

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CIV-MOT-REV-2018/00173

In the matter between:

**MOUSE PROPERTIES NINETY EIGHT CC**

**APPLICANT**

and

**THE MINISTER OF URBAN AND RURAL DEVELOPMENT**

**1<sup>ST</sup> RESPONDENT**

**THE TOWN COUNCIL OF THE MUNICIPALITY**

**OF OSHAKATI**

**2<sup>ND</sup> RESPONDENT**

**BH PROPERTIES**

**3<sup>RD</sup> RESPONDENT**

**FAI SQUARE DEVELOPMENT CONSORTIUM**

**4<sup>TH</sup> RESPONDENT**

**KALAHARI HOLDINGS (PTY) LTD**

**5<sup>TH</sup> RESPONDENT**

**LYNX DEVELOPERS (PTY) LTD**

**6<sup>TH</sup> RESPONDENT**

**OSHIWANA PROPERTY DEVELOPERS**

**7<sup>TH</sup> RESPONDENT**

**NDI HOLDINGS (PTY) LTD**

**8<sup>TH</sup> RESPONDENT**

**SINCO INVESTMENTS**

**9<sup>TH</sup> RESPONDENT**

**SUN INVESTMENT CC**

**10<sup>TH</sup> RESPONDENT**

**TECLINK CONSULTANTS**

**11<sup>TH</sup> RESPONDENT**

**WATER POWER TRADING CC**

**12<sup>TH</sup> RESPONDENT**

**Neutral citation:** *Mouse Properties Ninety Eight CC v The Minister of Urban and Rural Development* (HC-MD-CIV-MOT-REV-2018/00173) [2020] NAHCMD 42 (6 February 2020)

**Coram:** SIBEYA AJ

**Heard:** 08 October 2019

**Delivered:** 06 February 2020

**Flynote:** Applications – Review – Requirement for Ministerial approval in terms of section 30 and 63 of Local Authority Act 23 of 1992 – Expression of interests to set out evaluation criteria – sale of immovable property conditional to preceding approval of the Minister – internal evaluation processes to be complied with – market related prices to be considered during sale of property – *Audi alterm Partem* rule is flexible and can be in writing.

**Summary:** The applicant launched a review application for this court to review and set aside the decisions purportedly taken by the first respondent (The Minister) on 9 March 2018. Only the first respondent (The Minister) opposed the application.

*Held* that Part XIII of the Act includes the provisions of section 63 of the Act. Section 63 of the Act at the time when the decision of the Minister was made on 09 March 2018 was not yet amended, as it was amended thereafter. In the determination of this matter regard is had to section 63 as it was on 09 March 2018 before the amendment.

*Held* that, in terms of section 63(1)(b) of the Act, the Minister's approval shall not be required where a municipality referred to in Part I of Schedule 1 sell, dispose of, let, hypothecate or encumber immovable property other than townland. The municipalities listed in Part I of Schedule 1 are Swakopmund, Walvis Bay and

Windhoek. The council is not included in that category as it listed under schedule 2 of the act.

*Held*, that the reference to the approval of the sale required in terms of section 63(2) referred to in the aforesaid council resolution related to the approval of the private transaction of the sale to the applicant.

*Held* furthermore, that the notice issued by council on 22 July 2016 was issued in compliance with section 63(2)(b) and it informed the public of the nature of the business transaction, the nature of the property and description of the property, the location of the property, the price of the property and the names of purchaser and all for good measure to inform the public of sufficient details regarding the transaction.

*Held*, that when the council handpicked the applicant and voted for the acceptance of its proposal contrary to the said recommendations without reasons, council was engaged in a private transaction.

*Held*, that the decision of the Minister not to approve the sale was reasonably justified.

*Held further*, that the applicant was accorded audi when its written representations were considered by the Minister.

*Held finally*, that there is no merit in arguments raised by the applicant that the decision of the Minister should be reviewed and set aside nor is there merit in the argument which seeks to declare the agreement between the council and the applicant valid and enforceable in the face of all conclusions that such agreement was conditional and subject to the preceding approval of the Minister. The refusal of the Minister to approve the sale resulted in the agreement being of no legal force or

effect. It thus follows that the further relief sought by the applicant cannot be granted.

