matters raised by the objectors to the sale and by the Minister before his decision to not approve the sale of the said erf.

First respondent's position was that the Minister exercised the powers granted to him pursuant to s 63(3)(b) and (c) when he made his decision.

*Held that, the matter of Namundjebo-Tilahun NO & another v Northgate Properties (Pty) Ltd & others (SA 33/2011) [2013] NASC 12 (07 October 2013) refers – this court agrees with the analysis by Strydom AJA that the word 'so' in s 30(1)(t) of the Act can only apply to the manner in which an acquisition of a local authority is dealt with ie 'with the prior approval of the Minister and subject to such conditions, if any, as may be determined by him or her. . .'. The disposal is to happen in the same manner or in the same way as prescribed for the acquisition of property.*

*Held that, as the price was determined by the Town Council and accepted by the appellant without any public input or a transparent public bidding process, the sale was thus in essence one by private transaction.*

*Held that, the appellant is correct when it submitted that s 63(2) and (3) did not apply to the intended disposal of the property by the Town Council in this matter.*

*Held that, the prior approval of the Minister was and is required for the intended disposal, this is however pursuant to the provisions of s 30(1)(t) of the Act.*

*It is thus held that, s 63 was not applicable to the present matter and the approval or otherwise of the Minister had to be forthcoming by virtue of the powers vested in him by s 30(1)(t). It follows that the Minister could not make his decision in terms of s 63(2) but had to do so pursuant to the powers granted to him by s 30(1)(t). The Minister thus acted *ultra vires* the powers granted to him in s 63 when he made his decision in respect of a matter which did not fall within the ambit of s 63.*

*Held that*, although the Minister's decision must be set aside, this is not the end of the matter or of the Minister's involvement as s 30(1)(t) has not yet been complied with and it is still necessary to obtain the approval of the Minister for the transaction in terms of this section.

*Held that*, as the *audi alteram partem* was not applied, in respect of the price and other factual issues raised by the objectors and the Minister and taking cognisance of the fact that the Minister is the designated decision maker in terms of the Act, and not the court, the matter has to be referred back to the Minister to make a decision afresh after consideration of representations from the appellant.

The appeal succeeds as per the order of this court.

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## APPEAL JUDGMENT

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FRANK AJA (DAMASEB DCJ and SMUTS JA concurring):

### Introduction

[1] Local Authorities in Namibia are placed in one of three categories, namely municipalities, towns or villages and their activities are conducted by municipal councils, town councils or village councils respectively.<sup>1</sup> These councils exercise the powers granted to them by the Local Authorities Act 23 of 1992 (the Act). Recognised local authorities are legal persons and are listed in Schedule 1-3 of the Act.<sup>2</sup> Schedule 1, which consists of Part I and Part II, contains the municipalities, Schedule 2 the towns and Schedule 3 the villages. In general terms, as far as the powers of local

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<sup>1</sup> Section 3 of the Local Authorities Act 23 of 1992 (the Act).

<sup>2</sup> Section 6 of the Act.

authorities are concerned, the Act is structured so that municipalities are more autonomous than towns and towns more autonomous than villages when it comes to their functions. Thus Schedule 1 Part I municipalities (ie Swakopmund, Windhoek and Walvis Bay) are ranked highest when it comes to autonomy and the autonomy becomes less and less as one cascades down to Schedule 1 Part II then Schedule 2 and lastly Schedule 3. Put differently, the supervisory role of the Minister of Urban and Rural Development (the Minister) over local authorities increases as one moves from municipalities to towns and then to villages.<sup>3</sup>

[2] Appellant together with ten others (3<sup>rd</sup> to 12<sup>th</sup> respondents) in response to notices placed in the print media by the Town Council of Oshakati (the Town Council) made proposals to the said Town Council for the development of a prime erf (ie Erf No. 1342, Extension 4 (the erf)) in the town of Oshakati belonging to the Town Council. The Town Council provisionally accepted the proposal of the appellant. One of the conditions was that the approval of the Minister had to be sought for the sale of the relevant property to appellant.

