CASE NO.: (P) A 46/2004

SUMMARY

GROBBELAAR AND ANOTHER V COUNCIL OF THE MUNICIPALITY OF WALVIS BAY AND OTHERS

Damaseb JP, Silungwe J *et* van Niekerk J
Reasons delivered: 11 November 2005

APPLICATION FOR INTERIM RELIEF

CIVIL PROCEDURE

Application to strike – practice to strike out matter in replying affidavits which should have appeared in founding affidavits, including facts to establish *locus standi* – conclusion that applicant has *locus standi* on alleged facts is matter of law – need not be alleged in founding affidavit – open to party to argue any point of law based on the factual allegations in papers without referring to those points of law in papers themselves – municipal rate and tax payer has *locus standi* to challenge municipal actions relating to illegal actions by municipality in dealing with municipal funds and property – there is relationship of trust, i.e. fiduciary relationship between municipal council and ratepayers in respect of municipal funds and property – therefore sufficient to allege in founding affidavit that applicant is municipal tax and rate payer – need not set out legal contention that as a result thereof applicant has *locus standi*

LOCUS STANDI IN JUDICIO

Municipal tax and rate payer has standing to challenge illegal municipal actions in dealing with municipal funds and property

NAMIBIAN CONSTITUTION

Article 10 and 23 – land policy of Walvis Bay Municipality in terms of which property auctions are held in manner favouring previously disadvantaged Namibians, but excluding persons on basis of colour is discriminatory and in violation of Article 10 – Parliament has enacted no legislation under Article 23(2) to provide for implementation of

policies aimed at redressing imbalances arising out of past discriminatory laws or practices – as such the land policy is illegal

LOCAL AUTHORITIES ACT, 23 OF 1992

Section 63(2)(a) as amended by Act 24 of 2000 – purpose of section is to provide window period for interested persons to inspect full particulars regarding sale and other details on immovable property to be offered by sale at municipal auction – minimum sufficient period to provide for such opportunity is seven days - failure to do so gives applicant right to object to auction

Section 63(2)(b) – provides for procedures to be followed in case of immovable property sales by private treaty – must be followed before land may be sold – applicant may object to transactions concluded without procedures of giving notice having been followed in terms of section

Section 50 – provides for stringent procedures to be followed by local authority before closure of public spaces – conditions of sale which place onus on purchaser to do what local authority is supposed to do by law amount to abdication of its duty under the law – purchaser not entitled to take actions contemplated by sec 50 – sale conditions requiring this would be requiring purchaser to do what is legally impossible –– procedure must be followed before public space is closed - purpose of section is to protect interest of public and of owner or occupier of immovable property directly opposite public space – purpose not served by offering public space for sale before required procedure have been followed

CASE NO.: (P) A 46/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WILLEM GROBBELAAR **1ST APPLICANT**

HERMAN MARTIN GEORGE DAVIN **2ND APPLICANT**

and

THE COUNCIL OF THE MUNICIPALITY OF WALVIS BAY **1ST RESPONDENT**

THE MAYOR OF THE MUNICIPAL COUNCIL OF WALVIS BAY **2ND RESPONDENT**

THE CHAIRPERSON OF THE MANAGEMENT COMMITTEE OF THE MUNICIPAL COUNCIL OF WALVIS BAY **3RD RESPONDENT**

THE REGISTRAR OF DEEDS OF NAMIBIA N.O. **4TH RESPONDENT**

THE PURCHASER OF ANY OF ERVEN 954 to 1029; 1096 to 1100; 1115 to 1120 and 450, of Meersig, Walvis Bay and Erf 161, Long Beach (Langstrand), Walvis Bay (inclusive of all the aforesaid numbers) **OTHER RESPONDENTS**

CORAM: Silungwe J, Damaseb *et* Van Niekerk AJJ

Heard: 2004 March 25, 26, 29

Delivered: 2004 April 16

REASONS

VAN NIEKERK, J:

[1] An order was made in this matter on 16 April 2004 in the following terms:

> "1. The first applicant's non-compliance with the rules of this court is condoned and his application for interim relief is heard on an urgent basis.
>
> 2. The second applicant's application for condonation for non- compliance with the rules is dismissed and in respect of him the application for interim relief is struck. The second applicant shall pay the first, second and third respondents' costs in relation to their opposition of his application, which costs shall be limited to the costs of two instructed counsel.
>
> 3. The first, second and third respondent's application to strike out portions of the first applicant's replying affidavit is dismissed with costs.
>
> 4. The first, second and third respondents' application for condonation for the late filing of their answering affidavits is granted. There shall be no order as to costs.

