IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 1833/2008

DATE: 9 OCTOBER 2009

In the matter between:

STELLENBOSCH MUNICIPALITY	1st Applicant
STELLENBOSCH RATEPAYERS' ASSOCIATION	2nd Applicant

And

FUSION PROPERTIES 233 CC	1st Respondent
WUPERTHAL PROPERTY DEVELOPMENTS (PTY) LTD	2nd Respondent
AUTUMN STAR TRADING 235 (PTY) LTD	3rd Respondent
STELLENBOSCH EMPOWERMENT JOINT VENTURE CONSORTIUM	4th Respondent
ZAKHE ENGINEERING (PTY) LTD	5th Respondent
TINETTA DEVELOPMENT GROUP	6TH Respondent
AMC/DANEEL DIAMOND VENTURES (PTY) LTD	7TH Respondent

J U D G M E N T

DESAI, J:

[1] This is, in effect, an attempt by the first applicant, the Stellenbosch Municipality, to reverse an earlier decision by it to sell certain immovable properties to the respondents. The decision to sell the said properties was premised upon a policy adopted in March 2005 by the first applicant to sell excess municipal land, *inter alia*, in order to address past injustices which resulted in skewed land-owning patterns. Underpinning the current legal debate are the sporadic changes of the dominant political grouping in the municipality.

[2] Briefly stated, the key events preceding this application are the following: It appears that on or about 3 March 2005 the Municipality's Mayoral Committee ("Mayco") received from its municipal manager a report which dealt with a policy framework for its Land Management Policy. The report placed emphasis on the need to change landownership patterns. Later the same month, at a meeting open to the public, the report was adopted by the Municipality's Council.

[3] At a special meeting held on 19 May 2005, Mayco considered a report which dealt with municipal land which was immediately available for local economic development initiatives. Various properties were

identified for development in accordance with the Land Management Policy of Council and Mayco approved the list of properties to be developed. This list included the Transvalia properties, which were later sold to the first respondent, and Erf 194, which was later sold to the second respondent.

[4] Although the Municipal Supply Chain Management ("the MSCM") regulations came into effect on 1 July 2005, its application to Grade 10 municipalities, such as Stellenbosch, was delayed until 1 October 2005.

Recognising that a scorecard was needed "for the expeditious appointment of developers for the properties" listed in its earlier resolution, Mayco on 11 August 2005 approved a scorecard to evaluate the call for proposals and to take into account, *inter alia*, the Municipality's Preferential Procurement Policy and the Broad-Based Black Economic Empowerment Act 53 of 2003.

[5] The next day a notice appeared in the Eikerstadnuus advertising the call for proposals. The properties listed in the notice included all the erven which Mayco had resolved should go out on tender. On 24 August 2005 a meeting was held at which interested bidders were given

a briefing session by the first applicant's officials explaining the call for proposals and other relevant details. Thereafter, on 2 September 2005, the closing date for tenders was extended to 30 September 2005.

[6] On 20 September 2005 at a meeting of Council which was open to the public, the Council endorsed the disposal of the said capital assets in line with section 14 of the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA"). The respondents, it seems, timeously presented their proposals to the Municipality. A Bid Evaluation Committee ("BEC") was appointed on 3 November 2005. The appointment was done by Mr Bruce Kannemeyer, the first applicant's then municipal manager.

[7] Between 21 November 2005 and 2 December 2005 the first applicant obtained an evaluation of the properties to be sold from two independent property valuators. A consolidated set of delegations and sub-delegations was also approved by the Council at about this time.

[8] At a further meeting on 13 December 2005, the Council received the market valuation reports in respect of the properties to be alienated. After considering and

confirming the fair market value of the assets and the economic and community value to be received in exchange for it, that is as contemplated in section 14(2)(6) of the MFMA, the Council once again endorsed the disposal of the properties.

[9] On 3 February 2006 a third valuation was done by another independent valuator in respect of each of the parcels of properties eventually awarded to successful bidders, barring one. At about this time outside consultants conducted a BEE evaluation of the respondents.

