CASE NO.: (P) A 202/2007

SUMMARY

WLOTZKASBAKEN HOME OWNERS ASSOCIATION AND ANOTHER

versus

THE ERONGO REGIONAL COUNCIL AND OTHERS

2007 December 12

PARKER, J

Practice - Applications and motions – Motion proceedings by artificial persons – Not always necessary to attach resolution authorizing institution of proceedings – But, if authority to institute proceedings is attacked in answering affidavit resolution should be annexed to replying affidavit – In doing so applicant not necessarily raising new matters in replying affidavit.

Practice - Affidavit – Affidavit is primarily evidence – Affidavit deposed to on behalf of artificial person – Artificial person at liberty to request any individual familiar with the facts to depose to affidavit on its behalf – Such individual need not be a member of artificial person.

Contract - Legality – Contractual fetter of discretion of public authority – Rule of 'no fetter of discretion' of public authorities stated and explained – Agreement by regional council to sell all erven – Whether Agreement invalid as unlawful fettering of regional council's

statutory power to also lease in terms of Regional Council's Act (Act No. 22 of 1992).

Contract - Legality – Contracts allegedly contrary to public policy – Doctrine of *pacta sunt servanda* as aspect of public policy and conduces to constitutionalism.

Interdict - Final interdict – When order granted – On all the facts and circumstances of the case Court exercising its discretion in favour of granting order

CASE NO.: (P) A 202/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WLOTZKASBAKEN HOME OWNERS ASSOCIATION	**1st Applicant**
KERRY SEAN McNAMARA	**2nd Applicant**

and

THE ERONGO REGIONAL COUNCIL	**1st Respondent**
THE MINSTER OF REGIONAL, LOCAL GOVERNMENT AND HOUSING	**2nd Respondent**
THE CHAIRPERSON OF THE TOWNSHIPS BOARD	**3rd Respondent**
STUBENRAUCH PLANNING CONSULTANTS CC	**4th Respondent**

CORAM: **PARKER, J**

Heard on: 2007 November 26-27

Delivered on: 2007 December 12

JUDGMENT:

PARKER, J.

[1] In this matter application is made, on notice of motion, by the Wlotzkasbaken Home Owners Association (1st applicant) and Mr. Kerry McNamara (2nd applicant). The first applicant is a voluntary association whose members are lessees of some 104 of the

110 sites in the small fishing and holiday resort of Wlotzkasbaken, situated at some 35 km north of Swakopmund on the Namibian coast (Wlotzkasbaken). The 1st applicant has legal personality and, therefore, an identity separate from its members'. The 2nd applicant is one of the members of the 1st applicant and a lessee of one of the sites at Wlotzkasbaken and past chairperson of the 1st applicant.

[2] In the present application the applicants have prayed for an order in the following terms:

(1) That the forms and service as prescribed by the Rules of Court be dispensed with and that this application be heard as a matter of urgency as contemplated by Rule 6 (12).

(2) Issuing a rule *nisi*, returnable on Friday, 28 September 2007 at 10h00, calling upon respondents or any other interested parties to show cause why an order in the following terms should not be granted;

(2.1) That the first respondent be directed to comply with the terms and provisions of the agreement of settlement concluded between applicants and first to third respondents on 10 November 2006 and made an order of the above Honourable Court on 20 November 2006 under case number (P) A 338/2000, annexure "B" to the founding affidavit of Martin Moeller in this matter;

(2.2) That the first respondent be interdicted and restrained from leasing erven in the Wlotzkasbaken settlement pursuant to its invitation of 20 July 2007, annexure "F" to the founding affidavit or a similar such invitation to that effect;

(2.3) Save as authorised by annexure "B" aforesaid and subject thereto, that the first respondent be interdicted and restrained from leasing, or advertising an intention to do so, erven in accordance with the layout plan, annexure "C" to the said affidavit, until it has been amended and the township proclaimed, which would give rise to the establishment of those erven;

(2.4) Save as authorized by annexure "B" aforesaid and subject thereto, that first respondent is interdicted and restrained from leasing the erven to be established upon proclamation of the township of Wlotzkasbaken by reason of its agreement to sell same, as set out in annexure "B";

(2.5) That first respondent shall pay the applicants' costs, and in the event of any of the other respondents or parties opposing this application such respondents shall pay applicants' costs jointly and severally with first respondent;

(2.6) Grant such further or alternative relief as the Honourable Court may deem fit.

(3) That the relief sought in prayers 2.1 to 2.4, *supra*, shall operate as an interim interdict, pending the return day of the said rule *nisi*.

(4) Further or alternative relief.