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**ORDER**

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1. The applicant's application is dismissed with costs, such costs to include costs of one instructing and one instructed counsel.
2. The matter is removed from the roll and is regarded as finalized.

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**JUDGMENT**

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SIBEYA AJ:

Introduction

[1] This review application has its origin in the administrative process which led to the allocation of land by the second respondent (herein after referred to as 'the council') to the applicant subject to approval by the first respondent (herein after referred to as the 'Minister') and which approval was not granted by the Minister. The applicant further calls on this court to declare that a valid and enforceable sale of the land was concluded.

[2] The respondents with the exception of the Minister did not oppose the application.

### Relief sought

[3] The applicant seeks an order in the following terms:

'1. Reviewing, correcting and/or setting aside the following decisions purportedly taken by the first respondent on or about 9 March 2018, namely that:

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

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

2. An order declaring that the first respondent's prior approval as contemplated in section 30(t) and/or section 63 of the Local Authorities Act, 23 of 1992, as amended, is not required by the aforesaid sections, and does not constitute a condition precedent, in relation to the sale of Erf No. 1342, Extension 4, Oshakati Town, Republic of Namibia by the second respondent to the applicant, thus rendering such sale valid and enforceable.

3. An appropriate order as to costs against any of the respondents (jointly and severally, the one paying the others to be absolved) electing to oppose this application.'

[4] On 15 August 2014, the council placed an advertisement in the print media inviting expressions of interest for the submission of concept design and development plan for Erf No. 1342, Extension 4, Oshakati, the old open marked, measuring 16,177 m<sup>2</sup> (herein after referred to as 'the property').

[5] The council intended to have the property which was already surveyed and

serviced with municipal infrastructures such as electricity, water and sewerage developed into a commercial business complex. The concept design and development plan should uplift the face of the town of Oshakati and contribute to its economic growth by creating employment opportunities. The concept plan should include:

- 5.1 Access for cars and pedestrians to the property (drop-of-zones);
- 5.2 Architectural design of all levels include façade and indication of materials and colour;
- 5.3 Clear indications of the different functions (shops, offices, restaurants and others);
- 5.4 Design of surroundings, greenery, trees, public zones;
- 5.5 Design of inside parking of one parking place for every 50m<sup>2</sup> according to the town council's planning scheme.

[6] The closing date for the submission of the expression of interest was 13 October 2014.

[7] On 13 October 2014 the applicant submitted a concept design and development plan for the property to the council.

[8] A total of eleven companies responded to the advertisements and submitted proposals.

[9] The Land and Housing Committee of the council scrutinized the proposals submitted in response to the advertisement. Their analysis revealed that two companies, namely: Fai Square Development Consortium and Lynx Developers (Pty) Ltd which are not inclusive of the applicant satisfied all the requirements. It was thus recommended by the Land and Housing Committee on 22 April 2016 that the

proposal from Fai Square Development Consortium be accepted.

[10] Subsequent to the council's deliberations on 29 June 2016 where there was a tie between two companies, the chairperson casted a vote over and above the deliberative vote and resolved to sell the property to the applicant.

[11] The council's resolution of 29 June 2016 was communicated to the applicant in a letter of 04 July 2016 where it was stated, *inter alia*:

- 'a) That Erf 1342 (Old Open Market) measuring 16,177m<sup>2</sup> be allocated and approved to be sold to Mouse Properties CC,
- b) That a pre-emptive right be inserted as a clause in the Deeds of sale that Erf 1342 should not be sold to a foreigner, neither be sold undeveloped to any person except to the Council of Oshakati,
- c) That the purchase price be communicated at a later stage,
- d) ...
- e) That the approval is subject to the provision of section 63(2) and 30(1) of the Local Authorities Act (Act 23 of 1992) as amended,
- f) The development to commence within 12 months from the date of approval of the Minister.'

[12] As per the minutes of the extra-ordinary Council meeting of 29 June 2016, the Council resolved, *inter alia*, that:

'The price of the facility be determined at a later stage after an independent valuer has been appointed to serve as yardstick in the determination of the price.

The design as submitted must be adhered to and only allowed to improve with 10% of the quoted amount.