On 17 February 2006 the members of the BEC signed final reports in respect of each proposed call containing a recommendation as to which entities should be awarded the tenders. The property which was awarded to each of the first to fourth respondents for development is the following:

First respondent - Erf 1123 (Transvalia)

Second respondent - Erf 194 (Stellenbosch)

Third respondent - Erf 5652 (Die Boord)

Fourth respondent - Erf 1962 (Town Hall)

[10] Three days later on 20 February 2006 the Bid Adjudication Committee ("the BAC") approved the BEC's recommendations and signed off on the BEC's reports. It is emphasised that the BEC and the BAC are two distinct bodies. The BAC was comprised of the Chief Financial Officer, the Executive Director:Social Services, the Head:Supply Chain and one other.

[11] Also in February 2006 a new political grouping acquired control of the Council. Some of the parties refer to it as "new Council". In any event, on 21 April 2006 a notice was placed in the Eikerstadnuus advertising the proposed alienation of the properties. The erven to be alienated were listed in the notice, it indicated that full particulars of the proposed transactions were available from the municipalities and a date was specified for written objections. This notice was given in terms of section 124(2)(a) of the Municipal Ordinance 20 of 1974 ("the Ordinance").

[12] Mr I Jamie SC, who appeared with Ms G A du Toit on behalf of the first applicant, has pointed out certain inaccuracies in this advert. I shall revert to this aspect in due course.

[13] Mr Jongihlanga France, first applicant's acting municipal manager, signed deeds of sale and co-operation agreements with the respondents on 3, 5 and 7 May 2006 respectively. The agreements all provide that "the transfer of the property shall be effected as soon as possible after all suspensive conditions have been met". They furthermore provide that following the advertisement period "the parties shall negotiate in good faith" (my underlining) in an effort to address any objections.

[14] On 6 September 2006 a special Mayco meeting was held to consider the objections and, it seems, to reconsider fair market value and the economic value of the properties. This was done in accordance with the further valuation of the properties obtained by the Municipality's attorneys.

[15] It appears from a transcript of the meeting that what was decided at this meeting was that Mayco's recommendation to Council would be that the proposals in respect of two of the parcels of the property which are relevant to this application – subject to legal opinion being obtained – be approved. The proposals in respect of the other five parcels of property were not to be

approved but this was subject to the successful bidders being given the opportunity to make representations.

[16] The new acting municipal manager, a Mr Len Mortimer, and the Director:Corporate Services Mr Piet Smith, then wrote several inaccurate and confusing letters to the successful bidders. It appeared from the letters that the Council had itself formed an intention to uphold the objections in respect of certain of the tenders or that Mayco had decided to uphold the objections - the implication being that it had the authority to do so.

[17] First respondent then launched an application in this Court to set aside the proposals in respect of the five properties which were to be rejected. The matter came before me on 23 May 2007. By agreement between the parties, I set aside Mayco's decision of 6 September 2006 – in part that is – and directed the so-called "new Council" to take a final decision regarding the tender process and in respect of the objections received in response to the section 124 advertisement, that is after hearing submissions from the successful bidders in respect of both.

[18] First applicant contends that during January 2007 it was advised by its legal representatives that the BAC had acted without authority when it purported to identify the successful bidders and also that its acting manager had acted without authority when he purported to conclude the agreements on behalf of the Municipality.

Council resolved on 27 February 2007 to appoint external forensic auditors to investigate the procurement processes in respect of all seven land transactions. This decision was made ostensibly as a result of allegations of irregularities in the tender process received from officials, objectors and members of the public.

[19] The forensic report was completed on 14 June 2007. On Mr Jamie's own version, first applicant's municipal manager discovered factually incorrect statements and conclusions in the forensic report. It appears that he then drafted his own report for Council with reference to the documents forming part of the annexures to the forensic report, that is the source documents.

[20] The order granted by me on 23 May 2007 called upon the Council to make a final decision by no later than 31 July

2007 with regard to the tender process which resulted in the award or awards which are at issue in this matter.

On 27 June 2007, Mayco resolved that a special meeting of Council would be held on 24 July 2007 "to receive representations on Tender 34/2005 from successful tenderers" and that the meeting would continue on 31 July 2007 "to make a final decision on the matter".

[21] The section 124 objectors were also notified that they would be afforded an opportunity to address Council at the meeting of 24 July 2007 in respect of their objections and the responses to it. It appears that several parties made oral submissions at the meeting on 24 and 31 July 2007, including Mr R G C Stelzner on behalf of the first and second respondents, and Mr H C Schröder on behalf of third and fourth respondents. Mr Stelzner and Mr Schröder also appeared on behalf of their respective clients before this Court.