[3] It is important to step back to six or so years ago when the applicants brought a review application to this Court on 26 June 2001. The review application was finally settled in November 2006, after, what Mr. Smuts, for the applicants, referred to in his submission as "protracted negotiations". Thus, on 10 November 2006 the parties reached an Agreement of Settlement (the 2006 Agreement) in terms that follow, hereunder. Weightily significant is that the parties agreed that the 2006 Agreement must be made an Order of this Court.

[4] Pursuant to such term, the 2006 Agreement was made an Order of this Court on 20 November 2006. These are the terms of that Agreement:

The parties hereto have reached a settlement in the following terms which they agree will be made an order of court:

(1) The applicants withdraw their application on the basis set out hereafter and each party bears their own costs.

(2) The applicants record that they support the establishment of a township for Wlotzkasbaken and the parties agree that all erven situated at Wlotzkasbaken will be sold upon the applicants having withdrawn their application.

(3) The applicants record that they accept the proposed township layout of 258 erven (drawing No. W97007/BT/FIG9) subject to the following:

(4) The Wlotzkasbaken Home Owners Association and its members have a pre-emptive right in respect of the erven upon which their structures are located, at purchase prices to be determined by the Erongo Regional Council in conjunction with the Minister of Regional, Local Government and Housing at the upset prices for vacant erven (determined in accordance with the standard or usual practices adopted by the local authorities in Namibia for determining such prices) for the purposes of public auctions or tendering processes a required by the Local Authorities Act, and as agreed upon in terms of the Agreement of Settlement concluded during November 2000, which was already made an order of court; and

(5) The parties agree that the lease agreements entered into by and between the 1st applicants' members and the 2nd respondent will be renewed on an annual basis until date of exercise of the right of pre-emption by the Wlotzkasbaken Home Owners Association and its members in accordance with clauses 4 and 6 of this Agreement, subject to the terms and conditions as contained in the standard lease agreement of the Erongo Regional Council at the time; and

(6) The pre-emptive rights of the Wlotzkasbaken Home Owners Association and its members referred to in clause 4 above, shall be exercised by the Wlotzkasbaken Home Owners Association and its members within 90 (ninety) days after receipt of written notification of the purchase price payable.

[5] The earlier Settlement Agreement referred to in Clause 4 of the 2006 Agreement was concluded on 6 November 2000 (the 2000 Agreement), and was made an Order of the Court the same day. The 2000 Agreement provides:

1. The applicants withdraw the application on the basis set out hereafter and each party bears their own costs save that the costs as between the applicants and first and third respondents are reserved for determination.

2. The applicants record that they support the establishment of a township for Wlotzkasbaken.

3. The respondents agree that the first applicant's members will have the right to pre-emption in respect of such members' site remaining after the final proclamation of a township and on which such members' dwelling is situated at purchase prices to be determined by the second respondent in conjunction with first respondent at the upset prices for vacant erven (determined in accordance with the standard or usual practices adopted by local authorities in Namibia for determining such prices) for the purpose of a public auction or tendering

> process as required by the Local Authorities Act in respect of the sale of the sites of the township to be established, should second respondent resolve to sell same.

[6] The notice of motion in the present matter was filed with the Court on 6 August 2007, and the matter began its life as an urgent application, but pursuant to an interim agreement between the applicants and the 1st respondent, which was by the consent the parties thereto made an Order of this Court on 16 August 2007, the issue of urgency then fell away. Apart from the item about urgency and the other items concerning procedural matters, a substantive item was that the parties agreed that "First respondent shall desist from leasing erven at Wlotzkasbaken settlement (except those erven in respect of which the 1st applicant and its members have pre-emptive and renewal rights) until final determination of this application". The parenthetical words are necessary to ensure that the lease in respect of the 1st applicant and its members continued on renewal basis.

[7] I must say at this juncture that, in my opinion, there are no insoluble genuine and relevant disputes of facts. I now proceed to consider the challenge respecting *locus standi* mounted by the 1st respondent. The 1st respondent's challenge goes like this: In the 1st applicant's founding affidavit, Mr. Moeller, who deposed to the affidavit on behalf of the 1st applicant, states that he is the duly elected chairperson of the 1st applicant, and that he was duly authorized by the 1st applicant to bring the application on its behalf and to depose to the founding affidavit. The founding affidavit was attested on 6 August 2007. The 1st respondent denies that Mr. Moeller was duly elected as Chairperson and duly authorised by the 1st applicant to bring the application on its behalf and to depose to the founding affidavit on behalf of the 1st applicant. The 1st respondent denies further that Mr. Moeller is a tenant of Wlotzkasbaken because there is no record in the 1st respondent's possession, showing that there is a lease agreement between the 1st respondent and Mr. Moeller. In sum, the 1st respondent denies Mr. Moeller's authority to represent the 1st applicant.