5. In respect of first applicant's application for interim relief, a rule *nisi* is issued, pending the final outcome of the review proceedings instituted in terms of part B of the Notice of Motion, calling upon the respondents to show cause, if any, on or before **7 June 2004** at **10h00 am**, or as soon thereafter as the application may be heard, why an order in the following terms should not be granted:

5.1 Interdicting and restraining first, second and third respondents to give or cause transfer of any of erven 954 to 1029; 1096 to 1100; 1115 to 1120 and 450, all of Meersig, Walvis Bay as well as erf 161 of "Long Beach" (Langstrand), Walvis Bay (inclusive of all the aforesaid erf numbers) from first respondent to any of the purchasers of those properties or to any other third party;

5.2 Interdicting and restraining fourth respondent from causing or giving transfer of any of the aforesaid properties from first respondent to any other party;

5.3 Directing first, second and third respondents not to give effect to any agreement or transaction of sale to and in respect of any of the aforesaid properties;

5.4 Directing that the first, second and third respondents jointly and severally shall pay the costs of this application which shall include the costs of two instructed counsel;

5.5 Directing that such other of the respondents who may oppose the application shall pay the costs of

the application jointly and severally with first, second and third respondents.

6. The order set out in paragraphs 5.1, 5.2 and 5.3 shall operate as an interim order and interdict with immediate effect, pending the outcome and finalization of the review proceedings set out in part B of the Notice of Motion."

[2] At the time it was indicated that reasons for the order made would be provided. The reasons follow.

[3] The applicants brought an application on a semi-urgent basis for a rule *nisi* pending the final outcome of review proceedings instituted in relation to an auction of several erven held on 19 December 2003 at Walvis Bay at the behest of the first, second and third respondents. As can be seen from the order made, the relief sought in this application was essentially for an interim interdict pending the outcome and finalization of the main (review) proceedings in which the applicants seek to have the auction set aside. The interdict is sought to prevent transfer of certain erven situated at Meersig, Walvis Bay and Erf 161, Langstrand, Walvis Bay from first respondent to the purchasers of those properties or to any other party. An order is also sought directing the first to third respondents not to give effect to any agreement or transaction of sale to and in respect of the said properties.

[4] It is convenient to deal with the matters raised before the court in the following order:

A. Urgency;
B. Late filing of first, second and third respondents' answering affidavits;
C. Application to strike portions of first applicant's reply;
D. Interim relief.

A. Urgency

[5] The first applicant alleges that there is a substantial degree of urgency in this matter as the erven sold at and after the auction are due to be transferred to the purchasers on 31 March 2004, whereafter, for obvious reasons, countless complications would arise if the transfers were to be set aside.

[6] First to third respondents take up the attitude that the matter has not been properly brought as a matter of urgency for two reasons. Firstly, they say, the first applicant was in a position to attack the auction before it took place and should have done so.

Secondly, they say that when the application was finally brought, the urgency was self induced.

[7] Dealing with the first reason advanced, the first to third respondents alleged that the auction was held in accordance with a so-called land policy adopted and implemented by the third respondent since December 1998, as authorized by the first respondent, in respect of the sale of erven. The policy provided that when residential erven are offered for sale, this would be done in three phases. The first two phases would take place by way of public auction at which the first round of the auction would be open only to previously disadvantaged Namibians and the second round to all persons. Any erven not sold at the public auction would be offered for sale by private treaty. First to third respondents alleged that 15 other auctions had previously been held before the auction of 19 December 2003 on this basis and that over 800 erven had been put up for sale in this manner. They allege that the first applicant was very well aware of this policy, considering that he was an estate agent and property developer in Walvis Bay, that he was actively involved in civic life in Walvis Bay and that he is well acquainted with the affairs of first to third respondents. They alleged that he could have and should have challenged the auction of 19 December when he got

notice of it as he would have been aware on what basis the auction would be held.

[8] In response to these allegations the first applicant denies that he had knowledge of the land policy and states that, even is he were aware of it and failed to take action in respect of the other auctions, his failure cannot be construed to be a waiver of his right to challenge the auction of 19 December. In any event, he says, he only became aware that the auction would be held in a racially discriminating manner on the very day of the auction. There was no time to stop the auction then. On the basis if these facts I agree that the first applicant could not have taken action before the auction took place.

[9] As far as the second ground of the first to third respondents' objection is concerned, the following are the facts on which the objection is to be assessed. The first applicant says that after the auction he collected certain relevant information and documents from Mr Van Zyl, an official in the employ of the Municipality of Walvis Bay, which he obtained on or about 23 or 24 December 2003. He was unable to obtain needed information regarding the publication of notices of the auction, etc as the relevant offices, e.g. of the newspapers were closed for the Christmas and New

Year break. In the first days of January 2004 he made telephonic enquiries at the Office of the Ombudsman, but the latter was on holiday. He decided to prepare a letter to the Ombudsman, which he completed on 13 January 2004 and then drove to Windhoek to hand deliver it a day or two later. At that stage the Ombudsman was still on holiday. The letter is annexed to the papers and sets out in detail the substance of the essential objections to the auction which also forms the basis of the application for review and the application for the interim relief lodged in this court. The first applicant refers to the relevant legislation and incorporates several relevant annexures to the letter. In the letter the applicant requests the Ombudsman to take action as a matter of extreme urgency and to investigate the Municipality of Walvis Bay's disregard of the Constitution and the Local Authorities Act. He requests that the auction and the sale of the erven be declared null and void.