All other administrative procedures be followed as per section 63 of the Local Authorities Act

23 of 1992, and subject to ministerial approval.<sup>1</sup>

[13] The Council at its meeting of 12 July 2016 resolved to sell the property to the applicant at the price of N\$2,5 million excluding administrative charges and VAT. This position was communicated to the applicant in the letter of 13 July 2016. The council in the same letter, further reiterated that the sale of the property was subject to the approval of the Minister in terms of section 30(1)(t) of the Local Authorities Act. The council further stated that it took note of activities occurring at the property and advised the applicant to keep such activities in abeyance pending the completion of all required procedures and the pronouncement of the Minister on the matter.

[14] On 22 July 2016 the council published a notice in terms of section 63(2)(b)<sup>1</sup> of the council's intention to sell the property through private transaction to the applicant for N\$2,5 million and calling upon objections, if any, to the proposed sale.

[15] On 20 July and 05 August 2016, the applicant paid an amount of N\$2 million and N\$500,000.00 respectively to the council.

[16] From August 2016 the applicant expended N\$1.4 million for extensive earth works on the property. It is observed that the applicant expended such huge amount of money on the property contrary to the information received from the council in July 2016, to suspend the activities on the property pending the completion of required procedures and the pronouncement of the Minister on the matter. The applicant however claimed that it was advised that ministerial consent was not required and that it could commence construction on the property. The applicant failed to disclose his advisor and any qualms with the commenced construction can be attributed to such advice. The letter of 13 July 2016 explicitly provides for the suspension of activities on the property conditional to the completion of procedures and approval of

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<sup>1</sup>Act 23 of 1992.



the Minister, ignorance thereof is at own peril.

[17] Consequent to the Council resolution of 29 June 2016 that the price of the property was to be determined at a later stage after the appointment of an independent valuer to serve as a yardstick, the council appointed valuers who in turn submitted valuation reports to council in August and September 2016. The lowest market value of the property from the valuations submitted was for an amount of N\$16,115,000.00 while the highest value was for N\$45,531,000.00.

[18] On 29 September 2016 the applicant's then legal representative wrote to the council stating that the applicant suffered massive prejudices and damages for the unreasonable delay to provide the applicant with a written sale agreement. To this the council responded on 08 October 2016 that it was not in the position to provide the applicant with a deed of sale as the Minister had not yet consented to the sale.

[19] On 17 November 2016 the applicant's then legal representative wrote a letter to the Minister explaining the continued damages suffered by the applicant and implored on the Minister to act according to law. This letter was copied to the council.

[20] On 16 December 2016 applicant's legal representative informed the council in writing that the applicant will temporarily utilize the property for storage of excess stock and its trucks. The council did not respond to this letter.

[21] On 24 March 2017 the applicant's legal representative further addressed a letter to the Minister, copied to the town council complaining about failure to provide a response to the letter of 17 November 2016 and inquired on the progress of the ministerial approval. There was further no response forthcoming from the town council.

[22] On 06 September 2017 the applicant's legal representative further wrote a letter to the Minister expressing that a period of over a year has passed from the date of the sale of the property and yet ministerial approval was still not obtained. The Minister was urged to take a decision on the matter. This letter was copied to the council. No response to this letter was received.

[23] On 02 November 2017 the applicant's legal representative, undeterred by no responses, further wrote to the council expressing the applicant's disappointment regarding the delay in finalizing the deed of sale and further delay to obtain approval from the Minister. The prejudice suffered by the applicant was again brought to the fore. This letter was copied to the Minister but no response from either of the recipients was received.

[24] When the Minister is confronted in this application with all the above unanswered letters addressed to his office by the applicant, he responded that a letter of courtesy to reply and acknowledge the applicant's letters should have been done. This court is not taken into confidence by the Minister to explain the steps taken when the Minister read the letters addressed to him, any reasons why such letters were not responded to or at the very least acknowledged receipt thereof, if ignored, any reasons for such action. The response of the Minister is very shallow, lacks detail for not responding to damning letters and can therefore not be condoned. It is disheartening to even imagine that a public officer entrusted with public power at such an elevated level would ignore letters calling on him or her to take a decision, more so where there are allegations that the delay in making a decision prejudice another party.