[8] Mr. Moeller concedes that he has not entered into any lease agreement but that he is a co-tenant of Wlotzkasbaken in virtue of the fact that his wife is the lessee, but he pays the rent for the lease. To a replying affidavit deposed to by him, Mr. Moeller annexes a resolution taken on 1st August 2007 indicating his authority to represent the 1st applicant and to depose to the affidavit on its behalf. But in his submission, Mr. Oosthuizen says, that is not good enough; and that since the resolution was not annexed to the founding affidavit, Mr. Moeller's attempt to rectify that failure must be ejected. Mr. Oosthuizen says, "It is *trite* that an applicant such as the 1st Applicant and its deponent should show their authority in the founding papers." In support of his contention, Mr. Oosthuizen referred to me the following South African cases: *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (CPD) at 351D-H; *Director of Hospital Services v Mistry* 1979 (1) SA 739 (A); *Riddle v Riddle* 1956 (2) SA 739 (C)).

[9] In addition, Mr. Oosthuizen submitted that in terms of the 1st applicant's Constitution, membership of the 1st applicant is "restricted" to tenants; that only the committee of the 1st applicant can grant membership subsequent to an application made by a candidate; that Mr. Moeller only makes a bald statement that he is a member of the 1st applicant; and that is not sufficient. Mr. Oosthuizen then goes on to employ this syllogism: Mr. Moeller is not a member of the 1st applicant; he could not have been elected as a committee member; and he could not have been elected as chairperson of the 1st applicant; *ergo*, he could not represent the 1st applicant and depose to the affidavit on its behalf.

[10] Mr. Smuts submitted that Mr. Oosthuizen's submission on the point is not well founded. He says the three South African cases cannot assist the 1st respondent in its challenge; and that the 1st respondent's counsel's argument is based on a false premise, namely, that it is "trite" that the 1st applicant and Mr. Moeller should have annexed the

resolution to the founding affidavit and not later on to the replying affidavit. In support of this submission Mr. Smuts referred to me *South West Africa National Union v Tjozongoro and Others* 1985 (1) SA 368; *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615; *Pretoria City Council v Meerlust Investments Ltd* 1962 (1) SA 321.

[11] The golden thread that runs trough these cases, starting from *Mall (Cape) Pty Ltd, supra*, is set out succinctly in the following passage, *per* Strydom, J (as he then was) from *Tjozongoro and Others, supra*, at 381E:

> In all these cases (i.e. cases the learned judge referred to) the Courts concluded that in motion proceedings by an artificial person, although prudent, it is not always necessary to attach to the application the resolution authorizing the institution of proceedings and that a deponent's allegation that he was duly authorized would suffice in the absence of a challenge to his authority.

[12] Thus, from *Tjozongoro and Others*, it seems to me clear that where such authority is challenged, there is no rule of practice preventing the deponent from proving such of his or her authority by annexing the resolution authorising the institution of proceedings to his or her replying affidavit. If a deponent did that, he or she was not extending the issue by raising new matters in the replying affidavit, as Mr. Oosthuizen appears to argue. That being the case, I do not think *Director of Hospital Services v Mistry, supra*, is of any real assistance on the point under consideration. By a parity of reasoning, *Riddle v Riddle, supra*, too, cannot assist the Court in determining the issue at hand.

[13] To the principle in *Tjozongoro and Others, supra*, should be added the principle in *Ganes and Another*, s*upra*, in the following passages at 615G-H:

> In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorized to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorized to depose to the founding affidavit on behalf of the respondent, and he did not admit that Hanke was so authorized and that he put the respondent to the

> proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.

[14] I respectfully adopt the dicta in *Ganes and Another*, *supra*, and *Tjozongoro and Others*, *supra*, as correct statements of the law in support of the conclusion I have made above on he point.

[15] Indeed, it must be remembered that all that the 1st respondent's Constitution says about membership is, "Each tenant shall be *entitled* to be a member of the Association (1st respondent)." I do not, with respect, agree with Mr. Oosthuizen that membership is "restricted" to tenants: the Constitution does not say that. "Restricted" means "confined (to)" or "limited (to)" (*Concise Oxford Dictionary*, 10th ed.) "Entitled" means to have "a right" to or have "a just claim" to (*ibid.*) "Restricted" and "entitled" are, therefore, in my opinion, not synonymous. Thus, if the 1st respondent has extended membership to a co-tenant like Mr. Moeller, who may not be "entitled" to become a member, I do not think it is within the province of this Court to question the 1st applicant's decision on the matter; and I do not find that to be offensive of the 1st respondent's Constitution.