[10] At the time the first applicant's legal representative of the previous 10 years was still on holiday until 19 January 2004. On about that date the first applicant consulted his lawyer, who advised him to wait for the Ombudsman's reply. A few days later the first applicant made telephonic enquiries at the Ombudsman's office and was informed that a letter was on its

way to him, but that the Ombudsman's office would not be able to take action in the matter on his behalf. This the first applicant immediately communicated to his lawyer, who on 29 January 2004 addressed an urgent letter to the first respondent alerting it to the grounds on which the first applicant based his objections to the auction, requesting certain information regarding the purchasers of the erven and to request an undertaking within 5 days that the first respondent would, of its own accord, not be proceeding with the transfers of the erven. In this letter the first respondent was also alerted to the fact that the first applicant was contemplating an urgent application to this Court. First respondent required the first applicant to provide further information before responding to the substance of his letter. It should be pointed out that some of this information was already available to the first respondent, e.g. the relevant legal provisions and their requirements. Further correspondence was exchanged, but on 16 February 2004 it was clear to the first applicant that all was in vain and he lodged the application together with the review application and an application for substituted service on 18 February 2004.

[11] In the meantime, the first applicant had received the Ombudsman's response dated 20 January 2004 by normal post

only on 12 February 2004 and immediately telefaxed it to his attorney. In the letter the Ombudsman states, *inter alia*:

> "2. In your letter, you allude to the fact that the actions of the municipality may be discriminatory against the people of Walvis Bay, and presumably, yourself. Thus, that a fundamental right of freedom guaranteed by the Namibian Constitution has been infringed or threatened. In this regard, the Constitution states in Article 25(2) that *'Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.'* ".

[12] The Ombudsman further stated that as the first applicant appeared to be financially able to approach a competent Court for relief rather than to seek redress from the Ombudsman and advised the first applicant to instruct his lawyer to institute legal proceedings against the Municipality of Walvis Bay should he wish to pursue the matter further.

[13] Bearing in mind that the Christmas and New Year break impeded his ability to make progress, the first applicant in my view took reasonably prompt action in all the circumstances to protect his

rights. He promptly took steps to collect the relevant documents and information after the auction. He promptly made telephonic enquiries to the office of the Ombudsman in the New Year. Knowing that the Ombudsman and his lawyer were still on holiday, he went ahead on his own steam, it seems, and addressed the letter of 13 January 2004 to the former. When he delivered it the Ombudsman was still on leave.

[14] In view of the duties of the Ombudsman as envisaged in Article 91 of the Constitution to investigate complaints regarding instances of alleged or apparent violations of fundamental rights and freedoms and to take certain actions to deal with such violations, I agree with the submission made by first applicant that he was entitled to approach the Ombudsman first for assistance and advice.

[15] The first applicant contacted his lawyer as soon as he had returned from holiday. He followed up his letter to the Ombudsman by making enquiries. When he was informed of the stance of the Ombudsman, he did not wait for the letter to arrive, but instructed his lawyer to pursue the course of trying to obtain an undertaking from the first respondent not to proceed with the transfers. I agree that he was entitled to exhaust

alternative remedies and should in fact have done so. In my view the urgency was not self-induced. I further bear in mind that the date of 31 March 2004 set by the respondents for the intended transfers meant that urgent relief would in any event be required to stop the transfers from taking place.

[16] The first to third respondents pointed out that the second applicant set out no grounds for urgent relief in his papers. The grounds set out by the first applicant do not cover his situation. The furthest he takes it is stating at the end of his affidavit that he has read the founding affidavit of the first applicant and that he verifies and confirms, *inter alia*, the factual and legal grounds for the relief as set out in the affidavit both in respect of the interim as well as the final relief. In my view this is not sufficient in the circumstances of this case where the factual allegations on which the first applicant relies do not refer to or have any bearing on the second applicant. I have considered allowing him to proceed, as it were, on the back of the first applicant. However, I have decided that this would amount to an abuse of the rules of this court. In my view his application for condonation for non-compliance with the rules should be dismissed and therefore the application for interim relief in respect of the second applicant must be struck. (In as much as the first

applicant relies on the second applicant's papers in support for his application, regard may be had to them.) As a result, I am of the view that the second applicant should pay the costs of the first, second and third respondents in relation to their opposition of his application for condonation and interim relief. In my view the nature of the application before us does not require that three counsel be instructed, as first to third respondents have done, and therefore the costs are limited to the costs of two instructed counsel.

B. Late filing of first, second and third respondents' answering affidavits

[17] The applicants required in their notice of motion that the respondents file their answering affidavits by 14h30 on 11 March 2004. First, second and third respondents did not comply, but filed their answering papers a week later on 18 March 2004. They apply for condonation for the late filing relying on the following facts:

1. That the matter justified the instruction of leading counsel due to its importance to respondents, especially given the fact that it may influence that status of properties purchased at some 15 other auctions held since 1999.