[22] At the end of the aforementioned meeting, the Council resolved by a majority to authorise the institution of legal proceedings to have the tender process declared unlawful and the resultant awards and contracts set aside.

[23] Pursuant to the latter decision, the current application was launched on 31 January 2008. The relief sought by the applicants herein is twofold. Firstly an order is sought declaring (1) that the transfer of ownership of municipal property pursuant to a tender process initiated by the Municipality on 12 August 2005 referred to as ("Tender 34") would not be fair, equitable, transparent, competitive and consistent with their Supply Chain Management policy which the Municipality has since 1 October 2005 been required to have and maintain in terms of section 111 of the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA") and (2) the Municipality is accordingly precluded by section 14(5) of the MFMA from transferring the property to the respondents pursuant to an award of tenders in terms of Tender 34 and resultant agreements signed by the Municipality's acting municipal manager Jongihlanga France ("France") with the first respondent on or about 3 May 2006 and with the second and third respondents on 7 and 5 May respectively (the agreements).

[24] In the alternative to the relief sought in the above paragraphs, the Municipality sought an order reviewing and setting aside the decision of the Bid Adjudication

Committee (the "BAC") on or about 20 February 2006 to award tenders in terms of Tender 34 to the respondents and declaring the agreements to be invalid. It did so on the grounds that the BAC was not authorised to approve the awards and reference was made to section 6(2)(a)(i) and (ii) and section 62)(f)(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and that a mandatory and material procedure or condition prescribed by an empowering provision was not complied with, being section 14(5) of the MFMA (section 6(2)(b) of PAJA).

[25] This application is opposed by the first to fourth respondents.

[26] The second applicant is the Stellenbosch Ratepayers' Association. They were granted leave to intervene in this application on 27 February 2009. Shortly thereafter it filed an affidavit formally adopting the averments made by the first applicant in its founding and replying affidavits and the annexures thereto. Although there is no appearance before this Court on behalf of the second applicant, an advocate has made certain written submissions on its behalf. She relies on the first applicant's papers for her submissions.

[27] Both Mr Stelzner and Mr Schröder are *ad idem* that this application, properly analysed, is not an application for a declarator and, in the alternative, a review. It is in its entirety an application for the review and setting aside of the tender process in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Couching its principal prayers for relief in the form of a declarator appears to be a patent attempt to escape the provisions of PAJA with regard to the time limits relating to review applications.

[28] If I understand Mr Jamie correctly, the argument for the declarator is that a material condition prescribed by an empowering provision, namely section 14(5) of the MFMA, was not complied with. In other words, municipal officials took decisions without being authorised to do so by the empowering provision.

[29] Such conduct also falls within the provisions of section 6(2)(a) and (b) of PAJA and is reviewable in terms of section 6(1) of PAJA. As Mr Stelzner pointed out, this is not only factually so but also a legal requirement. PAJA governs the exercise of administrative action in general, therefore all decision-makers who are entrusted with the

authority to make administrative decisions by any statute are therefore required to do so in the manner that is consistent with PAJA. It follows that all statutes which authorise administrative action must now be read together with PAJA unless of course the provisions of the statute in question are inconsistent with PAJA itself. (See for instance The Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd & Others 2006(2) SA 311 (CC) para [97].

[30] It appears that the first applicant purports to rely on section 19 of the Supreme Court Act 59 of 1959 in order to avoid the consequences of bringing a PAJA application about 20 months after the decision which they wish to set aside was taken.

[31] The administrative actions to be set aside herein are the decisions to sell the properties to the respondents. The decisions were taken some time before the deeds of sale and co-operation agreement were signed. If the latter are to be regarded as the operative dates, the deeds were signed in May 2006.

[32] As I have already stated the application was instituted on 31 January 2008, that is almost 20 months later. It was

not brought within the onerous time periods prescribed by PAJA. Section 7(1)9a) and (b) of PAJA provides that:

> "Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date..."

on which any internal remedy has been exhausted or, in the absence of an internal remedy, on the date on which

> "the person concerned was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of the action and the reasons".

Section 9(1) of PAJA provides for the granting of condonation for the launching of proceedings outside of the 180 day time period. If there is no agreement between the parties the Court may, on application by the person or administrator concerned, grant condonation "where the interests of justice require it to do so".