[16] In any case, it must be remembered that Mr. Moeller does not say, I am the chairperson of the 1st applicant and so, therefore, I am authorized by the 1st applicant to bring this application on its behalf and to depose to this affidavit on its behalf. The fact of being chairperson is separate from the fact of being authorized to bring the application and to depose to the affidavit. As Mr. Smuts correctly submitted, affidavit constitutes evidence, and the 1st applicant's Committee could have authorised anybody who was familiar with the facts to depose to the affidavit on behalf of the 1st applicant.

[17] The result is that I am satisfied that the institution of the proceedings and the prosecution thereof have been authorized by the 1st applicant, acting through its Committee in term of Clause 6.7 of the 1st applicant's Constitution. It follows that the 1st respondent's challenge on *locus standi* fails.

[18] I pass to deal with the merits of the present application. The pith and marrow of the application is that, in sum, the applicants seek to enforce the Court Order of 20 November 2006, incorporating the 2006 Agreement: the terms of that Agreement is set out *in extenso* above. Therefore, logically, it is to the interpretation and application of the 2006 Agreement that I must address myself.

[19] As I see it, despite the fact that this case has been argued extensively and I have been referred to quite a number of authorities, in my view, it falls within an extremely short and narrow compass. It is this: what does the 2006 Agreement, read with the 2000 Agreement, say?

[20] Mr. Smuts submitted that the essence of the applicant's application is rooted in upholding the principle of rule of law, which finds expression in Article 1 of the Namibian Constitution. In short, he argued, there is the 2006 Agreement, which was elevated to the status of a Court Order, and the rule of law expects that Court Orders be obeyed. The second fundamental premise on which the application stands is the well-tested principle of *pacta sunt servanda*, which requires that contracts must be enforced (Christie, *The Law of Contract in South Africa*, 5th ed.: p. 199; *Barkhuizen v Napier* 2005 (5) SA 323 at 341B-D) Mr. Oosthuizen submits that the 1st respondent differs with the applicants' categorization that the application has its roots in, and is directed at, upholding the rule of law: the categorization is an oversimplification, he says. But he does not deal with the principle of *pacta sunt servanda*.

[21] In this connection, Mr. Oosthuizen submitted that in dealing with this matter the Court must bear in mind that the 2006 Agreement incorporates the 2000 Agreement. I respectfully agree with Mr. Oosthuizen; and I now proceed to interpret and apply the relevant provisions of the two Agreements, bearing in mind that the latter Agreement incorporates the former Agreement.

[22] Applying the golden rule of construction (see *Coopers & Lybrand* 1995 (3) SA 761 at 767E-768E) (and both counsel agree that that is the interpretational approach that should apply), the words "in respect of the sale of the sites of the township to be established, *should* second respondent (now 1st respondent) resolve to sell same" (in Clause 3 of the 2000 Agreement) means the sites will be sold *if* the 2nd respondent (now 1st respondent) resolves to sell them. In contradistinction to the 2000 Agreement, the 2006 Agreement provides in material parts in Clause 2 thereof: "the parties agree that *all* erven … *will be* sold."

[23] Juxtapose, as I do, the aforementioned provision in the 2000 Agreement with the aforementioned provision in the 2006 Agreement – as they can, and they should, since the latter Agreement incorporates the former Agreement – and the following interpretation irrefragably emerges, considering, as I say, the intertextuality of the two Agreements: in November 2000 the parties agreed that the erven would be sold *only if* the 2nd respondent (now the 1st respondent) resolves. Thus, in the 2000 Agreement, the sale was not categorical, and it was conditional, i.e. *if* the 2nd respondent (i.e. 1st respondent) resolved. Six years later, the language changed to: *all the erven will be sold.* Thus, in November 2006, the parties agreed – categorically and unconditionally – that *all* the erven *will be* sold; the sale of *all* the erven is, therefore, no longer conditional upon the 1st respondent

resolving: it will be done and it must be done, in my opinion, within a reasonable time if the 2006 Agreement was to have meaning and proper effect.

[24] It follows that I do not, with respect, accept Mr. Oosthuizen's submission that the applicants have no justiciable interest in what he calls "this residential group of erven", i.e. those that the 1st applicant's members do not have pre-emptive and renewability right in respect thereof, i.e. about 148 sites. The applicants' justiciable right arises out of the enforceable 2006 Agreement that *a fortiori* was made an Order of this Court; and, as I say, that Agreement says plainly and unambiguously that "*all* the erven will be sold" – all, not some, of them. And if the applicants have noticed that something else is being done to some of the erven, I think the applicants have not only a justiciable interest but also a protectable and justiciable right in what happens to not only the 110 but the 148 erven **(**i.e. **'**the all'**)** in terms of the 2006 Agreement.

[25] By placing the advert in the 20 July 2007 issue of *The Market Place/Die Mark* (Annex "F" to the 1st applicant's founding Affidavit), the 1st applicant crossed the Rubicon in its intention to breach of the 2006 Agreement and to disobey the Court Order of 20 November 2006.

