IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

[REPORTABLE]

CASE NO: 1427/2011

In the matter between:

CSHELL 271 (PTY) LTD	Applicant
and	
OUDTSHOORN MUNICIPALITY	Respondent

AND

In the matter between:

OUDTSHOORN MUNICIPALITY	Applicant
and	
CSHELL 271 (PTY) LTD	First Respondent
SANDRA AFRIKA	Second Respondent
JOHNNY FORBES	Third Respondent

Coram	:	**R.C.A. Henney, J**
Judgment by	:	**R.C.A. Henney, J**
For the Applicant	:	**Adv S P Rosenberg SC**
Instructed by	:	**WEBBER WENTZEL ATTORNEYS** 15th Floor Convention Tower Heerengracht CAPE TOWN (Ref: A Toefy)
For the Respondent	:	**Adv N. Bawa**
Instructed by	:	**STADLER & SWART ATTORNEYS** 12 Fairview Business Park Cnr First Street & Knysna Road George East (Ref: AH Swart/cvdl/0135-24671 c/o **Werksmans Attorneys**

18th Floor
1 Thibault Square
1 Long Street
Cape Town
(Ref: N SMITH/sl/C.309/STAD0005.5)

Date(s) of Hearing	:	**26 OCTOBER 2011**
Judgment delivered on	:	**30 MARCH 2012**

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JUDGMENT : 30 MARCH 2012

HENNEY, J

Introduction:

[1] This matter deals with the alienation of municipal property, namely Erf 5366, a portion of Erf 1 Oudtshoorn Municipality which measures approximately 15 hectares in extent. For the purposes of this judgement I

shall refer to this portion of property as the "property". There are two applications that will be dealt with in this matter; the first application was brought by the applicant (herein after referred to as "CShell") to review and set aside a decision by the respondent (herein after referred to as "the Municipality") to cancel the award of the tender made to CShell for the alienation and development of the property. The second application was brought by the Municipality as a counter-application.

Relief sought:

[2] CShell seeks the following relief:

2.1 An order against the Municipality for the setting aside of the Municipality's decision to cancel the award of the tender to CShell for the alienation and development of the property, also for the Municipality to be interdicted and restrained from accepting any other proposal for the alienation and development of the property, whether submitted in response to Municipal Notice MR193 of 2010 or otherwise.

[3] The Municipality seeks the following declaratory relief:

3.1 An order declaring that the Municipality has not awarded any tender to and/or concluded any contracts with CShell pursuant to the tender process conducted in 2006 in relation to the alienation of the property;

3.2 An order declaring that the award of a tender pursuant to Notice 60 of 2006 (hereinafter referred to as "the tender") to Newco: S Afrika had been cancelled, alternatively that it be declared cancelled;

3.3 In the alternative to paragraph above and only in the event that it is held that the tender was not cancelled and remains valid, declaring that any contract or agreement concluded between the Municipality and Newco: S Afrika, alternatively CShell, pursuant to the tender is cancelled, alternatively declared void *ab initio* and of no force and effect and that any steps taken as if such contract was valid, including but not limited to the conclusion of any agreements between the Municipality, on the one hand, and CShell, S Afrika and/or J Forbes in the counter-application, on the other, are void *ab initio* and of no force and effect.

3.4 In the further alternative, and only in the event that the court finds that the tender awarded to Newco: S Afrika remains valid; that CShell had been properly substituted as the preferred bidder and that a contract remains in force between the Municipality and Newco: S Afrika, alternatively CShell, the Municipality seeks the following orders:

3.4.1 Reviewing and setting aside the tender process and adjudication of the tender;

3.4.2 Reviewing and setting aside the decision to award the tender to Newco: S Afrika;

3.4.3 Reviewing and setting aside, following on from the relief sought in above two paragraphs, any contracts or agreements concluded between the Municipality and Newco: S Afrika, alternatively CShell, as being void *ab initio* and of no force and effect.

Facts and background:

[4] During May 2006, Municipal Notice 60 of 2006 (hereinafter referred to as the "notice") was published. This notice gave intention of the Municipality to dispose of the property pursuant to section 124(2) (a) of the Municipal Ordinance, No. 20 of 1974 (hereinafter referred to as the "ordinance").

[5] The notice was signed by the Municipal Manager and indicated that the property was being offered for purposes of development reconcilable with the environment and the tenders submitted ought to contain the development proposals and ought to include the profile and/or composition of the firm or institution, the socio economic contributions towards the development of the community in Oudtshoorn, and the employment opportunities, for the skilled, unskilled and professional services that would be utilised.

[6] The tender that was preferred indicated that it was submitted on behalf of a company still to be formed (hereinafter referred to as "Newco"). Newco tendered to pay an amount of R7.1 million for the property. This R7.1 million comprised of R5 million for the property and R2.1 million for the purposes of socio economic contribution to the Oudtshoorn community.

B C Design a firm of architects and project managers submitted this tender on behalf of Newco at that stage and dealt with the Municipality at the early stages after the tender was made.

[7] The tender submitted stated that the intention was to utilise the property for a shopping mall with a commercial and low income residential component with the possibility of a petrol station and a local tourist hotel being considered.

[8] A total of 11 tenders were submitted and evaluated by Mr Eastes, who was the Town Planner at that time, on the instructions of the Municipal Manager. During the evaluation, Mr Eastes adopted a methodology consisting of four categories, namely the price, the company structure with reference to the broad-based black economic empowerment criteria, social contribution and the submitted development proposal.

[9] Each of the four categories was scored out of a possible 10 points and each bidder was scored on a sliding scale. The award was made to the bidder who scored the highest number of points.

[10] Mr Eastes prepared a report in terms of the documents submitted on behalf of Newco by Ms Afrika, which indicated that it was 80% BBBEE compliant. The report was served before the Tender Committee at a meeting on 14 August 2006. Mr Eastes also prepared the minutes of meeting of the Tender Committee.

[11] On 14 August 2006, a unanimous decision (No 71.3/08/06) was taken by the Tender Committee to accept the recommendation of Mr Eastes that the tender be awarded to Newco: S Afrika.

[12] The report of the Tender Committee containing its decision to alienate the property was noted by the Council on 6 September 2006 during the meeting.

[13] On 8 September 2006 Eastes on behalf of the Municipal Manager, informed B C Design of this decision in a letter.

In the letter of 8 September 2006 it was further stated that the property be sold to Newco (a company to be incorporated) subject to the following conditions:

13.1 that the developer be informed in writing that within 3 months of this date (8 September 2006) a legal entity be registered or incorporated in whose name the property should be registered;

13.2 The municipality would appoint an attorney who would prepare a deed of sale and whose costs would be borne by Newco, and which deed of sale had to be concluded within 1 month of the registration of Newco.

13.3 Within two weeks of the signing of the deed of sale, a bank guarantee for R5 million had to be delivered to the Municipal Manager.

13.4 Clause 5 of the letter contained a condition that approval, from or notice to various government departments or parastatals like Eskom and Telkom be sought or given, regarding the proposed development.