#### The decision

[25] At the heart of this matter is the following decision of the Minister provided for

in the letter from the Permanent Secretary dated 09 March 2018 addressed to the council. The letter states that:

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

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

[26] The applicant appeared to raise the point that the above decision which is alleged to have been made by the Minister, was in all terms and purposes taken by the Permanent Secretary. This proposition is based on the fact that the said decision is revealed in a letter of 09 March 2018 signed by the Permanent Secretary. The Minister however provided an answering affidavit where he stated under oath that he took the decision communicated by the Permanent Secretary in the letter of 09 March 2018. He proceeded to state that he directed the Permanent Secretary who is the accounting officer in his ministry to inform the council of his decision. This ground of attack on the decision of the Minister cannot stand in view of the explanation of the Minister confirming that he made the decision under scrutiny. This conclusion finds support in the matter of *Matador Enterprises (Pty) Ltd and Clover dairy Namibia (Pty) Ltd v The Minister of Trade and Industry and Others*.<sup>2</sup> Suffice to state that the argument of abdication of power appear not to be pursued by the applicant and correctly so in my view.

#### The evaluation of the proposals

[27] In December 2015 the council’s Department of Planning and Properties conducted valuations of all 11 proposals for the property. It found that:

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<sup>2</sup>[2014] NAHCMD 156 (16 May 2014) at para 95.

- 27.1 The applicant proposed a three-floor building;
- 27.2 The parking did not meet the requirements of the Town Planning Scheme as the applicant provided for 169 and not the required 193 parking spaces.
- 27.3 The layout was written triple storey building thus contrary to the Town Planning Scheme which allows for height restrictions at two floors while the front elevation showed two storeys.

[28] On technical evaluation the Department analyzed and ranked the top five companies in the following manner: Fai Square Development Consortium (100%), Lynx Developers (85.71%), Sun Investment CC (71.42%), Kalahari Holdings (Pty) Ltd (57.13%) and Mouse Properties Ninety Eight CC (57.13%). The Department further stated that out of the eleven companies only the top three companies were further evaluated using the technical score index. The remaining companies, inclusive of the applicant were not so evaluated due to non-compliance with set requirements. Ultimately the Department recommended that the proposal of Fai Square Development Consortium be considered as the best concept design.

[29] The proposals were duly evaluated by the council's Land and Housing Committee and the committee's recommendations of 22 April 2016 were, *inter alia*, that the concept proposal from Fai Square Development Consortium be accepted as it complied with the requirements. The Committee submitted their recommendations directly to the Council. The council however took a decision to accept the proposal from the applicant contrary to all the above-mentioned proposals.

[30] The Minister considered the objections received from different companies against the sale of the property to the applicant, the price in view of the valuations of the property valuated at the instance of the council but whose valuations appear to have been ignored by such council for unexplained reasons, the sale of public

property at a giveaway price being against public policy, the inconsistencies in procedure and substantive fairness of the process by council. Eventually the Minister decided not to approve the sale.

Did the sale require ministerial approval?

[31] Mr Corbett who appeared for the applicant contended with a measure of force that the sale of the property by the town council to the applicant did not require the approval of the Minister. He argued that section 30(t)<sup>3</sup> requires the council to obtain ministerial approval before purchasing immovable property and this is reasonable as the Minister is duty bound to oversee the financial affairs of the council, so the argument went. It was argued further that ministerial approval is only required where the sale of immovable property of the council is by way of private transaction and the concerned property was sold by way of public tender and not private transaction. In the premises, it was argued, the condition of ministerial approval precedent to the sale of the property cannot find application to the matter at hand and is thus of no legal consequences.

[32] Mr Phatela who appeared for the respondent was not to outmuscled as he argued that the approval of the Minister is required at all times when the council intends to sell any immovable property relying on section 63(1) of the Act. In the event that the Minister's approval is not obtained as *in casu*, when it was required, as it was argued, meant that the intended sale of the property by the council to the applicant is of no force or effect.

[33] The provisions of the Act relevant to this matter are section 30(t) and section 63.

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<sup>3</sup>The Act.

[34] Section 30(t) provides that:

‘subject to the provisions of subsections (2) and (3), a local authority council shall have the power –

(a) ...