[26] On this point, Ms Machaka, for the 2nd and 3rd respondents, submitted that the advert did not violate s. 28 (1) (j) of the Regional Councils Act, 1992 (Act 22 of 1992) (the Regional Councils Act) because the 1st respondent would have to seek the approval of the Minister (i.e. Minister of Local Government and Housing) should the 1st respondent decide to lease to those who had responded to the advert and whose offer had been accepted by the 1st respondent. Section 28 of the Regional Councils Act provides in material parts:

> (1) In addition to the powers conferred upon a regional council by Article 108 of the Namibian Constitution or any other provision of this Act, a regional council shall have the power –
>
> (j) with the approval in writing of the Minister previously obtained in general or in every particular case and subject to such conditions, if any, as may be determined by him or her –
>
> (i) to acquire or hire, or hypothecate, let, sell or otherwise dispose of immovable property or any right in respect of immovable property.

[27] From the answers to my questions I got from Ms Machaka, I gather that what counsel is saying is this: it is too early in the day for the applicants to approach the Court when the advert in itself does not offend s. 28 (1) (j) of the Regional Councils Act. It seems to me Ms Machaka raises the question of anticipatory breach. In *Ponisamy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 387B the following passage from the judgement of Devlin, J in *Universal Cargo Carriers Corporation v Citati* (1957) 2 QB 401 at 436 is cited with approval:

> A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renunciating must 'evince an intention' not to go on with the contract. The intention can be evinced either by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renunciating has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract.

As Jansen, JA observed in *Tuckers Land Development Corporation v Hovis* 1980 (1) SA 645 (A) at 653E, the test propounded in *Citati*; *supra*, is both practical and fair; and I respectfully adopt it in this judgment.

[28] Thus, in the instant case the question that arises is, therefore, this: has the 1st respondent acted in such a way as to lead a reasonable person to the conclusion that the 1st respondent does not intend to fulfil its part of the 2006 Agreement, if regard is hard to the principle that the "reasonable person" must be placed in the position of the applicants

(*Hovis*, *supra*, at 653F)? *In casu*, I must take account of the fact that 1st respondent has failed to get Wlotzkasbaken proclaimed as a township within a reasonable time in order to implement the relevant provision of the 2006 Agreement. Even by the 1st respondent's own evidence (given on its behalf by the sole member of the 4th respondent) the process should take between eight and 12 months to complete; Mr. Simon, for the applicants, pegs the period at not more than three months. Then eight months after the conclusion of the 2006 Agreement, the 1st respondent posted the aforementioned telltale advert. From these facts, I have no difficulty in rejecting Ms Machaka's argument because it is not well-founded. I accept the applicants' contention that they have come to the reasonable conclusion that the 1st respondent does not intend to fulfil its part of the 2006 Agreement, and, therefore, they have approached this Court for relief. I do not find their contention amiss or unreasonable.

[29] For all the above, in my opinion, the correct interpretation and application of the relevant part of Clause 2 of the 2006 Agreement, read with the relevant part of Clause 3 of the 2000 Agreement, is this: the parties agreed that *all* the 258 erven situated at Wlotzkasbaken *will be sold* after the establishment of a township for Wlotzkasbaken. I do not think the respondents can quarrel with this interpretation, considering Ms Machaka's submission treated previously and Mr. Oosthuizen's submission in the next succeeding paragraph. But that is not the end of the matter.

[30] On behalf of the 1st respondent, Mr. Oosthuizen submitted that the central and decisive issue for consideration is whether the 1st respondent's statutory power and discretion to lease the erven situated at Wlotzkasbaken, apart from and excluding those erven in respect of which the 1st applicant's members have pre-emptive and renewal rights, may be fettered by the 2006 Agreement.

[31] Mr. Oosthuizen's submission calls for an inquiry into the applicability of the general principle of contractual fetters on discretion or the rule of 'no fettering of discretion'. The general principle is that "an authority may not by contract fetter itself so as to disable itself from exercising its discretion as required by law (Wade and Forsyth, *Administrative Law by Sir William Wade*, 7th ed.: p. 366)." (See also de Smith *et al.*, *Principles of Judicial Review*: Chapter 10; Baxter, *Administrative Law*: pp. 419-424.) The general principle has been stated, developed and refined in a number of cases, e.g. *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623; *Denman Ltd v Westminster Corporation* [1906] 1 Ch. 464 (CA); *Birkdale District Electric Supply Co v Southport Corporation* [1926] AC 355; *Stourcliffe Estates Co Ltd v Corporation of Bournemouth* [1910] 2 Ch. 12 (CA); *Rederiaktiebolaget 'Amphitrite' v The King* [1921] 3 KB 500; *Sachs v Donges NO* 1950 (2) SA 265 (A); *Waterfalls Town Management Board v Minister of Housing* 1957 (1) SA 336 (SR); *Regina v Hammersmith and Fulham London Borough Council, Ex parte Beddowes* [1987] 1 KB 1050 (CA); *Fellner v Minister of the Interior* 1954 (4) SA 523 (A) 1993 (A)); *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); *Dowty Boulton Paul Ltd v Wolverhampton Corporation* [1971] 2 All ER 277 (Ch D); *Rapholo v State President and Others* 1993 (1) SA 680 TPD at 693; *Barkhuizen v Napier* 2007 (5) SA 323 (CC)).

