DISSERTATION

A CASE STUDY: THE REGULATION OF PUBLIC POWER IN THE LOCAL SPHERE OF GOVERNMENT IN THE REPUBLIC OF SOUTH AFRICA

Sub- title:

Section 62 of the Local Government Municipal Systems Act No 32 of 2000: a critical analysis of how poor drafting and the lack of judicial activism can impact on the rights of aggrieved persons and the regulation of public power viewed from the perspective of the Municipality of the City of Cape Town.

DEGREE of MASTERS IN LAW [LLM]

PUBLIC LAW DEPARTMENT

CONSTITUTIONAL AND ADMINISTRATIVE LAW

AT THE UNIVERSITY OF CAPE TOWN

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15 FEBRUARY 2009

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the **degree of Masters in Law [LLM]** in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of **Masters in Law** dissertations, including those relating to length and plagiarism, as contained in the rules of this University and that this dissertation conforms to those regulations. **± 25 000 words**

DECLARATION

I, the undersigned hereby declare that the work contained in this assignment is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature: Signed by candidate

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Student number: FBNJIL001

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ACKNOWLEDGEMENTS

I am truly grateful to my supervisor, Prof Hugh Corder for the patience he has shown, advice and assistance provided in respect of this dissertation.

I would further like to thank fellow legal colleagues for their comments on this dissertation.

I am also grateful to the Director: Legal Services of the Municipality of the City of Cape Town who granted me permission to utilize the legal opinions acquired by the City of Cape Town, for the purposes of this paper.

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ABSTRACT

This paper seeks to explore the progress which has been made in controlling the exercise of public power by South African Municipalities. The tension between the concepts of administrative and operational efficiency and adequate checks and balances in respect of the exercise of delegated power are examined. It highlights the internal administrative appeal system that exists at local government level.

The conclusion is reached that in respect of local government in South Africa many of the objectives of the Breakwater Declaration of 1993 have been realized. The courts however have not played a very constructive role in this respect with the result that urgent legislative intervention may be required. Only this will ensure that public power at the local government level is adequately regulated in the interest of transparency, accountability and democracy.

CHAPTER 1

Introduction

The advent in 1994 of a truly democratic South Africa paved the way for an autonomous constitutionalised local government system which was empowered to regulate its own affairs. This responsibility to regulate its own affairs was embodied in legislative instruments which incorporated build in restrictions on the regulation of public power. In particular section 62 of the Local Government Municipal Systems Act, 2000 provides the public with the opportunity to challenge local authority decisions and thereby regulate the exercise of public power by this sphere of government. This situation is in stark contrast to the previous dispensation which existed prior to 1994.

At the outset a very relevant question is; what is local government? Feetham AJA in the matter ***Sinovich v Hercules Municipal Council***[1] describes it as follows:

" It may ,I think, be safely affirmed that the main object of establishing municipal councils and similar bodies for the purposes of municipal government as understood and carried on in the Union of South Africa and in other British Dominions , is to enable representatives of a given area to administer subject to some degree of control by a central authority, the local affairs of those areas in the general interests of their respective communities."[2]

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[1] *1946 AD 820*

[2] Johan Meyer 'Local Government Law Volume 1, General Principles' 1978 Durban Butterworths, at page 10

As a departure point it is important to briefly track the history of local government in South Africa so at to better understand its current structure, power and functions.

A form of local government existed at the Cape during the time of the Dutch East India Company.[3] During this time matters were brought before a Council for resolution. A new era for local government commenced in 1836 with the promulgation of Municipal Ordinance No 9 of that year. Under this system a number of commissioners were elected by a majority vote of the householders. These commissioners performed municipal duties and functions via appointed officials. They were authorized to raise funds for this purpose by imposing rates. Some of the following functions carried out were:-

- appointing police and night patrols;
- provide and maintain fire engines;
- street lighting , water supplies , drainage;
- the making and repair of public streets, roads and places;
- the establishing and regulation of markets;
- abating of public nuisances; and/or
- the enforcement of municipal regulations

This model of municipal government was soon adopted in other parts of the country such as Paarl, Stellenbosch and Beaufort West as well as in Natal, Transvaal and the Orange Free State, with certain modifications. In 1839 a municipality was established in Cape Town and a dedicated ordinance passed in this respect in 1840.

[3] Meyer at page 37

The Union of South Africa Act of 1909 did not recognize local government as a self-governing institution. The Act conferred power upon the Provincial Councils established by the Act to pass legislation, establishing and governing local government in their provinces. All four provinces promulgated ordinances on local government. In the Cape Province the following ordinances were promulgated Ordinance 10 of 1912, the Municipal Ordinance 19 of 1951 and the Municipal Ordinance 20 of 1974.

Municipalities established in terms of this legislation lacked any constitutional status and were merely creatures of statute and possessed only such powers, duties and rights as were expressly conferred upon them by the provincial legislature. They were fully accountable to the provincial government and were unable to even pass by-laws without provincial consent.

Steytler and de Visser[4] state that this system of local government which had the trappings of democracy was from its outset at the incorporation of the Union exclusively racial in nature and remained so for the next 80 years. Before 1971 coloureds could be elected to serve on municipal councils and divisional councils however the enactment of section 21[5] was substituted by section 10 of Ordinance 19 of 1971 which resulted in coloured people being no longer qualified as voters under the Electoral Act[6]. Since 1948 apartheid policies were entrenched which restricted persons other than white from voting for municipal councillors.[7]

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[4] Nico Steytler and Jaap De Visser 'Local Government Law of South Africa' 2007 Lexis Nexis
[5] Cape Municipal Ordinance No. 19 of 1951
[6] Electoral Consolidation Act No. 46 of 1946
[7] Randell & Bax, 'Municipal law in the Cape of Good Hope' third edition, Mullins, Butterworths; D L Craythorne 'Municipal Administration, The Handbook' sixth edition Juta & Co Ltd; Craythorne ' Municipal Administration, A Handbook' Juta; Apartheid and the Coloured People of South Africa' by Alex La Guma

Whilst there were forms of local government for coloureds , Indians and blacks these were of an inferior nature and based on group areas as demarcated in terms of the Group Areas Act of 1966. These structures were not regarded as legitimate by the people they were intended to serve and were thus the focus of much resistance. The areas occupied by black, coloureds and Indians were on the whole underdeveloped and received vastly inferior services. In the ***Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Council and Others*** [8] the court draws this contrast between the historically White areas with their privileged conditions and Black, Coloured and Indian areas with its underdevelopment , poor services and vastly inferior rates base.

Prior to 1994 local government consisted of a fragmented system of institutions based on racial segregation and it was the lowest tier of government in a strictly hierarchical system deriving its powers from national and provincial government. For example, in the metropolitan area of the City of Cape Town in 1994 there were 60 local authorities, most of which were the products of the racially discriminatory apartheid policy.

The transformation of local government commenced with the coming into operation of the Local Government Transition Act 209 of 1993 on 2 February 1994. The purpose of the Act was to remove racial discrimination, the integration of society and the redistribution of municipal services. This transformation took place in three phases being the pre-interim, interim and the final phase. The first local government elections were held in 1995/1996 when integrated municipalities were established. This election however was not fully democratic as certain sunset provisions existed.

[8] *1998 (12) BCLR 1458 (CC)* at paragraph 2

The local government election held on 5 December 2000 was the first fully democratic local government election and it established our current municipalities. This transformation was also informed by the Interim Constitution of 1993 and the Final Constitution of 1996 which provided the foundation for the change in South Africa.

For the first time in the constitutional history of South Africa, local government received constitutional recognition in Chapter 10 of the Interim Constitution. Section 174(3) provided that local government was autonomous and within the limits prescribed by the law it was entitled to regulate its own affairs. Section 174(4) in turn prohibited Parliament and the Provincial Legislature from encroaching on the powers, functions and structures of local government in a manner which compromised the fundamental status, purpose and character of local government.

The most significant feature of the Final Constitution for local government was that local government was removed as a competence of provincial government and became a distinctive sphere of government alongside national and provincial government. The autonomy of local government was thus constitutionally entrenched and protected.[9]

The court in the Fedsure case[10] described the status of local government as follows; "for the first time in our history, provision was made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions."

[9] See sections 40(1) and 151 of the Constitution
[10] at paragraph 126

Parliament subsequently passed a whole suite of legislation to shape the future of local government in South Africa, as follows:

Local Government Municipal Demarcation Act 27 0f 1998.

Local Government Municipal Structures Act 117 of 1998 [the Structures Act].

Local Government Municipal Electoral Act 27 of 2000

Local Government Municipal Systems Act 32 of 2000 [the Systems Act]

Local Government Municipal Finance Management Act 56 of 2003 [the MFMA]

Local Government Municipal Property Rates Act 6 of 2004

The preamble of the Structures Act sums up the new ethos of local government as follows:

> "WHEREAS the Constitution establishes local government as a distinctive sphere of government, inter-dependent, and interrelated with national and provincial spheres of Government;
>
> WHEREAS there is agreement on the fundamental importance of local government to democracy, development and nation-building in our country;
>
> WHEREAS past policies have bequeathed a legacy of massive poverty, gross inequalities in municipal services, and disrupted spatial, social and economic environments in which our people continue to live and work;
>
> WHEREAS there is fundamental agreement in our country on a vision of democratic and developmental local government, in which municipalities fulfil their constitutional obligations to ensure sustainable, effective and efficient municipal services, promote social and economic development, encourage a safe and healthy environment by working with communities in creating environments and human settlements in which all our people can lead uplifted and dignified lives;
>
> WHEREAS municipalities across our country have been involved in a protracted, difficult and challenging transition process in which great strides have been made in democratising local government; and
>
> WHEREAS municipalities now need to embark on the final phase in the local government transition process to be transformed in line with the vision of democratic and developmental local government:"

The aim of this new dispensation was to develop a strong system of local government capable of exercising the functions and powers assigned to it, whilst doing so in a manner which is accountable, transparent and democratic. The rule of law and control over the exercise of public power are important pillars of this system, given the extensive public powers municipalities can now invoke.

CHAPTER 2

Delegation

The aforesaid suite of new local government legislation sets out the framework for the powers, functions and duties of municipalities in a constitutional democracy. Operational and administrative efficiency in the delivery of services to the public is ensured by the enactment of extensive provisions authorizing the delegation and sub-delegation of original power. The aforesaid legislation also provides for the necessary checks and balances in respect of the exercise of delegated power thus ensuring the regulation of the exercise of public power.

Wiechers[11] points out that delegation forms an important part of modern administrative law. He says that this is due to the complex structure of present day government which is shaped by the needs of society and the many functions that administrations have to carry out in every sector of society. This makes delegation an essential tool. Within these complex systems of government various forms of delegation exist and it is often difficult to classify the particular legal nature of the form of delegation. He however suggests that any analysis should be preceded by an examination of the statute or measure governing the relevant delegation, this will enable one to categorize the nature and scope of the form of delegation.

He states that the rationale for delegation is to provide for a system of division of labour in an administration. The reality of present day government makes it impossible for a single person or body to cope with all the activities of the

[11] Marius Wiechers 'Adminsitrative Law' 1985 Butterworths Durban at page 51

administration. It is for this reason that certain powers and functions are transferred or delegated to another body or person for their implementation.

Meyer[12] states that "to delegate is to entrust to another the execution of some power or duty vested in oneself, as such delegation implies in its very essence the transfer to another of more than executory powers; a discretion is also transferred." Therefore the act of delegation is the conferring of authority on someone to do things which the authorized or delegator would have to do himself but for the delegation.

Of course the power to delegate is subject to the rule of administrative law that one may only transfer a function involving the exercise of discretion, if one is authorized to do so expressly or by necessary implication [the *delegare delegatus non potest* rule]. The justification for this rule is that authority is conferred on a particular person to perform a particular function due to his or her special knowledge or expertise. The passing on to someone else of this responsibility contravenes the rule.

2.1 Sub-delegation

Just as the delegator wishes to delegate power to the delegate, the latter may have very cogent reasons to further delegate power to subordinates. This is called sub-delegation and this practice is essential and important in any large administration. Sub-delegation is generally not lawful unless it has been authorized by the Legislature. Meyer[13] says that "Voet aptly states the reason being that the delegator or mandatory has nothing of his own. The power vested in him is delegated power which he exercises through the grace of another, the delegator."

[12] Meyer at page 105
[13] Meyer at page 95

2.2 The municipal system of delegation

Chapter 7 part 3 of the Local Government Municipal Systems Act 32 of 2000 [the Systems Act] sets out the regulatory framework of the municipal delegation system. Section 59 provides as follows:

> *"59. **Delegations** -* (1) A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may—
>
> (a) delegate appropriate powers, excluding a power mentioned in section 160 (2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76 (b) and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors, or staff members;
>
> (b) instruct any such political structure, political office bearer, councillor, or staff member to perform any of the municipality's duties; and
>
> (c) withdraw any delegation or instruction.
>
> (2) A delegation or instruction in terms of subsection (1)—
>
> (a) must not conflict with the Constitution, this Act or the Municipal Structures Act;
>
> (b) must be in writing;
>
> (c) is subject to any limitations, conditions and directions the municipal council may impose;
>
> (d) may include the power to sub-delegate a delegated power;
>
> (e) does not divest the council of the responsibility concerning the exercise of the power or the performance of the duty; and
>
> (f) must be reviewed when a new council is elected or, if it is a district council, elected and appointed.

(3) The municipal council—

(a) in accordance with procedures in its rules and orders, may, or at the request in writing of at least one quarter of the councillors, must, review any decision taken by such a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction, and either confirm, vary or revoke the decision subject to any rights that may have accrued to a person; and

(b) may require its executive committee or executive mayor to review any decision taken by such a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction.

(4) Any delegation or sub-delegation to a staff member of a power conferred on a municipal manager must be approved by the municipal council in accordance with the system of delegation referred to in subsection (1)."

2.3 Sources of Power

The various sources of power applicable to municipalities include section 151(1) of the Constitution which provides that "the executive and legislative authority of a municipality is vested in its municipal council." This provision is echoed by section 11(1) of the Systems Act which goes further by stating that the Council takes all the decisions of the municipality subject to section 59. Section 59 is part of chapter 7 part 3 of the Systems Act, the delegation system.

Section 157 of the Constitution provides that a Council consists of its elected members known as councillors.

Most laws relating to municipalities vest powers, functions and duties in the corporate body[14] known as the municipality for example section 14 of the MFMA provides that a municipality may transfer or otherwise dispose of a capital asset.

Section 18 of the Structures Act provides that a municipal council must meet at least quarterly. A metropolitan council like the City of Cape Town has 210 councillors and only meets for one day every second month. Given the complex nature of local government and the vast day to day service delivery requirements it is an impossible task for full council to conduct the day to day activities of the municipality. Section 59 of the Systems Act requires a municipal council to develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, this system must delegate powers and instruct political structures, political office bearers, councillors or staff members to perform any of the municipality's duties. Any delegation or instruction must be in writing and is subject to any limitations, conditions and directions the municipal council may impose and may include the power to sub-delegate a delegated power. Section 59(1)(a) embodies two very important mechanisms regulating the exercise of public powers:

(a) Certain powers may not be delegated at all and are reserved for full Council; and (b) in addition only appropriate powers may be delegated.

[14] section 2 of the Systems Act

2.4 Powers which cannot be delegated

The most important powers precluded from delegation are those contained in section 160(2) of the Constitution, which states that the following functions may not be delegated by a municipal council:

a) the passing of by-laws

b) the approval of budgets

c) the imposition of rates and other taxes, levies and duties; and

d) the raising of loans

Section 160(3)(b) of the Constitution provides that all decisions relating to these matters must be taken with a supporting vote of a majority of its members. All other decisions are taken by a majority of votes cast.

This is an important safeguard on the exercise of public power as it requires a higher number of votes to pass these important matters. The various political parties provide a check and balance mechanism in this respect. The principle is illustrated as follows: the City of Cape Town has 210 councillors. A normal quorum constitutes 106 members.[15] Most matters with the exception of those listed in section 160(2) of the Constitution can be passed with a majority of votes cast. Thus if Council is just quorate a matter can be passed with 54 votes. The section 160(2) items however require 106 votes, i.e. supporting vote of a majority of all members.

It is important to note that whilst section 59 of the Systems Act specifically precludes certain delegations it also provides that *only appropriate powers may be delegated.* It is thus important when effecting a delegation to carefully examine the provision of the enabling legislation to establish whether delegation

[15] section 160(3)(a) of the Constitution

is appropriate under the circumstances. Section 14 of the MFMA provides for the permanent transfer or disposal of municipal capital assets. It becomes clear on reading this provision carefully that it is inappropriate and unlawful to delegate it as the provision provides that such decisions can only be taken at a Council Meeting open to the public.