[33] The majority judgment of Miller, JA in Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978(1) SA 13 (A) 39C-D sets out the proper approach to the question of undue delay. First, a Court must decide

whether the proceedings are brought within a reasonable time and secondly, if not, it must decide whether the unreasonable delay ought to be condoned, in which event it must exercise a discretion taking into account all relevant factors which include, but are not limited to, prejudice to the respondents.

[34] The first applicant asks for condonation in its Notice of Motion but made out no case whatsoever in support of this prayer in its founding affidavit. It is only in reply that it sought to make out such a case. This, quite clearly, is impermissible. In their heads of argument, if not also in oral argument, counsel for first applicant, Mr Jamie, contended that the 180-day period should be taken to have started running on 31 July 2007 when its Council first considered the municipal manager's report of June 2007 which included legal advice furnished to the Municipality's legal representatives about the lawfulness of the award of tenders by the BAC. On this basis he contended that the delay is only four days.

[35] The latter submission is, simply stated, factually incorrect. Mr David Peter Daniels who signed the founding affidavit in the current application, also signed an affidavit on 16 March 2007 under case number

393/07. That affidavit was signed by Mr Daniels for a postponement of first respondent's application under that case number pending a final decision in the tender process, alternatively, for an order reviewing and setting aside the decision of the BAC on 20 February 2006 to approve the recommendation of the BEC that Fusion's (first respondent's) tender be approved.

[36] The grounds of review alluded to by Mr Daniels in his affidavit of March 2007 are very similar to those in the current application, for instance, that the Municipality's BAC acted without authority when it purported to award the tenders following on the advertisement for proposal calls in respect of the properties on 12 August 2005; that the acting municipal manager acted without authority when he signed the agreement with Fusion on behalf of the Municipality. In fact, the documents annexed to Mr Daniel's affidavit under case number 393/07 to a large extent duplicate those relied upon by the Municipality in this application. It is apparent from all of this that the Municipality was already aware of its rights and threatened a review application as far back as March 2007.

[37] The Municipality is not at liberty to calculate the period in question from the date of a later decision of Council. This would be in conflict with section 9 of PAJA. It has in fact provided no reasonable or acceptable explanation for the delay. In any event, the explanation furnished by it is contradicted by other evidence, as I have already indicated.

[38] Shortly prior to judgment being handed down herein, counsel for the Municipality brought to my attention a recent judgment of the Supreme Court of Appeal namely Municipal Manager: Qaukeni Local Municipality and Others v F V General Trading 324/08 [2009] ZA (SCA) 66 of 29 May 2009. According to Mr Jamie the issue to which it relates pertains to the form of relief which a public body may seek in resisting the enforcement of a contract concluded by it in non-compliance with prescribed competitive processes.

[39] In the Qaukeni case, it appears that the Municipality in question had brought a counter-claim for declaratory relief regarding unlawfully concluded contracts which the applicant sought to have enforced. The Court held that:

> "In doing so it raised the question of the legality of the contract fairly and squarely just as it would have done in a formal review. In these

circumstances, substance must triumph over form... the appellant's failure to bring formal review proceedings under PAJA is no reason to deny them relief". (at paragraph 26 of the judgment)

[40] Counsel for the Municipality contended that the case is authority for the principle that the question of whether a public body seeks the review and setting aside of its own unlawful act, on the one hand, or a declaration of unlawfulness of that act in such or other unrelated proceedings, on the other, is generally not something upon which anything will turn in the larger context of the public body's efforts to uphold the principle of legality.

[41] First applicant in essence argues that it was not necessary for it to have brought its application for a review coupled with a declarator, that is in compliance with PAJA, in order to have the tender process set aside. The argument proceeds on the basis that as a result it was not necessary to obtain condonation for its non-compliance with PAJA. The fact of the matter is that first applicant brought an application to have its own decision reviewed and set aside. It was *dominus litis* and elected to adopt this approach and cannot now be heard to argue

that the procedure adopted by it should be disregarded and ignored.

[42] The fact that one or other party had an interest in the contract in the Qaukeni matter was material to the Supreme Court of Appeal's decision that a PAJA review application was not strictly necessary. This finding was clearly predicated on the facts of that matter, which included the fact that the Municipality was a respondent in an application for the enforcement of a contract which had been awarded in circumstances where no process whatsoever had been followed.