[3] The Minister decided not to approve the sale and referred the matter back to the Town Council with certain directives and for reconsideration. The appellant, maintaining that the approval from the Minister was not necessary and that the Minister in any event did not exercise his discretion fairly and reasonably, approached the High Court to have the Minister's decision reviewed and set aside and for a declaratory order that, as the Minister's assent to the sale of the property was not

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<sup>3</sup> Sections 3, 18, 27, 30, 30(3), 63 and 73 of the Act.

required, there existed a valid and enforceable sale agreement between the appellant and the Town Council for Oshakati.

[4] The court *a quo* dismissed the application and upheld the decision of the Minister. The appeal lies against this decision and seeks the original relief from this court.

### Chronology

[5] During August 2014, the Town Council by notices in the print media solicited proposals for the development of a property belonging to it in a prime spot in the town of Oshakati. What was sought according to the notices was a 'Concept Design and Development' for a commercial business complex. These notices further stipulated that proposals of Namibian individuals and companies with a proven track record of high rise building development would be considered. These notices did not indicate that the Town Council intended to sell the property to the prospective developer. Further information could be sourced from the offices of the Town Council.

[6] From the further information available at the offices of the Town Council it is apparent that what was envisaged was the development of a commercial complex that would house offices, shops and restaurants with adequate parking. The design had to fit in with the environment and be of such a nature as to handle the traffic and pedestrian flow in the area. Overall, the development was envisaged to 'give the town of Oshakati a new face and status that will contribute to the economic growth of the town, thereby creating employment opportunities'. This information available at the

offices of the Town Council indicated that the Town Council intended to dispose of the property.

[7] As mentioned, the notices solicited 11 proposals and the proposers were each given the opportunity on 11 December 2014 to present their proposals to the Town Council. The Land and Housing Committee (the Committee) of the Town Council was tasked to evaluate the proposals and to prepare a report in this regard. This Committee consisted of three employees of the Town Council with relevant knowledge and experience. The Committee presented a report to the Town Council on 30 April 2015 where it was discussed but no decision was taken. The minutes of the meeting found their way to the Minister pursuant to s 15(2) of the Act who per letter dated 1 September 2015 directed the process to be followed. This was to establish if the proposals adhered to the advertised requirements, to evaluate the proposals against the technical requirements by the relevant department who had to forward its finding and recommendations to the Land Committee who in turn had to forward their recommendations to the Management Committee who had to forward its recommendations to the Town Council. In reaction to the directive from the Minister the Town Council held an extraordinary meeting on 15 December 2015 and resolved to implement the directives of the Minister.

[8] Despite resolving to implement the directives from the Minister this did not materialise. The Committee simply prepared a report dated 30 December 2015 for consideration by the Town Council. Whereas one can accept that the Committee did evaluate the proposals against the criteria in the advertisements and against the

criteria contained in the general conditions and undertook a technical evaluation and was in fact the Land Committee referred to in the directives from the Minister it was clearly not envisaged that this Committee would have to undertake all these tasks. Instead it was clearly intended that the scrutiny of the proposals had to be undertaken in a multi-staged approach culminating in a recommendation from the management committee to the Town Council. Be that as it may, the envisaged scrutiny by the Management Committee was simply bypassed with a report directly to the Town Council.

[9] The Committee scrutinised the proposals by comparing them with the requirements for the proposed development mentioned above and for compliance with the Oshakati Town Planning Scheme. Based on their assessment, they compiled a 'Technical Score Summary' in respect of all the proposals. Based on this summary the top three proposals were identified to be FAI Square Development Consortium (fourth respondent), Lynx Property Developers (Pty) Ltd (sixth respondent) and Sun Investment CC (tenth respondent). The Committee then only considered these three proposals so as to make a recommendation. Both the proposals of Sun Investment CC and Lynx Property Developers (Pty) Ltd were then excluded because they proposed high rise buildings (11 floors and 15 floors respectively) which was in conflict with the Town Planning Scheme which only allows two floors. The proposal of FAI Square Development Consortium which was in compliance with the general requirements and the Town Planning Scheme was thus recommended for approval by the Committee. The criteria in the published notices that only persons with experience in the development of high rise building projects could make proposals



was thus out of sync with the Town Planning Scheme and one wonders what the purpose of this statement was. The Planning Scheme was also not referred to in the general information handed to the interested parties at the Town Council offices. In fact, from the report of the Committee, six of the 11 proposals submitted exceeded the height (two floors) of the Town Planning Scheme. By the time the Town Council had to make a decision on 29 June 2016 (already two years from the publication of the invitation for proposals), FAI Square Development Consortium had withdrawn its proposal and the Town Council had two proposals for the development from its members namely the appellant and third respondent (BH Properties), neither of whom were recommended by the Committee.