Corder[16] points out the demand for empowerment given the need for service delivery and radical re-structuring required in a post apartheid society. Section 59 of the Systems Act sets out the imperative to achieve that delicate balance between **"administrative and operational efficiency"**, which is realized by the delegation of public power that vests in the municipality to its political structures, political office bearers, councillors and staff members; and the adequate checks and balances. If the exercise of this public power is not to be abused there have to be adequate checks and balances. In a large metropolitan municipality such as Cape Town, a written system of delegations exists. It is an extensive document comprised of 395 pages. Both this document and the City Manager's sub-delegations (50 pages) are to be found on the City website.[17]
This also constitutes a regulatory measure in the control of the exercise of public power as the general public are able to ascertain the nature of powers conferred and upon whom they are actually conferred.

Besides powers conferred by law upon the municipality it is important to note that certain laws confer powers directly upon designated officials. For example sections 62 and 81 of the MFMA confer powers in respect of the accounting

[16] 'Controling Public Power administrative Justice through the law' edited by Hugh Corder and Fiona Mclennan, Department of Public Law University of Cape Town 1995 at page 1-2
[17] www.capetown.gov.za.

officer and the chief financial officer respectively. Provision is also made for these parties to delegate their powers to other officials.[18]

[18] see sections 79 and 82 of the MFMA

CHAPTER 3

Local Government mechanisms for the control of public power

The delegation system which forms part of Chapter 7, part 3 of the Systems Act contains the following provisions which provide check and balance mechanisms to regulate the exercise of public power:

1. Section 59(1)(c) provides that Council may withdraw any delegation or instruction;
2. Section 59(2)(e) provides that if the fact that Council has delegated a power or a duty it does not preclude Council from considering a particular matter before the matter has been finalised and Council is deemed to be *functus officio*.
3. It is compulsory for a Council to review all of its delegation and instructions every 5 years.[19] The municipal manager is required to submit a report to Council in this regard with recommendations.[20]
4. Section 59(3) requires that upon the written request of at least one quarter of the councillors, a Council may review any decision taken in consequence of a delegation or instruction and may either confirm, vary or revoke such decision by a political office bearer, councillor or staff member; or Council may require the executive committee or executive mayor to do so.
5. Section 59(4) requires the delegation or sub-delegation of a power conferred on a municipal manager to be approved of by the municipal council. This would include the municipal manager's statutory powers. This is a very important

[19] section 59(2)(p) read with section 159 of the Constitution
[20] section 65

control mechanism as the municipal manager as head of the administration has extensive statutory powers.

6. Section 60 requires that certain delegations are restricted to the executive committee or executive mayor. These powers include the expropriation of immovable property or rights in or to immovable property; the determination or alteration of the remuneration benefits or other conditions of service of the municipal manager or managers directly responsible to the municipal manager.

7. Section 61 provides that a political structure, political office bearer, councillor or staff member who may dispose of any matter in terms of delegated or sub-delegated authority may (and must if instructed to do so by the relevant delegating authority) refer the matter to the delegating authority for decision.

8. Section 62 sets out the right to an internal appeal which is available to any person whose rights are affected by a decision taken under delegated or sub-delegated authority at municipal level. It will be submitted that this is a major mechanism for exercising control over public power at a local government level.

9. Section 63 states that a political structure, political office bearer, councillor or staff member must report at regular intervals to the delegating authority on decisions taken in terms of a delegated or sub-delegated power or duty.

10. Executive mayors have extensive statutory powers[21] and additional powers are usually delegated to them by Council. A mechanism to exercise control over such public power is the so-called system of designation.

11. Section 60(3) of the Structures Act provides that Council may designate such functions and powers which an executive mayor is required to exercise and perform together with other members of the mayoral committee. This prevents

[21] Structures Act, Systems Act and MFMA

the executive mayor from unilaterally exercising important and far reaching powers.

The Structures Act and Systems Act are the statutes which form the backbone of a municipality upon which it exists and they regulate the internal affairs of the various structures within the organization. Section 62 of the Systems Act is an important mechanism for controlling the exercise of public power. At the City of Cape Town this provision has given form to organizational structures e.g. an Appeals Unit and a full time Appeals Committee of councillors. The Appeals Unit is part of the Corporate Services, Legal Department known as the Statutory Compliance Unit [Unit] and the Committee referred to is known as the Planning and General Appeals Committee [PLANAP] which operates as an ad hoc appeals committee to hear appeals.

CHAPTER 4

Internal Administrative Appeals

The aforesaid delegation system gives effect to administrative decisions which may subsequently be the subject of an internal administrative appeal.

What constitutes an internal appeal has been extensively discussed by authors such as Burns, Hoexter, Baxter, Wiechers, Meyer, et el. These authors consider an appeal to be a purely administrative act or decision.

Burns[22] in her book refers to internal appeals as a purely administrative act or decision that involves the reconsideration of the validity, desirability and efficacy of an administrative act by a higher authoritive body which is free to allow new evidence and facts. She states that internal appeals are normally heard within the same department but by a higher authoritive functionary. Accordingly "internal appeals have certain distinct characteristics namely-

i) it is a departmental appeal and cannot be dealt with by another department.

ii) it involves purely administrative acts and not judicial or legislative acts.

iii) there is no appeal against legislative administrative acts e.g the making of subordinate legislative measures.

iv) internal appeals are not permitted in respect of judicial administrative acts as decisions by judicial administrative bodies can only be altered by the judiciary.

Hoexter[23] describes administrative appeals as the reconsideration of decisions by a higher authority, which challenge the merits of the decision taken by the original

[22] Burns at page 117
[23] Hoexter page 63 -68

decision maker and the higher authority can decide the matter afresh. She argues that it is also a system which is used as an internal check against maladministration. She notes that Baxter goes further and states that internal appeals protect individual rights and interests and reconsider the application of public policy. Hoexter furthermore adds that appeals can be divided into wide and narrow appeals. This distinction was clearly explained in the case of ***Tikly v Johannes NO*** [24]. A wide appeal is considered to involve the complete rehearing of the merits of a case whilst a narrow appeal is limited to the facts before the original decision maker.

Another important matter is the distinction between internal administrative appeals and judicial review. The internal appeal is a much less expensive and speedier remedy and courts seemingly hold that administrative authorities are the best judges of administrative decisions it being their field of expertise and furthermore because they are well informed of policy decisions.

Meyer[25] differentiates between a review which is directed at procedural irregularity, non-compliance with the general principle of legality and is not concerned with the substantive correctness of the decision on law and fact. An appeal is concerned with the correctness of the decision and could be a trial de novo. He also points out that there is no appeal against a decision taken in terms of delegated authority unless same is provided for specifically by the statute.

Wiechers[26] states that an internal appeal takes place when the validity, desirability or efficacy of administrative action is reconsidered by the superior organ. He provides a number of characteristics which identify internal appeals namely that an internal

[24] *1963 (2) SA 588 (T) at 590F – 591A*
[25] Meyer at page 151
[26] Wiechers at page 104

appeal is referred to as a departmental appeal as it generally occurs within the same hierarchy of authority. The judiciary is the organ that adjudicates on the validity and regularity of an administrative act via judicial review. It can only be invoked in respect of purely administrative acts and does not include legislative or judicial acts. In fact legislative administrative acts are generally performed by the highest authority within a public body and recourse would be directly to the courts. Appeals can further lie within a relationship of deconcentration and decentralization. In respect of deconcentration there is no distance between the superior organ and inferior organ which performed the administrative act. In decentralization of an appeal, the parties appear as independent parties before a superior organ which sits as a court of review and not an appeal body.

The common interpretation of an internal appeal is the reconsideration of a decision taken by an original decision-maker which is heard by a higher authority or body. An internal appeal is considered to be a wide appeal as emphasized in the ***Tikly case*** and a matter may be considered afresh with or without new evidence.

Within the framework of local government and the Systems Act, an appeal can only be lodged against the exercise of a delegated or sub-delegated power. Any other decision in terms of original authority must be taken on judicial review unless an appeal opportunity exists in another legislative instrument.

It is also very important to mention that the **Promotion of Administrative Justice Act, 2000 [PAJA] and the Promotion of Access to Information Act, 2000 [PAIA]** impact on all administrative processes of a municipality. This being so, it is understandable that when an appeal is lodged in terms of section 62 of the Systems Act reliance is placed on both of the aforementioned Acts. Appellants generally rely

on section 5 of PAJA to establish the reason for a decision to later formulate the grounds for their appeal. PAIA is relied on to request access to information pertaining to the decision to formulate the grounds of appeal and to bolster the appeal.

CHAPTER 5

Section 62 of the Systems Act

At the local government level an internal administrative appeal is provided for in section 62 of the Systems Act.

The birth of the new Constitution dramatically contributed to the development of the South African administrative law as evidenced by the enactment of the PAJA. Administrative law regulates the powers of public authorities or administrative agencies and its purpose is to protect the rights of citizens against the abuse of government power. PAJA dramatically developed administrative law to the extent that it is no longer solely guided by common law principles. In the ***Bato Star Fishing (Pty)Ltd v Minister of Environmental Affairs***[27], O' Regan J "cautioned that the continuing relevance of the common law would have to be worked out on a case by case basis". It has however not stopped the courts from using the common law to interpret the Constitution and PAJA.

Local governments are particularly sensitive to the new concept of administrative action provided for in PAJA and the Constitutional Court in the ***President of the RSA v South African Rugby Football Union***[28] case decided that administrative action must be evaluated on a case by case basis.

It is important to note that the internal appeal at local government level constitutes administrative action.

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[27] *2004 (4) SA 490 (CC)*
[28] *2000 (1) SA 1 (CC)*

5.1 Section 62 of the Systems Act provides for an internal right to an appeal and reads as follows:

"s62 (1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.

(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).

(3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

(4) When the appeal is against a decision taken by—

(*a*) a staff member other than the municipal manager, the municipal manager is the appeal authority;

(*b*) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or

(*c*) a political structure or political office bearer, or a councillor—

(i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or

(ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.

(5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.

(6) The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law."

5.2 Appeal contrasted with review

It is contended that appeals and review are very similar concepts. The traditional basis for distinguishing the two terms in fact no longer exists in our law.[29]

According to De Ville[30] in the past the power to review administrative action originated from the inherent jurisdiction of the courts [that is from the common law] whilst an appeal was derived from statutory authority. However with the advent of PAJA this distinction has disappeared given that judicial review is now authorised by the Constitution and statute in the form of PAJA. According to De Ville the distinction between an appeal and review relies heavily on the Diceyan concept of the rule of law. In terms of this doctrine the court is restricted to the *vires* of the matter and may not consider the merits of the issue. Thus the courts may not interfere with decisions because they disagree with them, it is not for them to consider whether a decision is right or wrong. This is also Baxter's[31] view as he states that the courts are concerned with legality and they are not empowered to question the merits or wisdom of the administrative act. De Ville maintains that these distinctions no longer hold water since the coming into operation of the Constitution. The courts have consistently weakened the distinction and the differences between appeal and review have become blurred. He goes so far as to suggest that the terms review and appeal are for all intents and purposes synonymous.[32]

The distinction between review and appeal becomes relevant for our purposes when one contrasts the provisions of section 59(3)(a) and (b) of the Systems Act with that of section 62. Section 59(3) provides that

The municipal council—

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[29] JR De Ville 'Judicial Review of Administrative Action in South Africa' Revised first edition 2005 Lexis Nexis Butterworths at page 27
[30] De Ville at page 27
[31] Lawrence Baxter 'Administrative Law' 1984 Juta at page 256
[32] De Ville at page 30

(a) in accordance with procedures in its rules and orders, may, or at the request in writing of at least one quarter of the councillors, must, **review** any decision taken by such a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction, and either confirm, vary or revoke the decision subject to any rights that may have accrued to a person; and (my emphasis)

(b) may require its executive committee or executive mayor to **review** any decision taken by such a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction." (my emphasis)

The question arises whether review in this section has the traditional meaning attributed to this term. Will Council and the Executive Mayor/Executive Committee only be examining the legality of the matter or will they entertain the merits of the matter? It is submitted that the use of the term review in this provision is not to be interpreted in the normal traditional legal technical sense of the word. It would seem that the Legislature intended the ordinary, grammatical meaning of **reconsider**.[33] Such a meaning would be consistent with the context of section 59 and the need to provide for adequate checks and balances in respect of the exercise of delegated and sub-delegated powers. Why could the Legislature not merely have used the word reconsider? It would also seem appropriate that the Council as the repository of the original power should be vested with this authority and consider the merits of the case.

[33]Collins, Short Dictionary and Thesaurus 1995

Whatever the meaning which is attributed to section 59(3)(a) & (b) and the term review, these provisions are now visited by the malady of the Reader case.[34] The reason is that any review which may revoke or vary the initial decision is subject to any rights that may have accrued to any person. In this respect, the wording of section 59(3)(a) is not consistent with section 62(3) which states "...detract from any rights that may have accrued." The inconsistency in the wording is difficult to fathom but might only amount to sloppy drafting and it is submitted that the intention is the same in both cases i.e. to protect rights which have been conferred.

5.3 Interpretational problems

Appeals are a very important element in the regulation of public power at a local government level. They are of vital importance to the community. Section 62 has given rise to many interpretational problems which have impacted on the implementation of this public right.

The drafting of section 62 leaves much to be desired and its provisions can hardly be described as a model of clarity. This situation has led to a number of practical problems for municipalities in the implementation of this section. A number of these problems are now highlighted:

1. **What is meant by "a person whose rights are affected" and what is the nature of these rights** – most municipalities have taken the view that the term "rights" must be extensively interpreted and not so as to only include real rights.

[34] *Reader and Another v Ikin and Another [2007] JOL 20533 (C)*

This term would then embrace all rights including personal as well as constitutional rights. Particularly important in this regard is the judgment ***Transnet limited v Goodman Brothers Ltd***[35] from which it is apparent that whenever an administrative decision goes against a party that party's *"rights are affected."* The right that is affected is the right to determine whether ones right to lawful administrative action has been violated. Section 62(1) requires the prospective appellant to give written notice of the appeal and reasons to the municipal manager. The question is, does this also require a clear statement as to which right has been affected and in which manner and to which extent. In this respect it should be mentioned that most appellants tend to be lay persons without legal assistance and often of a limited educational background. The City of Cape Town has taken the view that provided the appellant's notice of appeal provides sufficient detail from which it is possible to discern that rights were affected such appeals are admitted. In most cases it was clearly evident that the complaint is directed at a failure to satisfy the constitutional right to just administrative action.[36] Later jurisprudence such as the SCA judgment in the ***The Municipality of the City of Cape Town v Marina Guilietta Reader and Others*** [37] and the Constitutional Court case ***Walele v City of Cape Town and Others***[38] gave some guidance. In the Reader case Jafta JA[39] and O'Regan ADCJ in the Walele case[40] made it clear that an appellant merely has to make an allegation that his or her rights have been affected to be admitted under the section 62 provision.

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[35] *2001(2) BCLR 176 (SCA)*
[36] section 33 of the Constitution
[37] *Supreme Court of Appeal Case No. 719/07,* the Reader case
[38] *2008 (6) SA 129 (CC)*
[39] at paragraph 16
[40] at paragraph 142

2. **Section 62)(1) refers to the term "delegating authority" being the delegator of the power.** This term is in fact defined in the Act. However this definition has lead to numerous practical problems. The definition reads as follows: "delegating authority"—

(a) in relation to a delegation of a power or duty by a municipal council, means the municipal council; or

(b) in relation to a sub-delegation of a power or duty by another political structure, or by a political office bearer, councillor or staff member of a municipality, means that political structure, political office bearer, councillor or staff member;"

It would seem that what is intended are powers which vest in Council. The (a) part of the definition makes it clear that when section 62 refers to delegation what is intended is the delegation of a power or duty which vests in the municipal council. It further seems to follow when paragraphs (a) and (b) of the definition are read together, that when section 62 refers to sub-delegation one is also referring to powers and duties which vest in the municipal council which such council has delegated in terms of section 59 of the Act and has authorized a political structure, political office bearer, councillor or staff member to sub-delegate in terms of section 59(2)(d) of the Act.