This approval or notice sought or given should be done at the cost of the developer.

The other relevant conditions contained in the letter referred to the R2,1 million rand which the developer had made available for poverty alleviation and social upliftment for the benefit of Oudtshoorn.

[14] In a letter dated 12 October 2006, B C Design confirmed to the Municipality that the aforementioned conditions were acceptable to the successful bidder and that auditors had been instructed to register a new company in whose name the property would be transferred to.

[15] B C Design advised the Municipality in a letter dated 2 February 2007 that a company called CShell with the registration number 2006/00797/07 was

registered as the company as contemplated in the letter of 12 October 2006, there was no further details relating to the company and its shareholding. B C Design had requested that the attorney be identified; who had been appointed to draft the agreement of sale at the developer's cost.

[16] This letter of 2 February 2007 was accepted as the notification that CShell would replace Newco, however no mention was made that Afrika and Forbes would no longer be directors.

[17] In a letter dated 5 February 2007, it was stated that James King and Badenhorst were appointed to attend to the transfer and registration of the property. This transfer and registration however would only occur once environmental authorisation was obtained.

[18] In a letter dated 26 May 2009, the Municipality was for the first time made aware of the composition of CShell. After a letter dated 12 May 2010 the Municipal Manager considered the changes in the shareholding of the bidder with reference to the tender award. The letter stated that CShell was registered as a legal entity with the local authority merely to fulfil tender conditions and that it was a shelf company that had no assets or substance and would not be able to provide the necessary surety for a large development.

[19] On 12 May 2010, CShell requested the Council to grant them permission to change the legal entity registered with the Council to a new

entity to be nominated. Their primary reason for this request was that CShell as a shelf company was only used for the preliminary processes in preparing the property for development as required in terms of the law and the conditions of the tender. It had no assets or substance and would never be able to provide the necessary surety for a large development.

[20] In a letter dated 20 May 2009, the Municipality was for the first time made aware of the composition of CShell. The composition was:

20.1 25% - Troban Property Holdings Investments (Pty) Ltd;

20.2 25% - Ms Sandra Afrika;

20.3 25% - Victoria Street George (Pty) Ltd;

20.4 25% - The Manors Trust.

[21] In reply to this, the Municipality advised CShell in a letter dated 14 June 2010 that they could not enter into the agreement with them on the basis that the status and composition of CShell was materially different to that of Newco: S Afrika and that the Municipality was receiving legal advice on the matter.

[22] A meeting was held on 21 June 2010 with the representatives of CShell and the Municipality, indicated that the two companies, namely CShell and Newco were not the same entity because their basis of the composition that was markedly different than what was envisaged in the tender of Newco.

[23] CShell sought the enforcement of the agreement of sale in a letter dated 14 July 2010. Upon receipt of this letter of CShell, the Municipality sought and obtained legal advice from Messrs Barchard and Cilliers of the City of Cape Town regarding relating to the tender process and the composition of CShell were brought to their attention. In particular, that there was a failure to comply with the provisions of Section 14 of the Municipal Finance Management Act 56 of 2003 ("MFMA").

[24] The Municipality was advised that the Council could deal with the matter if they referred it back to them rather than to institute a review application in the High Court.

[25] In a letter addressed to the Municipality, CShell contended that it had been incorporated pursuant to the award of the tender as envisaged by Newco and thus the successful tenderer to which the property ought to be transferred, in a letter addressed to the Municipality.

[26] On 23 November 2010 the Council of the Municipality resolved that it would re-advertise the property for development proposals. In a letter dated 1 December 2010, the Municipality informed CShell that it had decided not to alienate the property, but rather re-advertise it for development proposals.

[27] CShell sent a letter to the Municipality on 9 December 2010 requesting reasons for the decision taken by the Municipality. The Municipality furnished CShell with reasons on 9 December 2010. The Municipality gave two reasons

for the decision. Firstly that the initial decision to award the tender had been taken by a tender committee and was not a decision that was taken by the Council as it ought to have been. Secondly, that the decision was based on section 124(2) (a) of the Ordinance which had been repealed by section 14 of the MFMA.

[28] The Municipality also stated that the decision was *ab initio* unlawful in that it was founded on a repealed ordinance, the tender committee did not have the authority to award the tender and section 14 of the MFMA had not been complied with, and the bidder had failed to comply with the conditions of the tender award and that the decision was taken to prevent the perpetuation of an unlawful situation.

[29] Thereafter CShell launched an urgent application on 31 January 2011 seeking an order interdicting and preventing the Municipality from seeking any other proposal for the alienation of the property.

[30] The matter was postponed by agreement between the parties on the understanding that the founding papers in the urgent application would stand and be supplemented as the application for review and that the Municipality in the course of dealing with CShell's application would also launch its counter-application within the time frame agreed to.

[31] I now turn to the legislative framework applicable in this matter.

Legal Framework:

[32] This matter deals with the disposal of property; this is an important factor to consider as it determines the legislative framework that ought to be followed and the laws that should govern this process.

[33] There is a difference between the disposal of property and the procurement of goods and services.

[34] The Constitution[1] needs to be considered when dealing with procurement of goods and services, and section 217 states:

> *"(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair equitable, transparent, competitive and cost-effective.*
> *(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-*
> *(a) categories of preference in the allocation of contracts; and*
> *(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*
> *(3) National legislation must prescribe a framework within which the policy referred to in subsection (3) must be implemented."*

[35] The Preferential Procurement Policy Framework Act[2] (hereinafter referred to as "PPPFA") states in the preamble that this Act provides the

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[1] Constitution of the Republic of South Africa Act 108 of 1996
[2] Preferential Procurement Policy Framework Act 5 of 2000

framework for the implementation of the procurement policy contemplated in s217 (2) of the Constitution. Section 2 of the PPPFA states:

> *"(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:*
> *(a) A Preference point system must be followed;*
> *(b) (i)for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific gods as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;*
> *(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goods as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;*
> *(c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;*
> *(d) the specific goals may include—*
> *(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;*
> *(ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994;*
> *(e) any specific goal for which a point maybe awarded, must be clearly specified in the invitation to submit a tender;*
> *(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and*
> *(g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, maybe*

cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.

(2) Any goals contemplated in subsection 1(e) must be measurable, quantifiable and monitored for compliance."

[36] There is no reference in section 217 of the Constitution, the PPPFA and its regulations of the disposal of capital assets and more particularly disposal of immovable assets. In terms of the national sphere it is regulated by the Disposal of State Property Act[3]. The disposal of property by a municipality is regulated solely by section 14 of the MFMA[4].

[37] Section 14 of the MFMA states:

"(1) A municipality may not transfer ownership as a result of a sale or other transaction or otherwise permanently dispose of a capital asset needed to provide the minimum level of basic municipal services.

(2) A municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsection (1), but only after the municipal council, in a meeting open to the public-

(a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services; and

(b) has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.