[32] In my view the general principle is as refined and succinctly set out in the following passage from *Birkdale District Electricity Co Ltd*; *supra*, at 364, *per* Lord Birkenhead:

> … (it is the) well-established principle of law, that if a person or public body is entrusted by the Legislature with certain powers and duties expressly or implied for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties.

[33] All the authorities adumbrated above state correctly the general principle but only a handful of them are directly in point and apropos to the facts of the present case. For instance, the *Amphitrite* case, *supra*, which was approved in *Sachs*, *supra*, concerns English Crown prerogative powers; and *Sachs,* concerns the power of the Crown to revoke a passport, and *Fellner, supra*, the Crown's power not to renew a passport. What about *Waterfalls Town Management Board*, *supra*, which is referred to in the *Amphitrite* case, *Sachs*, and *Fellner*? In *Waterfalls Town Management Board*, Murray, CJ found (at 342B-C) that there was no evidence that the respondent Minister of Housing granted a servitudal right, and it was even uncertain whether the servitude was intended for the benefit of the applicant Board; but, more important, the Court there found that the Board had a political, not a judicial, remedy. It follows that this case, too, is not much of assistance, considering the facts of the matter at hand.

[34] From the relevant authorities, I form the opinion that before this Court can conclude that the implementation or enforcement of the 2006 Agreement is incompatible with the due exercise of the 1st respondent's powers or the discharge of its duties, I must answer two immensely crucial questions. First, did the respondent possess the macro-authority to enter into the Agreement? In other words, was the concluding of that Agreement *ultra vires* the 1st respondent? This overall issue is essentially a question of legality, as Mr. Smuts correctly submitted. Baxter put it neatly thus in his *Administrative Law*, *supra*, p. 421:

> There is no need to elevate the principle to such levels of mysticism, it is simply an expression of the principle of legality in the failure to exercise conferred powers constitutes an abdication of that power, which is not in the public interest. It is akin to the principle that no one may waive a right or power which has been enacted for the public benefit.

In other words, a public authority like the 1st respondent "offends against legality by failing to use its powers in the way they were intended, namely, to employ and to utilize

the discretion conferred upon it" (de Smith, *et al*., *Principles of Judicial Review*, *supra*: p. 395). (See also *Stourcliffe Estates Co Ltd*, *supra*, at 18, 22; *Ex parte Beddowes*, *supra*, at 1064E.) Second, this large and fundamental issue of legality leads to the micro-issue: the micro-issue raises a question of public policy. The issue of public policy was canvassed by Mr. Oosthuizen.

[35] It seems to be clear and incontrovertible that in concluding the 2006 Agreement (and, indeed the 2000 Agreement) the 1st respondent did not act *ultra vires*. As a juristic person the 1st respondent has the power to enter into contracts necessary for the exercise of its powers and the performance of its functions (see, e.g. the prohibitions regarding contracts a regional council enters into or has entered into under s. 16 of the Regional Councils Act).

[36] In *Ex parte Beddowes*, *supra*, Sir Denys Buckley of the Court of Appeal made the following pithy observation on the application of the rule of 'no fettering of discretion' thus:

> I am clearly of the opinion that, if a statutory authority acting in good faith in the proper and reasonable exercise of its statutory powers thereafter preclude the authority from exercising some other statutory power, or from exercising its statutory powers in some other way, cannot constitute an impermissible fetter on its powers. Any other view would involve that the doctrine against fettering would itself involve a fetter on the authority's capacity to exercise its powers properly and reasonably as it thinks fit from time to time. So, in my view, the decision of the present case depends primarily upon whether the council was acting properly and reasonably in proposing to covenant with Barratts in the terms of the second schedule covenants.

I respectfully adopt Sir Denys's dictum as a correct statement of the application of the rule, as now developed and refined. Indeed, in my view, that dictum conduces to the principle of *pacta sunt servanda*, which as Ngcobo, J stated in the South African Constitutional

Court case of *Barkhuizen*, *supra*, is informed by the Constitution. The learned Judge of the Constitutional Court observed at 341B-C:

> … public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted (e.g. *Brisley v Drotsky* 2002 (4) SA 1 (SCA)) gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity.