[10] As the Town Council eventually had to decide between the proposals of the appellant and BH Properties, as will appear below, it is necessary to look at the findings of the Committee in respect of these two proposals. According to the 'Technical Score Summary' the Committee ranked appellant fifth and BH Properties seventh out of the 11 proposals.

[11] As far as BH Properties is concerned its proposal was criticised as it was a three floor building and hence not in compliance with the Town Planning Scheme. In addition, it was stated that it did not have sufficient links to the neighbourhood, was not conducive to reducing conflict between the traffic and pedestrians and its size was such that it meant that the erf would be underutilised. In respect of the appellant, the Committee found that it also proposed a three floor development in conflict with the Town Planning Scheme, that it did not meet the requirement to provide sufficient

parking space, had no link to the neighbourhood, and would also not minimise conflict between traffic and pedestrians.

[12] According to the minutes of the Town Council it was resolved on 29 June 2016 by way of casting vote of the chairperson to accept the proposal of the appellant instead of the proposal of BH Properties. The acceptance was conditional in that the price for the sale of the property would stand over until valuations had been obtained so as to establish a yardstick, the Town Council retained a right of pre-emption in respect of the property were it to be unsold without being developed, there was a prohibition on a sale to a foreigner, final design could not deviate more than ten percent from the proposed design and the procedures provided for in s 63 of the Act would have to be followed and Ministerial approval had to be obtained.

[13] Per letter dated 4 July 2016 the appellant was informed that the Town Council approved the sale of the property to it along the lines indicated in the resolution. Relevant to this appeal is that the appellant was informed in a letter that the purchase price would be communicated to him at a later stage and that the Town Council's approval of a sale to appellant was subject to the provisions of s 63(2) and 30(1)(t) of the Act.

[14] From the way the determination of the price unfolded it appears that the Town Council intended to negotiate the price with the successful bidder for the development of the property and that the bidders were not required to include price offers in this

regard in their bids. As indicated above, the evaluation by the Committee thus makes no mention of the price of the property as part of its assessment.

[15] At a meeting of the Town Council of 12 July 2016 it was resolved, despite the fact that the valuations for the property was not yet at hand, that the purchase price for the property would be N\$2,5 million and it was again mentioned that this would be subject to the approval of the Minister pursuant to s 63(2) and 30(1)(t) of the Act. This was conveyed to the appellant by way of a letter dated 13 July 2016. The letter mentioned that appellant had commenced with certain activities on the property and cautioned appellant that the sale was still subject to the Minister's approval. Appellant received the letter on 18 July 2016 and by 5 August 2016 the payment of the purchase price of N\$2,5 million had been paid in full to the Council. On 22 July 2016 a notice was published in the print media informing the public of the sale of the erf for N\$2,5 million and inviting objections thereto by 12 August 2016. This was done, it is averred, because the sale would be 'by way of a private transaction'. By 12 August 2016 five objections were received.

[16] Per letter dated 26 August 2016 the appellant's legal practitioner addressed a letter to the Town Council asserting that the approval of the Minister was not necessary for the sale of the land nor was it necessary for the sale to be advertised so as to invite objections as it was not a private sale but was effected through a public tender. In conclusion, the appellant's legal practitioner demanded a deed of sale signed on behalf of the Town Council. When no response to the letter was forthcoming the appellant's legal practitioner addressed a further letter dated 29

September 2016 to the Town Council demanding a signed deed of sale within five days. By this time appellant, according to the deponent to the founding affidavit had already 'expended N\$1,4 million on construction of the property' assumedly on the optimistic assumption that the advice he received from his legal practitioner was correct. The Town Council responded by letter on 8 October 2016 maintaining that the approval of the Minister was required and noting the allegations that appellant had incurred costs without admitting any liability in respect of such costs.