(3) A decision by a municipal council that a specific capital asset is not needed to provide the minimum level of basic municipal services, may not be reversed by the municipality after that asset has been sold, transferred or otherwise disposed of.

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[3] Disposal of State Land Act 48 of 1961
[4] Municipal Finance Management Act 56 of 2003

(4) A municipal council may delegate to the accounting officer of the municipality its power to make the determinations referred to in subsection (2) (a) and (b) in respect of movable capital assets below a value determined by the council.

(5) 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.

(6) This section does not apply to the transfer of a capital asset to another municipality or to a municipal entity or to a national or provincial organ of state in circumstances and in respect of categories of assets approved by the National Treasury, provided that such transfers are in accordance with a prescribed framework."

[38] The awarding of a tender falls within administrative action. In general, the decision to award a tender involves two stages. The first stage involves the award of a tender which is an administrative action and the second stage is the conclusion of the contract pursuant to a tender award which involves the Law of Contract. This distinction was recognised by the Constitutional Court in *Transnet Ltd v Goodman Bros (Pty) Ltd*[5] as well as *Steenkamp NO v Provincial Tender Board, EC*[6], in which it confirmed that a decision to award a tender by an organ of state constitutes an administrative action. The court made it clear in *Steenkamp* case *supra*, that *"Once the tender is awarded, the relationship of the parties is that of ordinary contracting parties, although in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship."* [7]

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[5] *Transnet Ltd v Goodman Bros (Pty) Ltd* 2001 (1) SA 853 (SCA).
[6] *Steenkamp NO v Provincial Tender Board, EC* 2007 (3) SA 121 (CC).
[7] Steenkamp NO v Provincial Tender Board, EC 2007 (3) SA 121 (CC) at 158 para 12.

[39] In *Aquafund (Pty) Ltd v Premier of the Western Cape*[8] the Court held that once the tender was accepted then it would result in a contract between the parties and therefore it would not amount to administrative action. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*[9] the Supreme Court of Appeal held that the public authority derived its *power to cancel the contract from the terms of the contract and the common law. Thus when it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract.*

[40] In *Pepcor Retirement Fund and Another v Financial Services Board and Another*[10] and *Sanyathi Civil Engineering & Construction (Pty) Ltd and Another v eThekwini Municipality and Others, Group Five Construction (Pty) Ltd v eThekwini Municipality and Others*[11]. It was held that a public body may not only be entitled but also duty-bound to approach a court to set aside its own irregular administrative act.

This *dictum* was followed in the case of *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC*[12].

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[8] *Aquafund (Pty) Ltd v Premier of the Western Cape* 1997 (2) All SA 608 (C).
[9] *Cape Metrorail Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) para 18.
[10] *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA).
[11] *Sanyathi Civil Engineering & Construction (Pty) Ltd and Another v eThekwini Municipality and Others, Group Five Construction (Pty) Ltd v eThekwini Municipality and Others* (7538/2011, 9347/2011) [2011] ZAKZPHC 45 (24 October 2011).
[12] *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 (1) SA 356 (SCA).

[41] **ISSUES FOR DETERMINATION**

On consideration of the papers and argument, the issues clearly distilled and refined are the following:

(a) Whether the Respondent ("Municipality") had awarded to and or concluded any contract with the Applicant ("CShell") or to Newco: S Afrika and whether CShell had legally substituted Newco: S Afrika after the tender was awarded;

(b) If so, whether the award of the tender to CShell or Newco: S Afrika was in accordance with the provisions as set out in Section 14(2) of the MFMA;

(c) If not, whether the Municipality was entitled to cancel the award of the tender;

I will now deal with these issues in turn.

Was the Tender awarded to CShell?

[42] What is in dispute is whether it was proper for CShell to be substituted as the special purpose vehicle specifically established for the purposes of the bid and the subsequent development of the property.

[43] The Municipality in their counter-application expressed a concern that an entity can submit a bid, rely on BBBEE criteria, be awarded a tender, and

thereafter simply sell/allocate the shareholding in the bidding entity to persons with a different BBBEE criteria and composition and then reaps the benefits of the tender. Miss Bawa for the Municipality further submitted that such a situation would be untenable, because it is contrary to a fair open and transparent tendering system which had to be complied with and in relation to the BBBEE criteria and it constitutes fronting.

From the outset, it was B C Design, a firm of architects and project managers under the name of SA Coetzee who dealt with the initial bid on behalf of Newco: S Afrika. The bid proposal was presented under the name of SA Coetzee acting on behalf of Newco.

[44] At pages 2 – 3 of the bid proposal document[13] dealing with "***PROFIEL / SAMESTELLING VAN DIE AANBIEDER***" the following is stated:

> *"Newco is 'n maatskappy wat spesifiek geregistreer sal word vir die doeleindes van hierdie aanbod en die gepaardgaande ontwikkeling.*
>
> *Aandeelhouers, Direkteure en belanghebbendes van die aanbieder bestaan uit die volgende persone en instansies:*
>
> 1. *Me Sandra Afrika – 'n plaaslike inwoner en welbekende sakevrou en konstruksiekontrakteur van Oudtshoorn. Me Afrika het geen bekendstelling nodig nie en haar betrokkenheid in die Oudtshoorn sakewêreld asook opheffing en sosio-ekonomiese bydraes in die groter Oudtshoorn is legio.*

[13] CS2 – record 25 - 26

Me Afrika is die mentor en leier van die Bemagtigingsaandeelhouers van Newco. Sy is ook die persoon wat hierdie aanbod geïnisiëer en gedryf het.

2. *Mnr Johnny Forbes. Welbekende Suidkaapse sakeman nou woonagtig in Oudtshoorn. Mnr Forbes het gevestigde sakebelange in Oudtshoorn en is 'n bekende in die nasionale kettingwinkelkringe.*

3. *Newco het reeds die finansiële steun van 'n prominente finansiële instelling geanker wat nie net finansieël sal bydra tot die voorgenome ontwikkeling nie maar ook welbekend is vir hulle betrokkenheid by die ontwikkeling van sakekomplekse landwyd en die ondersteuning wat aan bemagtigingsgroepe verleen word.*

4. *[a] Me Afrika is ook in gesprek met verskeie ander partye en indiwidue wat betrokke wil wees by die voorgestelde ontwikkeling.*

   [b] Me Afrika het mnre Bosman en Coetzee genader om hierdie tenderdokument en die skematiese voorstelling van die beoogde uitleg te formuleer – deels weens hul kundigheid op hierdie gebied".

[45] In a letter dated 8 September 2006[14], the Municipality notified that under council decision number 71.3/08/06, the tender had been awarded to the "developer". It is further stated that the developer informed the Municipality that within a period of 3 months from the date of the letter (8 September 2006) **"...** *[d]at 'n regspersoon gestig word in wie se naam die grond oorgedra moet word".*

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[14] CS3 - record 31

[46] In reply thereto, in a letter dated 12 October 2006[15], the B C Design informed the Municipality that they had already instructed their auditors to register a legal entity in whose name the property which was the subject of the tender, is to be transferred.