[43] The application before this Court which the respondents were called upon to meet was indeed a review, both in substance and in form. The provisions of PAJA dealing, *inter alia*, with the time within which the application is to be brought find clear application. The Qaukeni judgment dealt with the form of the counter-application brought by the Municipality. It does not deal with any delay in the bringing of such an application.

[44] Mr Stelzner diligently listed every conceivable reason why condonation should be refused in this instance. He made out a compelling case in this regard.

First applicant had access to legal advice or assistance at all material times. It knew what its rights were at an early stage yet decided to have a forensic investigation done rather than approaching this Court for relief at that time. It had the same information and documentation at its disposal much earlier - and the financial resources - to bring the application. It in fact threatened to do so in Court papers. The inordinate delay after the deeds of sale and cooperation were signed is not properly explained. The respondents participated in a public tender process at the invitation of the Municipality which they were led to believe was correctly conducted. They concluded deeds of sale and cooperation with someone they were entitled to believe was properly authorised.

[45] Moreover, the respondents have incurred major expenses and stand to suffer severe financial loss if the process is set aside. These are losses which cannot be compensated by way of a damages action. First respondent has also incurred holding costs and the purchase price has increased significantly because of the delay. Furthermore, building costs, the costs of services and interest rates have also risen steadily.

[46] If the process is set aside at this late stage and the participants have to start all over again it will be gravely prejudicial and unfair to those who participated in the process on the understanding that the officials knew what they were doing. Where a municipality delays inordinately it cannot be expected of its contracting partners to suffer the consequences of the municipality's own inaction or indecision.

[47] Quite clearly there was an unreasonable delay in pursuing this application and in the light of the factors listed above, I come to the conclusion that the delay cannot and should not be condoned. It cannot be in the interests of justice to do so. The application can accordingly be dismissed on this ground alone.

[48] Mr Stelzner has also placed in issue the Municipality's *locus standi* to bring the current application. He argued that it was not competent for the Municipality to alter, reverse, withdraw or review its own decision to sell the properties to Fusion and Wuperthal (first and second respondents) once the deeds of sale were properly concluded. It should not be permitted to approach this Court for that which it itself is prohibited from doing.

[49] The Municipality seems to accept that a binding agreement of sale was concluded and they ask for these agreements to be set aside. It was argued on behalf of the Municipality that the deeds of sale and cooperation have been concluded, it was now *functus officio* and therefore not entitled to take its own decision on review, especially in this instance where the motivation appears to be a somewhat narrow political one, without at least showing the prejudice it stands to suffer if the decision is implemented.

[50] In response to this, Mr Jamie contended that in terms of my earlier order (that is under case number 393/07) the Municipality was required to furnish Fusion and the other tenderers with the information on which it would rely in arriving at its final decision. The process followed by the Municipality thereafter was, as he argued, scrupulous in complying with this order and with its constitutional and legal obligations. All the required information was furnished and all the tenderers were given an opportunity to address Council, as were the objectors. Council was entitled, so Mr Jamie argued, to take the decision of 31 July 2007 not only because of the Court order, but because of the section 14 of the MFMA itself. That

decision put an end it seems to the process insofar as the Municipality was concerned.

[51] It was further contended that because of the need for certainty and out of respect for the principle of the rule of law council also decided to embark on legal proceedings to confirm that it was entitled to act as it did on 31 July 2007.

[52] Without commenting in any way upon the Municipality's professed commitment to the rule of law, I do not disagree with its right to approach this Court. However, Mr Jamie also submitted in the course of argument that the Municipality does not seek to challenge its decision of 31 July 2007, it seeks to enforce it. Whether the Municipality has a right to approach this Court in the present case involves an interpretation of the legislation which governs the Municipality's powers and duties. It also involves deciding whether the Municipality has suffered any prejudice. I do not intend making any finding in this regard as it is not necessary to do so for the purposes of this matter.

[53] The Municipality's case, principally, is that it is precluded by section 14(5) of the MFMA from transferring the properties to the respondents pursuant to an award of

tenders in terms of Tender 34. Section 14(5) of the MFMA provides that:

> "Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the Supply Chain Management Policy which the municipality must have and maintain in terms of section 111".