2. That leading counsel briefed in the matter was unavailable to attend to settling the papers until 15 March 2004. The reasons for counsel's unavailability are fully set out in the application for condonation.

3. That the offices of the respondents are situated at Walvis Bay, whereas respondents' legal practitioner is based in Windhoek and was required to travel to Walvis Bay on several occasions.

4. The papers in possession of respondents which have a bearing on this matter are particularly voluminous, especially given the nature and potential impact of the relief sought by applicants in the proceedings.

5. Instructing counsel for first, second and third respondents took the answering papers to Walvis Bay for signature and attestation and returned with the papers on the evening of 17 March 2004, where after the affidavits were filed on the morning of 18 March 2004.

[18] The applicants opposed the application for condonation and requested the Court to dismiss it and to hear it on an unopposed basis. They pointed out that the respondents had fifteen court days to prepare and file their papers and that no objection was made at any stage to the time limits set by the applicants. It was pointed out that the answering papers were filed just before the

advent of a long week-end which caused the applicants great inconvenience and costs in having to prepare and file their replying papers and heads of argument in time for the hearing on 25 March 2004. Applicants also pointed out that the application for condonation was only filed on 19 March 2004 and that the answering papers contained untranslated material in Afrikaans. This was rectified by the filing of sworn translations prepared over the long week-end.

[19] The applicants took issue with the reason put forward by the respondents, namely that their leading counsel was not available in time, submitting that there was no allegation made by respondents that no other counsel was available, or that the specific counsel was required because of his special expertise in the issues raised. Applicants submitted that any number of local counsel could have dealt with the matter and if not, counsel from outside Namibia could have been instructed.

[20] Mr *Olivier* who, with Mr *Tötemeyer* appeared for applicants, referred the court to the cases of *Pretorius v Die Drankraad en ‘n Ander* 1987 (2) SA 261 (NKA) at 262I-J; *Duncan v Roets* 1949 (1) SA 226 (TPD) and *D’Anos v Heylon Court (Pty) Ltd* 1950 (2) SA 40 (CPD) in which it was repeatedly decided that unavailability of

specific counsel is not a ground for obtaining a postponement of matters which have been set down and submitted that on the same basis condonation should be refused.

[21] First, second and third respondents referred to the matter of *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) in which the following was said (at 720E-G):

> "It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.
>
> These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong."

[22] This was stated in the context of an application for condonation for the late filing of an appeal record and to provide for security for costs. However, the principles as stated are of general application.

[23] In the matter before us no postponement of the application was sought because of the unavailability of specific counsel. Although the late filing of the answering papers caused applicants to reply and prepare for the hearing in haste and under pressure (which also had its impact on the members of the court, who received voluminous papers on short notice), the applicants were able to put their case before Court and the matter could be heard. Although applicants were inconvenienced, and perhaps considerably so, in my view they were not prejudiced in their case. On the other hands, the prejudice to be suffered by the respondents if their answering papers are ignored, as Mr *Olivier* suggested should be done, is clearly considerable.

[24] I further bear in mind that litigants do not have an extremely wide choice of counsel in Namibia with experience and expertise to appear on an urgent basis in complex and serious matters and that their preference to brief local counsel is reasonable. It seems to me, in the circumstances of this case, that the respondents have furnished a reasonable and acceptable explanation for the delay. Bearing all the relevant factors in mind, my view is that the respondents have shown good cause for their non-compliance with the time limits set by the applicants and their application for condonation is granted. Mr

Smuts submitted that there should be no order as to costs. I agree.

C. The application to strike out portions of first applicant's replying affidavit

[25] The first, second and third respondents applied for the striking out of certain portions of the first applicant's replying affidavit on the grounds that these portions contain impermissible new matter raised in reply. Both portions relate to allegations made by the first applicant regarding his *locus standi* to bring the application for the interim relief. The offending portions are contained in the second sentence of paragraph 28.2 and in the third sentence of paragraph 44.1 of the replying affidavit.

[26] In order to assess the respondents' objection to the relevant portions, first applicant's founding affidavit and the respondents' answering affidavit must also be considered.

[27] In the first applicant's founding affidavit he states in paragraph 1.1:

> "I am the first applicant in this matter and an adult male businessman and property developer residing at 56 Hofmeyer Road, WALVIS BAY. I have been so resident at Walvis Bay for the past 46 years and I am also a municipal tax and rate payer for the Municipality of Walvis Bay."

[28] In paragraph 15 of the answering affidavit of Mr Katiti on behalf of the first, second and third respondents, these allegations are merely "noted".