(t) Subject to the provisions of Part XIII, to buy, hire or otherwise acquire, with the approval of the Minister and subject to such conditions, if any, as may be determined by him or her, any immovable property or any right in respect of immovable property for any purpose connected with the powers, duties or functions of such local authority council, or to so sell, let, hypothecate or otherwise dispose of or encumber any such immovable property.’

[35] Part XIII of the Act includes the provisions of section 63 of the Act. Section 63 of the Act at the time when the decision of the Minister was made on 09 March 2018 was not yet amended, as it was amended thereafter.<sup>4</sup> For the purpose of the determination of this matter regard is had to section 63 as it was on 09 March 2018 before the amendment. Section 63 then provided that:

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

(a) the letting of immovable property other than townlands or any portion of such townlands by any local authority council for a period not exceeding one year;

(b) The selling or disposal, or letting, hypothecation or encumbrance of immovable property other than townlands or any portion of such townlands by the municipal council of a

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<sup>4</sup>Amended by the Local Authorities Amendment Act 3 of 2018 which was put into force on 24 April 2018.

municipality referred to in Part I of Schedule 1;

(c) The acquisition of any local authority council of –

(i) Immovable property transferred to the local authority council as a condition of any subdivision of land approved in terms of the Townlands and Division of Land Ordinance, 1963 (Ordinance 11 of 1963);

(ii) Immovable property by way of a grant or donation;

(d) A cemetery taken over in accordance with the provisions of section 30(1)(d).

(2) A local authority council referred to in paragraph (b) of subsection(1) shall, before any immovable property so referred to is sold, disposed of, or let, hypothecated or otherwise encumbered, whether by way of public auction or tender or private transaction, cause a notice to be published in at least two newspapers circulating in its area on one occasion in a week to 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 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 objections 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.

(3) (a) If no objections have been lodged in terms of paragraph (b) of subsection (2), the local authority council in question shall be entitled to sell, dispose of, let, hypothecate or otherwise encumber such immovable property by way of such private transaction within one year as from such date.

(b) If any objection is lodged in terms of the said paragraph (b) the immovable property in question shall not be sold, disposed of, let, hypothecated or otherwise encumbered, unless-

(i) the local authority council has submitted to the Minister such particulars as the Minister may require in relation to the proposed transaction, 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 sell, dispose of, let, hypothecate or otherwise encumber such immovable property.

(c) The Minister may grant or refuse to grant his or her approval contemplated in paragraph b(ii) or may direct the immovable property in question to be sold, disposed of, let, hypothecated or otherwise encumbered by way of public auction or tender.’

[36] It is apparent from the record that the gist of whether or not the Minister acted *ultra vires* or *intra vires* lies in the interaction of section 30(t) and 63 of the Act and the interpretation thereof.

[37] In interpretation, our courts have adopted the view that the ordinary meaning of the words should be regarded as the primary index to the intention of the legislature in enacting a particular statutory provision. In *Namibian Competition Commission v Namib Mills (Pty) Ltd.*<sup>5</sup> It follows that where the words in a statute are clear and unambiguous, such words should be accorded their ordinary literal meaning save where such interpretation would lead to absurdity or injustice or contrary to the intention of the legislature.

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<sup>5</sup>(HC-MD-CIV-MOT-GEN-2017/00061) [2019] NAHCMD 255 (23 July 2019) para 18.



[38] The Supreme Court in *Total Namibia v OBM Engineering and Petroleum Distributors*<sup>6</sup> cited remarks made by Wallis JA regarding the approach to interpretation in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,<sup>7</sup> wherein he held that:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighted in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or un-business-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.'

[39] It is apparent that the authority of the council to sell property is subject to Part XIII of the Act where section 63 is provided for. Section 63 sets out transactions where the council will or will not require the approval of the Minister prior to selling an immovable property to a third party.

[40] According to section 63(1)(b) of the Act, the Minister's approval shall not be required where a municipality referred to in Part I of Schedule 1 sell, dispose of, let, hypothecate or encumber immovable property other than townland. The municipalities listed in Part I of Schedule 1 are Swakopmund, Walvis Bay and Windhoek. The council is not included in that category as it listed under schedule 2.

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<sup>6</sup>2015 (3) NR 733 (SC) at para 18.