It thus follows that where a statutory power is conferred upon the Municipal Manager and that person delegates this power, no right of appeal exists in terms of section 62 as one is not dealing with a power or duty which is conferred upon a municipality.

3. **Section 62(1) provides that an appeal must be lodged within 21 days of the date of notification of the decision**. No definition of the term notification is provided and no substantive provision is provided for constructive notice such as when notice has been posted by registered or certified mail to that person's last known residential or business address in the Republic, it is deemed to have been received. It follows that notification must perforce take its ordinary grammatical meaning, to inform. This does not pose a problem in respect of appellants whose addresses are known. This however loses sight of the fact that many municipal decisions are often taken mero motu where such decisions adversely affect the rights of third parties. In some of these cases there are no prior applications, for instance road closures, water restrictions, etc. How does notification take place in such a situation when large numbers of potentially affected persons exist, and when does the 21 day appeal period in the Act start running?

4. Section 62(1) provides that written notice of the appeal must be given within 21 days of the date of notification of the decision. **The question arises as to whether the appeal authority can condone the late submission of appeals**. Linked to this question is whether a municipality is liable for damages arising from having granted condonation for the late filing of an appeal in terms of section 62 of the said Act. This matter raised its head in December 2005 when the City's Planning Appeals Committee sought to condone the late submission of an appeal in respect of property situated within the V &A Waterfront. The developer in this instance alleged that he had suffered damages as a result of this "extension". Counsel's opinion[41] in this respect concluded as follows:

[41] LA Rose-Innes SC and Karrisha Pillay

a) Section 62(1) provides no guidance as to what constitutes notification. Counsel was of the view that notification should be construed as being the date on which the party receives actual notice of the decision. In respect of registered letters it would therefore be appropriate to calculate the 21 day period from the date on which the party has received or was likely to have received the registered letter. [Clearly in the latter case this would constitute a rebuttable presumption].

b) Neither section 62 nor any other section prescribes the consequences of non-compliance with the timeframe of 21 days. The question therefore becomes whether on a proper construction of the section, are the prescribed time limits peremptory or directory? Counsel mentions that according to De Ville[42] uncertainty arises in this respect because statutes are often not clear when it comes to non-compliance with provisions of this nature.

After an exhaustive examination of cases such as: ***Sayers v Khan[43]; Nkisimane and Others v Santam Insurance Co Ltd[44]; Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd: Minister of Environmental Affairs and Tourism and Others v Smith[45]; Herculus Town Council v Della[46]; Le Roux and Another v Grigg-Spall[47]; Cornelius V Magistrate, Parys[48]; S Bothma and Son transport v President, Industrial Court[49]; Messenger of the Magistrate's Court, Durban v Pillay[50]; Weenen***

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[42] De Ville at page 259 "Constitutional and Statutory Interpretation (2000)"
[43] *2002(5) SA 688 (C) at 690 F-G*
[44] *1978 (2) SA 430 (A) at 434 A-E*
[45] *2004(1) SA 308 SCA*
[46] *1936 TPD 229 at 240*
[47] *1946 AD 244*
[48] *1958 (4) SA 723 (O)*
[49] *1988 (3) SA 335 (D)*

Transitional Local Council v van Dyk*[51]*; Ex Parte Mothuloe (Law society, Transvaal, Intervening*[52]*,

Counsel distilled the following rules:

- "the general rule of statutory interpretation is that non-compliance with a statutory prescription results in a nullity;
- historically, provisions with respect to time were considered to be obligatory, unless a power extending the time was given;
- developments in the law indicate that the intention of the legislature in enacting the relevant statutory prescription must be determined, this determination is to be made in accordance with the established principles of statutory interpretation and certain guidelines which have been developed; and
- the courts have cautioned that a common sense approach should not be sacrificed for an unduly legalistic one."

On the application of these rules to section 62, counsel concluded that the overall text of section 62 indicates a peremptory construction. They opined that section 62 is designed to achieve the expeditious determination of appeals within certain prescribed time periods. Therefore it would be anomalous to interpret section 62 in such a manner as to infer the power to condone late appeals. This view is supported by the fact that no power to condone any time period is conferred in respect of any of the provisions of this section [for example an express provision relating to condonation of time periods is to be found in regulation 22 of the Regulations on Fair Administrative Procedures, 2002 promulgated under PAJA]. Counsel concluded that the timeframes in

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[50] *1952 (3) SA 678 (A) at 683*
[51] *2002 (4) SA 653 (SCA)*
[52] *1996 (4) SA 1131 (T) at 1138D –E*

section 62(1) are to be regarded as peremptory. Counsel also pointed out that this position is buttressed by the effect that any postponement will have on the rights of a successful party in respect of a municipal decision. Often with land-use developments such delays have major economic consequences. Counsel's final conclusion is with respect sound, namely:

- the 21 day time period provided for in section 62(1) of the Systems Act is peremptory
- in the absence of an express power to condone the municipality does not have the power to grant condonation in respect of non-compliance with this time requirement.

Counsel further concluded that the timeframes provided for in section 62(1) are not for the exclusive benefit of the municipality and thus cannot be waived.

In respect of a damages claim arising from damages occasioned by an unlawful condonation of the late submission of an appeal, counsel concluded that a possibility exists that the municipality may be held liable. Counsel relied on the judgment in ***Premier, Western Cape v FairCape Property Developers (Pty)Ltd***[53] for this assertion but stated that the normal requirements need to be proven by the plaintiff being wrongfulness, negligence and causation.

5. Is the section 62 appeal a narrow or wide appeal?

All counsel consulted on this issue [Rose-Innes SC; I Jamie SC and Andrew Breitenbach] are of the view that the appeal in section 62 of the Systems Act is a wide one according to the first types of appeal considered in the ***Tikly case***[54]. Thus among the powers that the appeal authority would be vested with would be

[53] *2003 (6) SA 13 (SCA)*
[54] *1963 (2) SA 588 (T)*

the power to substitute the decision of an original decision-maker with its own decision. This view appears to be correct given the overall purpose of section 59 of the Systems Act, administrative and operational efficiency and adequate checks and balances. Both Breitenbach and Rose-Innes express the view that in appropriate circumstances the appeal authority may revoke the initial decision and refer it back to the decision-maker for reconsideration. Ismail Jamie SC however has a contrary opinion for which he relies upon de Ville at page 387 and Baxter at page 256 in that "the ambit of the powers of an appeal authority are to be determined in the first instance from the language used by the statute conferring the appeal power." He points out that the power conferred by section 62 is to confirm, vary or revoke. He thus concludes that a section 62 appeal authority is not able to remit a matter to the original decision-maker for reconsideration and that it must itself decide the matter finally. Based on the above analysis Ismail Jamie's viewpoint appears to be the better one. This is so as it appears to be more in line with the authoritative sources.

6. **The next problematic issue is whether the lodging of an appeal in terms of section 62 suspends the operation of the effect of the initial decision?**

In this respect reliance was placed on the judgement of Davis J in ***Max v Independent Democrats and others***[55]. Davis J[56] points out that under the common law and the uniform rules of the High Court the noting of an appeal suspends the judgement of a high court. The court was forced to confront the question of whether as a general rule the same situation applies to an appeal against an administrative decision. In this case some reliance was placed on the

[55] *2006 (3) SA 112 (C)*
[56] at page 118 E

views of De Ville[57], where he states; "where an appeal is allowed against an administrative decision, the decision appealed against will (unless the statute provides otherwise) take effect only once the period for appeal has expired or the decision was confirmed on appeal. Davies J[58] endorses this position where he states, "in my view there are good reasons why the rule of automatic suspension ought to apply in this case. In the present dispute, there is nothing in the first respondents code of conduct which suggests that it should not apply. In short, there is neither a legislative section nor a provision of the code which reverses the rule, which appears to be applied at the very least in practice."

Section 72 of the Systems Act [regulations and guidelines] provides that the Minister may make regulations to regulate;

- the procedure to be followed in appealing against decisions taken in terms of delegated powers and the disposal of such appeals
- the suspension of decisions on appeal

It is submitted that this is a clear indication that the Legislature did not contemplate that the lodging of an appeal in terms of section 62 will have the effect of suspending the initial decision. This is also the position that the City of Cape Town has adopted.

7. **Another more difficult matter is whether a 'recommendation' made to a higher body in terms of delegated authority constitutes a 'decision' which is appealable in terms of this section.**

This question arose out of a council committee making a recommendation in terms of a statutory provision. The recommendation was made to the provincial authorities in terms of section 2(4)(a) of the Removal of Restrictions Act, 1967

[57] De Ville at page 334
[58] Davis J at page 120 G-H

which relates to the removal of land use restrictions. A member of the public contended that this recommendation constituted a decision and thus was appealable. The City consulted senior counsel for advice. Counsel's view [Ismail Jamie SC] in this respect was that

- the making of a recommendation involves a anterior decision that is the decision to make the recommendation. It is thus this anterior decision which is appealable rather than the recommendation
- the decision to make a recommendation can affect someone's rights as it is a preliminary step that can have an affect on the ultimate decision in the sense that it lays a basis therefore, or commences a process which may well lead to approval or dismissal of the application. Senior counsel relies on certain case law for his position including ***Du Preez v Truth and Reconciliation Commission***[59]***; Director: Mineral Development, Gauteng Region v Save the Vaal Environment***[60]***; Garub v the Master and Others***[61] ***and Jerpis Trading (Pty)Ltd v Weston Hotel (Pty)Ltd and Others***[62].

Senior counsel's view, however, have been regarded as controversial and has not found universal acceptance. I am of the view that his conclusions go beyond the intention of section 62.

8. **The meaning to be attached to section 62(6) which reads: "the provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law."**

Views have been expressed by various parties including senior counsel at the Cape Bar that the effect of this provision is that if one has other appeal

[59] *1997 (3) SA 204 (A)*
[60] *1999(2) SA 709 (SCA)*
[61] *1999(1) SA 746(C)*
[62] *1984 (2) SA 431*

mechanisms available in respect of a municipal decision than section 62, then section 62 does not apply in these circumstances. For instance a planning decision is appealable to the provincial authorities in terms of section 44 of the Land Use Planning Ordinance[63]. The argument is thus that the Legislature could never have intended a double administrative appeal on a matter prior to the matter finding its way to the court. Opinion was sought on this matter from LA Rose-Innes SC and T Masuku, counsel concluded:

- "section 62 does not introduce a single exclusive appeal remedy nor does it provide that where there are other appeal procedures there is no appeal under section 62
- an appellant who wished to appeal a decision should first exercise the section 62 right of appeal and thereafter if necessary the section 44 right of appeal. The appellant runs a risk if he or she chooses to ignore the section 62 appeal and directly appeal in terms of section 44 of being confronted later with an allegation that there had been a failure to exhaust internal remedies."

There are divergent views on this point. It is however submitted that Rose Innes's view is the correct position. This is so, firstly because until the section 62 appeal process has been finalized no final decision can be said to have taken by the municipality. External appeals are all predicated on the fact of the existence of a final decision by the municipality. Secondly it is submitted that the prime purpose of section 62 is the regulation of the exercise of delegated power in the interests of public accountability and good governance. This being

[63] No.15 of 1985

one of the prime intentions of the legislature in enacting section 62, it follows that the section 62 appeal procedure must first be exhausted.

9. **A large municipality such as the City of Cape Town to achieve administrative and operational efficiency is perforce required to delegate extensive powers to officials.**

This results in a large number of appeals being lodged against decisions taken by staff members in terms of delegated or sub-delegated authority. In terms of section 62(4) of the Systems Act, the municipal manager is the appeal authority in such matters. Given the many other tasks for which the municipal manager is responsible it is virtually impossible for him or her to personally hear all of these appeals even if only on the papers. The question arises whether it is possible for this duty to be delegated to a suitable person by the municipal manager. This is a difficult issue to which there is no obvious right answer. Section 59(4) of the Systems Act provides that "any delegation or sub-delegation to a staff member of a power conferred on a municipal manager must be approved of by the municipal council in accordance with the system of delegations referred to in subsection (1)". An argument can be made that this sub-section which is not subject to any specific exclusions would permit the municipal manager to delegate any power conferred upon him by legislation to a staff member provided the requirements of the sub-section have been met.

It thus follows that the municipal manager could authorize a staff member to hear section 62 appeals on his behalf. The counter argument to this is that parliament, when enacting the Systems Act did not intend that the checks and balances that it imposed in the delegation system of the Act, sections 59 to 65 as being provisions susceptible to delegation. Part of parliament's careful selection

of checks and balances was the identification of the particular appeal authorities in sub-section 62(4). In counsel's opinion rendered on 23 June 2005, advocate Andrew Breitenbach expressed the view that the latter argument is the correct reflection of the legal position.

It is submitted that there is a cogent argument for both points of view and the courts will have to have the final say at the appropriate time. At a practical level it is beyond doubt that it is impossible for the City Manager of a large city reasonably to adjudicate all internal appeals from decisions of staff members. Time constraints do not permit this.

10. **As to the problems associated with section 62(3), these will be discussed extensively below.**

11. **Resources**

The City has created an administrative structure specifically to deal with appeals. This consists of six lawyers and three administrative staff. In addition the City has an electronic system upon which all appeals are tracked. This system is available on the City's web site. Thus any appellant as well as the administration can track the progress of any particular appeal. This administrative structure is also responsible for the administration of the PAIA. The resources created by the City are indicative of its commitment to regulate public power in the interest of transparent and accountable government. This further gives life to an effective internal administrative appeal system.

CHAPTER 6

Implementation of section 62 appeals by the City of Cape Town

The Local Government Municipal Systems Act was promulgated on 14 November 2000 and became operational on 1 March 2001.

Section 62 internal appeals commenced slowly within municipalities as the general public were not aware of their rights in this respect and the administration took time to adjust to the new suite of legislation which became applicable to local government. From the outset the Municipality of Cape Town and its advisors took the view that any persons whose rights were affected by a decision, was entitled to an internal section 62 appeal. The municipality did not limit such appeals to parties aggrieved by the initial decision but extended it to third parties who contended that their rights had been adversely affected by the decision. However it was recognized that in certain circumstances the effectiveness of an appeal remedy was limited as no variation or revocation of a decision could detract from any rights that may have accrued as a result of the decision appealed against. The City's departure point was soon to be tested in the arena of tender awards.

The tender in respect of the Potsdam Wastewater Treatment Works

In about June 2004 the City invited tenders for the design and supply of mechanical and electrical equipment for the phase I extension of the Potsdam Wastewater Treatment Works. The City's Chief Financial Officer [CFO] had the necessary authority to award a tender of this nature after considering a recommendation from an

advisory body known as the Goods, Services and Property Advisory Body. The City's Water department recommended that the tender be awarded to Lektratek Water Technology (Pty)(Ltd) who received the highest number of adjudication points in the preferential procurement ranking system.

The City's Goods, Services and Property Advisory body however recommended that the tender be awarded to Inenza CC trading as Same Cape. Lektratek's tender was the third lowest and Same Cape's tender was the sixth lowest tender. The two lowest offers were found to be non-responsive as they did not comply with tender requirements.

On 19 October 2004 the CFO awarded the tender to **Same Cape**. The CFO was somewhat misguided in this award. He based his decision on the fact that Lektratek did not have a presence in Cape Town and that the utilisation of local labour should take precedence. In fact Lektratek had an office in Cape Town and indicated in their tender submission that local labour would be employed. In any event the invitation to tender expressly stated that the employment of local labour was not a relevant factor in respect of the award of the tender. The actions of the CFO clearly constituted an invalid administrative act.

On 11 November 2004 Lektratek appealed in terms of section 62 of the Systems Act, the award of the tender to Same Cape. The appeal was heard by the City Manager on 30 December 2004. The appeal authority acknowledged at the hearing that the tender was wrongly awarded to Same Cape. However he had regard to the fact that the

contract was an urgent one and that Same Cape had commenced performing in terms thereof. By the time the appeal was heard they had already submitted their first account for R357 765, 36. The invitation to tender provided that pending the conclusion of a formal agreement the tender and the City's acceptance thereof would constitute a binding contract. The City thus appeared to be contractually bound.

On 4 January 2005 the appeal authority dismissed Lektratek's appeal on the basis that in this instance the tender as well as the written acceptance thereof had resulted in rights accruing to Same Cape. To vary or revoke the original decision would thus be in contravention of section 62(3) of the Systems Act. Lektratek was not satisfied with the decision and the reasons given by the appeal authority and threatened to take the matter further in the High Court. At this stage the City consulted LA Rose-Innes of the Cape Bar for advice.