[17] I interpose here to mention that towards the end of August 2016 and the middle of September 2016 the valuations of the property were provided to the Town Council. There was quite a wide variation as to the market value of the property. The valuations ranged from N\$16,6 million to N\$30,04 million. One valuator suggested a 'Forced Sale Value' of N\$10,47 million. The Town Council at an ordinary meeting held on 6 April 2017 resolved to increase the price to N\$3,5 million. There is nothing in the minutes of this meeting to explain or motivate this increase. From the chronology set out above it is in any event clear that appellant seeks to enforce a sale at the price of N\$2,5 million which it paid and not one at the price of N\$3,5 million as the extra N\$1 million is not tendered in the application.

[18] Appellant now turned to the Minister and per letter dated 17 November 2016 the Minister was informed by appellant's legal practitioner that appellant had already 'incurred millions of Namibian dollars in preparation for the development' and that the purchase price has already been paid and requested the Minister to urgently attend to the matter. Apart from informing the Town Council that appellant was using the

property to store 'excess stock and its trucks' a letter was forwarded to the Minister on 24 March 2017 enquiring as to the progress of this matter by the Minister. Another letter addressed to the Minister on 6 September 2017 requested that the decision be made. On 2 November 2017, a letter was forwarded to the Town Council and copied to the Minister asserting the right to claim damages as a result of the delay in the matter and putting the Minister on terms to make a decision within 30 days. On 19 March 2018, appellant was informed by the Town Council that the Minister had made a decision and attached a letter from the Permanent Secretary of the Ministry of Urban and Rural Development which contained the Minister's decision. According to this letter, the Minister did not approve the sale and ordered the Town Council to 're-evaluate the bids' on the basis set out in the letter.

[19] The decision of the Minister was stated as follows:

'Approval in terms of Section 63(3)(b)(i) and (ii) and Section 63(c) of the Local Authorities Act, 1992 (Act 23 of 1992) as amended, has not been granted, and;

Council is directed to re-evaluate the bids on clearly determined valuation measures and spelt out evaluation criteria as well as following the laid down governance procedures and approval structures within Council.'

#### Was the Minister's approval required?

[20] As is evident from what is stated above, the case for the appellant on the papers and in the court *a quo* was that the Minister's approval was not necessary pursuant to s 30(1)(t) and even if s 63 was applicable there was no private transaction and the requirements relating to private transactions stipulated in s 63(2) were not

applicable in the present circumstances and hence the approval of the Minister was also not required in terms of this section. It is on this basis that a declarator was sought to the effect that an enforceable and valid contract had been entered into between the appellant and the Town Council. This stance on behalf of appellant was persisted with in the heads of argument filed on its behalf. However, by the time the appeal was heard, the legal practitioners for both the parties had become aware of the judgment of this court in the case of *Namundjebo-Tilahun NO & another v Northgate Properties (Pty) Ltd & others*<sup>4</sup> which held that s 30(1)(t) requires the prior approval of the Minister where a local authority intends to sell a property.

[21] Sections 30(1)(t) and 63 of the Act read as follows (I only quote the relevant portions):

'30(1) . . . , a local authority council shall have the power -

“ . . . (t) subject to the provisions of Part XIII, to buy, hire or otherwise acquire, with the prior approval of the Minister and subject to such conditions, if any, as may be determined by him or her, any immovable property or any right in respect of immovable property for any purpose connected with the powers, duties or functions of such local authority council, or to so sell, let, hypothecate or otherwise dispose of or encumber any such immovable property;”

'63(1) Notwithstanding the provisions of section 30(1)(t), but subject to the provisions of subsections (2) and (3) of this section, the approval of the Minister shall not be required in relation to -

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<sup>4</sup> *Namundjebo-Tilahun NO & another v Northgate Properties (Pty) Ltd & others* (SA 33/2011) [2013] NASC 12 (7 October 2013) paras 47-52.