Thereafter, in a letter dated 2 February 2007[16], B C Design conveyed to the Municipality that their auditors had indeed registered a legal entity as indicated in their letter dated 12 October 2006. This legal entity is known as CShell 271 (Pty) Ltd.

[47] In reply thereto, the Municipality sent a letter dated 5 February 2007 to B C Design[17], informing the latter that it had appointed attorneys James King and Badenhorst to attend to the registration and transfer of the property.

[48] I must point out that from the record there is no indication that further correspondence between the Municipality and either B C Design or CShell took place.

[49] In a letter dated 26 May 2009[18], (some 2 years, 3 months and 21 days) after 5 February 2007, CShell, for the very first time since it had informed the Municipality that it is the company that had been registered as the special purpose vehicle to effect the transfer, communicated with the Municipality. In

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[15] CS4 – record page 34
[16] CS5 – record page 36
[17] CS6 - record page 37
[18] CS13 record page 64

this letter for the first time, the shareholding and composition of the registered company are revealed.

[50] The shareholders were identified as follows:

25% Troban Property Holdings & Investments (Pty) Ltd

25% 57 Victoria Street George (Pty) Ltd

25% Manors Trust

25% Sandra Afrika

This was in response to paragraph 2 of the letter from the Municipality dated 8 September 2006.

[51] In the letter of 2 February 2007, B C Design did not disclose to the Municipality that Newco with the profile and composition would not be the company who would take transfer of the property, but that it would be CShell. Then in the letter dated 26 May 2009 as referred to above, they also did not disclose that they had decided not to incorporate or register Newco as an entity or special purpose vehicle with the profile and composition as indicated in their bid.

[52] In a letter dated 12 May 2010[19], almost a year thereafter, the request was made by CShell to change it as the legal entity to take the development further. The new legal entity would be made known at a later stage. The

[19] CS15 record page 64

reason for this was that CShell, a shelf company lacked the capacity in the form of assets and security to secure funding for the completion of the development.

[53] They also do not inform the Municipality that CShell will therefore not be the entity in whose name the property will be registered as indicated earlier.

[54] This prompted the Acting Municipal Manager, T Botha, in a response thereto in a letter 14 June 2010 that the tender was not awarded to CShell, but to Newco: S Afrika. Botha further indicated that the tender was awarded on the basis of the company's composition as set out in the bid.

[55] This, it seems, was the catalyst that set the process in motion which ultimately lead to the Municipality cancelling the tender. In its reply to Botha's letter, CShell contended that there was never a requirement by the Municipality that Newco only be used as the special purpose vehicle for the transfer of the tender and to act as a developer. CShell further contended that it was unaware that the tender required a specific composition. They argued that this was not a requirement.

[56] CShell further states in an affidavit deposed by S Afrika[20] that it was their understanding and intention that if successful in their bid, the development would be undertaken by an appropriate special purpose vehicle

[20] - record page 234

which they envisaged would be a company. It was of no consequence to them whether it would have been the acquisition of a suitable shell company or by the incorporation and registration of a company.

[57] I have great difficulty with the Applicant's contention. If this was their understanding, how could the Municipality have known about it? This was never disclosed to the Municipality. It directly contradicts what is stated in their original bid wherein they state that "... *Newco is 'n maatskappy wat spesifiek geregistreer sal word vir die doeleindes van hierdie aanbod ...*".

[58] It is further contradicted by the content of annexure "CS4"[21] dated 8 October 2006 which states *"... ons bevestig dat ons reeds opdrag aan ons ouditeure gegee het om 'n Regspersoon te registreer in wie se naam die grond oorgedra sal word"*.

[59] When Coetzee wrote this letter to the Municipality, CShell had already been established and registered on 31 January 2006. This was some months before the tender was awarded in September 2006. Coetzee must have been aware of this. If therefore it was of no consequence whether the special purpose vehicle would have been a registered company or a company to be incorporated as stated by Afrika, why was this not disclosed at the outset to the Municipality in the tender document. This could also have been done even after the tender was awarded.

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[21] CS4 – record page 34

[60] Why did they indicate to the Municipality that they will request their auditors to register a company in whose name the property would be transferred if that company had already been registered? It was only on 2 February 2007 that was 6 months after the tender was awarded, that CShell was indicated as the company that had been registered in whose name the property was to be transferred. On 12 May 2010 it seems that there was also no intention to later register the property even in the name of CShell, when they requested that a new entity be registered to take transfer of the property.

[61] The profile and composition of CShell was also never disclosed to the Municipality at that stage. They also failed to state that it would not be similar to what was stated in the bid.

[62] Although the Municipality accepted that CShell[22] would be the entity in whose name the property would be registered, it was not aware of the composition and profile of CShell. CShell had failed to explain why this was not done at that stage.

[63] It was only after more than two (2) years had lapsed, that the shareholding of CShell was disclosed by means of a letter dated 26 May 2009[23].

[64] In their letter expressing their dissatisfaction with the decision of the Municipality dated 17 June 2010[24], CShell contends that *"... If the Tender*

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[22] CS13 – record 64
[23] CS13 record 64

called for a specific composition, we were unaware of this position and pre tender ...". This, however was clearly requested when they were invited to tender. If their understanding was different, why did they volunteer specific information pertaining to the specific composition of the company to whom the tender was awarded? Why did they use words *"... Afrika is die mentor en leier van die bemagtigings aandeelhouers?"*

[65] It was also stated in the bid that *"... Newco het reeds die finansiële steun van 'n prominente finansiële instelling geanker wat nie net finansieël sal bydra tot die voorgenome ontwikkeling nie, maar ook welbekend is vir hulle betrokkenheid by die ontwikkeling van sakekomplekse propertywyd en die ondersteuning van bemagtigingsgroepe verleen word".*

[66] This clearly creates the impression that due to its profile and composition Newco as an empowerment group had secured the financial assistance and backing of a prominent financial institution that has a record of supporting empowerment groups. Much reliance was placed on the profiles of Afrika and Forbes. It is common cause that the impression was created that Afrika, a person of colour held an 80% interest in Newco. It is clear that Eastes relied on this when he awarded the tender to Newco or that he was placed under such an impression.

[67] It is clear from the overwhelming evidence on record that this was the impression that was conveyed to the Municipality right at the beginning when

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[24] CS19 record page 66

Newco: S Afrika was awarded this tender in September 2006. It is also clear that there was never an intention to register Newco. This is evident if one has regard to what Afrika says in her Affidavit[25] dated 14 March 2011. She says *"... Newco was officially registered as CShell 271 (Pty) Ltd ... on 31 January 2006"*. The registration of CShell took place before the tender was awarded. From 8 September 2006 until 2 February 2007, the Municipality was placed under the impression that the special purpose vehicle in whose name the property was to be registered was still to be registered or incorporated.