The senior counsel was asked to advise on various issues, the first three of which are relevant:

1. Does the appeal authority have the right to substitute its own decision for that of the original decision-maker?
2. What does the phrase " but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision" in section 62(3) of the Systems Act mean and in what circumstance will rights accrue?
3. On the facts of this case was the appeal authority justified in refusing the appeal on the basis that rights had accrued to Same Cape?

In respect of question 1, Rose- Innes stated that the appeal authority was vested with the power to substitute its decision for that of the original decision-maker. He reasoned that it was the appeal authority's function to determine whether or not the original decision was under the circumstances the correct one. If so, the appeal authority would confirm the decision. If the appeal authority comes to the conclusion that the decision is wrong, the appeal authority has the power to vary or revoke the decision. The appeal authority will in such a case usually take the decision which should have been taken in the first instance although in appropriate cases the matter may be referred back. He reaches this conclusion, on the basis of his view of the meaning of the word 'vary'. He states that the ordinary meaning of the word in the context in which it appears is to change or amend the decision. In his view this would include the power to substitute the appeal authority's own decision for that of the original decision-maker.

In respect of the second question posed, senior counsel addressed it as follows:
It was not immediately apparent what the meaning of the phrase "but no such variation or revocation of such a decision may detract from any rights that may have accrued as a result of the decision"[64]. He then analyses section 62(3) by stating that it has there constituent parts and the meaning of the proviso is to be discerned from that immediate context. The first part is that the appeal authority must consider the appeal. The appeal authority is therefore obliged to address the merits of the appeal. It cannot simply take the view that because rights may have accrued as a result of the decision it is not required to consider the appeal.

[64] section 62(3)

Secondly after considering the appeal, the appeal authority must reach a decision thereon. It must either confirm, vary or revoke the initial decision. The third part of section 62(3) is the phrase which provides that "no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision". According to Rose-Innes the proviso is designed to qualify the legal effect of a variation or revocation. It in fact presupposes that the appeal authority has in fact varied or revoked the original decision. This is apparent from the reference to such variation or revocation. The purpose of the proviso is to provide that the decision on appeal and more particularly the revocation or variation of the original decision does not detract from any rights that may have accrued as a result of the decision. The proviso is not to be interpreted as meaning that the appeal authority should not exercise its appeal jurisdiction at all. He also concludes when reference is made to rights that have accrued, this must be taken in accordance with the recognized statutory presumption as a reference to rights that have lawfully accrued [***Union Government v Schierhout***[65]***, S v Maphele***[66]]

The effect of this is that if a particular tender process is vitiated by some illegality or irregularity and was likely to be set aside or corrected on appeal, the successful tenderer could not claim that the award of the contract to him or her resulted in the vesting of rights which could not be affected by an appeal.

In general he accepts that contractual rights and obligations may arise upon the acceptance of a tender or the conclusion of a formal contract following the award of a tender. Such rights and obligations are however subject to the outcome of any appeal process that may ensue.

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[65] *1925 AD 322 at 339*
[66] *1963 (2) SA 651 (A) at 655*

A contrary approach would in effect lead to the absurd conclusion that no right of appeal exists. Section 62 is designed to provide an appeal remedy. It could never have been the intention of the Legislature in the proviso to section 62(3) to deny an effective appeal remedy when the very purpose of section 62 is to provide such a remedy.

Importantly, he finally comes to the conclusion that the sort of rights which are protected, are those which would survive the appeal process. Accordingly the facts of the present case provide a ready example. Even if the award of the tender to Same Cape is set aside on appeal they have done certain work and they will be able to recover the cost of such work. In effect the rights protected are those between the award and the variation or revocation of the award.

Thirdly, the appeal authority was not justified in refusing the appeal on the basis that rights had accrued to Same Cape. The appeal authority was entitled if it was so minded to revoke the original decision and to vary it by granting the tender to Lektratek. The fact that a contract may have come into existence between the City and Same Cape prior to the appeal did not mean that rights had accrued in favour of Same Cape which precluded any meaningful appeal by Lektratek.

This matter was eventually settled out of court and it went no further. However with effect from early 2005 the Rose-Innes opinion has informed the appeal procedures of the City of Cape Town.

CHAPTER 7

Does the section 62 appeal process constitute administrative action?

An important factor in implementing a section 62 appeal system is to resolve whether such an appeal process constitutes administrative action as this will have a bearing on the procedures that are followed.

Administrative action is defined in section 1 of the PAJA. It is submitted that the hearing of an appeal in terms of section 62 of the Systems Act constitutes administrative action in terms of the Act. It constitutes the exercising of a public power in terms of an empowering provision [the Systems Act] which has a direct external legal effect and which has the potential to adversely affect the rights of the persons involved. This being so the parties to such an appeal process are entitled to the safeguards provided for in section 3 of PAJA. Apart from certain formalities which are prescribed by section 62, the Systems Act is silent as to the procedures to be followed when dealing with appeals. Section 72(1)(a)(i) of the Systems Act provides that the Minister may make regulations to regulate "the procedure to be followed in appealing against decisions in terms of delegated powers and the disposal of such appeals." The Systems Act was passed on 14 November 2000 and to date no such regulations have been promulgated. Not even draft regulations have been released for comment. The City of Cape Town was therefore obliged to design its own procedures in compliance with section 3 of PAJA. The City's policy which was adopted by full Council on 8 December 2004 as item C20/12/04 contains inter alia the following provisions:

"Affected parties must be informed by the relevant official who communicates a decision taken under delegated authority-:

- of his /her right of internal appeal;
- that it must be lodged within 21 days of notification of the decision;
- that it must be submitted to the City Manager at Private Bag X9181, Cape Town, 8000;
- that the appeal must be in writing and must set out the reasons for the appeal;
- state in which manner his/her rights were affected;
- state the remedy sought;
- be accompanied by a copy of the notification advising the person of the initial decision; and
- where decisions are conveyed which may confer rights the party is to be advised that no rights accrue for 21 days from notification of such decision or until any appeal has been finalised in terms of section 62 of the Systems Act."

"**The Appeal Procedure**

1. The appeal authority must commence with the appeal within six (6) weeks and finalise it within a reasonable time period.
2. The appeal authority will determine its own procedure for hearing an appeal.
3. The appeal authority must consider all requests for hearings and may initiate a hearing should it be deemed necessary [a hearing takes place when the appellant attends the appeal meeting and presents his/her case.]
4. The appeal authority must make site inspections if necessary.
5. The appeal authority may consider the appeal solely on the papers if this is appropriate.
6. The appeal authority may clarify issues either verbally or in writing.
7. The appeal authority is authorised to instruct any councillor or official to appear before it, to question same, provided prior reasonable notice is given.

8. All material upon which the initial decision was based must be submitted to the appeal authority.
9. The appeal authority is authorized to acquire professional assistance in complex and difficult matters including legal assistance.
10. Hearings are not to be seen as courts of law; no cross-examination is permitted.
11. Questions of clarity may be asked by the appeal authority and with the appeal authority's permission by the parties.
12. Legal representation is permitted.
13. Interested and affected parties may make submissions to the appeal authority.
14. The appeal authority must provide a written finding and the reasons for such finding."

To contextualize the effect of section 62(3) a comparative analysis of similar statutory provisions has been conducted. There are a number of provisions substantially similar to section 62(3) of Systems Act namely:

Local Government: Municipal Electoral Act 27 of 2000: Sections 90(4) and 91(3); Financial Intelligence Centre Act 38 of 2001: Section 16(3); National Environmental Management Act 107 of 1998: Sections 42(2B) and 42(3); National Environmental Management: Biodiversity Act 10 of 2004: Section 27(4); National Environmental Management: Protected Areas Act 57 of 2003: Section 71(4); Children's Act 38 of 2005: Sections 307(3), 308(3), 309(3), 310(3)(a) and 311(3)(a); Children's Amendment Act 41 of 2007: Sections 88(5)(a) and 225(5)(a); Public Audit Act 25 of 2004: Section 48(4); Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002: Section 23(3); Nursing Act 33 of 2005: Section 20(15).

The aforesaid Acts which have been promulgated since 1999 all have provisions similar to section 62(3) which permit decisions taken under delegated authority to be re-considered and to either be confirmed, varied or revoked subject to not detracting from any rights that may have accrued as a result of the initial decision. There is however an important distinction between these provisions and section 62 of the Systems Act. None of these provisions is termed an appeal [see heading to section 62 of the Systems Act] and the re-consideration of the initial decision is done by the delegator of the power unlike section 62. This is essentially not the case in terms of section 62 as the delegator of the power in the first instance is the municipal council. For example a municipal council can delegate power to a staff member to approve building plans in terms of section 7 of the National Building Regulations and Building Standards Act[67].

Any applicant for a building plan approval which has been refused has a right of appeal in terms of section 62 to the City Manager, an independent party, who did not delegate the initial power. It is submitted that there is an important distinction in this situation as it brings the section 62 process within the realms of an independent appeal tribunal. The section 62 appeal process is not merely an internal appeal to a departmental head in respect of decisions of a subordinate.

It is important to note that the National Environmental Management Act[68] has an appeal section which is headed up as "appeals". These appeals relate to decisions taken under delegated authority from the Minister or MEC. Section 43(6) reads as follows: "the Minister or MEC after considering such an appeal, may confirm, set

[67] No. 103 of 1977
[68] No. 107 of 1998

aside or vary the decision, provision, condition or directive or make any other appropriate order, including an order that the prescribed fee paid by the appellant or any part thereof, be refunded." This provision unlike section 62(3) of the Systems Act clearly makes no provision for the protection of accrued rights. It is therefore submitted that this is a clearer formulation which places matters beyond any doubt. This illustrates the point that poor drafting can often negate the very intentions of Legislature.

CHAPTER 8

Case law relating to the implementation of section 62

It was anticipated that many of the interpretational problems in respect of section 62 would be clarified in the somewhat prolific litigation which followed its implementation. In particular the much disputed section 62(3) and its proviso relating to accrued rights were at the forefront of this debate. This debate should also have informed the interpretation of similar provisions in the other statutes listed above.

The case law reveals what a difficult provision this has been to apply and the court's inability to resolve the real issues satisfactorily. It is with this in mind that a detailed analysis of the case law is undertaken to illustrate the difficulty and complexity of applying this provision. However having said this we should not lose sight of the fact that this provision contributes to the checks and balances system of administrative and operational efficiency within local government. Section 62 is an extremely important mechanism regulating the exercise of public power at a local government level.

In mid 2005 judgment was handed down by Veldhuizen J in the Cape of Good Hope Provincial Division in Case No. 5853/2003. The matter of **Marina Guilietta Reader [1st applicant], Ian Donald Peploe [2nd applicant] v Mrs. J Ikin [1st]. respondent], the Municipality of the City of Cape Town [2nd respondent]** was later to become known as the Reader judgment.

The applicants had applied for an order setting aside the decision of the municipality taken in February 2003 approving a building plan for alterations to a dwelling situated in Sea Point and ordering the first respondent to demolish certain building work erected on the premises pursuant to the aforesaid building plan. The application was dismissed. The second respondents had argued in limine that the application should be dismissed as the applicants had failed to exhaust their internal remedy in terms of section 62 of the Systems Act, as the plan had been approved in terms of delegated authority.

It was common cause that the applicants had failed to avail themselves of this right to an internal appeal. The court stated that section 7(2) of the provisions of the PAJA provides that "no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted." The applicants had failed to apply for any exemption in this respect in terms of section 7(2)(c) of the Act.

8.1 Reader and Another v Ikin and Another[69]

With leave of the Supreme Court of Appeal [the judge of first instance refused leave to appeal] the appellants approached a full bench of the Cape of Good Hope Provincial Division to appeal the judgment of Veldhuizen J. The matter was heard in July 2007 by Davis J, NC Erasmus J and HJ Erasmus J. Davis J delivered judgment on 16 August 2007.

[69] *[2007] JOL 20533 (C)*

Facts

Paragraph 9 of the judgment is important in that departures were required before the rider plan could be approved. Notices were served by the municipality on the neighbours, Reader and Peploe as interested and affected parties calling for objections. This is of particular importance given the finding of Lewis JA at paragraph 35 of the subsequent SCA judgment.

Ad Paragraph 15

The court found that the PAJA had reformed the common law and that it was now compulsory to exhaust the applicable internal remedy before approaching the court unless the party is exempted by the court in terms of section 7(2)(c) of PAJA [authority cited by Davis J; ***Nichol and Another v Registrar of Pension Funds and others***[70] *].*

Ad Paragraph 20

Counsel for first respondent argued that the restrictions imposed by section 62(3) on the right of appeal in terms of section 62 were congruent with the common law. He relied on Baxter[71] for the common law rule namely "an authority can alter its decision but it could not thereby affect or abolish rights which its previous act had created."

Ad Paragraph 21

In the end this becomes the justification for the courts decision; "the drafters of section 62(3) had recognized this principle of common law and incorporated it into the Systems Act, namely that whereas an aggrieved party could appeal a decision of a

[70] *(2006) ALL SA 589 (SCA) at para 15*
[71] 'Administrative Law' (1980) at 372-373

local authority, the internal appeal mechanism could not be extended to cases where another party acquired a right pursuant to the initial decision."

Ad Paragraph 25

The court held that statutory interpretation must start with the words which the Legislature has used [the literal approach]. The court then indicates that it should examine the range of possible and plausible, meanings which can be given to the words used by the Legislature. It will be submitted that the court however fails dismally in this respect. It fails to even interrogate the situation where the right has accrued by some illegality or irregularity. Surely the criterion after all should be that the right has lawfully accrued.

Ad Paragraph 30 & 31

In paragraphs 30 and 31 Davis J makes the point that a void administrative act remains an act and has legal consequences until such act is set aside and falls back on the common law principle that a functionary can only revoke its invalid decision with the consent of all interested parties or where it can be shown that revocation would be to the benefit of all concerned.

With respect he seems to be oblivious to the fact that the Legislature may well have had the intention that section 62 should be the vehicle to set aside such decisions.

Paragraph 32

This line of reasoning then leads Davis J to the conclusion that "the mechanism created by sections 62(1) and 62(3) of the Systems Act provides an appeal for a party

aggrieved by the initial decision but does not extend to third parties who contend that their rights or legitimate expectations have been adversely affected by the decision. The latter group however have a right of access to a court to set aside such decision."

In other words section 62 appeals are only available to applicants.

8.2 Critique of the Davis Judgment

What the court meant in respect of the particular building plan was that only the applicant for a building plan approval could taken a decision on appeal, but not any neighbour who objected to the approval of such building plan.

If this reasoning is extended to other types of decisions taken under delegated or sub-delegated authority it would materially curtail the effective ambit of the internal appeal procedure provided for in terms of the Systems Act.

In the area of tender awards the judgment has some interesting implications. All the tenderers who are party to a tender adjudication process would qualify as applicants and could potentially be aggrieved by the initial decision and they would therefore appear to qualify for a right of appeal in terms of the court's reasoning. However in the same breath they would not have a right of appeal because rights accrue to the successful tenderer upon the making of the award. This show the anomalous consequences of the court's reasoning in that an unsuccessful tenderer could only appeal if there was no successful tenderer i.e. if no tender award is made. The court's proposition also does not hold much logic in this context.

The Minister has the power in terms of section 72(1)(a)(ii) of the Systems Act to make regulations to regulate the "suspension of decisions on appeal". The wording of this section suggests that the Minister's power is to make regulations that would suspend a decision once it becomes the subject of an appeal. The reasoning of the court is not reconcilable with this provision. On the court's approach to the meaning of the accrual of rights, the accrual occurs at the time that the decision is taken in terms of delegated authority [*functus officio* doctrine applies] and this would occur before an appeal could be lodged or before the minister could effect a suspension in terms of section 72(1)(a)(ii) of the Systems Act. This strange result is the consequence of the court's literalistic construction of the appeal provision. The court should have applied a purposive approach to the applicable section to give the section a meaning which would not restrict the right of appeal by third parties and make section 72(1)(a)(ii) *pro non scripto*.