<sup>7</sup>2012 (4) SA 593 (SCA) at para 18.

[41] It should be stated that, whether the council intends to sell an immovable property by public auction, tender or private transaction, it is required by section 63(2) to issue a notice in at least two newspapers circulating in its area. The advertisement of 15 August 2014 does not stipulate whether the sale of the property would follow the means of public auction, tender or private sale neither can it be clearly ascertained from the advertisement as to which one of the three processes of sale was preferred by the council.

[42] It does not require magnified glasses to notice that where the council intend to sell an immovable property through private transaction to a third party, objections should be called from interested persons. If there are such objections made, the property shall not be sold unless the Minister is provided with the objections lodged and comments from the council, after which the Minister has approved the said sale, as provided for in the Act.<sup>8</sup>

[43] The resolution of the Council of 29 June 2016 was that the sale was subject to the approval of the Minister as contemplated in terms of section 63(2) and 30(1). Section 30 authorizes the sale of immovable property subject to section 63. The only provision in section 63(2) which provides for the requirements of ministerial approval for the sale of immovable property is section 63(2)(b) which regulates sale of immovable properties by means of private transaction. I therefore find that the reference to the approval of the sale required in terms of section 63(2) referred to in the aforesaid council resolution related to the approval of the private transaction of the sale to the applicant.

[44] The sale of the property through private transaction was reiterated by the council at its meeting of 12 July 2016 where it resolved to sell the property to the applicant subject to the approval of the Minister in terms of section 30(1)(t).

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<sup>8</sup>Section 63(2)(b) and 63(3).

[45] To put the debate of whether the sale to the applicant was through public auction, tender or private transaction to rest, the council issued a notice of sale of immovable property in the newspaper on 22 July 2016. The notice provides in no uncertain terms that it was issued in terms of section 63(2)(b) of the Act. In the notice, the council informed the public that it intended to sell the property by way of private transaction to the applicant. The notice was issued in compliance with section 63(2)(b) and it informed the public of the nature of the business transaction, the nature of the property and description of the property, the location of the property, the price of the property and the names of purchaser and all for good measure to inform the public of sufficient details regarding the transaction. This would necessitate the public to appreciate the nature of the intended sale and to meaningfully object thereto if necessary.

[46] It was persistently argued on behalf of the applicant that the sale of the property in question had no privacy in it, as it commenced with an expression of interest which is an invitation to the public to submit proposals and such sale was therefore through public tender. Inviting as this argument appears, a closer scrutiny of the evaluation process reveals that the council's Department of Planning and Properties analyzed the eleven proposals in December 2015 and ranked the applicant number fifth and therefore the proposal of Fai Square Development Consortium which was ranked first was recommended. The town council's Land and Housing Committee evaluated the proposals on 22 April 2016 and also recommended the proposal of Fai Square Development Consortium for acceptance.

[47] Fai Square Development Consortium however withdrew its proposal and the council could thus not resolve the agenda on the sale of the property. On the subsequent council meeting of 29 June 2016, the proposals of BH Properties and that of the applicant were nominated for approval where they received three votes

each. The chairperson then casted his vote over and above his deliberative vote and the applicant emerged victorious.

[48] There is no explanation from council why the proposal of Lynx Developers (Pty) Ltd (85.71%) which was ranked number two by the council's Land and Housing Committee, after Fai Square Development Consortium (100%) withdrew was not accepted. Similarly, if for some reason the proposal for Lynx Developers (Pty) Ltd (85.71%) could not be accepted there are no reasons why Sun Investment CC (71.42%) was not accepted after being ranked third or at the very least call for new proposals. For what it is worth, handpicking the applicant who was ranked fifth without justification means that the council could simply have picked proposal number 10 or 11 for as long as council members vote for such picking and thus diminishing the technical evaluation conducted by the council's Department of Planning and Properties. I hold the view that when the council handpicked the applicant and voted for the acceptance of its proposal contrary to the said recommendations without reasons, council was engaged in a private transaction.

#### Transparency and substantive fairness

[49] It is a fact that the Minister *in casu* is an administrative decision maker who should comply with Article 18<sup>9</sup> in his administrative decision-making process. Our administrative law has developed to such level that the administrative decision should be capable of producing a reasonable outcome. In the exercise of his discretion, the decision maker is expected to act fairly and reasonable.