- (a) the letting of immovable property other than townlands or any portion of such townlands by any local authority council for a period not exceeding one year;
  - (b) the selling or disposal, or letting, hypothecation or encumbrance of immovable property other than townlands or any portion of such townlands by the municipal council of a municipality referred to in Part I of Schedule 1;
  - (c) the acquisition by any local authority council of -
    - (i) immovable property transferred to the local authority council as a condition of any subdivision of land approved in terms of the Townships and Division of Land Ordinance, 1963 (Ordinance 11 of 1963);
    - (ii) immovable property by way of a grant or donation;
  - (d) a cemetery taken over in accordance with the provisions of section 30(1)(d).
- (2) A local authority council referred to in paragraph (b) of subsection (1) shall, before any immovable property so referred to is sold, disposed of, or let, hypothecated or otherwise encumbered, whether by way of public auction or tender or private transaction, cause a notice to be published in at least two newspapers circulating in its area on one occasion in a week for two consecutive weeks -'

[22] The notice in the newspapers referred to in s 63(2) must contain certain particulars and in the cases of sales by public auction and by tender must inform the public that the documents will lie for inspection for not less than seven days for persons interested therein. Where the sale is in terms of a private transaction the notice must call on interested persons to lodge any objection to such sale with the local authority within a period not less than ten days of the publication of such notice. If there is no objection the sale can proceed and must be finalised within a year. If

there are objections these must be forwarded to the Minister to approve or disapprove or to direct that the sale be done by way of public auction or tender.<sup>5</sup>

[23] In *Namundjebo-Tilahun*, this court per Strydom AJA refers to the interpretation of s 30(1)(f) as follows:

[49] I am furthermore satisfied that the words 'or to **so** let, sell etc.' (my emphasis) can only be a reference to the manner in which it can be let or sold, namely with the prior approval of the Minister otherwise the word 'so' would have no meaning and would be redundant. As was stated in the case of *City of Cape Town v Premier, Western Cape and Others*, 2008 (6) SA 345 at 376 para [70], it is a trite principle of statutory interpretation that a statute should not be construed so as to render any part thereof superfluous. (See also *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd*, 1993 (4) SA 110 (A) at 116F–117B.) The above interpretation is also supported by the context of the Act because, if a local authority had the power to let and sell immovable property without the prior approval of the Minister, then it would not have been necessary for the Legislator to enact s 63(1)(a) and (b) whereby the provisions of s 30(1)(f) were specifically made subject to this section in regard to the letting and selling, etc of property.'

[24] I fully agree with the analysis by Strydom AJA. If s 30(1)(f) did not apply to the disposal of property it would mean that those local authorities with the least autonomy would be able to sell property without any oversight from the Minister but those with the most autonomy would have to follow the procedures prescribed in s 63(2) which would be contrary to the whole scheme or ranking of local authorities in the Act. It furthermore does not make sense to place procedural hurdles in respect of Schedule 1 Part I municipalities in this regard and none in respect of other municipalities, town

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<sup>5</sup> Section 63(3) of the Act.



councils and village councils. This detracts from the general principle that those local authorities mentioned in Part I of Schedule 1 which operate the most autonomously are required to follow certain procedures (notice of the disposals in the print media as discussed above) whereas the other local authorities with the least autonomy are free to dispose of their properties without any control from the Ministry.

[25] Moreover, I also agree with the analysis of Strydom AJA with his emphasis on the word 'so' in s 30(1)(t). The word 'so' can only apply to the manner in which an acquisition of a local authority is dealt with, ie 'with the prior approval of the Minister and subject to such conditions, if any, as may be determined by him or her, . . .'. This is the ordinary meaning of the word 'so'. The Shorter Oxford English Dictionary, 6 ed gives the meaning as 'in the way or manner described, indicated or implied contextually' and also refers to 'in the same way'. This means a disposal is to happen in the same manner or in the same way as prescribed for the acquisition of property.<sup>6</sup>

#### Applicability of s 63(2) and (3) of the Act

[26] The Town Council when resolving to accept the proposal of appellant decided that 'the administrative procedures be followed as per s 63 of the Local Authority Act 23 of 1992, and subject to the Ministerial approval'. The letter informing appellant of the decision stated that the approval was subject to the provisions of ss 63(2) and 30(1)(t) of the Local Authority Act . . .'. The later resolution where the price of N\$2,5 million was determined once again referred to it being 'subject to ss 63(3)(b) and 30(1)(t) of the Local Authority Act . . .'.

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<sup>6</sup> See *Steains v R* 1939 NPD 21 at 23-24 and *Wilford v Thominet* 1952 (3) SA 859 SA at 862-863 (SR).