I agree with Mr Jamie that the most likely meaning of the said section is that the process leading up to the transfer of ownership of the capital asset must comply with the requirements of the section.

[54] It is the Municipality's case that it has a duty to decline to take steps to transfer ownership of a capital asset if the requirements of section 14(5) of the MFMA have not been met as regards the preceding tender or other process. They say that it is in such circumstances incumbent upon the Municipality to refuse to transfer ownership of the capital asset, even in the face of a contract of sale in respect of that asset.

[55] It is common cause that the Municipality has been required since 1 October 2005 to have and maintain a Supply Chain Management Policy and that prior to

December 2005 the Municipality did not have such a policy in place. The respondents, however, contend that in the period between 1 October 2005 and December 2005 the supply chain management regulations were implemented by the Municipality. The relevance of this to the present matter is that the BEC, which is the committee that evaluates tenders, was appointed during this period.

[56] There was some debate as to precisely when, if at all, in December 2005 the regulations were adopted. According to the Municipality its Council resolved on 13 December 2005 to approve certain paragraphs of a draft supply chain management policy. These paragraphs were to be implemented together with the provisions of the supply chain regulations until the final policy had been accepted. It contends that the provisions of policy dealing with the appointment of committees for the adjudication of tenders, or the processes to be followed by such committees, were not approved.

[57] It is common cause that on 3 November 2005 Mr B Kannemeyer, the then municipal manager, appointed the BEC to evaluate the proposals for Tender 34. The respondents initially alleged that the BEC was appointed

in terms of regulation 28 of the municipal supply chain management regulations. Regulation 28, according to Mr Jamie, does not confer authority on the municipal manager to appoint a Bid Evaluation Committee. It regulates the duties and composition of such committee once it has been appointed. Instead, Regulation 26(1)(a) and (b) states that a municipality supply chain policy must provide for the appointment by the accounting officer of the members of a BEC and a BAC. No such policy was in place when the members of the BEC or the BAC were appointed.

[58] The Municipality's next complaint relates to the scorecard which was used to evaluate the tenders. It alleged that the BEC and BAC adjudicated the tenders for the sale of municipal land in accordance with a scorecard which was largely determined by them. On their papers the respondents allege that the scorecard was adopted by Council. Mr Jamie argued that this was not so. According to him, on 11 August 2005, Mayco approved a score card for the expeditious appointment of developers for the properties identified by it. Mr Jamie argued that not only did the BEC and the BAC act without legal authority when they awarded the tenders, they also

did so in accordance with a score card which had not been approved by Council.

[59] There is then the complaint that the tender process was not conducted on an equitable basis as there was no proper due diligence performed in respect of the BEE status of the respondents. Mr Jamie contended that the report was based on questionnaires submitted by the entities and it does not appear that any independent verification process was undertaken.

[60] Finally it was argued that it is apparent from a comparison of the detailed calls for proposals and the individual proposals submitted by respondents that the proposals were non-responsive and non-compliant in all cases, very often in respects which have an impact on the imperatives of the calls. This so-called non-compliance, it was suggested also, had implications for the fairness, equitability and competitiveness of the process more generally. An example of this complaint cited was that the allegation in respect of the first respondent's bid that there was no indication given as to how the parking needs of the proposed businesses would impact upon the availability of public parking.

[61] The municipal manager, Mr Kannemeyer, quite clearly had the authority to appoint a bid evaluation committee, whether in terms of the municipal supply chain management regulations under the Local Government Municipal Systems Act 32 of 2000 or in terms of his delegated powers. At a meeting of Mayco on 11 August 2005 it was noted that the municipal manager would adjudicate the various proposal calls in terms of the MFMA. The municipal manager was entitled to appoint the BAC to assist him with this - that is in fact what sections 115, 117 and 118 of the MFMA require. Even if this power was not properly delegated to the municipal manager and even if he could not have appointed the BAC, their appointment by him was subsequently ratified when the Council adopted the recommendations.

[62] The first applicant is a municipality with a mayoral executive system combined with a ward participatory system. The Executive Mayor has extensive powers and duties in terms of section 56(3) of the Local Government: Municipal Structures Act 117 of 1998. See section 59 of Municipal Systems Act 32 of 2000. Section 59 of the said Act requires a municipal council to develop a system of delegations that will maximise administrative and

operational efficiency and provide for adequate checks and balances.