[29] Paragraphs 28.1 and 28.2 of the first applicant's affidavit reads as follows [the sentence sought to be struck is underlined]:

> "28.1 I note with interest first respondent's allegation that it is in its best interest to obtain the best possible price for the properties in question. I essentially agree with this. This is indeed the purpose of a public auction, namely to sell a property to the highest possible bidder;
>
> 28.2 Respondents' conduct by excluding certain categories persons from the said auction (including myself), indeed served to limit the number of eligible purchasers and defeated the aforesaid object. <u>For this reason alone – and due to the fact that it is undisputed that I am a resident and municipal tax and rate payer of the Municipality of Walvis Bay – do I have *locus standi* to bring this application.</u> The aforegoing is quite apart from the fact that I intended to bid at the said auction and was unlawfully precluded from doing so;"

[30] These paragraphs form part of the reply to the following paragraph in Mr Katiti's answering affidavit (I only quote the relevant part):

> "20.3 I record that it is obviously in the best interests of the first respondent's financial affairs that the best possible prices are obtained for the properties in question and that wide publication of the auctions is in the first respondent's interests. Furthermore all properties were properly valued for the purposes of determining reserve prices. ....."

[31] Paragraph 44.1 of the first applicant's replying affidavit reads [the sentence sought to be struck is underlined]:

> "44.1 I deny that the issue raised has any relevance to this matter. I respectfully submit that even if I was only interested in purchasing one erf, I would have *locus standi* to challenge the said auction in its entirety. I also submit that even if I was not interested to attend, or purchase property at the said auction at all, I would still have *locus standi* to challenge the said auction by virtue of the fact that I am a resident and municipal rate and tax payer of Walvis Bay with a direct and substantial interest in the municipality's finances. I refer to what is stated above. This issue will be further referred to during argument if need be;"

[32] This paragraph constitutes the first applicant's reply to paragraph 22.2 of Mr Katiti's affidavit, which is set out here in context:

"22.

Ad paragraph 16

I note that the applicants request this court to grant them the interdictory relief contained in Part A of the notice of motion, in respect of all of the properties. I respectfully submit that, at best for the applicants, they would certainly not be entitled to this relief. I am advised and submit that the interdictory relief prayed for and on their own versions amounts to an abuse of the process of this court for the following reasons:

22.1 The first applicant's lack of standing by virtue of the fact that he did not even intend attending the auction itself.

22.2 The first applicant states that he was only *'seriously considering'* purchasing the erven marked on annexure "C" to his founding affidavit. These erven consist of erven numbers 972 to 996, erf 1120, erf 450 and also the erf he claims could not have been sold (i.e. erf 161). The first applicant accordingly only considered purchasing some 28 erven of the total number of 88 erven for sale. As is clear from annexure "D" to first applicant's affidavit, the erven he was interested in all constitute the prime erven

> which are either lagoon-facing or close to the lagoon, and sea-facing in the case of erf 161, Long Beach."

[33] Mr *Smuts* submitted on behalf of the first, second and third respondents that the reason for the application to strike out is that the first applicant's application was never brought on the basis that he has a direct and substantial interest in the Municipality of Walvis Bay's finances by virtue of his position as a municipal tax and rate payer and that the first applicant was supposed to have stated this in his founding papers. Counsel also submitted that the first applicant should have set out in his founding affidavit the basis of how and why the Municipality's finances are affected.

[34] Mr *Smuts* relied on the cases of *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (TPD) and *Coin Security Namibia (Pty) Ltd v Jacobs and Another* 1996 NR 279 (HC). In the *Titty's Bar* case VILJOEN J stated at 368H:

> "It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish *locus standi* or the jurisdiction of the Court. See Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, 2nd ed., pp. 75, 94. In my view this practice still prevails."

[35] In the *Coin Security* matter, MTAMBANENGWE J (as he then was) referred (at p288) to the passage quoted above from the *Titty's Bar* case with approval. He also referred to the case of *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* 1978 (1) SA 173 (W) at 177G-H where that court said (*per* NESTADT J):

> "The second part of the application to strike out, that relating to Auret's affidavit, is based on the contention that the allegations therein contained should have formed part of the applicant's founding affidavit and annexures, or, alternatively, constitute new matter. It is founded on the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits for the Courts will not allow an applicant to make or supplement his case in his replying affidavits and will order any matter appearing therein which should have been in the founding affidavits to be struck out. (See *Herbstein and Van Winsen*, p. 75.)"

[36] The first applicant's contention regarding the application to strike is that there is no substance in the application especially in relation to the first portion, as it concerns undisputed allegations already made by the first applicant. It is further contended that the *locus standi* established from those allegations is a legal conclusion based on the facts alleged. As such it cannot be struck out. In my view a perusal of paragraph 28.2 clearly bears

out this contention and in respect of this portion the application to strike clearly cannot be upheld.

[37] As regards the second portion, the first applicant contended that it clearly constitutes a submission and not a new allegation of fact. The submission that, by virtue of the fact that first applicant is a resident and municipal rate and tax payer of Walvis Bay, he would have a direct and substantial interest in the Municipality's finances, follows not only as a matter of logic, but is also a conclusion based on the legal relationship between the parties. This conclusion can be inferred from the first applicant's allegations and status as municipal rate and tax payer, which establishes *locus standi* for such an applicant to challenge municipal actions relating to illegal actions by the municipality in dealing with municipal funds and property.