[68] It was more than two (2) years after the tender was awarded, that the Municipality was informed of the real and actual composition and profile of CShell. When the Municipality was advised of the shareholding, Afrika was not even a director of CShell, she was only appointed as such on 21 August 2009. This was a misrepresentation to the Municipality. The Municipality was also never informed when the bid was submitted that B C Design's directors who assisted with the bid would take up a position of the interest in the development. This was only revealed in an Affidavit of Afrika for the first time.

[69] One of the 25% shareholders in CShell Troban Property Holdings and Investments is indicated in Cipro documentation that it was deregistered on 16 July 2010. The other 25% shareholder 57 Victoria Street George (Pty) Ltd had also been finally deregistered on 24 February 2011 according to the Cipro documentation. The only active director of this company was Sarel Albertus

[25] At record page 233 - 234

Coetzee who is also a director of B C Design. Coetzee was a director of CShell prior to the award of the tender as at 31 May 2008.

[70] Thus it seems that 50% of the shareholding of CShell and hence 50% of the property do not as a matter of law exist and cannot trade. As far as the other 25% shareholder, The Manor's Trust is concerned, the beneficiaries of the Trust are Rian Emiel Van Der Merwe, Frederick Johannes Conradie, the Elma Trust and the Erik Conradie Verwey Trust and their descendants Van der Merwe and Conradie are the trustees. It was never disclosed that any of these persons would benefit from the tender when Coetzee initially submitted it on behalf of Afrika. It is clear that Afrika is the successful tenderer changed the legal persona of the initial entity it purported to be. Once again no good reason was given as to why this was not disclosed to the Municipality.

[71] The only conclusion that one can come to is that it was deliberately concealed. The question is for what purpose? The reason, in my view, would be that these entities and persons were not consistent with the BBEEE profile that was presented to the Municipality. The BBEEE composition of CShell it seems was only 25%. That was the shareholding component of Afrika as opposed to the 80% BBEEE profile Newco claimed to be.

From this it seems Afrika had improperly made herself available as a BBEEE piece of bait to hook the tender on behalf of other unknown individuals or entities which was not disclosed to the Municipality at that stage.

[72] The argument that the Municipality did consider the BBEEE profile and composition of the company as a requirement for the award of the tender goes against the overwhelming evidence as presented on the papers.

In my view the tender was not awarded to the applicant CShell, but to Newco: S Afrika.

[73] Was there compliance with Section 14(2) of the MFMA when the Municipality awarded the tender?

The publication of a Municipal Notice 60 of 2006 on behalf of the Municipality during May 2006 advising of its intention to dispose of its property occurred pursuant to the provisions of Section 124(2) (a) of the Municipal Ordinance.

Section 124(2) (a) of the Municipal Ordinance ... states that

"*124.(1) Subject to the provisions of subsection (2), a council may –*

(a) alienate, let or permit to be built upon, occupied, enclosed or cultivated any immovable property owned by the municipality unless it is precluded from so doing by law or the conditions under which such property was acquired by the municipality, and

(b) ...

(2) No council shall act in terms of subsection (1) unless it has –

(a) advertised its intention so to act;

(b) transmitted to the Administrator the objections (if any)

lodged in accordance with the advertisement contemplated by paragraph (a) together with its comments thereon and a copy of such advertisement, and

(c) obtained the administrators approval of the proposed alienation, letting or permission;

Provided that the foregoing provisions of the subsection shall not apply where the proposed alienation, letting or permission is for a purpose generally or specially determined by the Administrator.

[74] Any fair-minded person who perused the tender document would have understood it to have been issued in terms of the provisions of the Ordinance. This would further imply that the decision to alienate the property would have been taken in terms of the provisions of the Ordinance. By purporting it to be such any reasonable and fair-minded person would have understood Mr May ("May") as the Municipal Manager to have acted in terms of the provisions of the Ordinance.

[75] On a close comparison between the provisions of the Ordinance and of Section 14 of the MFMA, there seems to be a vast difference between the pieces of legislation. In my view there can be a basis for the contention that there had been substantial compliance with the provision of Section 14 of the MFMA.

[76] It is also common cause that this particular Ordinance in terms of which the tender was advertised was repealed when Section 14(2) of the Local Government Municipal Finance Management Act 56 of 2003 came into operation on 1 July 2004.[26]

[77] In terms of subsection (2) of Section 14, a Municipality may transfer ownership or otherwise dispose of a capital asset other than one contemplated in subsect (1) only after the municipal council, in an open meeting to the public:

(a) has decided on reasonable grounds that the asset is not needed to provide the minimum level of basic municipal services;

(b) such municipal council has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.

[78] It was contended on behalf of CShell that according to the municipal manager May as well as the executive mayor ("Swartbooi") at the time when the tender was awarded, May had submitted a detailed report to the committee on the disposal of the property. It was further recommended that the tender be advertised for the disposal thereof. The report further motivated in some detail the economic and community value to be received for the disposal of the property.

[26] See Sect 179 of the MFMA and the Schedule thereunder

[79] This report as well as the recommendation served before the council which decided that the property was not needed to provide the minimum level of basic municipal services and that the value against which the property was to be alienated and the community value to be received would be considered after receipt of the tender proposal. Thereafter tenders were considered by the tender committee whose decision had to be endorsed by the council who in turn on 14 August 2000, endorsed the decision of the tender committee.

[80] CShell further contends that both May and Swartbooi confirmed that the power to sell immovable property was specifically reserved for the council and it was for that reason that the council in fact approved the sale.

[81] May[27] deposed to an Affidavit wherein he states that he had been in local government since 1994 until June 2007 and that he is familiar with the statutory requirements of the MFMA regarding the disposal of capital assets by a Municipality. By stating this, he suggests that he was aware at that time when the tender was awarded, of the provisions of the MFMA and in particular Section 14(2). The tender notice number 60 of 2006 regarding the proposed alienation of this property given under his hand stated that ... *"Notice is hereby given that Oudtshoorn Municipal Council intends to alienate Erf 5366 (+-15ha) in terms of Section 124(2)(a) of the Municipal Ordinance".*

[82] That would mean that the decision to alienate the said property was considered having regard to the provisions of Section 124(2) of the repealed

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[27] Record 310

Ordinance. Eastes who was the Town Planner at the Municipality at the time, states in an Affidavit he deposed to on behalf of the Municipality states, that to the best of his recollection prior to drafting the notice, he was informed by May that the decision was made to sell the property.

[83] He says further that when he prepared the notice, he was of the view that the property had to be put out to tender pursuant to Section 124(2) (a) of the Municipal Ordinance 20 of 1974. He did not have any knowledge at the time of the MFMA.

[84] The Municipality further alleges that the first full council meeting for 2006 took place on 15 March 2006. None of the agendas and final minutes of the Council meetings that took place between the period March 2006 to September 2006 showed that any report prepared by the Committee or Eastes served before it. It further does not appear that the council took any decision or even noted a report prepared from the committee.

[85] Counsel for CShell submits that the question whether the provisions of Section 14(2) of the MFMA had been complied with raises a dispute of fact between the parties.