In my view, the constitutional principle enunciated by Ngcobo, J in *Barkhuizen* must apply with equal force to Namibia's constitutional milieu.

[37] For all the above, I find that regarding both the macro-question of legality and the micro-question of policy, the 1st respondent has no legal leg to stand on to refuse to be bound by the 2006 Agreement and to act in a manner that frustrates the implementation of the 2006 Agreement in a reasonable time. In my view, in concluding that Agreement, the 1st respondent acted in good faith in the proper and reasonable exercise of its statutory powers under the Regional Councils Act: the fact that the obligation to sell *all* the 258 erven may thereafter preclude the 1st respondent from exercising its statutory power in some other way (e.g. by leasing some of the 250 erven in the interim, i.e. before the sale) cannot constitute impermissible fetter on its power under s. 28 of the Regional Councils Act, or any statutory provision for that matter. Relying on authority in *Commissioners of Crown Lands v Page* [1960] 2 QB 274 (CA) at 293, *per* Devlin, J, Professor Wade wrote (in *Administrative Law*, 5th ed.: p. 339):

> It would be quite wrong to conclude that a public authority can "escape from any contract which it finds disadvantageous by saying that it never promised to act otherwise than for the public good"

> There will often be situations where a public authority must be at liberty to bind itself for the very purpose of exercising its powers effectively.

[38] Thus, in my view, the 1st respondent cannot escape its obligation under the 2006 Agreement because it finds it disadvantageous. Above all, what marks the present case most distinctively is the fact that the 2006 Agreement (like the 2000 Agreement) was made an Order of this Court: this is superlatively significant. The 2006 Agreement between the parties who are also parties to the proceedings before the Court approached the Court to make their Agreement an Order of the Court; and it must be remembered, the parties were legally represented in both the drawing up of that Agreement and in the application to make it an Order of the Court. In practice, in my opinion, what the 1st respondent is asking the Court to do is to rule against its own Order. That, this Court cannot do, in the absence of an application before it.

[39] In the way I have interpreted and applied the 2006 Agreement (as influenced by the interpretation of the 2000 Agreement) and considering the conclusion I have reached concerning the applicability of the rule of 'no fettering of discretion' to the present case, I cannot, with the greatest deference, accept the 1st respondent's contention that they are entitled to do what they wish to the sites over which the 1st applicant's members have no pre-emptive and renewable rights, e.g. lease them before selling them at an indefinite time in the future.

[40] One should also not lose sight of this exhibition of bad faith on the part of the 1st respondent. The 2006 Agreement was concluded on 10 November 2006 and made an Order of the Court on 20 November 2006, as aforesaid. The 1st respondent's evidence is that the proclamation of Wlotzkasbaken as a township to enable the Council to "sell all" the 258 erven will take between eight and 12 months to complete. Some eight months

after the 2006 Agreement was made an order of the Court, the 1st respondent decides to put on hold (put on hold it is, in my view, because according to 1st applicant the proclamation of Wlotzkasbaken as a township is not a priority) the process which was to be completed in four months' time from July 2007 (by the 1st respondent's own reckoning) when they placed the advert to lease the remainder of the 258 erven, i.e. the 148 or so sites The 1st respondent's conduct amounts to hiding behind the rule of 'no fetter of discretion' and 'public policy' to frustrate the implementation of the 2006 Agreement, which as I have held, binds the 1st respondent. This, to my mind, is an attempt to undermine the 2006 Agreement; and I do not think this Court should lend the 1st respondent a hand in doing what is wrong and inequitable; if it did that, the Court would be stultifying and subverting the principle of rule of law, which is firmly embedded in Namibia's constitutionalism, and the principle of *pacta sunt servanda*, which, as I have said, is a factor of public policy that forms a part of our constitutional way of life.

[41] For all the above, in my judgment, I hold that the 1st respondent cannot run away from its obligation to sell all the 258 erven within a reasonable time and to ensure the proclamation of Wlotzkasbaken as a township also within a reasonable time to enable the implementation of that obligation; and so, therefore, in my judgment the 1st respondent is not entitled to lease the part of Wlotzkasbaken that the 1st applicant's members have no pre-emptive or renewability rights.

[42] The applicants have applied for interdictory relief, and they must, therefore, satisfy me:

(a) that the right sought to be protected is clear, and

(b) that there is an injury actually committed or reasonably apprehended, and

(c) that there is proof that there is no other satisfactory remedy available to them.

(See Prest, *The Law and Practice of Interdicts*: pp 42-47 and the authorities there cited; Joubert (ed.), The *Law of South Africa* (First Issue) vol. 11: pp. 288-290 and the authorities there cited, including *Setlogelo v Setlogelo* 1914 AD 221 at 227.)