[38] That this is so, has been held in numerous cases, as there is said to be "a relationship of trust [i.e. a fiduciary relationship] between the council and the ratepayers in respect of municipal funds and property." (*Director of Education, Transvaal v McCagie and Others* 1918 AD 616 at 628; *Dalrymple and Others v Colonial Treasurer* 1910 TPD 372 at 383, 385; *De Villiers v Pretoria Municipality* 1912 TPD 626 at 631; *Le Grange v*

Sterkstroom Divisional Council 1970 (1) SA 1 (ECD) at 3B; *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (AA) at 536D-537B; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (2) SA 1115 (SCA) at 1121 F-H).

[39] It is clear from the allegations contained in the founding papers that the implementation of the decision to hold the auction and the auction itself involved municipal expenditure and dealing in municipal property which, according to the applicant, is illegal in the circumstances of this matter.

[40] The question remains whether the first applicant should have stated, not only that he is a resident and ratepayer, as he has done, but also, in so many words, that he claims *locus standi* on the ground that he is a resident and ratepayer. In my view this is not necessary as the claim of *locus standi* is a matter of law. As long as the factual allegations on which the claim is based are set out in the founding papers, that is sufficient. It is open to a party to argue any point of law based on the factual allegations in the papers without referring to those points of law in the papers themselves. In this regard I rely on *Simmons, N.O. v*

Gilbert Hamer & Co Ltd 1963 (1) SA 897 (NPD) at 903C-D where the following was stated by CANEY J:

> "A party is entitled to make any legal contention which is open to him on the facts as they appear on the affidavits."

(See further *Van Rensburg v Van Rensburg en Andere* 1983 (1) SA 505 (AA) at 510A).

[41] It is clear that a court is entitled to proceed on the legal inferences to be drawn from all the allegations of fact in the papers (*Gramaphone Co Ltd v Music Machine (Pty) Ltd* 1973 (3) SA 188 (WLD) at 204C-D).

[42] In *Allen v Van der Merwe* 1942 WLD 39 at 47 SOLOMON J stated that the applicant might have omitted any mention of the legal contentions on which the prayer in his petition was based and then would have been entitled to argue any legal point which arose from the recited facts. The court further held that the applicant was not confined to the legal grounds set out in his petition but could advance any further legal basis for the application that might arise from the stated facts.

[43] Returning to the principle stated in the *Titty's Bar* and *Coin Security* cases, it is clear from a reading of these cases that the applications to strike succeeded because the applicant in each of the cases had failed to make the necessary factual allegations to establish *locus standi* in the founding papers and sought to rectify the omissions by inserting new facts in reply. This is not the case in the matter before us. The application to strike must therefore fail.

[44] Initially Mr *Olivier* requested this court to make a special costs order against the first, second and third respondents on an attorney and client scale as, he submitted, the application was mischievous, reckless and vexatious, but this request was later abandoned, leaving the matter in the hands of the Court. In my view there is no need to make a punitive order. It was therefore ordered that the first, second and third respondents pay the first applicant's costs in this application jointly and severally, which costs shall include the costs of two instructed counsel.

D. Interim relief.

[45] In considering the application for the interim relief operating as an interim interdict I bear in mind that the court has a discretion

to grant a temporary interdict if (i) the right which the applicant seeks to protect in the main application is *prima facie* established, even though open to some doubt; (ii) there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right; (iii) the balance of convenience favours the granting of interim relief; and (iv) the applicant has no other remedy (*Setlogolo v Setlogolo* 1914 AD 221 at 227).

[46] Further, in considering whether the first requirement has been met, the proper approach it to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant would be able on those facts to make out a case for final relief (*Gool v Minister of Justice & another* 1955 (2) SA 682 (C) at 688 E-F; *Ferreira v Levin NO and others; Vryenhoek & others v Powell & others* 1995 (2) SA 813 (W) 817F-H).

[47] The first to third respondents oppose the granting of the interim relief on several grounds. One of these is that the first applicant has no standing to apply for the relief as he never intended to attend the auction. This the first applicant denies. He state that

he intended registering as a bidder, but when he was informed of the discriminatory manner in which it would be held, he decided not to register. These facts must be accepted at this stage. Apart from this, for the reasons already set out in the application to strike dealt with above, the first applicant has the required standing as a municipal tax and rate payer to challenge actions in relation to that municipality's property dealings.

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[48] The first to third respondents further oppose the application for interim relief on the basis that the first applicant failed to satisfy the prerequisites for the granting of an interim interdict. On the other hand, the first applicant maintains that he has established a clear right to the relief sought.

[49] The first applicant bases his attack on the sale of the erven concerned on several grounds. The first is that auction itself was held in a manner which was an infringement of his constitutional and common law rights, more specifically, his right to human dignity (Article 8); the right to equality and freedom from discrimination (Article 10); the right of all persons to, in any part of Namibia, acquire, own and dispose of all forms of immoveable and movable property, individually or in association with others (Article 16); his right to administrative justice (Article 18); and

the right to practice any profession or carry on any occupation, trade or business (Article 21(1)(j)).