[86] Counsel submitted that in dealing with this dispute of fact, the Respondents (in the counter-application) version as deposed by May, the erstwhile Municipal Manager and Swartbooi, together with the Applicants' version to the extent that it is admitted and the version of CShell (the

respondents in the counter-application) can only be rejected on the papers if it is not a real or genuine dispute. The version of CShell should therefore hold sway he submitted. This is according to the well established rule in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 634.*

[87] I am unable to agree with this contention for the following reasons:

(a) If May had applied his mind properly and had knowledge of Section 14(2) of the MFMA, he would not have signed a notice stating that a decision to alienate the said property was to have been made in terms of Section 124(2) (a), the repealed Ordinance.

(b) He neglects to state in his affidavit why he made this error, which he would not have made if he had indeed had knowledge of the MFMA at that time. He is also silent on why the notice makes no mention of the MFMA instead of the ordinance.

(c) Furthermore, there is no proof of a council resolution or documentary proof to substantiate the claim of May and Swartbooi that there was compliance with Section 14(2) of the MFMA.

(d) Eastes who drafted the notice had no knowledge of the provisions of the MFMA. This he did on the instructions of May who signed it later as Municipal Manager.

(e) Eastes was the functionary who principally dealt with this tender. He states that he was not aware of the ambit and input of the MFMA.

(f) The strongest indication that does not support the suggestion that there was substantial compliance with the provisions of Section 14(2) of the MFMA is contained in a document titled "*TENDER KOMITEE BESLUIT*"[28]. This document embodies a decision of the Tender Committee to award the tender to Newco. This decision of the Tender Committee was recorded in tender decision no 71.3/08/06, chaired[29] by Eastes. It is indeed odd that the decision of the Tender Committee bears the same number as the Council's decision number. The decision to award the tender was thereafter conveyed by the Municipality in the letter dated 8 September 2006[30] to B C Design and reads as follows *"... Hiermee u formeel in kennis te stel dat die Munisipale Raad van Oudtshoorn per Raadsbesluit nommer 71.3/08/06 soos volg besluit het ...".* According to MNP4 this seems to be a Tender Committee decision number 71.3/08/06 and according to the letter dated 8 September 2006 (CS3, this was a Council decision (Raadbesluit) with number 71.3/08/06). (own emphasis)

(g) May and Swartbooi merely makes the allegation in the words of Section 14(2), that the council decided that the property was not needed to provide the minimum level of basic municipal services and that the value against which the property was to be alienated and the community value to be received would be considered after receipt of

[28] MNP4 – record 167

[29] Record 168

[30] CS3 record 31

the tender proposal. The reasons for the decision to exercise its discretion in terms of Section 14(2) are not mentioned.

In Wightman t/a J W Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at 375 para [13] the court held:

> *"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."*

[88] What this means is that May and Swartbooi had to do more than merely regurgitate or recite what the Act says, namely that the council decided that the property was not needed to provide the minimum level of basic services and the value against which the property was to be alienated and the community value it would receive. They had to state, to have adequately disputed the averments made by the Municipality, that there was compliance with the provisions of Section 14(2)[31]; in that

(a) the council on a specific date held a meeting which was open to the public;

(b) in that meeting especially over which Swartbooi had presided, that the council had decided on reasonable grounds, stating what these grounds are, that the property in question was not required to provide the minimum level of Municipal services;

(c) that they had to state what in the meeting was considered to be the fair market value of the property. Lastly, they also failed to mention in their affidavit what the economic and community value was which will be received for the asset.

[89] These facts had to be fully conveyed in their Answering Affidavit instead of merely stating that they have complied with the provisions of Section 14(2). This they had to do by laying an adequate basis for disputing

[31] Waenhuiskrans Ratepayers v Verreweide Eiendomsontwikkeling 2011 (3) SA 434 at 105

the veracity or accuracy of the averments made by the Municipality in their counter-application in order for it to be regarded a real, genuine and *bona fide* dispute.

(d) Having regard to all the relevant evidence, it is clear to me that there was no compliance with the provisions of Section 14(2). In *SA Metal Machinery v City of Cape Town 2011 (1) SA 348 at para 24,* this court had occasion to consider the objects of the provisions of Section 14(2) of the MFMA where Binns-Ward, J had the following to say **...** "*the objects of the provision, which appear to be twofold: (i) to prohibit the taking of any decision by a local authority to alienate capital assets that are needed for the municipality to be able to discharge its core function in providing at least the minimum level of services to its community; and (ii) to introduce procedural constraints directed at minimising the possibility of decisions being made in respect of the alienation of municipal property ...*". This view was further amplified by De Swart AJ in the *Waenhuiskrans Ratepayers* case (supra)[32] where she held at 461 para 105 *"... in terms of S14(2), a Municipality is constrained, before it may transfer a capital asset, to do at least three things. Firstly, it must hold a meeting of its council which is open to the public; Secondly, at such meeting, the council must decide on reasonable grounds, that the asset is not required to provide the minimum level of Municipal services; and thirdly, at the said meeting, the Council must*

[32] Footnote - 24

consider the fair market value of the asset, as well as the economic and community value which will be received in exchange for the asset".

[90] In the circumstances, I am not satisfied that the factual dispute that has been raised in this matter regarding compliance of Section 14(2) of the MFMA is a dispute of fact that cannot be resolved on the papers.

[91] There is no evidence to suggest that the Municipality:

(a) Held a meeting of its council which was open to the public, and if this had been the case interested parties like Afrika, Forbes as well as Coetzee would have attended it;

(b) Where its council took a decision on reasonable grounds, that the property was not required to provide the minimum level of basic services. This fact would have been recorded at least in a report Eastes had submitted to the council[33];

(c) Where the fair market value had been considered as well as the community value which will be received through the asset.

[92] To have complied with the provisions of the Act in order to determine or estimate the fair market value, a valuer's certificate should at least have been provided and included in the report of Eastes, which was submitted to the council.

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[33] Record page 167 - 170

[93] It needs however to be mentioned in the document wherein the tenders are evaluated by Eastes[34] a proposal is made by each applicant as to how the community will benefit if the tender is awarded.

[94] In the result I find that the disposal of the property of the municipality namely Erf 5366, had not been effected in accordance with Section 14(2) of the MFMA.

In the light of the above the next question would be:

[95] Whether the Municipality was entitled to cancel the award of the Tender?

It is common cause that the award of a tender amounts to administrative action. CShell seeks to have the decision to cancel the award of the tender by the council set aside. CShell contends it is not competent for the council to cancel the decision which constitutes administrative action, without approaching this court for a review and setting aside the decision. In the circumstances, CShell wants this court to uphold the award of the tender.