[27] Appellant's legal practitioner also took issue with this stance of the Town Council submitting that as the matter was not a private transaction there was no need for a notice in the print media calling for objections. By implication it is averred that the sale was by way of a public tender and hence there was no need to invite objections to it in the print media. What the purpose of the notice is in respect of sales by public auction or tender is not addressed at all. The legal practitioner for the appellant persists with this stance that the sale was not a private one but one by tender and submits that s 63(2) and (3) did not apply to the intended sale.

[28] It is correct that, the Town Council is not mentioned in Part I of Schedule 1 to the Act. It thus follows that the requirements relating to the publication of notices do not apply to it. The requirements relate to municipalities listed in Part 1 of Schedule 1 who need not obtain the prior approval of the Minister for a disposal of property, but who must instead follow the applicable procedures provided for in s 63(2), eg either simply publish a notice of the intended sale with the relevant particulars where such sale is by public auction or by tender or publish a notice of the intended sale with the relevant particulars and invite objections thereto if the intended sale is by way of a private transaction. It thus follows that there was no legal necessity for the Town Council to make use of the procedures prescribed in s 63(2) of the Act.

[29] Was the transaction by way of a public tender or a private transaction? It is strictly speaking not necessary to deal with the aspect, as once it has been accepted, as I have found above, that s 63(2) is not applicable at all to the Town Council

because it is not mentioned in Part I of Schedule 1, there was no need for any notice in the print media irrespective of whether the sale was by way of tender or by way of private transaction. I am however of the view that the fact that the proposals were sought in respect of the development of the property in a public process or tender does not mean the sale was by way of a tender. It is clear that once the proposals had been assessed, a price would have to be negotiated and agreed to before a sale could be concluded. Price is an essential requirement for a sale and despite the fact that the parties were *ad idem* as to the *merx* and the envisaged development, a price still had to be agreed upon for the sale to be concluded.<sup>7</sup> The price was determined by the Town Council and accepted by the appellant without any public input or a transparent public bidding process and the sale was thus in essence one by private transaction.

[30] It thus follows that the legal practitioner for appellant is correct in submitting that s 63(2) and (3) did not apply to the intended disposal of the property by the Town Council in this matter. This is not of any moment in this matter as the prior approval of the Minister was and is required for the intended disposal pursuant to the provisions of s 30(1)(f) of the Act as pointed out above.

Was the Minister's non-approval *ultra vires* his powers?

[31] The Minister states that he exercised the powers granted to him pursuant to s 63(3)(b) and (c) when he made his decision. As is apparent from what is stated

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<sup>7</sup> *Treasurer-General v Lippert* (1883 (2) SC 172, *Scholtz v Grobler* 1970 (1) SA 85 (E).

above s 63 was not applicable to the present matter and the approval or otherwise of the Minister had to be forthcoming by virtue of the powers vested in him by s 30(1)(t). It follows that the Minister could not make his decision in terms of s 63(2) but had to do so pursuant to the powers granted to him by s 30(1)(t). The Minister thus acted *ultra vires* the powers granted to him in s 63 when he made his decision in respect of a matter which did not fall within the ambit of s 63.

[32] Whereas s 30(1)(t) was referred to in the correspondence between the parties, this is not the section relied upon by the Minister, probably because of the fact that the Town Council followed the process provided for in s 63(2) despite the fact that this section did not apply to it. It was submitted on behalf of the appellant that it is not permissible for a public authority who purports to act under specific statutory authority which did not grant him such authority, to assert that the same powers could have been invoked under a different provision.<sup>8</sup> This position was not disputed by the legal practitioner of the Minister.

[33] Whereas it follows from the above that the Minister's decision must be set aside it obviously cannot be the end of the matter or of the Minister's involvement as s 30(1)(t) has not yet been complied with and it is still necessary to obtain the approval of the Minister for the transaction in terms of this section as was conceded by the legal practitioner for the appellant.

*Audi alteram*

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<sup>8</sup> *Mostert v The Minister of Justice* 2003 NR 11 (SC) at 35E-I.