[50] Where the relief sought is for an interim interdict *pendente lite,* it is in my view not necessary to deal with the matter at this stage on the basis of all the alleged infringements. The first to third respondents admit in their papers that the auction was held in a manner excluding certain persons from participating in the first round on the basis of their colour, in this case, on the basis that they are white. They allege that this was done in terms of the so-called land policy, to which I have referred above and allege further that this policy is lawful and permitted in terms of Article 23 of the Constitution. The relevant parts provide:

“Article 23 Apartheid and Affirmative Action

(1) The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.

(2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service."

[51] The so-called land policy and the manner in which it was applied at the auction is clearly discriminatory on grounds of colour and therefore in violation of Article 10. Parliament has not enacted legislation under Article 23(2) to provide for the implementation of such a policy. As such it is clearly illegal.

[52] The second ground on which the first applicant relies is that the first to third respondents failed to comply with the provisions of section 63(2)(a) and (b) of the Local Authorities Act, 1992 (Act 23 of 1992), as amended by, *inter alia*, the Local Authorities Amendment Act, 2000 (Act 24 of 2000). This section provides:

"63. (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 –

(a) setting out the zoning and situation of such property and stating the place, dates and times where full particulars relating to the sale, disposal, letting, hypothecation or encumbrance of such property will lie for inspection by interested persons for a period of not less than seven days after the last date of the publication of such notice;

(b) in the case of the sale, disposal, letting, hypothecation or encumbrance of such immovable property by way of a private transaction, calling upon interested persons to lodge any objection to such sale, disposal, letting, hypothecation or encumbrance with the local authority council in writing within a period of not less than ten days after the last date of the publication of such notice.”.

[53] As far as section 63(2)(a) is concerned the main objection raised by the first applicant is that the required notice was not given at least 7 days before the auction. It is not disputed that during the last two weeks before the auction publication occurred as follows:

(i) in the “Republikein” on Monday, 15 December 2003 and on Thursday, 18 December 2003;

(ii) in the “Namibian” on Thursday, 18 December 2003;

(iii) in the “Namib Times” on Friday, 12 December 2003 and on Tuesday, 18 December 2003.

[54] First to third respondents contended that there was substantial compliance with the requirements of the section and that the first applicant did see the notice and had an opportunity to inspect the particulars required to be published, thereby not suffering any prejudice.

[55] Apart from this, the first to third respondents admit in their answering papers that by an oversight, no notice was given in respect of erf 1096 and that the sale of this erf was invalid.

[56] I agree with counsel for the first applicant that the purpose of the section is to provide a window period for interested persons to inspect full particulars regarding the sale and other details on

the property to be offered for sale. When the legislature determined a period of seven days, it seems to me that it must have considered this to be the minimum sufficient period to provide for such an opportunity, at it used the words "not less than seven days after the last date if the publication of such notice". Not only does it provide sufficient time for inspection, but also affords an opportunity to prospective purchasers to make arrangements to attend the auction and to be able to bid. This must surely be in the interests of the local authority which obviously wants to attract as many bidders as possible with enough funds available to sell its property at the best possible prices. Affording inadequate time to interested persons, which is considered by the legislature to be less than 7 days, cannot serve the interests of the local authority and its rate payers. *Prima facie*, it seems to me that the first applicant has established a right to object to the auction on these grounds.

[57] The same can, in my view, be said in respect of the alleged non-compliance with section 63(2)(b) of the Act, when 44 of the remaining erven were sold by private treaty. None of these were advertised as required by the Act. Although the first to third respondents alleged that evidence of these sales was inadmissible hearsay evidence, it must be pointed out that this

information is contained in the list of purchasers they provided to the first applicant on 17 February 2004.

[58] The third ground on which the first applicant relies for the interim relief is the non-compliance with section 50 of the Act in relation to erf 161, Langstrand. It is common cause that this erf is a public space, which is defined in the Act as “any square, garden, park, recreation ground, show ground, rest camp or other open or enclosed space intended for the use, enjoyment or benefit of residents in a local authority area”. The relevant parts of section 50 provide:

> **“50 Closing of streets or public places**
>
> (1) A local authority council may -
>
> (a) at any time and upon such notice as it may deem fit -
>
> (i) temporarily close any public place or any part of a public place for any purpose which in its opinion requires it to be so closed;
>
> (ii) temporarily or permanently close any street or any portion of a street for any particular class of traffic for any purpose which in its opinion requires it to be so closed; or
>
> (iii) temporarily close or divert any street or any portion of a street for all traffic for the purpose of maintenance or any reason which in its opinion requires it to be so closed;

(b) subject to such terms and conditions as may be determined by the local authority council, let or grant the right to use temporarily, any public place or part of a public place or any street or portion of a street closed in terms of paragraph (a) to any person for any period during the period in which it is so closed;

(c) subject to the provisions of subsections (2), (3) and (4), permanently close any public place or any part of a public place, or permanently close or divert any street or any portion of a street;

(d) re-open any public place or part of a public place or re-open or re-divert, *mutatis mutandis* in accordance with the provisions of subsections (2) and (3), any street or portion of a street closed or diverted in terms of paragraph (c).