[43] From all the facts and circumstances of this case and conclusions I have reached thereon above, I hold it established, on a preponderance of probability, that the right of the applicants is clear; for, I have held above that the applicants have a right under the 2006 Agreement, namely, that *all* the 258 erven will be sold and that not until that is done, the 2006 Agreement does not permit the 1st respondent to lease any of the remainder of the erven, i.e. the 148 or so sites. As I say, in going ahead with the advert and leasing the 148 or so sites, the 1st respondent is breaching the 2006 Agreement and thereby violating the Court Order, and such wrongful conduct has the effect of taking away the applicants' right that has inured as a result of the 2006 Agreement.

[44] I have mentioned previously that the 1st respondent has effectively put on hold the process necessary for the proclamation of Wlotzkasbaken as a township when not more than three to four months remained to accomplish the exercise. Furthermore, the 1st respondent has placed an advert inviting interested persons to apply for leases of sites at Wlotzkasbaken, and this was done some eight months after the 2006 Agreement was concluded and made an Order of this Court, as aforesaid. All this conduct and behaviour on the part of the 1st respondent would cumulatively make any reasonable person in the position of the applicants to reasonably apprehend injury. Finally, is there any other satisfactory remedy available to the applicants? The applicants say there is none. On all the facts and circumstances of this case I think there is no adequate alternative remedy to the interdict claimed. Indeed, this aspect was not really contested by the respondents. It

seems to me that the applicants have established, on a balance of probabilities, that they have no adequate alternative "legal remedy". (*Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd* 1916 (2) SA 505 (W) at 518F)

[45] The result is that for all the above, I am satisfied that the applicants have made out a case for the grant of the relief sought. I must, therefore, exercise my discretion in favour of granting the interdictory relief as set out in the Order below.

[46] To the matter of costs. Mr. Smuts argued that by its conduct the 1st respondent flouted an Order of this Court and reneged on the terms of the 2006 Agreement, and so this behaviour justifiably warrants the censure of this Court in the form of a special costs order; that is, if the applicants succeed, costs should be on the scale as between legal practitioner and client, including costs of two instructed counsel. Ms Machaka submitted that a special costs order would not be justified. It was Mr. Oosthuizen's submission that if the application failed, the applicants must be made to pay costs of the 1st respondent, inclusive of costs of instructing and two instructed counsel. I respectfully accept Ms Machaka's submission that a special costs order is not justified. In my view, it would not also not be fair: the 1st respondent's conduct cannot be characterized as a deliberate attempt to disobey the Court Order. I do not think the 1st respondent should be censured to the extent of awarding a special costs Order against it for misreading the 2006 Agreement, incorporating the 2000 Agreement. That being the case, I am of the view that an award of party and party costs is adequate and fair.

[47] In the result, I make an Order in the following terms:

(1) The 1st respondent is directed to comply with the terms of the Agreement of Settlement concluded on 10 November 2006 and made an Order of this

Court on 20 November 2006 (under case number (P) A 338/2000, annexure "B" to the founding affidavit of Martin Moeller in this matter).

(2) The 1st respondent is interdicted and restrained from leasing erven in the Wlotzkasbaken settlement pursuant to its invitation by advert of 20 July 2007 (Annexure "F" to the founding affidavit) or by such similar invitation by advert or any other means to that effect.

(3) Save as authorized by, and subject to, the Agreement of Settlement referred to in par. (1) of this Order, the 1st respondent is interdicted and restrained from leasing, or advertising an intention to do so, erven in accordance with the layout plan (Annexure "C" of the founding affidavit) until the layout plan has been duly amended and the township proclaimed, which would give rise to the establishment of those erven.

(4) Save as authorized by, and subject to, the Agreement of Settlement referred to in par. (1) of this Order, the 1st respondent is interdicted and restrained from leasing the erven to be established before the proclamation of the township of Wlotzkasbaken, by reason of the 1st respondent's agreement to sell same, as set out in the Agreement of Settlement referred to in par. (1) of this Order.

(5) The 1st, 2nd and 3rd respondents must, jointly and severally, pay the applicants' costs on party and party scale, including costs of two instructed counsel.

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Parker, J

ON BEHALF OF THE APPLICANTS:	Adv. D. Smuts
	Adv. R. Tötemeyer
Instructed by:	Diekmann & Associates
ON BEHLF OF THE 1ST RESPONDENT:	Adv. G.H. Oosthuizen
	Adv. G.S. Hinda
Instructed by:	Shikongo Law Chambers
ON BEHLF OF THE 2ND AND 3RD RESPONDENTS:	Ms C. Machaka
Instructed by:	The Government Attorney