It is conceded that section 62 of the Systems Act is a poorly drafted provision. The proviso in section 62 (3) that any appeal decision may not detract from any rights that might have accrued as a result of the initial decision, can indeed be interpreted in the manner the Cape High Court did. It however seems highly unlikely that this was the intention of the Legislature. The meaning attributed to this provision by the High Court gives the appeal mechanism an extremely limited effect and in fact makes it legally quite unnecessary. The doctrine of *functus officio* provides that when an administrative organ makes a decision in the exercise of a power, it is discharged from its office in regard to that decision and it may not revisit it. This general principal is subject to exception that such an authority may change its mind and alter or withdraw its decision as long as it does not alter or abolish any rights which were conferred as a result of its

decision [***Brown v Leyds NO***[72] ***and Holden v Minister of Interior***[73]]. The effect of the Judgment of Davis J is to hold that the appellate power provided for section 62 is co-extensive with the inherent common law powers of any administrative authority to revoke its own decisions, subject to the constraint against affecting rights conferred by the initial decision. The correctness of the court's equation of the appeal powers under section 62 with an administration's inherent power at common law is highly questionable. It overlooks the obvious that section 62 is an appeal mechanism. The very basis of an appeal authority embraces the power to alter a decision of first instance. It is impossible to adequately reconcile the operation of the *functus officio* doctrine with the exercise of an appeal authority.

The importing of the common law doctrine of *functus officio* essentially limits the category of persons to whom a section 62 appeal is available. The courts construction is not supported on a contextual analysis of the provision. In other words the court held that in effect section 62 of the Systems Act amounts to little more than the codification of an administrative functionary's limited power to revisit its own decision within the ambit of the *functus officio* doctrine. This departure point overlooks the inherent incompatibility of the *functus officio* doctrine with the exercise of a statutory function. Section 62 affords an appeal to any person whose rights are affected by a decision made under delegated or sub-delegated authority and not only to the person who might have applied for the

[72] *(1987) 4 OR 17 at 38*
[73] *1952 (1) SA 98(T)*

determination in issue. The nature of the appeal authority's powers indicates that the appeal is one in the widest sense as described in the ***Tikly case***[74].

This provision does not conceive of "an initial decision" and "third parties" in the manner that Davis J does. The question of whether or not section 62 provides an effective remedy in any particular circumstances or not, because of the proviso to section 62(3), is a discrete question from the availability of the appeal remedy. The inadequacy of the remedy in given circumstances does not however amount to the absence of the remedy. Whilst this distinction escaped Davis J, the same did not escape Jafta JA, in the subsequent appeal to the SCA where he states at paragraph 25; "section 62(3) does not insulate the decision forming the subject matter of the appeal itself, from variation or even revocation, what is protected by the subsection is the rights which have accrued as a result of such decision." The judge goes on to say whether this constitutes appropriate relief is a different matter and the answer to this question lies in what is meant by an internal remedy contemplated in section 7(2) of PAJA.

If Davis J's approach was correct it is difficult to understand why section 62(1) was worded by the Legislature in a manner consistent with an intention that the right of appeal should be available to **any person** whose rights were affected by a decision taken in terms of delegated or sub-delegated authority. Had the Legislature intended the provisions to operate as narrowly as Davis J found

[74] *1963(2) SA 588(T) at 590G – 591A*

them to be, there are examples in prior legislation which could have been used to unambiguously achieve this purpose.[75]

8.3 Counter Arguments

The proviso contained in section 62(3) could not have been more clearly stated. The plain meaning of the language should be respected and what bears emphasising is that given the language of the proviso its ordinary meaning does not produce an incongruous or problematic result. On the contrary the proviso reflects a well-established respect which our law has always shown for rights which have accrued when a public authority is given a power to vary or revoke a decision of a delegated authority[76]. The golden rule of interpretation requires that language in a statute be given its grammatical and ordinary meaning unless this would result in some absurdity of some repugnancy or inconsistency with the rest of the statute. ***Coopers v Bryant***[77]. As pointed out the clear language of section 62(3) does not give rise to any absurdity or repugnancy or inconsistency with the section as a whole. Sections 62(1) and 62(3) must be read together as section 62(1) is qualified by section 62(3).

The Amicus Curiae[78] submitted to the SCA (appeal from Davis judgment) "that section 62 does not constitute an "appeal" in the ordinary sense, not only out of respect for the fairness inherent in the *functus officio* doctrine but also with a view to enhancing efficiency in local government. The court needs to note that section 62 appeals are an extremely time consuming, labour intensive and an

[75] see section 88(4) of the Natal Local Authorities Ordinance 25 of 1974
[76] de Ville at 73-77
[77] *1995(3) 761 (A) at 767E – 768E*
[78] The Ethekweni Municipality

expensive process. It has meant that efficient decision making in town planning and like matters is compromised when objectors are involved. Disputes create delays and discourage applicants from pursuing a lawful course of action which the objector would prefer to see abandoned. In short the decision making process as it pertains to a municipal decision made under delegated authority has been inexorably extended. This could never have been the intention of the Legislature when introducing sections 59 and 62 of the Systems Act."

It seems that their ethos of transparency, accountability and democracy was somewhat over shadowed by their expediency.

8.4 Syntell (Pty) Ltd v City of Cape Town and Actaris South Africa (Pty)(Ltd)

This is a judgment of the High court of South Africa ***(Cape of Good Hope Provincial Division) case no. 17780/2007***. Judgment was handed down on 13 March 2008 by Sven Oliver AJ. The applicant in the matter and the second respondent [Actaris] both competed along with three other companies for a tender issued by first respondent for a prepaid uniform electricity vending system. On 15 January 2007 the tender was awarded to Actaris by the City's Supply Chain Management Bid Adjudication Committee [SCMBAC]. In a letter dated 19 January 2007, Actaris was advised by the City that the tender had been accepted. Actaris was however also informed that the award of the tender was subject to a 21 day appeal period in terms of section 62 of the Systems Act and that no rights would accrue for 21 days from date of this notification or until any such appeal has been finalized. In a letter of even date Syntell was advised by the City that its tender was unsuccessful. Syntell being the highest ranking tender of the **unsuccessful** tenderers, appealed on 8 February 2007 [within the

21 prescribed period] and further supplemented its appeal grounds by letters dated 30 March 2007 and 18 May 2007.

The appeal was argued before the appeal authority [City Manager] on 24 July 2007. However before the appeal was determined the full bench of the Cape Court delivered judgment in the ***Reader and Another v Ikin and Another*** case, on 16 August 2007. The *Reader case* interpreted the provisions of section 62 of the Systems Act in a manner which resulted in the availability of internal appeals under the provision being much more limited than had been the case in terms of the City's understanding of the provision. The City's understanding of the *Reader case* was that once a tender is awarded the unsuccessful tenderers are third parties *vis-a-vis* the successful tenderer in the sense of that expression as employed by Davis J in his judgment. The City subsequently on 12 September 2007 addressed a letter to Syntell's attorneys advising them that the appeal authority had almost completed its findings when the *Reader* judgment intervened. The City took the view that when the City made the tender award on 15 January 2007 rights accrued to the successful tenderer and Syntell would thereafter be regarded as a third party *vis-a-vis* the successful tenderer. The City thus now regarded itself bound by the *Reader* judgment and therefore Syntell had no right of internal appeal in terms of section 62 of the Systems Act.

Syntell's attorneys did not accept this position and took the position that their matter was significantly different from the decision in the *Reader case*. They pointed out that the award was a conditional one specifically made subject to a section 62 appeal and the fact that no rights would accrue for 21 days from date

of notification of the award or until any appeal lodged had been finalized. The City however would not relent and took the attitude that it could not confer a right of appeal which the law did not provide for by suspending the effect of a decision as this would amount to the municipality selectively conferring rights of appeal as it deemed fit. Syntell were therefore forced to approach the court for relief. The court resolved to deal with the matter as one of urgency and not only to clarify the rights of the parties to the matter but also those of many other unsuccessful tenderers who had been turned away or placed on hold. The court deemed it in the public interest that clarity is obtained on the correctness of the City's views.

Counsel for Syntell pointed out to the court that an internal appeal is an important safeguard against faulty administrative decision-making. He relied on Baxter[79] for this submission as follows: "it provides an aggrieved individual with the assurance that the decision will be reconsidered by a second decision-maker. The appellate body is able to exercise a calmer more objective and reflective judgment. Detached from the "dust of the arena" as it were and the immediacy of the initial decision, the second decision-maker is in a better position to discern a faulty reasoning process and in particular to evaluate facts." Counsel also submitted that it was in the City's interest as well as that of all tenderers, and indeed the public at large that there be an appeal mechanism available in procurement matters. This he submitted must have been the intention of the drafters of the Systems Act. The court distinguished the *Reader*

[79] Baxter "Administrative Law 1984 page 255"

case in that the plans approval in that case was not conditional and thus rights accrued which was not the situation before the court.

The court points out at paragraph 35 the far reaching consequences of the *Reader case*, one of which being the potential number of reviews which may be brought before the courts, a process which is more expensive , time consuming and requiring a more rigorous burden to discharge than was the case with an internal appeal. The court also took note that the City's Supply Chain Management Policy [a statutory document governing procurement matters] provided for a right of internal appeal and the suspension of the accrual of rights in this regard.

The ratio of the court is to be found at paragraph 58 of the judgment in that the successful tenderer was informed that the tender award was subject to an appeal process and that rights did not accrue in the sense of the Reader case. Factually the City did not intend rights to accrue to Actaris until the appeal process had been finalised.

The weakness in the Syntell judgment is that it suggests that the City can on a contractual basis extend a right of appeal to third parties. This cannot be the position as an appeal in terms of section 62 operates *ex lege* and not *ex contractu*. The factual position is that because the City assumed that a right of appeal existed it advised the successful tenderer in terms of its Supply Chain Management Policy that the decision would not be effective until the expiry of the appeal period for appeals or the determination of any appeal which may be

lodged. This situation was however dependant on the existence of a right in law which permits an aggrieved unsuccessful tenderer to appeal. If no such right of appeal existed it follows that the decision to suspend the accrual of rights had no legal basis. In view of the *Reader* judgment it is clear that rights accrue at the time of the decision and therefore no rights of appeal exist in respect of third parties. Once rights accrue, the municipality is for all intents and purposes *functus officio.*

There is no indication in section 62 of the Systems Act that by making their decisions subject to a right of appeal in terms of this provision and purporting to suspend the determinative effect of its decisions a municipality may confer a right of internal appeal on a dissatisfied party. This would amount to conferring a right of appeal which the law does not provide for. In paragraph 52 of the judgment the court accepts that it is possible that a municipality can in this manner confer a right of appeal on a particular person or class of persons. The point is that the decision to award the tender by the decision-making body [SCMBAC] was not conditional and the relevant procurement legislation in fact makes no provision for conditional awards. The MFMA envisages the SCMBAC making a final award in respect of a tender.

The City's letter of notification to the successful tenderer did not purport to insert conditions into the award, it simply purported to set out what the City's view was regarding the prevailing legal position namely that tender awards were subject to section 62 appeals. This notification letter however could not confer a

right of appeal either *ex lege or ex contractu* by virtue of an incorrect interpretation of the legal position.

It is in any event legally difficult to justify a rational basis for a municipality to act in such a discriminatory manner by suspending the effect of administrative decisions in respect of certain matters such as tender awards and not in others such as a building plan approval i.e. by conferring a right to an internal appeal upon certain parties and excluding other categories of persons. It is submitted therein lies the weakness of the court's argument as it could never have been the intention of the Legislator that it would be at the discretion of a municipality to confer a right to an internal appeal in such an arbitrary manner. It is not difficult to contemplate that this would lead to situations where in certain areas in the country, municipalities would permit appeals in respect of certain decisions taken in terms of delegated or sub-delegated authority whilst in other areas of the Republic this would not be permitted. It could never have been the intention of the Legislator to permit such a discriminatory and irrational system to prevail.

8.5 Walele v City of Cape Town and others[80]

In this matter Azeem Hassan Walele appealed to the Constitutional Court against the dismissal of his review application. He had applied to the Cape High Court to set aside a decision by the City of Cape Town to approve building plans for a four storey block of flats adjoining his residential property. He contended that the City had not considered the effect that the erection of the flats would have on his property (the provisions of the National Building Regulations and

[80] *2008(6) SA 129(CC)*

Building Standards Act, 1977 applied). He argued that this violated his right to property protected by section 25 of the Constitution. He also asserted that it had violated his section 33, constitutional right, to procedural fairness by failing to afford him a hearing prior to the approval of the building plans. The Cape High Court dismissed his application and his petition to the Supreme Court of Appeal was also unsuccessful. He subsequently applied to the Constitutional Court for leave to appeal. The matter was heard in February 2008 and judgment handed down in June 2008.

Jafta AJ gave the majority judgment in which Madala J, Mokgoro J, Ngcobo J, Nkabinde J and Skweyiya J concurred. O'Regan ADCJ gave a minority judgment supported by Langa CJ, Kroon AJ, van der Westerhuizen J and Yacoob J. At page 3 of the report Jafta AJ finds that the plans in question complied with the Zoning Scheme and the property concerned fell within an area where the erection of flats of up to seven storeys was permitted as of right. The court admitted the matter for a hearing as it deem it to be a constitutional matter, the applicant had invoked the provisions of section 6 of PAJA and the interpretation and application of PAJA was a constitutional issue.[81]

In this matter the amicus curiae[82] raised the point that the applicant was barred from bringing the matter before the court by section 7 of PAJA, as he had not exhausted his right to an internal appeal before approaching the High Court and had not applied in terms of section 7 of PAJA to be exempted from this requirement. At paragraph 19 the court poses the issue as follows " the question

[81] At paragraph 15
[82] City of Johannesburg

is whether the internal appeal provided for in section 62 of the Systems Act was available to the applicant who was not a party to the application for the approval of the plans." It is submitted that the court correctly identified the issue in that it holds that the answer to the question lies in the interpretation of section 62 of the Systems Act, in essence, does the person have an identifiable right which was affected by the decision to approve the plans. The court finds that this had not been established on the papers as none of the applicants rights were affected by the plans approval as in terms of the relevant planning law, the property owner was entitled as of right to erect a block of flats up to seven storeys on the erf in question.

O'Regan ADCJ, para 142, has the following to say about internal appeals:

"Our system of administrative Justice seeks to encourage internal remedies to resolve disputes that arise out of administrative action. This is the very purpose of section (7)(2) of PAJA. In my view section 62 should be read in the light of this commitment as it establishes an internal remedy. It may mean, therefore that the section only applies where a person alleges that his or her rights have been affected by the decision in question." She adds that it is not necessary for her to consider the proper interpretation of section 62 and that she would leave this for another day.

Both Jafta AJ and O'Regan ADCJ saw the need for an internal appeal mechanism such as section 62.

8.6 *The Municipality of the City of Cape Town v Marina Guilietta Reader and Others Supreme Court of Appeal*[83]

This matter was heard by the Supreme Court of Appeal in August 2008 and judgment was handed down on 14 November 2008. This was an appeal from the Cape High Court (Davis J, NC Erasmus J and HJ Erasmus J) sitting as the full court on appeal from a single judge. In this case a minority judgement was given by Jafta and Mlambo and a majority judgement by Lewis JA, Cameron JA and Combrinck JA concurring. The Ethekwini Municipality was admitted as an amicus curiae.

Jafta JA states[84] that the question which the court needs to consider is whether section 62 of the Systems Act affords the applicants an internal remedy as contemplated in section 7(2) of PAJA. In order to do this the court needs to interpret section 62. The court finds[85] that section 62(1) has two threshold requirements. The first is that the decision complained of must have affected rights, secondly the decision must constitute the exercise of delegated authority. In respect of the rights issue the court accepts that a mere allegation will suffice however without such allegation the finding that the approval affected the rights of the applicant cannot be made. The court[86] finds that the applicants have failed to make an allegation that the approval of the plan affected their rights. What their case was; is that the erection of the building will affect their rights in that it will diminish the value of their properties and he distinguishes this from the approval of the plan. He holds that their remedy is to take the plans approval on review for failure to comply with national building legislation.

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[83] *Case No.719/07(unreported)*
[84] At paragraph 13
[85] at paragraph 15
[86] at paragraph 17

Importantly Jafta JA differs[87] with Lewis JA in that he finds that section 62(3) of the Act does not preclude a decision from being appealed against and from subsequent variation or even revocation. What the sub-section however does is to protect the rights which have accrued as a result of the initial decision. Therefore no decision to vary or revoke the initial decision may detract from accrued rights. He states that this situation cannot obviously constitute appropriate relief in terms of section 7(2) of PAJA in respect of a plans approval.