[96] For its contention CShell relied on the decision of the SCA in *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others*[35] where it was held that an administrator's, in this case the Municipality's approval, of a decision to award the tender and also the consequences of the awarding of

[34] MNP3 – record 160 - 164
[35] 2004 (6) SA 222 (SCA) at 242A

the tender is an administrative action and is to be set aside by a court in proceedings for judicial review. The decision exists in fact and has legal consequences that cannot by simply overlooked or ignored. CShell's Counsel argued therefore that, after a public authority, in this case the Municipality has reached its decision, it cannot, even if it was unlawful, be cancelled, because it is *functus officio*.

[97] In my view, the situation as contemplated in the Oudekraal is distinguishable from the facts of this case. In the Oudekraal decision more than forty years has passed since the administrative decision to establish a township was made. This even though the administrative act was invalid, and did not exist in law it did exist in fact.[36] (Also see Oudekraal at para's 27 – 31). In this particular case in my view the factual consequences of the award of the tender had not yet come into existence, being the transfer of the property into the name of the successful bidder.

[98] Although the initial preparatory work had been done, it was not enough to enable the transfer of the property to be effected in order to bring into being the factual existence the award of the tender. From the time the tender was awarded in September 2008 until at least 12 May 2010[37], CShell was in the process of complying with the conditions of the tender before the property could finally be transferred. At that stage on CShell's own version, it stated that due to capacity constraints it was unable to continue with the

[36] Hoexter: Administrative Law in South Africa at 487
[37] Record pg 66 – CS 15

development and it wanted to register a further entity to take the process further and could not proceed.

[99] CShell also concedes that in certain circumstances, specific authority may be conferred upon a public body to revoke prior administrative action. There is also an abundance of authority for this proposition to which I will refer to later in this judgment[38]. They further contend that where there is such authorisation, the revoking decision itself will constitute administrative action, if any other ground of review under Section 6(2) of PAJA is present.

[100] In the counter-application the Municipality inter alia contends that it was entitled to cancel the award of the tender and want the court to declare it as such. Alternatively, that the court should set aside the tender on review.

I agree with this contention of the Municipality and I am of the view that the Municipality was in this instance entitled to cancel the award of the tender.

[101] I have already made a finding that the tender was not awarded to CShell, but to Newco. I have also made a finding that in awarding the tender, there was non-compliance with Section 14 of the MFMA.

[102] The awarding of the tender by the Municipality was illegal. In my view, the Municipality was entitled to cancel the award of the tender. In *Municipal Manager Qaukeni Local Municipality v FV General Trading CC (supra) para*

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[38] See para 116 - infra

[26] it was held ... "While I accept that the award of a municipal service amounts to administrative action that may be reviewed by an interested third party under PAJA, it may not be necessary to proceed by review when a municipality seeks to avoid a contract it has concluded in respect of which no other party has an interest. But it is unnecessary to reach any final conclusion in that regard. If the second appellant's procurement of municipal services through its contract with the respondent was unlawful, it is invalid, and this is a case in which the appellants were duty-bound not to submit to an unlawful contract, but to oppose the respondent's attempt to enforce it. This it did by way of its opposition to the main application and by seeking a declaration of unlawfulness in the counter-application. 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. And while my observations should not be construed as a finding that a review of the award of the contract to the respondent could not have been brought by an interested party, the appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief".

[103] The present case is one of those instances where the Municipality after having regard to all the circumstances under which the tender was awarded, the fact that there had been a misrepresentation as to who the real beneficiary of the tender was, the fact that there was non-compliance with the provisions of the Act and supply chain management procedures, was entitled to cancel the award. Hoexter at 247 says:

> *"The functus officio doctrine is not an absolute one, however. In certain circumstances our law recognises that an administrator may be justified in altering or rescinding its own decision, typically where the decision turns out to have been induced by fraud or based on non-existent jurisdiction. The more obvious the illegality, the more absurd and inefficient it seems not to allow an administrator to vary or revoke it, thus forcing the administrator (or someone else) to go to court to have the flawed decision set aside".*

The circumstances as cited by Hoexter as to when an administrator is entitled to rescind its decision/s clearly find application in this matter.

This finding, is however not dispositive of the matter. The next question was whether the Municipality in cancelling the award of the tender, acted in a procedurally fair manner.

[104] There is no doubt in my mind that there was an obligation on the Municipality to act in a procedurally fair manner in cancelling the award of the tender.

[105] The fact that it was never their intention to award a tender to CShell, did not absolve them as a public authority from acting in terms of Section 3 of the Promotion of Administrative Justice Act, which enjoins a public authority such as the Municipality to act procedurally fair.

Section 3 of PAJA states that:

> *"3. Procedurally fair administrative action affecting any person*

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representation;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

(3) ...

(a) ...

(b) ...

(c) ...

(own emphasis)

(4)(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure."

[106] It is therefore clear that the Municipality did not formally give adequate notice of their intention to cancel the award of the tender before they took the decision as communicated in a letter dated 1 December 2010.

[107] *De Ville: Judicial Review of Administrative Review in South Africa* (Revised First Ed at 252 says that ... "*Adequate notice includes the duty to provide the person concerned of essential information which motivates the impending action. In other words, it must indicate what the main consideration for the contemplated action is or the substance or gist of the allegations against him/her, in order to enable her to prepare properly for the case. What is sufficient information will depend upon the circumstances of each case".* (own emphasis)

[108] When adequate notice is given it is usually accompanied with an invitation to make representations. No such invitation was formally extended to CShell. I, am however, of the view, given the peculiar circumstances of this case that there were justifiable reasons in terms of Section 3(4) (*supra*) to depart from the provision of adequate notice. If one has regard to the correspondence between the Municipality and CShell after the Municipality voiced its unhappiness with the fact that they did not award the tender to CShell in its letter dated 14 June 2010.

[109] This is borne out by the following facts:

(a) When the Acting Municipal Manager, Botha, in a letter dated 14 June 2010, initiated that according to the Municipality's understanding, the tender was not awarded to CShell, but to Newco. CShell reacted to this.

In reply to this in a letter dated 17 June 2010 and an email dated 26 August 2010 they indicated that this was not their understanding and fully explained to the Municipality what they understood to have been the requirements of the tender.

(b) When they got wind of the fact that the Municipality believed that there were certain irregularities in the award of the tender and more specific that there were non-compliance with the provision of Section 14(2) of the MFMA, they reacted to this with correspondence from their

attorneys in a letter dated 22 November 2010[39]. In this letter, they state the following:

"[2] ... For ease of reference we attach hereto a copy of two letters of the Oudtshoorn Municipality (the Municipality) respectively dated 8 September 2006 and 14 June 2010. We hold instructions that the letter of the Municipality of 8 September 2006 records the official resolution of your Council to award the abovementioned tender to the Newco. As remarked above, CSHELL 271 (Pty) Ltd was incorporated pursuant to the award of the abovementioned tender as the envisaged Newco and legally therefore constitutes the successful tenderer to which the development property must now be transferred".