(2) A public place or any part of a public place shall not be closed, or a street or any portion or a street shall not be closed or diverted, in terms of paragraph (c) of subsection (1), except upon a decision of the local authority council taken, upon the recommendation by its management committee at a meeting at which a majority of its members are present and, in the case of a municipal council or town council, on the recommendation of its management committee.

(3) (a) A local authority council shall, before it closes any public place or part of a public place or closes or diverts any street or portion of a street -

(i) cause a plan to be prepared showing the nature of the closure or diversion of such public place or street and the location of such public place or street;

(ii) cause a notice to be published in the *Gazette* and in at least two newspapers circulating within its area, setting out -

(aa) the nature of the closure or diversion of such public place or street;

(bb) the location of such public place or street;

(iii) state that the plan referred to in subparagraph (i) is lying for inspection at the offices of the local authority council during ordinary office hours; and

(iv) call upon interested persons to lodge any objections to such closure or diversion with the local authority council in writing within a period of not less than 14 days after the date of the publication of such notice.

(b) A copy of the notice referred to in subsection (1) shall within 14 days after its publication be served on the owner and occupier of any immovable property situated directly opposite any such public place or street.

(c) If any objection is lodged in terms of paragraph (a), the public place or part of a public place or the street or portion of a street shall not be closed or diverted, as the case may be, unless -

(i) the local authority council has submitted to the Minister such particulars as the Minister may require in relation to the proposed closure or diversion, together with the objections lodged and the comments of the local authority council thereon; and

(ii) the local authority council has obtained the approval of the Minister to so close such public place or such

part of a public place or divert such street or such portion of a street.

(4) A local authority council shall notify the Surveyor-General of any permanent closure or diversion of a street or portion of a street effected in terms of this section.

(5) Notwithstanding the provisions of section 33, the owner of any immovable property who has suffered any damage or loss in consequence of the closure of any public place or part of a public place or the closure or diversion of any street or any portion of a street under this section, shall be entitled to such compensation as may be determined by mutual agreement between such owner and the local authority council in question or, in the absence of any such agreement, by arbitration.

(6) Any person who uses a public place or street or any portion thereof that has been temporarily closed or diverted in terms of subsection (1) shall be guilty of an offence and on conviction be liable to a fine not exceeding N$2000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

[59] The first applicant alleges that none of these provisions have been followed. The first to third respondents' reply is that the sale of erf 161 is conditional and rely on a document which was attached to their letter to first applicant dated 17 February 2004 which apparently set out conditions of sale in respect of erf 161 in which the following paragraphs appear:

> "THE AGREEMENT OF SALE WILL BE SIGNED ONCE THE PURCHASER HAS ATTENDED TO ALL LEGAL AND RELATED PROCEDURE IN TERMS OF THE LOCAL AUTHORITIES ACT, 1992 (ACT 23/1992) AS AMENDED, AND THE WALVIS BAY TOWN PLANNING SCHEME, AS FAR AS THE CLOSURE AND REZONING OF THE PUBLIC OPEN SPACE ARE CONCERNED. THE SAID PUBLIC OPEN SPACE CAN BE REZONED TO GENERAL RESIDENTIAL 11.
>
> THE PURCHASER MUST COMMENCE WITH THE ABOVEMENTIONED PROCEDURES WITHIN THREE MONTHS FROM DATE OF THIS AUCTION.
>
> THE MUNICIPALITY WILL GIVE THE REQUIRED ASSISTANCE."

[60] In as much as the so-called conditions place an onus on the purchaser to do what the local authority is supposed to do by law, it seems to me to amount to an abdication of its duty under the law to follow a rather stringent procedure before a public place may be closed. A purchaser would not, in terms of the section be entitled to take the actions contemplated by the relevant legal provisions. I agree with counsel for the first applicant that this would be requiring of the purchaser to do what is legally impossible. The procedure contemplates notice being given to interested parties and allows for objections to be made against the proposed closure. The section states that the procedure must be followed before the public space is closed.

The purpose of the section is to protect the interests of the public and of the owner or occupier of immovable property directly opposite the public space or who may suffer any damage as a result of the closure. This purpose is not served by offering the public space for sale before the required procedures have been followed.

[61] In my view the first applicant established that there was a reasonable apprehension of irreparable harm to him should the transfer of the erven sold not be interdicted. I am also satisfied that the balance of convenience favours the first applicant.

[62] Consequently the application for the interim relief was granted as set out in the order at the commencement of these reasons.

VAN NIEKERK, J

I agree.

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DAMASEB, JP

I agree.

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SILUNGWE, J

APPEARANCE FOR THE PARTIES:

APPLICANTS: Adv W Olivier SC, with Adv R Tötemeyer

Instructed by: Dr Weder, Kruger & Hartmann

FIRST TO THIRD RESPONDENTS: Adv D F Smuts SC,

with Advv R Cohrssen and L Hamutenya

Instructed by: Metcalfe Legal Practitioners