Lewis JA finds[88] that neighbours who have not been party to a municipal planning permission do not have a section 62 appeal. The court[89] further finds that section 62 gives no general right of appeal to those who object to municipal decisions. Such a right is only given to those whose rights are directly affected by a decision. This raises the question as to who this class of persons is. At first glance the court held it might appear that this is anyone who is in some way affected by a decision but concluded that this cannot be the case. The court finds that only a party who has been party to an application process can appeal against the decision which results from this process. Lewis supported this argument by reading section 62(1) in conjunction with section 62(3). She concludes at paragraph 31 that "it seems plain that the purpose or section 62 as a whole is to give to the dissatisfied applicant for permission – and to no-one else- an opportunity for the matter to be reheard by a higher authority within the municipality. It is only the aggrieved applicant who has failed to secure the

[87] at paragraph 25
[88] at paragraph 27
[89] at paragraph 30

permission sought in his or her application, who is afforded a right of appeal under section 62."

The court finds that any other view is pointless as any other party could not succeed if the appeal resulted in a revocation or variation once rights had accrued to the applicant. In paragraph 35 she however contradicts herself and undermines her position where she states; "thus in my view the applicants – and neighbours in their position who are not party to an application **or an objection** to the grant of permission to act by a municipality – are not afforded an appeal under section 62. The very wording of the section precludes it." (my emphasis)
In this paragraph she opens the door to objectors contrary to what she has previously stated. I think she is driven to this conclusion by the fact that in many statutory processes the exercise of public powers is preceded by an advertisement calling for objections and comments from interested and affected parties. Such parties are clearly part of the application process.
In a footnote on the last page of the judgment the court neatly avoids the question of tenders which is a very vital issue.[90] This was not unexpected as at the hearing of the matter she remarked that tenderers are clearly applicants and she was thus alive to the difficulties that this may raise for the court.

[90] "Counsel for the municipality referred this court to a decision of Olivier AJ in the Cape High Court, Syntell (Pty) Ltd v City of Cape Town & another (unreported judgement, case 17780/2007, handed down on 13 March 2008), in which that court sought to distinguish the case before it from that now before us, having regard to the judgement of the full court in this matter. This issue before that court was the right to an unsuccessful tenderer to an appeal in terms of section 62 of the Systems Act. since no final tender had been awarded, the court held that an appeal under section 62 was not precluded by the decision of the full court. The question of a tenderer's right to appeal as it emerged in that case is not before us."

8.7 *Millenium Waste Management (Pty) Ltd v City of Cape town and Wasteman (Pty) Ltd High Court of South Africa Cape of Good Hope Provincial Division*[91]

In a letter dated 24 May 2006 the City advised the applicant that it had been awarded certain work in terms of the tender. However the award was subject to a 21 day appeal period in terms of the Systems Act and that no rights would accrue in the interim until appeals received had been finalised. In terms of the City's system of delegations which existed at the time the tender was awarded by the City Manager acting in terms of his delegated authority.

The applicant was dissatisfied with the award of the tender and notified the City in a letter dated 31 May 2006 that it intended to appeal against this decision in terms of section 62 of the Systems Act. The applicant also requested the City to provide it with reasons for its decision in terms of section 5 of the PAJA . On the 12 June 2006 the applicant lodged an appeal in order to comply with the 21 day appeal period provided for in the said Act, despite not having been furnished with the reasons for the award. The City replied to the appeal letter in the following terms; "please be advised that in respect of tenders in excess of R10 million there is no section 62 internal appeal available. Should you wish to pursue the matter you must approach the appropriate court for relief."

The applicant then approached the court on an urgent basis for relief. The applicant's counsel argued that its rights were affected by the award and therefore in terms of section 62 of the said Act it was entitled to an internal

[91] *Case No. 11088/06(unreported)*

appeal. He argued further that the applicant's appeal rights were recognized and confirmed in express terms i.e. paragraph 24 by the tender documents, and confirmed in a letter by the municipality when it notified the result of the award. The municipality's counsel submitted inter alia that:

1. The applicants had no right to an appeal because in terms of section 62(4)(c) of the Systems Act the applicant's proposed appeal would be to the City's Executive Mayor. In this regard it was submitted that section 62 of the Systems Act should be read in conjunction with sections 3(2) and 117 of the Local Government Municipal Finance Management Act, 2003 [MFMA] which expressly prohibited the Executive Mayor from participating in tender decisions.
2. The court should take cognisance of the fact that the second respondent had accrued contractual rights which could not be revoked by an appeal in terms of section 62(3) of the Systems Act.

At paragraph 17 of his judgment Zondi AJ finds that the decision to award a tender does affect the rights of all tenderers and that in general a dissatisfied tenderer has a right to seek an internal appeal against a tender award. The court finds in this particular instance that the applicant derives its right of appeal from the Systems Act and the tender document. The court goes on to find that there is no conflict between section 62 of the Systems Act and section 117 of the MFMA as when the Executive Mayor acts as an appeal authority in terms of the Systems Act she does not function as a member of a municipal bid committee within the meaning of section 117 of the MFMA. In this role she is performing the role of an appeal authority and not that of a bid committee member in that she is not evaluating or approving tenders, quotations, contracts or other bids.

On 13 November 2006 Zondi AJ granted an order in the following terms:-

1. declaring that the City of Cape Town is obliged to afford the applicant an appeal in terms of section 62 of the Systems Act against the award of certain sites in respect of sections 2 and 3 of tender number 95-2005/06 to the second respondent.
2. that the City of Cape Town be ordered to comply with its obligation in terms of section 62 of the Systems Act and that the applicant's appeal be submitted by the Municipal Manager to the appropriate appeal authority in terms of section 62(3) within 20 days.
3. that pending the finalization of the applicants appeal the first respondent be interdicted from permitting the second respondent to commence rendering services in terms of the tender.

8.8 *Advanced Parking Solutions CC and Numque 20 CC versus City of Cape Town and three others*[92]

This is a review application which is currently before the Cape of Good Hope Provincial Division. In this matter the applicants are seeking an order to set aside a tender award for a Kerbside Parking Management System. In this application they seek to distinguish the Reader case and contend that they have a right to an internal section 62 appeal. They rely heavily on the Syntell judgment for authority. It will be interesting to see what the court will make of their case. Perhaps fate will have it that Davis J is assigned the case, which may be appropriate given the fact that he started the ball rolling.

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[92] **Case No. 100/09**

8.9 *M5 Developments (Cape) (Pty) Ltd v C C Groenewald NO and three others; Case No 6277/08, High Court of South Africa, Cape of Good Hope Provincial Division*

This is a judgment of Le Grange J handed down on 12 February 2009. In this matter the Overstrand Municipality awarded a tender for housing projects within their municipal area. The award was suspended pending a right of appeal in terms of section 62 of the Local Government Municipal Systems Act, 2000. An appeal was lodged timeously by an unsuccessful tenderer. In paragraphs 35, 36 and 37 the court applies the Syntell case and holds that no rights have accrued, thus a section 62 appeal is available to the unsuccessful tenderer.[93] In paragraph 38 the court holds that such an appeal constitutes administrative action. In paragraph 41 the court recognizes that a section 62 appeal is a wide appeal and relies on the Tikly case as authority. At paragraph 42 the court seems to suggest that when considering an appeal, if the appeal authority itself discovers an inherent defect in the adjudication process it cannot take this into account, if this matter was not raised by the appellant.

Analysis of judgment

The judge loses sight of the fact that once the SCMBAC takes its decision in terms of the supply chain management regime provided for in the MFMA, rights accrue and it is not possible for the municipality to suspend these rights and thereby confer a right of appeal in terms of section 62 which does not exist. It is submitted that due to the fact that a section 62 appeal is a wide appeal no good

[93] section 62(3) of the Systems Act

reason exists for the appeal authority to ignore a gross irregularity it itself discovers during the appeal process, provided it brings same to the notice of all the parties to the appeal and gives them an adequate opportunity to make representations in this respect. Surely the main purpose of the appeal process is to ensure that the correct decision is made.

Whilst the aforesaid case law is instructive in some respects it has only served to further confuse the implementation of section 62.

CHAPTER 9

Comparative Law

Against the backdrop of section 62 and the PAJA it is appropriate to briefly examine administrative appeals in other jurisdictions

To date in South Africa no uniform administrative appeal tribunal has been formed or legislation drafted to further develop our administrative appeal system before approaching ordinary courts on review. The PAJA provides for the judicial review of administrative action. Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.[94] (my emphasis)

A tribunal is defined in the Act as "any independent and impartial tribunal established by National Legislation for the purpose of judicially reviewing an administrative action in terms of this Act".

South Africa has various appeal bodies.[95] These are statutory bodies regulated by the provisions of the relevant statute. The different appeal bodies include e.g. officials, politicians as provided for under section 62; there are appeals to national control bodies e.g. provided in section 49 of the National Heritage Resources Act[96] referring to heritage committees; there are appeals to administrative tribunals e.g. licensing appeal boards and town planning appeal boards[97] and then there are appeals to special courts e.g. the Tax Courts.

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[94] section 6
[95] Hoexter at page 64 - 68
[96] Act 25 of 1999
[97] section 9 of the National Building Regulations and Building Standards Act, 1977

As stated tribunals as an element of the regulation of public power have been a feature of the South African legal framework. For example Town Planning Appeal Boards, Licensing Appeal Board, Film and Publication Review Board etc. PAJA in its initial draft sought to promote the concept of a general administrative tribunal, the purpose of which would be to review administrative action. Unfortunately this concept seemed to enjoy limited support and it was watered down in the final version.

The Act in its current form only contains in section 10 a regulation making power. The Minister [of Justice] may in terms of this section promulgate regulations relating to the establishment, duties and powers of an Advisory Council. The purpose of the Council is to monitor the application of the Act and to advise the Minister inter alia on the establishment of independent and impartial tribunals. The purpose of these bodies is to review administrative action. This will include specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of State or a number of organs of State to hear and determine appeals against administrative action.

Despite the fact that PAJA came into operation on 30 November 2000, regulations establishing an Advisory Council still have to see the light of day. In fact the Minister has been far from industrious as the only regulations promulgated to date are the regulations relating to fair administrative procedures which were promulgated on 31 July 2002. It therefore appears that it will be some time yet or perhaps never that the tribunals envisaged by PAJA become a reality.

Other countries such as Canada and Australia have administrative tribunals. For instance in Canada besides the federal tribunals certain regional tribunals exist such as the Quebec Tribunals, Yukon Tribunals, British Columbia Tribunals etc.

The federal tribunals consist of elements such as the Canada Industrial Relations Board, Canadian International Relations Board, Canadian International Trade Tribunal, Competition Tribunal, National Energy Board etc. There is also a Canadian Council of Administrative Tribunals.[98]

In Australia they have an administrative appeals tribunal which was established by the Administrative Appeals Tribunal Act 1975 [AAT Act]. This tribunal commenced its operations on 1 July 1976. The Act and the Administrative Appeals Tribunal Regulations 1976 set out the tribunal's powers, functions and procedures. The tribunal falls under the portfolio of the Attorney-General. In general, tribunals are flourishing in Australia both within the commonwealth government and the state and territory governments. Australia also promulgated the Administrative Decisions (Judicial Review) Act 1977 which has codified their law of judicial review. The creation of a general tribunal in Australia for the review of administrative decisions was at the time and is still today one of its kind in the world. The role of the AAT is to provide an independent merits review of administrative decisions in a manner which is fair, just, economical, informal and quick. Section 33 of the AAT Act in fact requires that this is the case. In this vein the tribunal is not bound by the rules of evidence and can inform itself in any manner it considers appropriate.[99]

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[98] www.simsgroup.com.
[99] www.aat.gov.au

The tribunal reviews a wide range of administrative decisions made by Australian government ministers, departments, agencies, authorities and other tribunals. The tribunal can also review administrative decisions made by state government and non-state government bodies in limited circumstances. As stated the tribunal conducts a merit review it thus decides whether the correct or preferable decision has been made in accordance with the applicable law. It has the power to affirm, vary or set aside the decision under review. These powers are similar to that of an appeal authority dealing with a section 62 appeal. The tribunal does not have a general power to review decisions made under Australian law. The tribunal can only review a decision if an Act, regulation or other legislative instrument confirms jurisdiction upon the tribunal. Currently the tribunal has jurisdiction in respect of more than 400 separate Acts and other legislative instruments. The tribunal is most active in the areas of social security, taxation, veteran's affairs and workers compensation. The tribunal also reviews decisions in areas such as civil aviation, customs, immigration, citizenship, etc. The qualification requirements for the different categories of members are provided for the AAT Act. Whilst federal judges and experienced legal practitioners hold senior positions provision is also made for members who have skills in accountancy, aviation, medicine, taxation and other relevant disciplines. The administrative support to the tribunal is provided for the registrar and his staff. Legal assistance is provided to self-represented parties. The tribunal also provides interpretors and makes access to the tribunal easier for persons with a disability.[100]

It is submitted that it is highly desirable that South Africa develops such a system as there is a real need and PAJA provides the necessary mechanism.

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[100] Speeches and papers " Overview of Tribunals Scene Australia " speech delivered by the Hon Justice Garry Downes AM on 5 April 2006

CHAPTER 10

The Way Forward

During the period 2001 to 2009 the City of Cape Town had taken a legal view on section 62 and had adjusted its internal appeal processes accordingly.

10.1 THE CITY OF CAPE TOWN

Following the decision in the ***Reader (SCA) case*** the City was forced to take stock of its internal appeal procedures. An urgent opinion was sought from senior counsel[101] on a number of matters arising out of this judgment. The first question posed was whether the City had a reasonable prospect of successfully appealing the SCA's decision to the Constitutional Court [CC]. Senior counsel advised that no reasonable prospects existed. Counsel based his advice on the peculiar facts of the case which related to a building plan approval. Counsel was of the view that the Constitutional Court would follow its judgment in ***Walele v City of Cape Town and Others***[102] as the facts were almost identical. In the *Walele case* both the majority and minority found that the approval of the building plan did not adversely affect the rights or legitimate expectations of a neighbour.

Counsel was critical of Lewis JA'S formulation of the rule in the *Reader case* and stated that he doubts whether section 62 is capable of being so narrowly

[101] Owen Rogers SC
[102] *2008 (6) SA 129 (CC)*

construed so as to limit appeals to applicants. He stated that it is quite conceivable that a person whose rights are affected may well be someone other than an applicant. He prefers Jafta JA's approach which focuses on whether the particular decision affects the rights of the person in question and not whether he or she was an applicant. He states that section 62(3) is not easy to construe. He notes that the majority differ from the views expressed by LA Rose-Innes SC in an opinion furnished to the municipality in February 2005. Whilst he can see arguments on both sides he thinks on balance the view expressed by Lewis JA in *Reader* would prevail. He postulates that even if the CC found that the language of the section was capable of a construction contrary to that given to it by the SCA, one needs to bear in mind the practical benefit of the SCA ruling to the City.

Firstly the number of persons to whom the City would have to give notice of its decisions would be drastically reduced. This would also reduce the number of internal appeals which the City would have to contend with. He was also of the view that by permitting an extended system of internal appeals this will not be accompanied by a reduction in the number of judicial reviews instituted against the municipality. This was so as persons who would but for section 62 have instituted review proceedings are unlikely to be deterred by section 62 from doing so. All that would happen is that the review will simply be delayed pending the outcome of the appeal process. In addition applicants whose approvals are overturned on appeal may subsequently attack appeal decisions by way of review.

It would thus seem that at a policy level it would be sufficient to confer a right of appeal on an aggrieved applicant and leave aggrieved outsiders to launch review proceedings where they wish to attack municipal decisions. Counsel further advised that the City should in future act in accordance with the reasoning of the majority in the *Reader case* until that reasoning is overruled by a court of equal or higher authority. Thus the City should proceed on the basis that only the aggrieved applicant for an approval can invoke section 62. Counsel concludes that such an approach could bring the City into conflict with statutory objectors and unsuccessful tenderers [whom he regards as part of an application process]. However if litigation ensued, the City could in essence seek shelter behind the SCA judgment in the *Reader case*.

Counsel also advised that it was not open to the City as a statutory body to suspend the effect of its decisions and thereby confer a right of appeal in terms of section 62. This was so as the power to suspend decisions would have to be conferred in the relevant empowering statute either expressly or by necessary implication. It was not for the City to add qualifications and conditions to its decision in order to avoid the strictures of the *Reader judgment* and thus achieve the result which it thinks the Legislature intended in promulgating section 62. The City should simply make its decisions in the usual way, leaving it up to courts to determine the scope and breadth of section 62. On the advice of senior counsel the Municipal Manager as the accounting officer of the municipality issued a newsletter to all staff on 12 January 2009 which clarified the municipality's position in respect of section 62 appeals. [copy attached as annexure A].