[50] The court in the *Minister of Health and Social services v Lisse*,<sup>10</sup> stated the following while discussing administrative discretion:

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<sup>9</sup>The Namibian Constitution.

<sup>10</sup>2006 (2) NR 739 (SC) at 773.

'Discretion means when it is said that something is to be done within the discretion of the authorities that something is to be done within the rules of reason and justice and not according to private opinion; according to law and not humour. It is to be not arbitrary.'

[51] On the reasonableness of the decision of the administrative body, the Supreme Court in *Trustco Ltd t/a Shield Namibia and Another v Deeds Registries Regulation Board and Others*<sup>11</sup> stated that:

'What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interest involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision maker. The concept of reasonableness is at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct that they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.'

[52] The Minister in his decision of 09 March 2018 directed the council to re-evaluate the bids on clearly determined valuation measures and evaluation criteria and to follow the laid down government procedures and approval structures within council structures.

[53] It appears from the report of the council's Department of Planning and Properties and the Land Housing Committee that their recommendations on the submitted proposals regarding the sale of the property were not approved or let

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<sup>11</sup>2011 (2) NR 726 (SC) 737 para 31.

alone considered by the council and no reasons are apparent for such position.

[54] The evaluation criteria were not laid bare in the advertisements. The Minister stated in his affidavit that:

‘There were no clear or transparent evaluation criteria set out in the advertisement or documents given to prospective companies and individuals who were interested in developing the property, so there is no way the applicant could have understood that council was more concerned with the concept design than the actual price to be paid for the property. The interested parties were provided with general information to submit their presentation.’

[55] In reply thereto the applicant stated that:

‘I admit that the advertisement did not contain evaluation criteria. However, the Invitation For Expression of Interest does, a factor which the deponent seeks to ignore. I refer to what I have stated earlier in this regard. Nothing however turns hereon as the second respondent conducted the requisite evaluations of the respect (sic) bids. The applicant’s bid was eventually successful.’

[56] It has always been the contention of the applicant that when the council called for the expression of interest it was more concerned with the investment in the development of the property which will uplift the face of the town than the price at which it was to sell the property. The applicant budgeted an amount of N\$120 million for the development of the property.

[57] The Invitation for Expression of Interest provides, *inter alia*, that the concept plan should indicate:

57.1 Access to the property for cars and pedestrians (drop-of zones)

- 57.2 Architectural design of all levels including facade and indication of materials and colours)
- 57.3 Clear indication of the different functions (shops, offices, restaurants and others.
- 57.4 Design of surroundings, greenery, trees, public zones;
- 57.5 Design of inside parking places 1 parking place for every 50m<sup>2</sup> of Oshakati Town Planning Scheme.

[58] Although the Invitation for Expression of Interest stipulated what the concept plan should indicate, same did not provide for the evaluation criteria. Furthermore, any suggestion on the price was not included in the advertisement of the accompanying documents and the Minister was therefore justified in concluding that the applicant could not have understood in the premises that the council was more concerned with the concept design than the purchase price.

[59] This court finds comfort in the fact that, few of the objective facts relevant and material to the determination of this matter are really in dispute and that the factual disputes between the parties relate more to the interpretation of certain documentations and the application of the undisputed facts. Resultantly this court's approach is that where there is a factual dispute, the final order may be granted if the facts as stated by the first respondent together with the facts stated in the applicant's affidavits which have been admitted by the respondent justify such an order. Therefore, where the facts are clear that, though not formally admitted, cannot be denied, they must be viewed as admitted. See *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.<sup>12</sup> It thus follows that any remaining factual disputes must be resolved in favour of the first respondent.

[60] The Minister, in his decision to disapprove the sale of the property further stated that openness and accountability of the council should be maintained. The

<sup>12</sup>[1984] (2) All SA 366(A) 367-368; 1984 (3) SA 623(A) 634E-635D.

Minister stated further that council should further ensure that the interest to be served by the alienation of public immovable property is not compromised in the re-evaluation of the bids on clearly determined valuation measures and evaluation criteria. The determined valuation measures of the council are provided for in the valuation roll, but this was not considered by the council neither were the valuers' valuation reports which were obtained by council at its instance.