[34] It is common cause that the appellant was not apprised of the objections to the intended sale. Neither the objections nor a summarised version thereof was provided to the appellant so as to seek the appellant's response to the matters raised in the objections. Neither was the appellant approached to comment or make representations in respect of information the Minister intended to act on to make findings contrary to the interests of appellant.<sup>9</sup>

[35] The fact that the appellant through its legal practitioners engaged with the Town Council and Minister spelling out the stance of the appellant in respect of the interpretation of ss 30(1)(f) and 63 of the Act and exhorting the Minister to make a decision does not assist the Minister in this regard as submitted on the Minister's behalf. As pointed out by the legal practitioner for appellant, these letters contained legal submissions and did not deal with any factual averments or objections to the sale. It was simply not possible for appellant to deal with such factual averments as he was not provided with the information to enable a response to such averments.

[36] One of the issues raised by the Minister was the price that the Town Council determined for the property. As mentioned above this was arrived at without waiting for the valuations and compared to the valuations is ridiculously low at about 15,6 per cent of the lowest valuation. It is evident from the record that the Town Council worked from outdated municipal valuations and added an arbitrary percentage thereto. The fact that appellant simply virtually immediately paid this amount without a

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<sup>9</sup> *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC) at 231G and *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC) at 10J-11A.

further bargaining process is probably indicative of the fact that appellant knew the acquisition of the property at that price amounted to a real bargain. The arbitrary nature of the Town Council's decision on price is also borne out by the fact that they at a later stage sought to increase it to N\$3,5 million without even attempting to set out a rational basis for how this increased amount was calculated in view of the valuations received.

[37] As appellant was aware of the fact that the price was an issue, he dealt with this in the papers. It is pointed out that a transaction was agreed to with the Ongwediva Town Council for the purchase of a bigger property in that town for N\$500 000 and states that that Town Council was not so much concerned with the price of the land as with the envisaged development on the land. The Ongwediva transaction was concluded in 2016.

[38] When the Minister points out in his answering affidavit that price is regarded as the most important criteria when it comes to sale of public property and that the purpose of the appointment of the valuers was to establish a yardstick as to the market value of the property, the deponent on behalf of the appellant simply states that 'the primary consideration was not price but the best concept design which would uplift the town. . .' and that the Town Council was thus 'content with the purchase price of the property'.

[39] The fact that price should be of primary importance where public authorities sell assets cannot be gainsaid.<sup>10</sup> It may be of relevance that such land is to be developed in the short to medium term which will further benefit the local authority and that this may induce such authority to give some discount on the price as opposed to the sale of the vacant land without knowing when and to which extent it will be developed. This however does not mean that the discount in the present matter was in anyway a rational decision. No cost benefit analysis of any sort was done by the Town Council to show that the income flow from the envisaged development would offset the massive discount on the price compared to the valuations. As pointed out, the price was not even considered in conjunction with the valuations. Furthermore, apart from inferring from the fact that a discount in price was applicable in Ongwediva, that the same applied to Oshakati - the appellant offers nothing to suggest the price is within reasonable bounds save to state that the Town Council was satisfied with it. Lastly, I should note that the reference to the purchase in Ongwediva is not helpful at all as there is no indication as to what the valuations were in regard to that property or market in that town compared to Oshakati and whether or not that property came with municipal infrastructure such as water, electricity and sewerage connections in place.

[40] It is correct that appellant was not given *audi* in respect of the price and it thus did not have an opportunity to make representations in this regard to the Minister. What is clear however is that, if its representations to the Minister would have been

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<sup>10</sup> *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province & others* 1999 (1) SA 324 (CKH) at 349E-G and 359A-B, *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board, & others* 2001 (2) SA 675 (C) at 686A-E and *JFE Sapela Electronics & another v Chairperson: Standing Tender Committee & others* [2004] 3 All SA 715 (C) at 728i-j.

along the same lines as those raised in the court *a quo*, those representations would have been and should be to no avail. They do not support any basis for the low price. What is clear is that the Town Council did not provide any rational basis for how it determined the price and appellant also does not as it knew it was getting the property for a bargain and thus did not have to further discuss or negotiate with the Town Council so as to lay a basis for a realistic price.