It would seem that the ultimate victims of this protracted saga are the general public and the need to regulate the public power exercised by local government.

10.2 LEGISLATIVE REFORM

Courts are reactive in their application of the law and mostly it is only the Legislator who is able to rectify the shortcomings in the law.

Given the current contradictory court rulings in respect of section 62 it is unlikely that the current problem will be resolved by our courts. What is required at this stage is a legislative intervention. This matter has now become urgent and the public interest will best be served by ensuring that a viable right of appeal is assured in terms of section 62.The following is a suggested amendment to section 62. The suggested amendments are in bold type and are underlined, deletions are also indicated:

62. Appeals.— (1) A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision **in accordance with section 115**.

(2) The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).

(3) The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that

may have accrued **during the period until such variation or revocation,** [as a result of the decision.] **to be deleted.**

(4) When the appeal is against a decision taken by—

(*a*) a staff member other than the municipal manager, the municipal manager is the appeal authority;

(*b*) the municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or

(*c*) a political structure or political office bearer, or a councillor—

(i) the municipal council is the appeal authority where the council comprises less than 15 councillors; or

(ii) a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.

(5) An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.

[(6) [The provisions of this section do not detract from any appropriate appeal procedure provided for in any other applicable law.] **to be deleted insert new section**

(6) The provisions of this section do not apply in respect of any decision if a right of appeal exists in terms of any other law.

10.3 THE BREAKWATER DECLARATION RE-VISITED[103]

Now appears to be an appropriate moment to reflect on the visions and hopes of the participants of a workshop held during 1993 and examine whether some of the objectives embodied in their declaration have been realized in our new democracy.

The declaration is the product of a workshop convened early in 1993 by the Department of Public Law of the University of Cape Town and the Community Law Centre of the University of Western Cape. The purpose of the workshop was to debate administrative law for a future South Africa. This gathering was attended by a number of South African and foreign specialists in the field of administrative law. The workshop having been held at Cape Town's Waterfront, its product is aptly titled the Breakwater Declaration 1993.

Corder in January 2003 stated that the controlling of public power by means of the law is a concern in all systems of government. In South Africa at that time controls over executive power and the administrative acts of public officials were particularly lacking, which lead to and promoted many of the human rights abuses of the Apartheid State.

Corder calls into question the need for the law to hold the executive and the administration accountable for the exercise of very often largely discretionary powers. He states that it is widely accepted that the law should play its part in this regard. In his view the relevant factors would be the appropriate terms for the allocation of power to the executive and the provision of mechanisms by

[103] 'Controling Public Power administrative Justice through the law' edited by Hugh Corder and Fiona Mclennan Department of public law University of Cape Town 1995

which persons affected by the exercise of such powers can contest its affects. He also suggests that whilst the courts are often the inappropriate fora for appealing against an administrative act there may be alternatives which are less formal, expensive and time-consuming which are to be preferred. In this respect he mentions internal appeals which amount to a reconsideration on the merits.

The Breakwater Declaration of 1993 sought to contribute to the debate about administrative justice in a future South Africa and highlighted a number of important principles. These include the need to create procedures and structures which will foster good decision making in order to create conditions conducive to good administration. Effective parliamentary control over the nature and scope of delegated power and the way in which it is exercised including the need for and design of administrative appeals, internal or external.

It is submitted that our new constitutional state has more than answered these hopes in respect of the local sphere of government by virtue of the aforementioned provision of the Local Government Municipal Systems Act, 2000. Ironically enough, unexpectedly our courts have failed to grasp the mettle and have drastically retarded the development of the internal municipal appeal system in a manner which never could have been in the contemplation of the Legislature. A legislative intervention is now called for if this impasse is to be breached and the visions of the Breakwater pioneers realized. Who would have predicted that our courts would have failed to see the imperative of controlling public power and curtail at the local government level its most important mechanism, the right to an internal appeal?

History will show that Davis J who was a contributor to the Breakwater Workshop was the one who at a critical moment let the judicial baton slip from his grasp. Fact is often stranger than fiction.

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Annexure A The City Manager's communication to staff.

Annexure B An example of a typical appeal finding

ANNEXURE 'A'

From: Staff Newsletter
Sent: 12 January 2009 08:27 AM
To: Staff Newsletter
Subject: e-nform: Staff Newsletter

THIS CITY WORKS FOR YOU

e-nform

Appeals in terms of Section 62 of the Local Government Municipal Systems Act, 2000
Section 62 of the Systems Act provides any person whose rights are affected, by a decision taken in terms of delegated or sub-delegated authority, with a right of internal appeal. These decisions relate to powers conferred upon the Municipality in terms of the law, which Council has subsequently delegated.

On 14 November 2008 the Supreme Court of Appeal handed down a judgment in Bloemfontein in respect of this section. The City was a party to this case, the so-called Reader case.

Arising out of this case and a subsequent opinion obtained from a Senior Counsel, clarity has now been obtained in respect of such appeals. **In future, internal appeals will only be available to unsuccessful applicants and will not be available once a decision is taken which confers rights.**

According to the Reader judgment the applicant for a building plan approval which is refused, would have a right of internal appeal. Neighbours who object to the approval of a plan will not have such a right of internal appeal as they are not applicants. It therefore follows from this principle that an internal appeal will not be available to statutory objectors as they are not applicants. Unsuccessful tenderers also do not have a right of appeal, as once the Supply Chain Management Bid Adjudication Committee has taken a decision, rights accrue to the successful tenderer. These parties, if aggrieved, will have to use other remedies including the courts.

It is important to note that section 3 of the Promotion of Administrative Justice Act, 2000 requires the Municipality to bring to an unsuccessful applicant's attention his / her right to an internal appeal, when conveying a decision. All applicants who lodge an internal appeal will have to comply with the requirements of section 62(1) of the Act.

Any queries in the above regard must be directed to Ms L Gomomo, Manager Statutory Compliance Ph 400 2187 or Ms J Fabing, Head Policy and Statutory Compliance Ph 4003863.

Achmat Ebrahim
City Manager

Civic Centre
12 Hertzog Boulevard
Cape Town 8001
P O Box 298, Cape Town 8000
Ask for: J. FABING
Tel: 021 400-3863
Fax: 021 400-5830
E-mail:Jill.Fabing@capetown.gov.za
Webmail: http://www.capetown.gov.za
Ref: 166/APT/JF/LK
Filename:

Iziko loLuntu
12 Hertzog Boulevard
Cape Town 8001
P O Box 298, Cape Town 8000
Cela: J. FABING
Umnxeba: 021 400-3863
Ifeksi: 021 400-5830

Burgersentrum
Hertzog-boulevard 12
Kaapstad 8001
Posbus 298, Kaapstad 8000
Vra vir: J. FABING
Tel: 021 400-3863
Faks: 021 400-5830

ANNEXURE 'B'

ACHMAT EBRAHIM: *CITY MANAGER* *24 APRIL 2008*

ATTENTION: AP SCHEIFLINGER
CAMPBELL SCHEIFLINGER ATTORNEYS
P. O. BOX 1296
MILNERTON
7435
FAX NO. 021 552 5258

NOTICE OF DECISION

APPEAL IN TERMS OF SECTION 62 OF THE LOCAL GOVERNMENT MUNICIPAL SYSTEMS ACT, 32 OF 2000: AGAINST THE AWARD OF TENDER 69E/2006/07 FOR AN ELECTRICITY PREPAYMENT UNIFORM VENDING SYSTEM

FACTS

This is an appeal against the decision of the **Municipality's Supply Chain Management Bid Adjudication Committee** (hereinafter referred to as ("the **SCMBAC**") taken under the delegated authority to award the abovementioned tender to **Actaris South Africa (Pty) Ltd** (hereinafter called "the successful tenderer").

This tender is aimed at the replacement of the City's three legacy prepayment vending systems with a single, unified system for the whole City. This unified system will serve customers in excess of 300 000. This single unified system will significantly reduce the operating costs and constitute a single solution of management reporting, customer services and financial system interfacing. Currently the City makes use of 3 different and non-integrated vending systems supplied by **Syntell** [Central, Southern, Cape Town and Tygerberg], **Landis and Gyr** [Helderberg and Oostenberg] and **Actaris** [Blaauwberg]. This project has been identified as a major project (over R2 000 000,00) targeting Historically Disadvantaged Individuals (HDI's) as prime contractors, joint venture partnerships, sub-contractors, suppliers, manufactures, and/or service providers. The value of the award by the SCMBAC is R 4 036 715, 00.

The appellant is **Syntell (Pty) Ltd** who is **represented** by **Campbell Scheiflinger Attorneys**.

Subsequent to the awarding of the tender by the **SCMBAC** to the successful tenderer, **Syntell (Pty) Ltd** (hereinafter, "the appellant"), lodged an internal appeal in terms of the abovementioned Act. In addition to the appeal, the appellant also submitted a request for access to information in terms of the **Promotion of Access to Information Act, 2 of 2000,["PAIA"]** in which it requested the successful tenderer's submitted tender documentation as well as other documentation related to the tender in question. In its letter of appeal the appellant stated: "**This appeal is filed with a reservation of our rights to amend and/ modify this appeal by way of written and/ or oral submissions, once the City complies with its obligations to provide us with the information and/ or documents requested under the aforesaid Act**".

In dealing with the appellant's access to information request, the appellant was provided with the tender evaluation and adjudication documents. The appellant was however refused access to the successful tenderer's tender documentation on the ground that it is information protected in terms of section 36 (1)(b) and (c) of the PAIA. It was also afforded a period of seven (7) days within which to supplement its appeal. The period expired on 20 March 2007. The appellant requested an extension for filing of additional grounds of appeal on the basis that it received the Deputy Information Officer's decision on the 20 March 2007. On the 27 of March 2007, the appellant was granted its request for an extension until 30 March 2007. The appellant submitted additional grounds of appeal on 30 March 2007 and also lodged an internal access to information appeal in terms of section 74 of the PAIA. The appellant however subsequently withdrew its PAIA appeal after receiving the information mentioned in its section 74 PAIA appeal. The appellant was as a result hereof given a further extension of seven (7) working days from 8th May 2007 to amend or supplement its grounds of appeal. The appellant submitted an additional ground of appeal on the 18th May 2007.

The appellant was informed of the decision of the SCMBAC via a fax transmission notice dated 19 January 2007, and subsequently lodged its appeal on 8 February 2007. The appeal was lodged within the twenty one (21) day period as prescribed in terms of section 62 of the Local Government Municipal Systems Act, 32 of 2000 and it is therefore timeous.

GROUNDS OF APPEAL:

1. Grounds of appeal received on 8 February 2007

1.1 The City awarded the tender based on cost over a three (3) year contract period. This being a material departure from the tender conditions and briefing which called for a four (4) year contract period to be utilised and on which the costs would be assessed;

1.2 the calculation by the City of the 90 points for price of the successful tenderer's tender submission is flawed as well as the calculation for the alternative tender offer of the appellant as set out in the City's telefax dated **26 January 2007 for** the following reasons, namely, that;

1.2.1 the tender data provides for tenders to be submitted for fixed as well as hourly support costs. In the calculation of the scoring price however the value to the City of fixed versus hourly support costs was not equally measured between tenderers. Indeed it is submitted that hourly support costs cannot be measured or compared when the fixed costs is an absolute and the hourly cost is not capped. This negates any ability to objectively compare or score between the two options vis-a-vis different tenderers and renders the process unreasonable and flawed.

1.2.2 the City has not properly taken into account all relevant information pertaining to the determination of the price component of both the successful tenderer and the appellant, including long term IT costs and capacity over the period of the advertised contract (being 4 years).

1.3 In its tender submission the successful tenderer did not comply with section 5.6 of the tender specification document, i.e. *"The vending system must be able to vend to all meters installed in the municipalit 's service area including the following meters: All STS meters, Plessey proprietary-both sequence number and PTS types, Cashpower proprietary."* To the knowledge of the City, Actaris claimed in its tender that it can vend to the Plessey proprietary meters. To do so currently would be unlawful as it does not have a cross licensing agreement with Syntell enabling it to vend to Plessay meters.

1.4 The calculation and/or allocation of the 10 points for HDI credentials in respect of the successful tenderer are also flawed and incorrect.

2. Additional grounds of appeal received on 30 March 2007

2.1 Incorrect scoring for HDI-status and local content under option 2 (the alternative offer)

2.1.1 According to the City's tender evaluation table, Syntell was awarded 5 points (out of 5) for local content and awarded 3.43 points (out of 5) for HDI status in respect of option 1 of its tender. Yet it was awarded 0 points for local content and 0 points for HDI status in respect of option 2 of its tender (the portion of the tender allocated a higher score based on price).

2.1.2 The HDI and local-content scoring for option 2 (the alternative offer) in Syntell's tender was clearly wrong.

2.1.3 Syntell's offering was correctly scored 5/5 for local content in respect of option 1. Syntell is after all a local company, which has developed all its software itself. Syntell's HDI status was also, at worst for Syntell, 68.5%, and thus Syntell was entitled to no less than 3.43 / 5 in respect of HDI status in relation to option 1.

2.1.4 Clearly, any scores for local content and HDI status should be the same for option 1 or option 2. Option 1 involved an outright purchase of Syntell's software and annual support costs. Option 2 involved a once-off implementation fee in respect of the software and annual licensing and support costs. The same product would thus be supplied by the same firm (Syntell) in two different ways: with only the cost differing.

2.1.5 Clearly, too, any evidence provided in support of local content and HDI status was, and is, applicable to both options 1 and 2. There was one application, which merely contained two different pricing options. The only difference between those two options was moreover pricing (or cost) structure, and thus the financial implications for the City. Syntell is obviously no less empowered under option 2 than option 1. The local content component is also no lower under the second option than the first.

2.1.6 The tender evaluation committee thus made a fundamental error when scoring Syntell under option 2. Syntell should have been awarded 5 points for local content and, at least, 3.43 points for HDI status, under option 2, rather than 0 and 0. (In other words, Syntell should have been awarded the same local-content and HDI-points for options 2 and options 1 on the City's tender evaluation table.) The City was also wrong to say, in the evaluation table, that the "*Tenderer failed to claim points for CPG L/C and HDI*" in respect of the alternative offer. The application shows that Syntell made the same submissions and contentions (in relation to HDI-status, local content and the like) in respect of both pricing options tendered. That is also the only logical and reasonable way to interpret Syntell's tender.

2.1.7 Syntell was awarded 89.26 points for price under option 2. Because it was incorrectly awarded 0 points for either local content or HDI-status under option 2, its total score for option 2 was 89.26. That was wrong. Syntell should have been awarded 89.26 points for price under option 2 (as it was), plus 5 points for local content and, at least, 3.43 points for HDI-status, giving a total of 97.69 points.

2.1.8 That score would have been higher than the score of Actaris, with the result that Syntell should have been awarded the tender.

2.2 **Incorrect HDI percentage used for Syntell**

2.2.1 Syntell indicated in the body of its tender submission that it was "*a truly BEE company with 74.25% of its shares being black owned and 84.25% HDI ownership*".

2.2.2 From the tender evaluation tables furnished to Syntell, it is however apparent that the City considered Syntell to be 68.5% empowered – and thus entitled to a HDI score of 3.43/5.

2.2.3 The City may have relied in this regard on the verification form from Tradeworld included in Syntell's tender (which indicates an HDI Equity

Ownership of 68.5%). But the date of that document is 24 March 2005. Syntell's HDI status had improved since that date, as Syntell informed the City in the body of its tender.

2.2.4 Syntell should thus have been allocated 4.21 for HDI status.

2.3 **Actaris's inability to perform**

2.3.1 As Syntell pointed out to the City on 27 November 2006, Actaris does not have the licence to use the relevant software outside of the Tygerberg administration area. It also is not permitted to make copies of that software, or reverse engineer, decompile or translate it, so as to use it without the licensor's knowledge or permission.

2.3.2 The City's response, in a letter dated 18 December 2006, was that the City is indemnified against patent infringements, and that it is the responsibility of the contractor to pay all royalties and expenses, and to meet any liability claims, arising from the use of patent rights, trademarks, or other protected rights.

2.3.3 That is no response at all. Syntell's complaint was that Actaris did not have the right to use software it tendered in the stipulated area. Syntell could say that with the utmost conviction because it is the licensor.

2.3.4 The City could not reasonably or responsibly regard Actaris as being a compliant tenderer, or award the tender to Actaris, without obtaining written and indisputable proof of Actaris's right to use the software it tendered. Absent such proof, the City would have to assume that Actaris could not properly perform in terms of its tender, and that it could be interdicted from using the software before the tender implementation period began.