[61] Several valuations of the property which is a public immovable property revealed that its lowest market value in 2016 was N\$16,115,00.00 while its highest value was N\$45,531,000.00. In the absence of an explanation from the council as to what was considered, if any, in arriving at the price of N\$2,5 million and the council's non-participation in these proceedings denies the court the opportunity to appreciate the rationale for fixing of the price at N\$2,5 million. There being no document on record substantiating the fixing of the price at N\$2,5 million, it can be concluded that such price was sucked from the thumb by the council in wanton disregard of the interests to be served by such sale. For the reasons stated herein above I find that the decision of the Minister not to approve the sale was reasonably justified.

*Audi Alteram Partem*

[62] The applicant further attacks the validity of the decision of the Minister where the Minister refused to approve the sale of the property to the applicant on the basis that it was not afforded an opportunity to make meaningful representations before the decision was made.<sup>13</sup> The applicant extended its claim and stated that it should have been apprised of the nature of information and reasons central to the pending decision of the Minister in order to allow for meaningful representations.

[63] The *audi alteram partem* rule (*the audi*) does not carry along a singular form

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<sup>13</sup>Article 18 of the Constitution.



or substance as its applicability is dependent of the facts and surrounding circumstances of each particular matter. The *audi* has been referred to as not a rigid rule. *Strydom CJ* (as he then was) in the matter of the *Chairperson of the Immigration Selection Board v Frank and Another*<sup>14</sup> stated as follows regarding the form of *audi*:

'In the absence of any prescription by the Act, the appellant is at liberty to determine its own procedure, provided of course that it is fair and does not defeat the purpose of the Act (Baxter). Consequently the Board need not, in each instance give an applicant an oral hearing, but may give an applicant an opportunity to deal with the matter in writing.'

[64] What was required of the Minister was to approve or disapprove the sale of the property to the applicant in terms of the interaction of the section 31 and 63 discussed herein above. The consideration of the Minister follows the submission of the expressions of interest received by the council; the notice of the council calling for objections, if any; the objections lodged and comments of the council and such further particulars as the Minister may require. The Minister further considered the extensive letter of 24 August 2016 received from the applicant's then legal representative. The applicant argues in the said letter that ministerial approval was not required and proceed to set out its perspective of the legal position. The Minister considered the said written representations when he took an impugned decision. The Minister further stated in his affidavit that he agreed to meet and hear the applicant as per its request.<sup>15</sup> The applicant and its then legal representative maintained their perspective of the legal position of this matter. I therefore find that the applicant was accorded *audi* when its written representations were considered by the Minister.

## Conclusion

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<sup>14</sup>2001 NR 107 (SC) 174H.

<sup>15</sup>Paragraph 50.1 of the 1<sup>st</sup> respondent's answering affidavit.

[65] On the facts of this matter and the interpretation of sections 30 and 63 of the Act, I am satisfied that the approval of the Minister for the sale of the property was required. Further that in the absence of the evaluation criteria, the non-consideration of the valuations of the property (inclusive of the valuation roll and the evaluation reports obtained at council's instance which provided the market price of the property), the fixing of the purchase price at a giveaway price against public policy, allowed the Minister to act within his powers to refuse the approval of the sale of the property. I thus hold the view that there is no merit in arguments raised by the applicant that the decision of the Minister should be reviewed and set aside nor is there merit in the argument which seeks to declare the agreement between the council and the applicant valid and enforceable in the face of all conclusions that such agreement was conditional and subject to the preceding approval of the Minister. The refusal of the Minister to approve the sale resulted in the agreement being of no legal force or effect. It thus follows that the further relief sought by the applicant cannot be granted.

[66] In the result, it is ordered that:

1. The applicant's application is dismissed with costs, such costs to include costs of one instructing and one instructed counsel.
2. The matter is removed from the roll and is regarded as finalized.

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O S Sibeya  
Acting Judge

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APPEARANCES:

APPLICANT : Mr. A Corbett, SC (with Him Mr. T Muhongo).  
Instructed by Shikongo Law Chambers,  
Windhoek

FIRST RESPONDENT: Mr. T. Phatela  
Instructed by Government Attorney,  
Windhoek