[63] The Council may in accordance with that system delegate appropriate powers to its Executive Mayor and instruct any committee or functionary to perform any of the Council's duties. Although certain powers cannot be delegated, the delegation of the power to alienate immovable property is not prohibited.

[64] First applicant has at different times delegated its various powers. A consolidated list of delegations was adopted in December 2005, all the powers of Council which can be delegated but which are not specifically referred to in other parts of the General Delegations, were delegated to the Executive Mayor together with its Mayco. The question whether the Executive Mayor and Mayco, the Municipal Manager (or in his absence the acting municipal manager) committees of the Municipality (such as the BEC and BAC) and its officials were authorised to do what they did in respect of Tender 34, i.e. whether they were the ones entitled or empowered to take the various steps they took in this process, is to be answered with reference to the delegations.

[65] It is clear from the General Delegation that in the absence of any specific delegation to a lesser body or official, all the original powers of Council which could be delegated were delegated to the Executive Mayor and Mayco. The significance of this is that once Council adopted the Land Management Policy it was entitled to delegate the necessary powers, to give effect to the policy, to the Executive Mayor and Mayco and that the Executive Mayor in turn had the power to delegate his or her powers to other officials.

[66] The executive mayor and Mayco instructed the municipal manager to give effect to the policy by, *inter alia*, identifying suitable properties and following the whole Tender 34 process. This included the powers to appoint BECs and BACs, establish scorecards etc. and ultimately conclude deeds of sale with the successful tenderers.

[67] The Municipality's argument was that it had no Supply Chain Management Policy as required by section 111 of the MFMA prior to October 2005 and that Tender 34 was therefore in contravention of section 14(5) of the MFMA. The simple answer to this is that section 111 did not apply until 1 October 2005 and that the requirement, in any event, was that the disposal of assets needed to be

consistent with such a policy and not in terms thereof. Section 115 of the MFMA requires the accounting officer of a municipality, as the municipal manager, to implement the Supply Chain Management Policy and to take all reasonable steps to ensure that proper mechanisms and separation of duties in the supply chain management system are in place to minimise the likelihood of fraud, corruption, favouritism and unfair and irregular practices.

[68] The duty of the municipal manager was to implement a policy in terms of which immovable property of the Municipality would be sold in a manner which was consistent with the aforementioned requirements in respect of other goods and services, and which satisfied the further requirements of section 14(5) of the MFMA such as fairness, transparency and equity.

[69] This very regulation was introduced to ensure that a process such as Tender 34 would be fair. The fact that the Municipality applied the regulations from which they were exempt prior to 1 October 2005 and used these regulations as guidelines in terms of which the sale of the immovable property was conducted redounds to their credit. The adoption or non-adoption of a Supply Chain Management Policy in respect of capital assets is in this

instance, as Mr Stelzner contended, somewhat of a red herring.

[70] The scorecard which the BEC and the BAC used was valid. Approval by Council was not required and, if required, it was in fact accepted and ratified by Council. The power had been delegated to Mayco and Mayco approved the scorecard. The scorecards illustrate the equitable nature of the process that was followed. The score card was used for all the tenders and all were scored in terms of the same system. The scoring included various categories such as BEE ownership percentages, employment creation and local procurement.

[71] The second committee, the BAC, verified and ensured that the score cards had been used equitably and was a check for the work of the BEC. The score card encapsulated, *inter alia*, the economic and community value of the land as required by section 14 of the MFMA.

[72] Insofar as it is raised by Mr Jamie I need only note and restate that there was a proper due diligence performed in respect of the BEE status of Fusion and Wuperthal (the first and second respondents). The BEE status of

the other respondents is also not really in issue. The fact that the the BEE status and the use of local SMME's played an important role in the scoring system shows that both Council and its delegated committees are all fully aware of the requirements set by Council in its policy.

[73] With regard to the issues raised by the Municipality under the heading "non-responsive" and "non-compliant", I note the following. The tenders by and large complied with the tender calls. Fusion provided a business plan indicating the source of its funding, a proposed time-table, the manner in which the development was to be managed and further aspects relevant to preserving the historic core Stellenbosch and dealing with the issue of traffic congestion. Any shortcomings in this regard would have been catered for by the evaluation criteria and could form the subject matter of further negotiations.