2.3.5 The tender adjudication committee thus erred materially in awarding the tender to Actaris.

3. **Additional ground of appeal received on 18 May 2007**

3.1 The appellant dispute the correctness or accuracy of the HDI score awarded to Actaris. The HDI credentials of Actaris are speculative and vague in that they appear to be based on shareholding by an entity under construction and shareholding by the Actaris Empowerment Trust for all Actaris employees whose HDI status is undisclosed.

Due to the fact that the appellant's grounds of appeal included serious allegations of non-compliance as well as the complexity of certain issues which were raised, it was decided that an oral hearing be scheduled on the 24th July 2007. The names of all parties which were present at the hearing were recorded on an attendance register which now forms part of the appeal record. It is noted that both the appellant **["Syntell"]** and successful tenderer **["Actaris"]** were represented by their respective attorneys and counsel from the Cape Bar.

In addition the representatives of the appellant and the successful tenderer submitted written representations supporting their oral arguments on the day and these written representations also form part of the appeal record.

DECISION

After carefully considering this matter and applying my mind to the relevant documentation, grounds of appeal, oral representations and the decision of the **SCMBAC**, I am of the view that sufficient facts are available to me to make an informed ruling on this matter.

Acting in terms of the powers vested in me by **section 62** of the **Local Government Municipal Systems Act, 2000**, I hereby dismiss the appellant's appeal and **confirm** the decision of the **SCMBAC** to award tender **69E/2006/07** to the successful tenderer. The reasons for my decision appear below. In addition I vary the award of the **SCMBAC** by reducing it from R4 036 715,00 to R3 484 774,00

REASONS FOR THE DECISION

In my view although the appellant has submitted a plethora of appeal grounds this matter can be determined finally without traversing all of these grounds of appeal. I say this as this matter turns on two critical aspects: **firstly** the number of points awarded for price and **secondly** non-compliance with clause 5.6 of the tender specification document. Counsel for the appellant conceded that the HDI status of the parties was not an appeal maker or breaker and that clearly price was the critical issue. Clause 5.6 of the specification document required the vending system offered to be able to vend all meters installed in the municipality's service area. According to the appellant the successful tenderer did not have the necessary licence to use the relevant software outside the of the Tygerberg administration area and therefore was unable to comply with clause 5.6 of the specification document of this tender.

At the hearing on 24 July 2007 counsel for the successful tenderer **ADV. P K Weyer** raised an objection to the appellant's grounds of appeal. She stated that they were materially lacking in detail and therefore inordinately difficult to rebut. She further alleged that when the appellant was not awarded the tender it adopted a shot gun approach to have the tender set aside. At the hearing counsel for the appellant submitted that his client had abandoned one point of appeal and they had thus fired seven shots, six had hit the mark and one had disappeared into the woods.

1. It is noted that at the hearing on the 24th July 2007 counsel for the appellant, **ADV. Paul Farlam**, abandoned the ground of appeal relating to the three year contract period as opposed to a four year contract period.

2. **ADJUDICATION POINTS**

   This tender was awarded in accordance with the City's Procurement Policy which is based on section 217 of the Constitution, The Preferential Procurement Policy Framework Act, 2000 [**"PPPFA"**] and the regulations thereunder [GN R725 dated 10-08-2001]. This system is essentially one where preferential points are awarded. The tenderer with the highest number of points is awarded the tender unless a legally sustainable reason not to do so exists [Regulation 9]. The tender document under the section styled "Form of tender" at page 4 sets out the manner in which this tender would be scored as follows:

   Price – 90 points

HDI Status	–	5 points
Other Specific Goals	–	5 points
Total		100 points

The HDI status relates to a category defined in the promulgated regulations under the **PPPFA** as being "historically disadvantage individual". The 5 points allocated to "other specific goals" in this case related to the criteria of local content. It is implicit from various sections of the tender document that preference points will be awarded according to the data registered and verified on the **Western Cape Supplier's Database [WCSD]**. In this regard see "Notes for the Guidance of Tenderers" in paragraph j page 2 of the tender document. The adjudication system operates on the basis that the tenderers submit their calculation of their HDI and contract participation goals and the HDI component is determined by the Municipality according to the WCSD which is the regulating mechanism.

3. POINTS FOR PRICE

As previously stated 90 points (out of a 100) were awarded for price the other 10 points were awarded for HDI status and local content, being 5 points each. The price component is comprised of three(3) elements the **first** being the cost of the online vending system; the **second** component being the support costs per hour after final commissioning and the handover of the system and the **final** component being the annual database licence fees. In this respect see **"Annexure A"** being the Form of Tender which was required to be completed by every tenderer.

Clause 4.3 of the tender specification deals with the support costs and reads as follows: **"the tenderer shall specify his support costs per hour after final commissioning and handover."** This clause must however be read with **clause 3.5.3** of the specifications which reads as follows:

"in the event of any latent defect (programming "bug") becoming evident after the guarantee period of 12 (twelve) months referred to in the "Form of Tender", the tenderer shall be responsible for the immediate rectification of such defects at their costs."

It is also important to have regard to **clauses (4.1) and (4.2)** of the specification which read as follows:

"(4.1) the Municipality's preferred method of payment for the vending system is a once off purchase fee for the software and an annual fee to cover the cost of license fees, if any.
(4.2) the tenderer may however offer an alternative method of payment for the vending system."

When read in conjunction as they must be, clauses 4.1 to 4.3 gainsay the appellant's assertion that the tender data provides for tenders to be submitted for fixed as well as hourly support costs. What clause 4.1 categorically states is that the municipality's preferred method of payment for the vending system is an once off purchase fee for the software and an annual fee to cover the costs of the license fees if any. Clause 4.2 permits the tenderer to offer **an alternative method of payment for the vending system.**

However in my view clause 4.3 stands alone and requires whether an once off payment is applicable or an alternative method of payment is offered, for the tenderer to specify its support costs per hour after final commissioning and handover of the vending system in respect of both options.

The tender document does not elaborate as to the nature of the support that is required after the final commissioning and handover of the vending system in this respect the tender document is not a model of clarity. At the hearing **Hoosain Essop** the City's **Manager: Vending Systems** provided clarity in respect of this matter. He said *"the vending system staff of the City of Cape Town will operate, manage and support the new single vending system. Therefore the tender only requested a vending software package. All hardware and network infrastructure is being provided by the City of Cape Town. As such the performance of the system once commissioned will be the responsibility of the City of Cape Town."* He went on to add that *"the hourly support cost is a vehicle to be used should the City of Cape Town have additional requirements over and above those stated in the tender specification. These may include, but are not limited to additional reports, query tools or new tariff modelling, etc."* In essence Mr. Essop maintained that this support component was customer driven and will be utilized as and when required.

In my view whatever the nature of the support function it is impossible to quantify this factor at the outset of the tender award, as this demand would occur as and when it is required hence the requirement that support cost per hour needed to be submitted by the bidder. The officials that evaluated the tender utilised a hypothetical test to determine the rand value of such support. According to Mr. Essop this test was benchmarked against the current contracts that the City was utilizing for the vending systems. This criterion was calculated as an eight (8) hour day over a fifty five (55) day period, a practical example will illustrate the principle. The successful tenderer's hourly support rate was R342,00[R342,00 x 8 hours x 55 days pa = R150 480,00]. The total cost of three years being R451 440,00 [R150 480 x 3]

In my view given that it was impossible at the outset to quantify the support costs the aforesaid hypothetical test constituted a suitable vehicle as an adjudication tool provided it was applied to all tenderers in an equal and fair manner. The use of support being obviously in the sole discretion of the City.

The successful tenderer's price

The successful tenderer's price was composed of the following three components **["Annexure B"]**:

1. complete prepayment online vending system R1 929 452,00
2. support costs per hour after final commissioning and handover for a three year period R451 440,00
3. annual database licence fee of R551 941,00 [First year licence fee free, see **"Annexure C"**] total licence fee for 3 years is R1 103 882,00
4. Total price R3 484 774,00

NOTE: At the hearing, counsel for the successful tenderer confirmed that the first year licence fee was free and that her client was entitle to discount its price so as to obtain a competitive edge.

Counsel for the appellant made much of the fact that there was inconsistency between **"Annexure B and Annexure C"** [Form of Tender and Summary of costs]. In my view an element of consistency is evident in that the total annual price of R551 941,00 in respect of licence fees clearly appears on both documents and therefore it is evident that the intention is that licence fees will only be paid from the

second year. A position that was confirmed by counsel for the successful tenderer. This concession by the successful tenderer's counsel of course also has the effect that the quantum of the **SCMBAC** award needs to be varied accordingly.

The appellant's price

The appellant failed to comply with tender specification 4.3 in that no support costs per hour after final commissioning and handover was provided. In both its main and alternative offers the appellant provided a yearly cost for support contrary to specification 4.3. See **"Annexure D".** The appellant's price was composed of the following three components

Main offer

1.	complete prepayment online vending system	R3 876 000,00
2.	support costs per annum after final commissioning and handover R 339 720,00 pa x 3, for three year period is	R1 019 160,00
3.	annual database licence fee for a three year period	NIL
4.	Total price for three years R 4 895 160,00	

Alternative offer

1. Once off implementation cost R 478 800,00 incl vat
2. Annual software licence & support fee R 1 197 000,00 incl vat [three yearly cost is R3 591 000,00]
3. Total cost R 4 069 800,00

The **SCMBAC** accepted that the appellant's alternative offer was a valid one, I however am of the view that this offer fails to comply with the tender specification and should have been disqualified. It is clear from tender specification 4.1 that the City intended **purchasing a vending system.** The alternative that was available to tenderers in terms of clause 4.2 of the specification, was an alternative method of payment for the vending system. It was however always the City's intention that it would be purchasing a vending system of which it would become the owner. A reference to **"Annexure E"** which constitutes the appellant's alternative offer reveals that it is merely a yearly software licence fee and support contract and does not constitute the purchasing of a vending system. This needs to be contrasted to their main offer which is an outright purchase of their software with a yearly support

fee. In my view the appellant's alternative offer should have been found to be non-responsive.

Support costs

In its tender submission the appellant in respect of its main and alternative offer failed to comply with tender specification 4.3 in that it did not specify its support costs per hour which would apply after final commissioning and handover of the vending system. The appellant elected rather to provide a fixed annual support fee. Its approach in this respect was communicated to the City's Manager: Vending Systems in a facsimile received on 23 November 2006 **["Annexure F(1-7)"]**. In essence it would appear that their position was that support costs would constitute 10% of the software purchase price. However they maintained their position that theirs was a fixed annual support cost. They however stated in their fax that their effective support rate per hour is R350 inclusive of vat.

The successful tenderer's counsel raised the point that the appellant had failed in its tender documentation to provide an hourly rate as required by the specification. It was therefore not open for the appellant to blame other parties in this respect, if there was any blame to be had, it was theirs as the fault lay with them.

4. SCHEDULES IN RESPECT OF PREFERENTIAL RANKING

Attached hereto as **"Annexures G and H",** which are the schedules in respect of the preferential ranking for this tender. The first annexure was the one that served before the **SCMBAC** and contained an error in respect of the successful tenderer in that the licence fee was calculated for a three year period whereas no fee was charged for the first year. In addition the appellant's alternative offer was wrongly scored in respect of local content and HDI status. The latter annexure reflects the corrected schedule in respect of both tenderers.

Successful tenderer's ranking

It will be noted that the successful tenderer had submitted the lowest price and therefore was awarded 90 points for price 4,18 for local content and 1,15 for HDI status giving a total adjudication point of 95,33. The successful tenderer price consisted of the purchase price of the vending system being R1 929 452,00; the support costs being R 451 440,00 and the licence fee being R1 103 882,00. As previously stated due to the fact that their support costs were an imponderable, a hypothetical test was applied being eight (8) hours x fifty five (55) days against the hourly cost. A similar test could not be applied to the appellant due to the fact that they had failed to comply with tender specification 4.3 by not providing an hourly rate. The same test was applied to tenderer No. 4 Contour Technology (Pty) Ltd. It could however not be applied to tenderer No.3 Landis and Gyr (Pty) Ltd in that whilst they did provide an hourly rate they qualify this by including a mandatory support contract of R119 250,00 per month which amounts to R1 631 340,00 per year. In respect of tenderer No. 5 Debt Manager (Pty) Ltd the test could not be applied because no hourly rate was provided.

Appellant's ranking

In respect of the appellant's main offer the once off purchase fee amounted to R 3 876 000,00. Due to the fact that they failed to provide an hourly rate their support costs were calculated on their annual rate multiplied by three [x3]. In their facsimile received on 23 November 2006 they persisted with the fixed support cost however they sought to have the opportunity to break down these costs. At the bottom of the second page[annexure F2] of the fax they state *"Our effective support rate per hour is R350 include vat."* If they are given the benefit of the doubt in this respect and their main offer is re-scored according to the hypothetical test being R350 x 8 x 55 = R154 000,00 would constitute their annual rate and their rate for three years this would be R462 000,00 bringing their total price to R4 338 000,00 which is still substantially more than the successful tenderer's price.

As previously stated I am of the view that the appellant's alternative offer must be regarded as non-responsive and therefore its ranking can be disregarded.

5. TENDER SPECIFICATION 5.6 AND 5.7

These tender specifications provide as follows:

"5.6 the vending system must be able to vend to all meters installed in the municipality service area including the following meters:

- *All STS meters*
- *Plessey propriety – both sequence number and PTS types*
- *Cashpower propriety"*

"5.7 the Municipality shall be indemnified against any patent infringements including any damages awarded, attorney costs and the costs of replacing the vending systems should patent infringements be awarded against the municipality due to the successful tenderer's vending system."

It is the appellant's position that the successful tenderer cannot comply with specification 5.6 and therefore its tender should be rejected. **The appellant's position is summed up in the words of its counsel** *"there is in any event a significant problem with the Actaris tender as regards licensing. As Syntell has pointed out in its appeal submissions (record:81 and 84-85), Actaris cannot comply with the requirement imposed in clause 5.6 of the tender specification document (record: 33-34), as it cannot vend to "Plessey propriety meters". Syntell can say this with absolute confidence because it is the licensor (see record: 96-110, read with 87 -95, and 111, 112-113). Actaris thus cannot perform in terms of the tender and if it purports to do so will be in breach of other parties' intellectual property rights. The City thus cannot, fairly and reasonably award the tender to Actaris."*

Counsel for the successful tenderer sought to address this matter on two fronts:

a) Firstly, she alleged that her client provided similar service in sixteen (16) other municipalities in the Western Cape which use Plessey meters. In none of these cases has the appellant raised any objection and it must in law be deemed to have waived any rights which it now claims to have, alternatively Syntell would be estopped from relying on this as a cause of action given that it has by its consistent prior conduct in regard to the other municipalities held out a certain factual position on this issue and Actaris can be said to have acted upon the correctness of the facts so represented. She stated that the cross licensing agreement which previously existed between her client, the appellant and the City was in fact not really necessary. She conceded that it was not the correct

forum in which to raise questions of estoppel and this is a matter that needs to be resolved before the appropriate court.

Counsel for the appellant retorted "that estoppel is a matter often pleaded but seldom proved and in any event there may be licence agreements in place with the 16 municipalities for all we know."

b) Counsel for the successful tenderer submitted that the Plessey meters (hardware) which were situated in the various areas of the City belonged to the municipality. Her client would utilize the meters (hardware) but will not utilize the appellant's software. The appellant's software system would be bypassed and not used. All that was required was that the Appeal Authority had to satisfy itself that the undertaking by the successful tenderer was binding and that it could therefore rely on such an undertaking. If at a later stage the appellant sought to protect what it perceived to be its intellectual property rights in this matter the City was suitably indemnified by clause 5.7 of the tender specifications.

I have no reason to doubt the successful tenderer's submission in this respect which forms part of its written submission pages 17-23. In addition it needs to be noted that the general conditions of purchase and conditions of tender, Form A to the tender document, **clause 10** provides as follows:
"The contractor shall pay all royalties and expenses and be liable for all claims in respect of the use of patent rights, trade marks or other protected rights and hereby indemnifies the Council against any claims arising therefrom."

I CONCLUDE:

In view of the above analysis of facts and reasons, the appeal is dismissed and the decision of the **SCMBAC** is hereby confirmed.

ACHMAT EBRAHIM

APPEAL AUTHORITY in terms of section 62 of the Local Government Municipal Systems Act, 2000

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