And further in paragraphs 4 – 6 of this letter

"[4] It has now come to our client's attention that your Council is of intent to revisit it's previous resolution to award the abovementioned tender to our client. Apparently your Council has taken legal advice from counsel to this effect and that a Council's meeting has been scheduled for this purpose for 23 November 2010. The advice of your counsel is apparently based on alledged procedural irregularities to the tender process. Our client strongly disputes any such irregularities and has in any event been advised that it will legally be impossible for your Council to revisit its award of the tender. Your Council is what is known in administrative law terms, functus officio with regard to the award of the abovementioned tender.

[5] We have furthermore advised our client that even should the tender process have been irregular in some or other respect, which our client strongly disputes, such decision has in any event gone beyond legal attack. In this regard we specifically refer you to section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which

[39] CS17 – record page 68

effectively limits the time period for judicial review of the resolution of your Council to 180 days. Section 7(1) of the PAJA states as follows:

'(1) 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-

(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

(b) where no such remedies exist, 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.'

[6] Our client therefore takes the view that your Council is legally bound by the award of the tender to the Newco, now known as CSHELL 271 (Pty) Ltd."

(c) This letter was written it seems to pre-empt any decision by the Council to revisit its resolution to award the tender. It can be inferred from the contents of this letter that CShell was aware that the Council intended to revisit the award of the tender and by this letter, they wanted to persuade the Council not to revisit the award of the tender document. They were aware of the fact that the Council had acquired legal advice and that there would be a Council meeting on 23 November 2010 to decide on this issue.

(d) Further, it seems that CShell was aware that according to the legal advice given to the Council that there were alleged procedural

irregularities in the tender process. CShell in this letter disputed that any such irregularities had occurred. They further state that according to them it would be legally impossible for the Council to revisit its award of the tender and that the Council is deemed according to what is known in administrative law terms, as *functus officio*.

In paragraph 7 of the same letter, they state that ... *"We hereby record that any purported revisit of your Council's said resolution will be totally unlawful and will materially and adversely affect and rights and legitimate expectations".*

(e) Lastly, they urged the Council to take appropriate legal advice on the submissions that they made in their letter and not to take any administrative action in respect of the resolution to award the tender.

(f) Thereafter in a letter dated 1 December 2010[40] titled *"Finale Raads-besluit van Tender Nr 60 van 2006 vir die voorgestelde ontwikkeling van erf 5366"*, the Municipal Manager after referring to the letter of CShell's attorneys dated 22 November 2010 (the letter discussed above) informed the attorneys that they have decided that the property will not be alienated to Newco. Furthermore he states ... *"Die redes hiervoor is reeds op 'n vorige geleentheid skriftelik en mondelings aan u klient oorgedra".*

[40] CS21 – at page 73

[110] Therefore in the light of CShell's letters dated 14 June 2010, email dated 26 August 2010 and letter from their attorneys to the Municipality dated 22 November 2010, it is clear that CShell had been sufficiently informed of the action the Municipality or its Council wanted to take. In my view they were sufficiently informed of the substance and gist of the allegations against them and at that stage they had already made representations to the Municipality and/or Council regarding it and to persuade them not to cancel the award of the tender. This prompted CShell at that stage to seek competent legal advice, which is similar advice upon which they based their case in this Court.

[111] If regard is to be had to the particular circumstances of this case as set out earlier where:

i) The Municipality and Council had been misrepresented as to the profile, composition and identity of the entity to who the tender was awarded to and;

ii) CShell had known prior to the taking of the decision by the Council albeit not formally by unknown sources that the Council intended cancelling the tender;

iii) The tender was not awarded in terms of the law and was void *ab initio*, in terms of SS(4) (a) of PAJA, the failure of the Municipality to give adequate notice and give CShell a reasonable opportunity was

reasonable and justifiable under the circumstances, where CShell long before the decision, knew what the reasons were.

[112] This was clearly an invalid award of a tender to a party. The Municipality or its Council had to act urgently. There was no way in terms of the law especially Sec 14 of the MFMA that the award of the tender could be sustained. Any representations CShell would have made could not make an invalid and unlawful award valid. This is because it was void *ab initio.*

[113] As I stated earlier, this decision was made in breach of Sec 14 of the MFMA and other legal precepts with regard to Supply Chain Management procedures. It is void *ab initio.* To have condoned the irregularities and allowed the award of the tender to stand would not have promoted a transparent and competitive tendering process in the public interest. See *Premier, Free State and Others v Firechem Free State (supra) Eastern Cape Provincial Government v Contract Props 25 (Pty) Ltd 2001 (4) ALL SA 273 (A); Telkom SA Ltd v Merid Trading (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd and Others [2011] JOL 26617 (GNP) at para 12 – 13.*

[114] In the Qaukeni case at para 16 it was held *..."that a procurement contract for municipal services concluded in breach of the provisions dealt with above which are designed to ensure a transparent, cost- effective and competitive tendering process in the public interest, is invalid and will not be enforced".*

[115] As this was a decision that was void *ab initio* and of no force and effect. It could not be enforced. On the basis of the principle of legality, the Municipality was entitled to cancel it as it was not *functus officio*.

In this regard, De Ville[41] has this to say:

> *"It has for example been held that where a decision is void it may be ignored with impunity. A void decision (ie where there is a manifest absence of jurisdiction) may also be ignored by the public authority concerned and a new decision taken. In other words, the authority in question is in such an instance not functus officio. There would also be no need to have such a decision set aside on review."*

[116] In light of the fact that I have found that it was not necessary for the Municipality to have the decision set aside on review, it becomes unnecessary to decide the question of unreasonable delay on the part of the Municipality. More so, in a case like this where the administrative act was void *ab initio*. It was CShell who initiated this action, to set aside the decision of the Municipality to cancel the award of the tender.

By opposing the main application, the Municipality by implication held the view that it was entitled to cancel the award of the tender.

By dismissing the main application, the decision of the Municipality or its Council to cancel the tender therefore stands. (See Quakeni para 26)

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[41] See De Ville (supra) at 327 and Qaukeni 365 at 26; Telkom SA Ltd v Merid Trading (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd and Others (supra) at para 13 and at para 19

[117] On this basis therefore, the relief CShell is seeking in the main application cannot succeed and is dismissed.

Having found therefore, that the Municipality was entitled to cancel the award of the tender, the counter application as far as it relates to the main component thereof should succeed.

[118] **ORDER**

In the result therefore I make the following order:

1) The application in the matter between CShell 271 (Pty) Ltd (Applicant) and Oudtshoorn Municipality (Respondent) is dismissed with costs in its entirety.

2) The counter-application in the matter between Oudtshoorn Municipality (Applicant) and CShell (Pty) Ltd (First Respondent), Sandra Afrika (Second Respondent), Johnny Forbes (Third Respondent) succeeds with costs and it is declared that;

   (i) The Municipality did not award the tender to CShell pursuant to a tender process conducted in 2006 in relation to the alienation of erf 5366, a portion of Erf 1 Oudstshoorn Municipality measuring approximately 15 hectares;

(ii) That the Municipality had lawfully cancelled the award of the tender pursuant to Notice 60 of 2006.

R.C.A. HENNEY
Judge of the High Court