[41] Be that as it may, as the *audi alteram partem* was not applied, in respect of the price and the other factual issues raised by the objectors to the Minister and taking cognisance of the fact that the Minister is the designated decision maker in terms of the Act, and not the court, the matter has to be referred back to the Minister to make a decision afresh after consideration of representations from the appellant. I emphasise however that if the appellant cannot convince the Minister that the envisaged price of N\$2,5 or N\$3,5 million is reasonable in the circumstances that this reason alone would justify the refusal of an approval by the Minister.

#### General remarks

[42] Before I make the order to refer the matter back to the Minister it is necessary to make a few general remarks that the Minister ought to take into consideration when the matter is reconsidered.

[43] The proposals for the development of the erf had to be lodged with the Town Council on 13 October 2014, the notice in the newspaper sought proposals from persons or entities with a proven track record in high rise building development and



mentioned that the general requirements could be obtained from the office of the Town Council. Neither these two documents alerted the potential bidders that the Town Planning Scheme prevented the construction of a high rise building on the property. As a result the majority of proposals had to be disqualified. The question that arises is would the process have been more competitive if it was made clear upfront that the proposed development could not exceed two storeys?

[44] A similar question arises in terms of the price. Would there have been more potential bidders had the notices in the news media indicated that the Town Council intended to sell the property on which the envisaged development was contemplated?

[45] Eleven proposers made oral presentations of their respective intended development of the property to the Town Council on 11 December 2014. The next step is the report by the Land and Housing Committee which is dated more than a year later, namely 30 December 2015. Another nearly six months passes before the Town Council resolves to accept the proposal of appellant on 29 June 2016. By that time the entity recommended by the Land and Housing Committee had withdrawn their proposal. The determination of the price follows on 12 July 2016 whereafter the advertisements inviting objections are placed and the matter winds its way to the Minister. There it gathers dust until the Minister eventually makes his decision on 5 March 2018. This means from the time oral presentations were made on 30 December 2015 until the Minister made his decision on 5 March 2018 the process took two years and three months. It seems to me that the officials of both the Town Council and the Ministry have little idea of how commerce works. Prices escalate and

markets change and to attempt to hold bidders to a price more than two years after it had been offered can be problematic. Seeing the scale of the proposals much more urgency was needed to finalise the matter. The review application and the appeal to this court did not help matters. The new decision by the Minister will eventuate by mid-2022 which will be nearly nine years after the soliciting of the proposals. Should the appellant not be able to persuade the Minister that the sale to him should be approved, the Minister should consider whether it would not be advisable that the whole matter be considered afresh by the Town Council seeing the effluxion of time and possible change in circumstances relating to the economy and possible bidders should they not be misled about a high rise development or the sale of the property. In short, the circumstances as they now exist as opposed to when the proposals were solicited must be considered.

### Conclusion

[46] In the result, the appeal succeeds and I make the following order:

- (a) The appeal succeeds and the order of the High Court is set aside and the following order is granted in substitution of the order in the High Court:
  - (i) The decision of the Minister taken on 5 March 2018 and conveyed by letter dated 9 March 2018 to the Oshakati Town Council that the intended sale by the said Town Council to the

appellant of Erf No.1342, Extension 4, Oshakati, is not approved is herewith reviewed and set aside.

- (ii) The appellant is granted the opportunity – if it so desires – to within one month from the date of this order make written representations to the Minister addressing any issues arising from the objections to the proposed sale and from the report on which the Minister indicated his non-approval.
- (iii) After receipt of the representations by the appellant or after the period of one month referred to in paragraph (ii) had elapsed (where no representations have been received from appellant) the Minister is directed to decide the matter *de novo*. In making the decision *de novo*, the Minister is to take due cognisance of, and give consideration to, the contents of the judgment of the Supreme Court in this matter.
- (iv) The first respondent is to pay the costs of the application including the costs of one instructing and two instructed legal practitioners.

- (b) The costs of the appeal are to be paid by the first respondent inclusive of the costs of one instructing and two instructed legal practitioners.

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**FRANK AJA**

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**DAMASEB DCJ**

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**SMUTS JA**

APPEARANCES

APPELLANT:

J J Gauntlett SC, QC (with him F B  
Pelser)

Instructed by Shikongo Law Chambers

FIRST RESPONDENT:

T C Phatela

Instructed by Government Attorney