[74] The size of a housing component in respect of Wuperthal's proposal or the number of parking bays Fusion has provided for in its proposals, are simply issues to be dealt with in terms of the deeds of cooperation and the further planning, rezoning and subdivision stages following upon the sale. Similarly, Wuperthal accepted that the provision of medium cost

housing for the appropriate group of potential homeowners who lived and worked in Stellenbosch was a priority for the Council. Any unsatisfactory feature of Wuperthal's proposal in this regard can, of course, be the subject matter of further negotiations.

[75] Finally, if there were errors in the description of the erven in Fusion's agreement such as size, location or erf number, these should be rectified to reflect the common intention of the parties. The problems, if such, identified by the Municipality with the assistance of its rather nitpicking forensic audit report, should be addressed in terms of the co-operation agreements and with the parties negotiating in good faith to address them.

[76] Given the nature of the concepts in the first part of section 14(5), it cannot be a requirement of the MFMA that there must be strict compliance with the Act. This is impossible. There is no exact measure or yardstick for what is fair. Fairness ultimately involves a value judgment. As long as the overall purpose of the Act is met, substantial compliance with its requirements suffices. (See in this regard the comments by Brand, JA in Unlawful Occupiers, School Site v City of Johannesburg 2005(4) SA 199 (SCA) at 209G-I)

[77] For the Municipality to argue that the appointment of its own BEC and BAC was not properly authorised or that the score card had not been approved by it, misses the point, it is the process which had to be fair, equitable, transparent and competitive. The process was quite clearly fair in that for example the initiatives to bid for the property were advertised, the proposed documents were made available to all interested parties, sufficient time was given for the prospective tenderers to consider the proposals and make their bids and briefing sessions were held at which, *inter alia*, the score card was explained.

[78] The equitable nature of the process is borne out especially by the fact that all the participants were scored in terms of the same system and moreover the BAC verified and ensured that the score card had been used equitably. The public meetings, the advertisements, the calls for objections and the detailed written reports all confirm the transparency of the entire process. Moreover, three sets of valuations of the properties were done by independent valuers and all confirm that the prices received were better than market-related prices. Besides the open call for proposals, the

different elements in the score card ensured that the bids were competitive and, in any event, more than 40 bids were received in respect of seven substantial opportunities. The aforegoing graphically confirms that the regulations were complied with. The fairness of the process is what the regulations intended to ensure and if the compliance was not perfect, there was, in my view, certainly substantial compliance.

[79] It also appears from the various resolutions that the Municipality was receiving legal advice on an ongoing basis. The whole Tender 34 process itself culminating in the conclusion of the agreements between the first applicant and the respondents was, it seems, guided by legal advice.

[80] The Municipality, quite correctly, complied with section 124 of the Municipal Ordinance by advertising its intention to dispose of the properties. Instead of considering the objections and dealing with them in accordance with the co-operation agreements it brought the current review. Even if these objections, or some of them, had to be upheld by the Municipality, it was still contractually bound to enter into discussions with the respondents and to negotiate in good faith with them in

order to address the objections. It was required of them to enter into negotiations with the respondents in order to accommodate those objections which had merit. The Municipality failed to do so.

[81] With regard to the respondents' counter-application, Mr Jamie correctly points out that the Council has yet to decide on whether to accept or reject the objections received in terms of section 124 of the Municipal Ordinance. Until it has done so the disposals are incapable of being finalised.

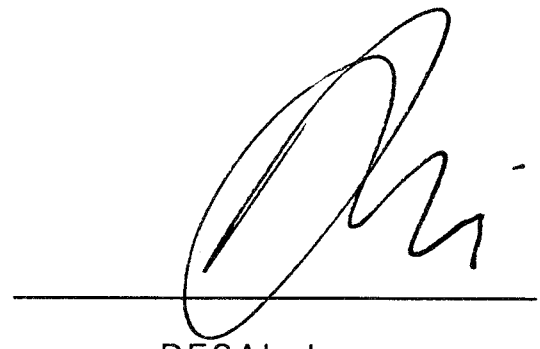
[82] In the result I make the following order:

1. The application is dismissed.

2. First applicant is ordered to pay first and fourth respondents' costs.

3. First applicant is also ordered to pay first respondent's costs in respect of case number 393/07.

4. The counter-application is dismissed with costs.



DESAI, J